NOTE: ORIGINAL DECISION APPEARS IMMEDIATELY FOLLOWING DECISION ON RECONSIDERATION

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	Appeal No. 95-0109
	)	
JOSEPH A. DITTRICK,	)	DECISION ON
Appellant	)	RECONSIDERATION
	)	
STANLEY R. WEIKAL,	)	February 27, 1996
Respondent	)	
)		

DISPOSITION AND ORDER

On October 20, 1995, this office rendered a Decision[1] ordering the Restricted Access Management Division [Division], in part, to issue quota share [QS] to Mr. Stanley R. Weikal, for landings of halibut and sablefish that he made from the F/V WILSON during the period of May 8, 1988, through June 15, 1988. The date of June 15, 1988, was predicated on a finding by the appeals officer (following the receipt of Mr. Weikal's stipulation of August 16, 1995) that "Mr. Weikal had made only one or two trips with the vessel and returned it to the owner in early-to-mid June of 1988."

On November 22, 1995, Mr. Weikal informed this office that the Decision's June 15, 1988, cut-off date had short-changed him of landings that he had made from the F/V WILSON on June 17, 1988, and June 23, 1988, since it was his understanding that his attorney and the Appeals Officer in this matter had agreed that the Decision would allocate the landings made in May and June of 1988 to Mr. Weikal, and September and October of 1988, to Mr. Dittrick.

On December 14, 1995, this office informed Mr. Weikal and Mr. Dittrick of its intent to reconsider the Decision's June 15, 1995, cut-off date to allow Mr. Weikal to receive QS credit for the landings of June 17, 1988, and June 23, 1988. Mr. Dittrick was given thirty days to respond. On January 23, 1996, Mr. Dittrick called this office, stating that although he disagreed with the Decision (which had found that Mr. Weikal had in fact leased Mr. Dittrick's vessel) he would not challenge its reconsideration, even though it would likely reduce his allocation of QS.

Given that a mistake of fact, oversight, or miscommunication was made with reference to the determination of the June 15, 1988, cut-off date; that this office has the authority to correct the record

[1] *See* Dittrick v. Weikal, Appeal No. 95-0109, affirmed October 24, 1995.

under such circumstances; that changing the cut-off date to include the landings of June 17, 1988, and June 23, 1988, would comport with the original understanding of the parties; that Mr. Weikal did, in fact, make the landings of June 17, 1988, and June 23, 1988, when he had possession of the F/V WILSON, and that this was not disputed by Mr. Dittrick; and that Mr. Dittrick was given a reasonable opportunity to respond to the reconsideration of the Decision; I hereby order the Division to MODIFY the decision of Dittrick v. Weikal to allow Mr. Weikal to receive QS credit for landings made from the F/V WILSON during May 8, 1998, through June 1988. The Division is also ordered to REVOKE the shares issued to Mr. Dittrick as a result of the landings made on June 17 and 23, 1988, and to issue them to Mr. Weikal. This order takes effect on March 28, 1996, unless by that date the Regional Director orders the review of the order.

In order to ensure that QS and Individual Fishing Quota are issued to the Appellant in time for the start of the 1996 season, I recommend that the Regional Director expedite review of this decision and, if there is no substantial disagreement with it, promptly affirm the decision and thereby give it an immediate effective date.

Randall J. Moen
Appeals Officer

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	
	)	Appeal No. 95-0109
JOSEPH A. DITTRICK,	)	
Appellant,	)	
	)	DECISION
and	)	
	)	
STANLEY R. WEIKAL,	)	October 20, 1995
Respondent	)	
_____	)	

STATEMENT OF THE CASE

On June 29, 1995, Joseph A. Dittrick, filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] on May 24, 1995. The IAD found that Stanley R. Weikal demonstrated conclusively that he held a lease of the F/V WILSON during the period May 8, 1988, through October 14, 1988. The IAD allocated qualifying pounds of halibut and sablefish landed from the vessel during that period to Mr. Weikal. The IAD also denied the same qualifying pounds to Mr. Dittrick, the vessel's owner. An order joining Mr. Weikal as a party Respondent was issued on July 11, 1995. In his appeal, Mr. Dittrick requested a hearing "if deemed necessary."

The entirety of the administrative record, including all appeal documents, has been reviewed by the Appeals Officer prior to the issuance of this decision. Those documents having particular relevance are specifically referred to in the decision. In an order issued on August 31, 1995, the record in this appeal was closed and it was determined that a hearing was not necessary.

ISSUES

1. Was there a valid vessel lease in effect between the parties?

2. If so, when was it in effect?

BACKGROUND

To support their respective positions, Mr. Dittrick and Mr. Weikal each submitted a copy of a two-

page handwritten document [Exhibit 1], dated May 8, 1988, and entitled "Vessel Charter Agreement of F/V Wilson." The document was executed by Joseph A. Dittrick, as owner, (and/or as agent of F/V Mustang Seafoods, Inc., Owner) and Stanley R. Weikal, as operator.
The document provides,[1] in relevant part, that the operator:

- **P** will operate the vessel for the owner for a period ending October 14, 1988
- **P** agrees to be responsible for the safe operation of vessel
- **P** agrees to pay the owner 34% of the gross proceeds of all product landed by the vessel
- **P** agrees to pay for trip expenses, i.e. fuel, bait, lube oil, groceries, crew shares, gear loss
- **P** agrees to use the vessel only for longlining halibut, black cod, and Pacific cod
- **P** agrees to devote his best efforts to fish the vessel and to fish with the vessel during all lawful time periods in lawful locations, in the fisheries agreed upon with owner, except as prevented by bad weather conditions or the inoperability of the boat

and that the owner:

- **P** will provide the operator with a seaworthy vessel
- **P** will provide for maintenance & repair except for those repairs required due to the gross negligence of the operator, for which the operator will be liable to the extent permitted by law
- **P** hereby approves all such expenses that are both urgent and reasonably necessary to operate the vessel in good condition, and for which the operator is unable to obtain prior approval from the owner due to the owner's unavailability or lack of communication equipment
- **P** agrees to purchase crewmember insurance

The document also contains general provisions to the effect that "owner and operator will inventory gear and supplies before and after charter" and that the operator will deliver the boat to the Port of Homer (unless otherwise agreed) with all gear, supplies and equipment that came with the boat.

In his appeal, the Appellant:

> (a) maintained that the document should not be construed as a lease because, after outfitting, crewing and fishing the vessel himself for three trips, he became sufficiently debilitated by an earlier injury that on May 8 he signed an agreement with Mr. Weikal to fish the vessel until October 14, 1988; that the vessel then had an existing crew; that he (Dittrick) agreed in the contract to pay for maintenance and repair (except that due to the gross negligence of the operator) and crewmember insurance; and that "financial risk" and "capital investment" language in responses to Comment 10 (sic 11) and

[1]The wording of the document has been paraphrased slightly for clarity.

Comment 13 in the Federal Register, (58 Fed. Reg. 59,385-386, November 9, 1993) support his position that there could be no lease because Mr. Weikal "bore no initial or capital investment costs nor any risk of financial loss" and; that by returning the vessel before the end of the term agreed upon, Mr. Weikal was in breach and should not be compensated for that breach; and

(b) advised for the first time that in any event Mr. Weikal had returned the vessel to him in June before the end of the term in the written agreement and it was he (Mr. Dittrick) that had fished it for two fall openings, making landings on September 9 and October 3, 1988. [Certified copies of fish tickets subsequently submitted to the Appeals Officer by the Alaska Commercial Fisheries Entry Commission at the request of Mr. Dittrick confirms[2] that he landed 19,937 pounds of halibut (presumably less head & slime) on September 9, 1988, and landed 16,722 pounds of halibut (less head & slime) on October 4, 1988.]

Mr. Dittrick requested that the Division's determination be amended to grant all the 1988 landings to him and/or grant the two fall landings to him and/or grant him 34% (the boat share) of the landings made by Mr. Weikal.

When he was joined as a party to the appeal, Mr. Weikal was granted thirty days to file a response. He subsequently requested copies of documents, but did not file a response.

DISCUSSION

Under the IFQ program, as implemented by the Division, an applicant for an initial issuance of QS may receive credit only for legal landings of Pacific halibut or sablefish that were made from a vessel owned or leased by the applicant at the time of the landings. See 50 C.F.R. § 676.20. Under § 676.20(a)(1)(iii), a written vessel lease is conclusive evidence of the existence of a vessel lease between the parties. To be conclusive evidence, a written lease must identify the leased vessel, the name of the lease holder, and the period of time during which the lease was in effect. Where, as in this case, an applicant has submitted a written document said to be a vessel lease, the appropriate inquiry on appeal is whether that document on its face actually constitutes a vessel lease for purposes of the IFQ program.

The inquiry begins with an examination of the provisions in the document itself, rather than with other

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[2]Although the certified copies of both fish tickets bear Mr. Dittrick's CFEC card imprint, the one for the October 4, 1988 landing does not bear his (or anyone else's) signature in the place designated for the fisherman's signature. For the purposes of this decision I shall presume the omission was merely an oversight.

evidence concerning the intent or actual conduct of the parties. In the absence of evidence challenging the validity of the agreement, a document that contains provisions consistent with a vessel lease is conclusive evidence of the existence of a vessel lease between the parties, and the inquiry on that question need go no further. However, evidence that the agreement was invalid (void) *ab initio*, such as evidence of fraud, duress, coercion, or incapacity, is always relevant and should be considered.[3] If the Appeals Officer determines that a valid vessel lease existed, then the next question is to determine when the lease was in effect. In examining that question, the Appeals Officer will presume that the lease was in effect for the term stated in the lease, unless contrary evidence is presented.

The IFQ regulations do not define "vessel lease," nor do they prescribe the minimum requirements for, or essential elements of, a vessel lease. Recognizing that commercial fishermen and vessel owners enter into a considerable variety of business arrangements relating to fishing operations, this office has chosen not to establish a single, narrow definition of a vessel lease. Rather, we have identified a number of factors that should be considered in deciding whether a vessel lease existed.

In two published decisions involving claimed oral vessel leases,[4] this office reviewed the regulatory history of the vessel lease provisions and concluded that the North Pacific Fishery Management Council intended to allocate Quota Shares to those who "acted like entrepreneurs in controlling and directing the fishing operations that produced the legal landings in question."[5] We pointed to five factors that should be considered, but stated that this was not intended to be an exclusive or exhaustive list. These factors are:

> (1) whether and to what extent the claimed lessee had possession and command of the vessel and control of navigation of the vessel;
>
> (2) whether the claimed lessee directed fishing operations of the vessel;
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> (3) whether the claimed lessee had the right to hire, fire, and pay the crew;
>
> (4) whether the claimed lessee was responsible for the operating expenses of the vessel; and

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[3]If the Appeals Officer finds that a written document does not constitute conclusive evidence of a vessel lease, but does constitute a valid agreement between the parties, the document may still be considered as relevant evidence of the relationship between the parties, along with other evidence of the parties' actual conduct and intent.

[4]O'Rourke v. Riddle, Appeal No. 95-0018, May 18, 1995, affirmed May 23, 1995; Seater v. Seater & Seater, Appeal No. 94-0010 [consolidated with Appeal No. 95-0006], June 6, 1995, affirmed June 9, 1995.

[5]O'Rourke at 13.

(5) whether the claimed lessee treated the fishing operations in which the vessel was used as his/her own business for federal income tax and other purposes.

Since issuing O'Rourke and Seater, we have reviewed several other appeals involving conflicting claims about the existence of a vessel lease. As a result, it has become clear that some of the factors, which are appropriate to consider in an oral lease situation, might not be relevant in a written lease situation. For example, while it might be useful when reviewing a claimed oral lease to consider how the parties treated the fishing operations for tax purposes, one would not expect a written lease to address this question. Thus, a flexible approach is needed. Therefore, each claimed lease, whether written or oral, must be reviewed on its own merits. Whatever factors are relevant in a particular case will be considered and given appropriate weight.

1. Was there a valid vessel lease in effect between the parties?

There are no allegations of fraud, collusion, incapacity, or coercion as to the execution of the agreement between the parties. Therefore, it only remains to determine whether the document on its face constitutes conclusive evidence of a vessel lease.

The title of the document and the terminology used in the document can be relevant evidence of whether the parties intended the document to constitute a vessel lease. In this appeal, the document is entitled "Vessel Charter Agreement" and the parties are referred to as "owner" and "operator." The document provides that the operator will "operate the vessel for owner." This language is inconclusive. Use of the word "charter" is consistent with a vessel lease; the phrase operate "for the owner" could suggest something other than a lease. Therefore, the terminology in this case will be given little weight.

The Appellant contends that the document was actually a contract with the Respondent for him to operate the vessel on the Appellant's behalf. As further evidence that the document does not constitute a lease, the Appellant points to the provisions requiring the owner to provide or pay for maintenance and repair, and restricting what species were to be targeted. I have given careful consideration to this argument, but I do not find it persuasive. The aspects of the agreement emphasized by the Appellant are outweighed by several other factors that indicate this document is a vessel lease. In particular, I rely on five provisions as evidence of the existence of a lease -- the Respondent was responsible for: (1) directing the entire fishing operation; (2) paying the crew; (3) paying all trip expenses; (4) paying the owner 34% of the gross landings;[6] and
(5) replacing lost or damaged gear.

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[6]Mr. Dittrick implies in his appeal that Mr. Weikal wrongfully deducted gear expenses and costs of supplies before Mr. Dittrick's 34% share was calculated. Even if such were the case, it would not retroactively void the lease.

While the document arguably did not constitute a classic bareboat charter, it did constitute a vessel lease within the meaning of the IFQ regulations. The fact that Mr. Dittrick had the capital investment in the vessel and paid the insurance and maintenance is not relevant in determining whether or not there was a lease.[7] Additionally, I do not find persuasive Mr. Dittrick's argument that no lease could have existed because Mr. Weikal "bore no initial or capital investment." Mr. Dittrick apparently relies on the response to Comment 13, cited above, for that proposition.[8] However, that comment is not applicable to deciding *between* an owner and a putative lessee. Furthermore, if such investments were a requirement, only vessel owners could qualify, thus making the lease provision an absurdity.[9] Finally, I cannot agree with Mr. Dittrick that Mr. Weikal bore no risk of financial loss. It was Mr. Dittrick who was to be paid "off the top," pursuant to the written agreement. By the terms of the agreement, Mr. Weikal was responsible for all the trip operating expenses. If fishing were poor, he could have suffered a net loss.

I have also considered Appellant's argument that an acknowledged breach by the Respondent -- returning the vessel to the Appellant before the end of the term stated in the agreement -- retroactively voided the agreement and converted it into something other than a lease. It did not. It may be that the Appellant had a cause of action for breach of the agreement, but that is not for an Appeals Officer to decide. The appropriate question for our purposes is whether the document presented by the Respondent constitutes a vessel lease. A breach of the agreement does not change the nature of the document. Looking at the document as a whole, I am persuaded that it constitutes a valid written lease within the meaning of the IFQ regulations.

2. When was the vessel lease in effect?

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[7]The 34% lease fee was presumably intended to constitute a return on capital investment and provide some offset for repair, maintenance and the insurance costs. Mr. Dittrick's position that he should be at least entitled to Quota Shares equivalent to 34% of the gross landings Mr. Weikal made on the F/V WILSON is intriguing in that it would seem to provide an equitable solution to conflicts of this sort; however, under the IFQ regulations, I have no authority to make such equitable apportionments. If there is a lease, the entire amount must go to the lessee for the term of the lease. If there is not a lease, the entire amount must go to the vessel owner or owners.

[8]Response to Comment 13: " . . .the Council decided to give eligibility for initial allocations only to vessel owners and lease holders because they have a capital investment in the vessel and gear that continues as a cost after crew and vessel shares are paid for a fishing trip." 58 Fed. Reg. 59,386 (November 9, 1993)

[9]If capital investment truly were intended to be a significant criterion in deciding between an owner and a putative lessee, there never could be an IFQ lease; a putative lessee could never match the capital investment of the vessel owner. Simply stated, it would be absurd to conclude that the Council, in providing for QS to be allocated to lessees, would set criteria that made an IFQ lease an impossibility.

The Appellant argued that a breach by the Respondent retroactively invalidated the agreement. As discussed above, breaches of a written agreement do not invalidate the document or its status as conclusive evidence. Evidence of a breach could, however, be relevant to the question of when the lease was in effect and, particularly, when the lease terminated. Such a breach would have to fundamentally change the nature of the relationship between the parties or evidence a clear intent to terminate the agreement. An appropriate question is whether the lessee permanently relinquished possession and control of the vessel and evidenced an intent to cease using the vessel for commercial fishing operations. Examples of the kind of breaches that could constitute termination of a vessel lease include a lessee's abandonment of the vessel or the return of the vessel to the owner.

In this instance, the Respondent has stipulated to the fact that he returned the vessel to the Appellant in early- to mid-June of 1988, and did not fish the vessel for the entire term stated in the agreement.[10] Therefore, I must conclude that the vessel lease was in effect only from the date it was executed (May 8, 1988) until it was returned to the Appellant (June 15, 1988).

FINDINGS OF FACT

1. The parties executed a valid written agreement entitled "Vessel Charter Agreement" on May 8, 1988.

2. Although the term of the agreement was from May 8, 1988 until October 14, 1988, in fact Mr. Weikal made only one or two trips with the vessel and returned it to the owner in early- to mid-June of 1988. The owner, Mr. Dittrick, fished the vessel for two halibut openings in the fall of 1988, landing approximately 35,000 pounds of halibut.[11]

3. The agreement was in effect from May 8, 1988, through June 15, 1988.

CONCLUSIONS OF LAW

1. The written agreement constitutes a vessel lease for purposes of the Pacific halibut and sablefish IFQ program.

2. The written agreement is conclusive evidence of the existence of a vessel lease between the parties.

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[10]Mr. Weikal's attorney, in an August 16, 1995 letter sent to the Appeals Officer, stipulated that Mr. Weikal returned the vessel to Mr. Dittrick in mid-June of 1988.

[11]Certified copies of the fish tickets were submitted by the CFEC at the request of Mr. Dittrick.

3. The Respondent qualifies as the person to whom qualifying pounds resulting from legal landings of halibut and sablefish made from the F/V WILSON during the period May 8, 1988, through June 15, 1988, should be allocated, based on his lease of the vessel from the Appellant during that period.

4. The Appellant qualifies as the person to whom qualifying pounds resulting from legal landings of halibut and sablefish made from the F/V WILSON during the period June 16, 1988, through October 14, 1988, should be allocated, based on his ownership of the vessel during that period.

DISPOSITION AND ORDER

The Division's Initial Administrative Determination, dated May 24, 1995, involving a conflict between the Respondent and the Appellant over the allocation of qualifying pounds of halibut and sablefish landed from the F/V WILSON is MODIFIED. The RAM Division is ORDERED to allocate qualifying pounds derived from landings from the F/V WILSON during the period May 8, 1988, through June 15, 1988, to Stanley R. Weikal. The RAM Division is further ORDERED to allocate qualifying pounds derived from landings from the F/V WILSON during the period June 16, 1988, through October 14, 1988, to Joseph A. Dittrick. This decision takes effect on November 17, 1995, unless by that date the Regional Director orders review of the decision.

James Cufley
Appeals Officer

I concur in the factual findings of this decision and I have reviewed this decision to ensure compliance with applicable laws, regulations, and agency policies, and consistency with other appeals decisions of this office.

Because the parties in this appeal still have an opportunity to receive QS and the corresponding IFQ for the 1995 fishing season, I recommend that the Regional Director expedite review of this decision and, if there is no substantial disagreement with it, promptly affirm the decision and thereby give it an immediate effective date.

Edward H. Hein
Chief Appeals Officer