NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 95-0133
	)	
CHARLES A. ADAMONIS,	)	DECISION
Appellant	)	
_____	)	April 5, 1996

STATEMENT OF THE CASE

On August 24, 1995, Charles A. Adamonis filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] on July 5, 1995. The IAD found that the Appellant's claim to certain qualifying pounds of halibut was untimely and, therefore, denied the claim. The Appellant has adequately alleged that his interests are directly and adversely affected by the IAD.

ISSUES

1. Whether Appellant's claim was timely filed and timely appealed.

2. Whether Appellant should receive credit for certain qualifying pounds of halibut resulting from a 1987 landing from the F/V TRASK.

BACKGROUND

On his Request for Application for Quota Share [RFA], timely filed on May 20, 1994, the Appellant claimed 100 percent ownership of the F/V TRASK beginning on March 1, 1992. The Division sent the Appellant an Application for Quota Share showing him as ineligible for halibut or sablefish and showing no ownership of the F/V TRASK. The Appellant returned the application on July 12, 1994, asserting that he had leased the F/V TRASK from March 15, 1984, through March 15, 1992. The Division approved the Appellant's lease and ownership claims on July 18, 1994, and amended the NMFS official record to show that the Appellant should receive an allocation of all qualifying pounds of halibut and sablefish from the F/V TRASK during the time the lease was in effect.

On October 6, 1994, the Division sent to the Appellant a Quota Share Data Summary [QSDS] that summarized the Appellant's data in the official record. This showed, among other things, that the Appellant would receive credit for 146,118 qualifying pounds of halibut in IFQ regulatory area 4A. The Division gave the Appellant until January 6, 1995, to make any corrections to the QSDS and to submit to the Division evidence in support of any requested changes to the record. The Appellant did not respond by January 6, 1995. On December 16, 1994, however, the Division issued Quota Share [QS] to the Appellant in accordance with the amounts shown in the official record.

The Division did not notify the Appellant specifically that he was not receiving credit for a landing of 50,525[1] qualifying pounds of halibut because the fish ticket on which the landing was recorded did not specify the type of gear used in harvesting the fish. On March 20, 1995, the Division received a notarized statement from the Appellant pointing out what he claimed was an oversight by the Division, i.e., the credit for the landing in question. In response, the Division issued an IAD denying the Appellant's claim to this landing on grounds that the claim was untimely because it had not been made by the January 6, 1995, 90-day deadline following issuance of the QSDS.

On appeal, the Appellant submitted a copy of a Washington state fish ticket [#Q405796], showing a landing of 50,525 pounds of halibut from the F/V TRASK made to Bornstein Seafoods on August 26, 1987. [Exhibit 1] The Appellant also submitted a letter, on Bornstein Seafoods letterhead, dated August 8, 1995. [Exhibit 2] In the letter, Carol Petersen, Fish Purchasing Clerk for Bornstein Seafoods, states:

> We would like to apologize for not marking the correct physical gear used on the above noted fish ticket [Washington State Fish Ticket #Q405796] dated August 26, 1987. This was merely an oversight on our part. We realize the gear type was #43 Set Line and failed to indicate on the ticket.

The Appellant states that it has been illegal since 1941 to harvest halibut with gear other than hook-and-line. He submitted a letter to that effect, dated August 3, 1996, from Stephen H. Hoag, Assistant Director of the International Pacific Halibut Commission. [Exhibit 3] The Appellant argues that the lack of any citation for illegally catching, landing, and transporting halibut in this instance shows that the fish were harvested and landed legally, i.e., using hook-and-line gear.

The Appellant also submitted his logbook for the F/V TRASK. An entry for August 15, 1987, shows that an estimated 52,000-plus fish were harvested using hook-and-line gear. There was a 48-hour halibut opening in area 4A from August 15-17, 1987. The Appellant states that the log was signed by an International Pacific Halibut Commission representative in Homer, Alaska. The signature on the page in question is "K. Bunselmeyer" [Exhibit 4] Heather Gilroy of the IPHC in Seattle verified over the telephone [Memo to file, phone call, April 3, 1996] that Kim Bunselmeyer was working for the IPHC doing port sampling in Homer, Alaska, during the August 15-17, 1987, opening. Ms. Gilroy stated that she reviewed the IPHC's log record for the F/V TRASK for this landing. She stated that the record shows the fish were landed on August 22, 1987,[2] in Homer; that the fish were sold to

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[1]The IAD stated the amount denied as 50,223 qualifying pounds. The actual amount at stake appears to be 50,525 qualifying pounds.

[2]I accept August 22, 1987, as the correct date of the landing. Although the IAD [at page 4] lists the date as August 27, 1987, and the fish ticket submitted by the Appellant is stamped August 26, 1987,

Bornstein Seafoods and transferred to Bornstein's vessel in Homer; and that there was no indication that the fish were harvested illegally. Ms. Gilroy stated that the IPHC would not have included this landing in the data it provided to the State of Alaska (and thence to the NMFS) if it had been an illegal landing. She concluded that the fish were "definitely" caught with longline gear.

DISCUSSION

1. Timeliness of the Appellant's claim and appeal

The Division determined that the Appellant's claim to the halibut landing in question was a new claim that was untimely because it was not made before the January 6, 1995, 90-day deadline following issuance of the QSDS. The determination of untimeliness was based on the Division's reading of federal regulation 50 C.F.R. § 676.20(d)(1), which provides, in part:

> If additional data presented in an application are not consistent with the data compiled by the Regional Director, the applicant will be notified of insufficient documentation. The applicant will have 90 days to submit corroborating documents . . . in support of his/her application or to resubmit a revised application. All applicants will be limited to one opportunity to provide corroborating documentation or a revised application in response to a notice of insufficient documentation.

The Division supplemented this regulation with instructions that accompanied the QSDS sent to applicants. The instructions stated, among other things, that:

> All statements and evidence submitted in support of any requested change to the Official Record, as displayed on your QS Data Summary, must be submitted by no later than 90 days after the "Control Date" printed on the top of the QS Data Summary, i.e., by the response date specified on the Data summary.

The response date on the Appellant's QSDS was January 6, 1995. Because the Division did not receive any request to change the official record from the Appellant until March 20, 1995, the Division concluded that the claim to these 50,525 qualifying pounds of halibut was untimely. Therefore, the claim was denied.

The Division's determination is based on its conclusion that the Appellant made the claim *for the first*

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the Appellant claimed that the landing was made August 22, the IPHC has that date in their records, and the NMFS database also shows August 22. I presume that the date on the fish ticket was either in error or was entered when the fish arrived in Bellingham, Washington. The August 27 date used in the IAD appears to have been a typographical error.

time more than two months after the QSDS response date. In our decision on reconsideration in Tiger, Inc,[3] this office agreed with the Division that claims made for the first time after the 90-day response deadline are untimely and will not be considered on appeal. The record in this case is clear, however, that the Appellant in his application claimed a lease of the F/V TRASK for the period March 15, 1984, through March 15, 1992. The Division does not dispute that the Appellant had a lease during that period.

A fair reading of the application is that the Appellant was claiming all the halibut landed from the F/V TRASK during the period of the lease. The Division did not notify the Appellant, before the 90-day response deadline, that it was not crediting him with the August 22, 1987, landing. The Division did not advise the Appellant that the fish ticket for this landing was in any way inadequate. Although the Appellant's QSDS displayed the number of qualifying pounds for area 4A, the Division did not specifically inform the Appellant that this figure did not include one of the landings for 1987, which was in the Division's database. The Division was following its standard procedure, which was not to notify applicants of particular landings that were not being credited unless the applicant specifically mentioned those landings.

For purposes of determining whether the Appellant's claim was timely made, I look to the Appellant's expectation, which presumably was that he would receive credit for all legal landings that the Division had a record of from the F/V TRASK during the period for which he leased it. I find that, although the Appellant's application did not list any number of pounds, his claim at the time of his application encompassed the August 22, 1987, landing. I make this finding, in part, because the Division had a record of the landing at the time the QSDS was sent to the Appellant and because the Division, even though it was following its normal procedure, did not specifically inform the Appellant that he was not receiving credit for the landing because the gear type was not specified on the fish ticket. Therefore, I find that the Appellant's claim to the August 22, 1987, landing was part of the claim he made in his application and was timely made.

In our reconsideration of Tiger, Inc., we stated that an applicant who failed to notice a problem on the application or QSDS, even if that failure constituted a careless mistake, can still seek to correct that mistake on appeal, as long as the applicant made a timely claim and filed a timely appeal.[4] Although the Appellant filed a timely appeal of the written IAD that the Division sent him, the question is whether he appealed the denial of the 1987 landing within the appeal period following the issuance of QS to him. The appeal period in effect on December 16, 1994, [the date the QS was issued] was 90 federal working days. The 90th day following issuance of the Appellant's QS was April 27, 1995. Because

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[3] Tiger, Inc., Appeal No. 95-0100, decision on reconsideration, February 26, 1996, *aff'd* March 4, 1996, at 7.

[4] *Id.*, at 3.

the Appellant's written notice about the failure to receive credit for this landing was received by NMFS on March 20, 1995, I deem it a timely appeal of this claim.

2. Whether the Appellant should receive credit for the 50,525 qualifying pounds of halibut resulting from the August 22, 1987, landing from the F/V TRASK.

Three pieces of evidence support the Appellant's assertion that longline gear was used to harvest the halibut involved in the landing in question. First, the letter from Bornstein Seafoods, which is on company letterhead, acknowledges that the processor was at fault by failing to enter the gear type on the Appellant's fish ticket and states that set line gear was used. Second, the Appellant's log book entries, which were signed by an IPHC representative, show that the Appellant used hook-and-line gear to harvest fish during the August 15-17, 1987, halibut opening. Third, the statements of Heather Gilroy of the IPHC verify the information in the Appellant's log book and confirm that the fish had been harvested with longline gear, notwithstanding the fact that the gear type was not recorded on the fish ticket.

I am persuaded by a preponderance of the evidence that the Appellant's August 22, 1987, landing in area 4A was a legal landing and that the halibut was harvested with longline gear. Since the issue of gear type was the Division's only stated basis for not crediting the fish ticket in the first place, it appears that the Appellant should receive credit for this landing, and I so find. Furthermore, given the statement of Ms. Gilroy that the IPHC would not have included an illegal landing in the data provided to the State of Alaska, it appears that the Division should never have excluded the landing in question in this appeal from the totals displayed on the Appellant's QSDS. Had the Division included these pounds on the QSDS, this appeal would not have been necessary.

FINDINGS OF FACT

1. The Appellant legally landed 50,525 pounds of halibut from the F/V TRASK at Homer, Alaska, in regulatory area 4A, on August 22, 1987.

2. Implicit in finding #1 is my finding that the fish in question were harvested with longline gear.

3. The Appellant's claim to the August 22, 1987, landing was part of the claim he made in his application

CONCLUSIONS OF LAW

1. The Appellant's claim to qualifying pounds of halibut resulting from the August 22, 1987, landing in area 4A was timely made and timely appealed.

2. The Appellant should receive credit for the halibut landing in question and the resulting qualifying pounds should be allocated to him.

DISPOSITION AND ORDER

The Division's Initial Administrative Determination, dated July 5, 1995, which denied the Appellant's claim to 50,525 qualifying pounds of halibut in regulatory area 4A is VACATED. The Division is ORDERED to allocate these qualifying pounds to the Appellant and to issue the resulting QS and Individual Fishing Quota [IFQ] for 1996. This decision takes effect May 6, 1996, unless by that date the Regional Director orders review of the decision.

Because the Appellant still has an opportunity to receive QS and the corresponding IFQ for the 1996 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