

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 95-0125
)
DEL KIRK RUTZEBECK,) DECISION
Appellant)
_____) January 26, 1999

STATEMENT OF THE CASE

Appellant Del Kirk Rutzebeck filed a timely appeal of an Initial Administrative Determination [IAD] issued on May 31, 1995, by the Restricted Access Management [RAM] program.¹ The IAD denied Mr. Rutzebeck's application for halibut and sablefish quota share [QS] under the Individual Fishing Quota [IFQ] program because he was unable to show that he made legal landings of halibut or sablefish from a vessel owned or leased by him during the QS qualifying years (1988, 1989, or 1990). Mr. Rutzebeck's interests are directly and adversely affected by the IAD. A hearing was not held because the relevant facts are not in dispute.

ISSUE

Can Mr. Rutzebeck qualify for halibut and sablefish QS on the basis of legal landings made while his vessel was leased to another person or on the basis of landings he might have made but for his medical condition?

BACKGROUND

On his Request for Application [RFA] of halibut and sablefish QS, Mr. Rutzebeck claimed that he owned four fishing vessels, and that only one of the vessels, the F/V TRISHA C, was owned by him during a QS qualifying year, 1988. He acknowledged that the vessel was leased to Timothy Martin during that year, from March 15 through September 30, 1988. RAM's records show that Mr. Rutzebeck owned the F/V TRISHA C in 1988, that the only qualifying landings of halibut and sablefish made from the vessel occurred during the period of the claimed lease to Mr. Martin, and that QS for those landings was issued to Mr. Martin.

On Part 3 of his Application for QS [Work Sheet], Mr. Rutzebeck noted that he was "injured and hospitalized" in 1988 and 1989, and was "handicapped/unable to run boat--crewed only" in 1990. RAM denied Mr. Rutzebeck's Application for QS on the grounds that he was not a "qualified person"

¹The Restricted Access Management Division was renamed Restricted Access Management Program, effective September 28, 1997. [NOAA Circular 97-09, 19 Sep 97].

under IFQ regulations,² and that RAM does not have authority to grant IFQ credit for landings that were never made, even though an applicant was prevented from fishing by a medical condition.

On appeal, Mr. Rutzebeck argues that he meets the definition of "qualified person," and therefore is eligible for QS, because he owned the F/V TRICIA C in 1988, when halibut and sablefish landings were made from the vessel. He also argues that NMFS should consider the "special circumstances" (head injury) that affected his ability to fish during the qualifying years of 1988 - 1990.

DISCUSSION

To qualify for QS under the regulations of the IFQ program, a person must have owned or leased a vessel that made landings of halibut or sablefish during a QS qualifying year, 1988, 1989, or 1990.³ A person who owns a vessel cannot be a qualified person based on landings made by a person who leased the vessel for the duration of the lease.⁴

The evidence in the record shows that the only period during the qualifying years in which Mr. Rutzebeck owned or leased a fishing vessel from which legal landings of halibut or sablefish were made was 1988. All of the qualifying landings made from Mr. Rutzebeck's vessel (F/V TRISHA C) occurred while the vessel was leased to Timothy Martin. Mr. Rutzebeck did not own or lease any other vessels during the qualifying years. Because a vessel owner cannot qualify for QS based on a lessee's landings, I must conclude that Mr. Rutzebeck is not a qualified person.

Additionally, RAM does not have authority to issue QS to compensate an applicant for medical or other hardships that prevented him from fishing during the qualifying years. This Office has ruled in several decisions⁵ that under the IFQ regulations a person cannot qualify for QS without proof of an *actual* landing of halibut or sablefish during the QS qualifying period, from a vessel owned or leased by that person at the time of the landing. The North Pacific Fishery Management Council in 1994 refused to create an exception to this rule, irrespective of a person's hardship or special circumstance.⁶ The

²50 C.F.R. § 679.40(a)(2).

³50 C.F.R. § 679.40(a)(2); formerly 50 C.F.R. § 676.20(a)(1). All IFQ regulations were renumbered, effective July 1, 1996. *See*, 61 Fed. Reg. 31,270 (1996). The wording of the regulation in question was unchanged by the renumbering.

⁴*Id.*

⁵*See, e.g., Kenneth M. Adams*, Appeal No. 95-0004, March 22, 1995; and *William E. Crump*, Appeal No. 95-0024, June 27, 1995.

⁶The Council made the decision at its September 28-October 5, 1994, meeting.

Council determined that providing a three-year qualifying period [1988, 1989, or 1990] and allowing applicants to select their best five years of landings during the base years was sufficient to compensate applicants whose catch [or landings] had been reduced as a result of circumstances beyond their control, and that no additional hardship provisions would be considered for the IFQ program.

As a result, I conclude that Mr. Rutzebeck cannot be considered a qualified person and cannot receive an initial issuance of QS, based on landings that he might have made but for his medical condition.

FINDINGS OF FACT

1. The only period during the qualifying years in which Mr. Rutzebeck owned or leased a fishing vessel from which legal landings of halibut or sablefish were made was 1988.
2. All of the qualifying landings made from Mr. Rutzebeck's vessel (F/V TRISHA C) occurred while the vessel was leased to Timothy Martin.
3. Mr. Rutzebeck did not own or lease any other vessels during the qualifying years.

CONCLUSIONS OF LAW

1. Mr. Rutzebeck cannot qualify or receive QS on the basis of legal landings never made because of his medical condition.
2. Mr. Rutzebeck cannot qualify or receive QS on the basis of legal landings made while his vessel was leased to Timothy Martin.
3. Mr. Rutzebeck is not a qualified person and is not eligible for an initial issuance of QS.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect on February 25, 1999, unless by that date the Regional Administrator orders review of the Decision.

Any party, including RAM, may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m., Alaska Time, on February 5, 1999, the tenth day after the date of this Decision. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement or Points and Authorities in support of the motion.

Randall J. Moen
Appeals Officer