NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 95-0132
	)	
BRIAN MERRITT,	)	DECISION
Appellant	)	
_____	)	March 12, 1997

STATEMENT OF THE CASE

Appellant Brian Merritt appealed an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] on June 28, 1995. The IAD denied Mr. Merritt's request for additional halibut Quota Share [QS] under the Individual Fishing Quota [IFQ] program. Mr. Merritt has adequately shown that his interest is directly and adversely affected by the IAD. A hearing was held on January 17, 1997, before Appeals Officer Randall Moen. Mr. Merritt and Mr. Alan Ollivant, owner of the F/V SUSIE, testified during the hearing.

ISSUES

1. Whether Mr. Merritt made a timely claim of halibut landings from the F/V ELLEN W in May and June of 1988.

2. Whether Mr. Merritt adequately proved that the landings of halibut by Mr. Ollivant in May and June of 1988 were made from the F/V ELLEN W.

BACKGROUND

Appellant Brian Merritt submitted to the Division a timely Request for Application [RFA] for Quota Share in which he claimed ownership of three fishing vessels, including the F/V ELLEN W during the period September 1985 through November 1988. On his Application, Mr. Merritt revised his ownership dates slightly to cover the period December 2, 1985, through December 18, 1988. These revised dates were verified by the Division, and Mr. Merritt was awarded halibut QS for landings made from the F/V ELLEN W during this period.

Within the appeal period following the QS issuance, Mr. Merritt asked the Division in writing to allocate to him additional pounds of halibut landings made by Mr. Alan Ollivant during May and June of 1988. Mr. Merritt stated that he and Mr. Ollivant had fished together during those openings. He stated that they used two boats -- the F/V ELLEN W, a 32-foot troller owned by Mr. Merritt, and the F/V SUSIE, a 20-foot scow owned by Mr. Ollivant. He stated that they traveled, ate, and slept on the F/V ELLEN W, with the F/V SUSIE in tow. At the fishing grounds, Mr. Merritt stated, they fished from the F/V SUSIE; then they transferred their catch to the F/V ELLEN W, where they gutted and iced the

fish. According to Mr. Merritt, they towed the F/V SUSIE into Wrangell, Alaska. He stated that they unloaded all the fish from the F/V ELLEN W and sold it to processors in Wrangell. By agreement with the processors, 60 percent of each catch was recorded on fish tickets using Mr. Merritt's permit; 40 percent of the catch was recorded on other fish tickets using Ollivant's permit. Mr. Merritt stated that he was claiming Mr. Ollivant's landings because they had fished together and because Mr. Ollivant had not applied for QS and did not object to Mr. Merritt applying for them.

The fish tickets and, therefore, the records of the CFEC and the Division, indicated that Mr. Merritt's landings were made from the F/V ELLEN W and that Mr. Ollivant's landings were made from the F/V SUSIE. The Division interpreted Mr. Merritt's letter as a claim to additional pounds *landed from the F/V SUSIE* based on an alleged partnership between Mr. Merritt and Mr. Ollivant. In the IAD, the Division denied the claim on two grounds: (1) that it was a new and untimely claim because Mr. Merritt had not requested credit for any landings from the F/V SUSIE before the deadline for making claims and submitting evidence in support of them; and (2) that Mr. Merritt did not produce any evidence of the existence of the partnership or the partnership's eligibility for QS.

Following the Division's lead, Mr. Merritt based his appeal on the theory that he is entitled to credit for Mr. Ollivant's landings by virtue of their partnership. During the course of the appeal, however, it became clear that Mr. Merritt's claim is actually that the landings in question were made from his own vessel, the F/V ELLEN W. Mr. Merritt does not allege that his vessel was owned or leased by the partnership -- a requirement for eligibility based on a partnership. Thus, in determining Mr. Merritt's eligibility for additional QS based on Mr. Ollivant's landings, it is irrelevant that they may have operated as partners. Mr. Merritt's claim on appeal will turn on whether he can establish that the landings in question were, in fact, made from the F/V ELLEN W. He also must show that his claim was timely made.

DISCUSSION

1. Whether Mr. Merritt made a timely claim of halibut landings from the F/V ELLEN W in May and June of 1988.

We have acknowledged that claims for QS must be timely made in order to be considered on appeal. In Tiger, Inc., we stated that:

> We agree with the Division that an applicant who has not presented a timely claim that is contrary to the information on which the QS award was based, should not be granted relief on appeal. Applicants who did not raise a contrary claim on the RFA or application, or in some other manner before the 90-day deadline for substantiating claims or, if no 90-day period was provided, before QS was issued, do not have a

timely claim for which relief could be granted on appeal.[1]

Whether a claim received by the Division after the 90-day response deadline was timely made depends on whether it was, or can be considered to have been, part of the applicant's original (timely) claim.[2] Claims should be broadly construed in order to supply the meaning intended by the applicant and to serve the ends of justice.[3]

On his application, Mr. Merritt claimed ownership of the F/V ELLEN W for the period December 2, 1985, through December 18, 1988. He also claimed a total of 25,473 qualifying pounds of halibut landed from all his vessels. It is reasonable to conclude that Mr. Merritt intended this claim to include all the landings of halibut made from F/V ELLEN W to which he would be entitled as owner of the vessel. The landings in question in this appeal are alleged to have been made from the F/V ELLEN W during the time Mr. Merritt owned the vessel. Thus, they can be considered to have been part of the Appellant's original (timely) claim.

In Adamonis, the Appellant had not made an explicit claim of qualifying pounds on his application. We said that under those circumstances, it was reasonable to conclude that the Appellant's claim of a vessel lease necessarily implied a request to receive all the legal landings made from the vessel during the period of the lease.[4] In the present appeal, Mr. Merritt made a claim for a specific amount of qualifying pounds that did not include the landings in question. As discussed below, however, the evidence indicates that Mr. Merritt's failure to include Mr. Ollivant's landings as part of his original claim resulted from a reasonable mistake. We have stated that where an applicant makes a mistake in completing or reviewing his application, that mistake cannot be construed as a knowing waiver of the right to appeal the Division's determination regarding the amount of QS to be issued.[5]

Mr. Merritt testified that he believed he could only claim "his own" landings, i.e., those that were made

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[1]Tiger, Inc., Appeal No. 95-0100 (Decision on Reconsideration), February 26, 1996, *aff'd,* March 4, 1996. Upon further review, it appears that the IFQ regulations do not necessarily require this result. We do not reconsider our position in this appeal, however, because we conclude that the Appellant's claim was timely made.

[2]Charles A. Adamonis, Appeal No. 95-0133 (Decision on Reconsideration), February 7, 1997, at 5.

[3]*Id.,* at 6.

[4]*Id.,* at 6.

[5]Tiger, Inc., Appeal No. 95-0100 (Decision on Reconsideration), February 26, 1996, at 8, *aff'd,* March 4, 1996.

from his own vessel and recorded on fish tickets under his own permit card. He said that is why he did not include on his application the landings from the F/V ELLEN W that were recorded on Mr. Ollivant's fish tickets and permit card. Our review of the IFQ regulations, the application form, and the accompanying instructions indicates that an applicant could reasonably conclude that IFQ credit would be given only for landings made on the applicant's own fishing permit card, and that an applicant should not claim landings made on other persons' permits and fish tickets.

The IFQ regulations provide that QS is to be issued to "qualified persons." A qualified person is one who "owned a **vessel that made legal landings** of halibut or sablefish, harvested with fixed gear, from any IFQ regulatory area in any QS qualifying year." 50 C.F.R. § 676.20(a)(1). A vessel owner may become a qualified person regardless of who made the landings from the vessel and regardless of whose fishing permits were used on the fish tickets that recorded the landings. A vessel owner can be a qualified person without personally having made *any* landings. The key requirement is that the qualifying landings must have been made from the owner's vessel. [Emphasis supplied.]

Under 50 C.F.R. § 676.20(b), the amount of halibut QS to be initially issued to a qualified person must be calculated on the basis of "that **person's** highest total legal landings of halibut in each IPHC regulatory area for any 5 years of the 7-year halibut QS base period 1984 through 1990." Likewise, the assignment of vessel categories for QS is to be based on "the length overall of vessel(s) from which that **person** made fixed gear legal landings of groundfish or halibut in the most recent year of participation. . .." 50 C.F.R. § 676.20(c). And the application forms sent out by the Division to persons requesting QS allocation must include "all data on that **person's** vessel ownership and catch history of halibut and sablefish . . .." 50 C.F.R. § 676.20(d). [Emphases supplied.]

Thus, the actual language of the regulations requires that the **vessel's landings** be used to determine who is a qualified person, and the **person's landings** be used to determine the amount of QS to be issued and the vessel category to be assigned, and that the **person's catch history** be displayed on the application. This distinction in the regulations between a **vessel's landings** and a **person's landings** was disregarded by the Division when implementing the IFQ program. From the beginning, the Division has consistently calculated and issued QS on the basis of the landings made from the vessel, not the landings made by the person (applicant). We find nothing in the regulatory history of the IFQ program to suggest that the Division's approach was in any way contrary to the intent of the North Pacific Fisheries Management Council or the Secretary of Commerce, notwithstanding the language of the regulations to the contrary. Nor are we suggesting here that the Division should have taken a different approach. We are merely trying to show that the language of the regulations supports Mr. Merritt's position that at the time of application he reasonably believed he was not allowed to claim other persons' landings made from his vessels.

Nothing on the application forms explicitly contradicted Mr. Merritt's view. Part 3 of the Application for Quota Share consisted of two pages -- a work sheet and a "Quota Share Summary" with boxes for

entering the weight in pounds of halibut landings being claimed. The section of the accompanying instructions relating to landings information ("About Weights and Individual Landings Information") states:

> Part 3 of your application contains a summary (by species, area, and assigned vessel category) of relevant landings. In most cases, the summary data provided should be sufficient; however, you may wish to review specific landings information and your personal records may not be complete enough to provide the information. In that case, you may obtain a detailed computer summary of **your individual landings** by contacting the State of Alaska, Commercial Fisheries Entry Commission (CFEC) . . .. For a modest fee, and if they have received the necessary waiver(s), CFEC will print out the data and sent it to you.
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> *A form to request **your landings** information from CFEC is included in the Appendix*. [Application Information, Pacific halibut and sablefish Individual Fishing Quota Program, at 4.][Emphases supplied.]

The form referred to above ("Request for Halibut and Sablefish Data and Waiver of Confidentiality") states:

> As an applicant for Quota Share under the halibut and sablefish Individual Fishing Quota program, you may wish to review landings data used by the National Marine Fisheries Service, Restricted Access Management Division. Computerized print-outs of all halibut landings during 1984-1991, and sablefish landings during 1985-1991, **attributed to your permit card(s)** are available from the State of Alaska, Commercial Fisheries Entry Commission (CFEC) for a fee of $80.. . . [Emphasis supplied]

We believe the message conveyed by these instructions and forms, as well as by the IFQ regulations, is that an applicant is supposed to claim on the Application for QS only his or her own personal landings, i.e., those attributed to the applicant's permit card(s). The only place where anything to the contrary is mentioned is in the section of the application instructions entitled "About Confidentiality." [Application Information, Pacific halibut and sablefish Individual Fishing Quota Program, at 5.] There it states, among other things:

> . . . [E]ven though we want to provide you with a record of the landings made on vessels you owned or leased during the relevant years, we cannot do so without a waiver of confidentiality signed by those, other than you, who may have made the deliveries aboard the same vessel. It was for this reason that you and all other applicants were required to sign and return the Request for Application forms. Once

> signed, those forms provide a waiver for the release of the data so that NMFS/RAM can properly allocate the landings.
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> If you, as the owner or lessee of the vessel, were the only person who made landings, or if four or more permits were used to make landings on your vessel, Part 3 of the application displays a summary of all the landings information contained in the data base . . .. However, if fewer than four permits were used to make deliveries aboard your vessel . . ., confidentiality rules may prevent NMFS/RAM from displaying that information.
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> . . . Therefore, it is clearly in your interest to obtain fish ticket waivers from the people who actually signed the fish tickets for landings made from your vessel. . .

While these statements may imply that an applicant can get credit for landings attributed to other persons' permit cards, we believe that they do not clearly say so. In addition, these instructions may well have been confusing to some applicants because the definition of "landing" provided by the Division mistakenly equates harvesting and landing.[6] On balance, we find that any statements in the instructions suggesting that an applicant for QS could receive credit for other persons' landings are outweighed by the statements to the contrary found elsewhere in the instructions and the IFQ regulations.[7] Therefore, we find that Mr. Merritt's belief at the time of application that he was not entitled to claim Mr. Ollivant's landings was a reasonable, albeit erroneous, belief. Although it need not be shown that Mr. Merritt's failure to include Mr. Ollivant's landings as part of his original claim resulted from a *reasonable* mistake, we find that, under the circumstances discussed above, his mistake *was* reasonable. We reject any

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[6]In the instructions, at page 2, "Legal landing" is defined as "the harvest of halibut or sablefish with fixed gear in compliance with state and federal regulations in effect at the time of the landing." This appears to be a misquote of the language found at 50 C.F.R. § 676.20(a)(1)(v): "As used in this section, 'legal landing of halibut or sablefish' means halibut or sablefish harvested with fixed gear and landed in compliance with state and Federal regulations in effect at the time of the landing." Admittedly, even this latter definition is somewhat circular in that it essentially defines "landing" as harvesting and landing.

[7]It is worth noting that although the regulations, instructions, and application forms may have confused some applicants about whether they could receive credit for other persons' landings, in most cases this problem was probably remedied by the specific landings information the Division provided on the application or, later, on a Quota Share Data Summary. The Division would reveal and include in an applicant's qualifying pound totals those landings of other persons who had signed confidentiality waivers. That would effectively notify applicants that they could receive credit for more than just their own landings. In the present case, however, no one other than Mr. Ollivant had made landings on Mr. Merritt's vessel, and Mr. Ollivant's landings appeared to have been made from the F/V SUSIE. Therefore, there were no other landings in Mr. Merritt's totals to tip him off that he could claim and receive credit for more than his own landings.

argument that this mistake made Mr. Merritt's claim for additional qualifying pounds untimely or that he should not have the opportunity to correct the mistake on appeal.

2. Whether Mr. Merritt adequately proved that the landings of halibut by Mr. Ollivant in 1988 were made from the F/V ELLEN W.

The Official Record of the Division, based on fish ticket information supplied by the CFEC, shows that the landings claimed by Mr. Merritt on appeal were made from Mr. Ollivant's vessel, the F/V SUSIE. Copies of fish tickets for these landings were submitted by Mr. Merritt during the appeal. The fish tickets, dated May 25, 1988, June 21, 1988, and June 22, 1988, are imprinted with Mr. Ollivant's gear card and show the vessel name as the F/V SUSIE. Mr. Merritt claims on appeal that these landings were, in fact, made from his vessel, the F/V ELLEN W and that, therefore, he should receive credit for them for IFQ purposes. To be granted relief on appeal, Mr. Merritt must establish by a preponderance of the evidence that the vessel name on these fish ticket is incorrect, and that the correct vessel was the F/V ELLEN W.

Frankly, we began our review of the evidence with a certain amount of skepticism about Mr. Merritt's claim to these landings because it was made only after he learned that Mr. Ollivant had not done so. To an objective observer, these circumstances raise the suspicion that this is merely a convenient and opportunistic claim. Nonetheless, as discussed below, we found the testimony and other evidence in support of Mr. Merritt's claim to be credible and consistent, and, therefore, we find that the landings in question were, in fact, made from the F/V ELLEN W.

At the hearing, Mr. Merritt and Mr. Ollivant testified that they fished together during the May and June halibut openers in 1988, using their two vessels: the F/V SUSIE, to catch the fish, and the F/V ELLEN W, to ice, clean, store, transport, and deliver the fish. They stated that each landing was recorded on two fish tickets. In each instance, they said, the buyer recorded 60 percent of the catch on Mr. Merritt's card and 40 percent on Mr. Ollivant's card.

The two fish tickets issued for each landing are consecutively numbered, indicating that they were issued at (or approximately at) the same time. The amounts recorded on each pair of fish tickets, when added together, show that Mr. Merritt received 60 percent of the total and Mr. Ollivant received 40 percent of the total.

Two of the pairs of fish tickets were issued by Windjammer Seafoods in Wrangell. The other pair were issued by Wrangell Fisheries Company. Mr. Merritt submitted two affidavits of Mr. William King, the manager of Windjammer Seafoods at the time[8] and one of the two buyers[9] of the fish. Mr.

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[8]Mr. King asserts that he was the owner/manager of Alaska Crown Seafoods in Wrangell before and after 1988. He has stated that from 1987 - 1989 he leased his plant to Windjammer Seafoods, a subsidiary of Trident Seafoods, and managed the plant for Windjammer.

[9]The fish tickets showing purchases by Wrangell Fisheries are signed by K. Early as buyer.

King stated that in 1988 he unloaded fish from the F/V ELLEN W, not the F/V SUSIE. He stated that he could not recall the dates that he recorded the sale of the fish on different fish tickets, but that he commonly weighed the fish as they came off the vessel, gave the total weights to fishermen, and then processed the fish and completed the fish tickets later at the plant. He said that many fishermen would show up later in the day or week to "punch their cards" on the fish tickets. Mr. King stated that his processing plant was located one mile from the dock where the fish were weighed. He stated that he would "indicate on the fish ticket the vessel the fisherman wanted put on there. This did not mean the halibut were landed from that vessel on the fish ticket. In this case it only meant who owned the vessel and who would receive the check."

In light of the evidence presented, I find it more probable than not that all of the halibut caught by Mr. Ollivant in May and June of 1988 were landed from the F/V ELLEN W. I base my finding on the following confluence of factors: (1) Mr. Ollivant's and Mr. Merritt's accounts of what occurred are consistent and credible; (2) each pair of fish tickets for the F/V SUSIE and the F/V ELLEN W are consecutively numbered, which shows that, in each instance, the fish were delivered to the same buyer and most probably on the same day and as part of the same landing; (3) the pounds recorded on the fish tickets are in proportion to the percentages of Mr. Ollivant's and Mr. Merritt's stated partnership arrangement; and (4) Mr. King's affidavits, in which he stated that the fish were unloaded from the F/V ELLEN W, supports the testimony of Mr. Merritt and Mr. Ollivant.

FINDINGS OF FACT

1. The Appellant's claim to the landings in question in this appeal were part of his original (timely) claim.

2. At the time the Appellant submitted his application for quota share, he reasonably believed that he was not allowed to claim other persons' landings made from his vessels and, in particular, the landings made by Mr. Ollivant.

3. The landings of halibut by Mr. Ollivant in May and June of 1988 were made from the F/V ELLEN W.

CONCLUSION OF LAW

The Appellant's claim for additional pounds of halibut based on Mr. Ollivant's landings was timely made.

DISPOSITION

The Division's IAD denying the Appellant's application for additional QS as untimely filed is

VACATED. The Division is directed to amend the Official Record to reflect that the halibut landings by Mr. Ollivant in May and June of 1988 were made from the F/V ELLEN W. The Division is ORDERED to allocate to Mr. Merritt the qualifying pounds resulting from the landings of halibut made by Mr. Ollivant in May and June of 1988, and to issue to Mr. Merritt any resultant QS and IFQ to which he may be entitled. This decision takes effect April 11, 1997, unless by that date the Regional Administrator orders review of the decision.

Any party, including the Division, may submit a Motion for Reconsideration, but it must be received at this office not later than 4:30 P.m. Alaska Standard Time, on the tenth day after the date of this Decision, March 24, 1997. A Motion for Reconsideration must be in writing, must allege one or more specific, 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. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or issuance of a Decision on Reconsideration.

Randall J. Moen
Appeals Officer

Edward H. Hein
Chief Appeals Officer