

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)
)
GLEN LOCKHART,)
F/V SABLEFISH,) DECISION
ADF&G # 53355)
Appellant)
_____) November 16, 1999

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on Reconsideration on June 6, 1996, which denied Mr. Lockhart's application for a Vessel Moratorium Qualification under the Vessel Moratorium Program on Groundfish and Crab.¹ The IAD concluded that Mr. Lockhart was not entitled to a Moratorium Qualification based on the landings of the F/V SABLEFISH because he was not the current owner of the F/V SABLEFISH and he had not shown that he retained the moratorium qualification of that vessel.

RAM referred this case to this Office for filing as an appeal. Because the record contains sufficient information on which to reach a final decision, because there is no genuine and substantial issue of adjudicative fact for resolution and because Mr. Lockhart did not request a hearing, no hearing was ordered.²

ISSUE

Is Mr. Lockhart entitled to a Vessel Moratorium Qualification based on the landings of the F/V SABLEFISH?

¹ The Vessel Moratorium Program for Groundfish and Crab, 50 C.F.R. § 679.4(c), expires on December 31, 1999. This decision involves Mr. Lockhart's rights under the Moratorium Program. This decision does not affect Mr. Lockhart's rights under the North Pacific License Limitation Program (LLP), which is found at 50 C.F.R. § 679.4(k). As of January 1, 2000, a license limitation permit will be necessary to harvest certain species of groundfish in the Gulf of Alaska and Bering Sea and Aleutian Islands areas and certain species of crab in the Bering Sea and Aleutian Islands area. **The application period for LLP is from September 13, 1999 through December 17, 1999.** For further information on the License Limitation Program, Mr. Lockhart may contact Restricted Access Management (RAM), NMFS, Box 21668, Juneau, Alaska 99802-1668, 907-586-7474 or 1-800-304-4846 (option 2). The NMFS website at "<http://www.fakr.noaa.gov>" also has information on LLP.

² 50 C.F.R. § 679.43.

BACKGROUND

Mr. Lockhart applied for a Vessel Moratorium Qualification on January 13, 1996.³ He claimed landings of moratorium groundfish with hook gear in period 1 (January 1, 1988 to February 9, 1992) and period 2 (February 10, 1992 to December 11, 1994) from the F/V SABLEFISH. RAM made an Initial Administrative Determination on February 23, 1996, which denied Mr. Lockhart's application, because RAM's Official Record for the Moratorium Program showed John Wisenbaugh, not Glen Lockhart, as the owner of the F/V SABLEFISH.

On March 6, 1996, Mr. Lockhart asked RAM to reconsider its decision. Mr. Lockhart submitted a Purchase Agreement for the F/V SABLEFISH, which showed that Glen Lockhart sold the F/V SABLEFISH, with specifically listed gear, to John Wisenbaugh on May 29, 1991. Mr. Lockhart noted that the "sales agreement does not refer to Glen Lockhart selling vessels moratorium rights to John Wisenbaugh." Mr. Lockhart also submitted an application for a transfer of a moratorium qualification for the F/V SABLEFISH that he, but not John Wisenbaugh, signed.⁴ The record on appeal does not reveal whether John Wisenbaugh applied for a Vessel Moratorium Qualification or Permit based on the fishing history of the F/V SABLEFISH.

On reconsideration, RAM affirmed its earlier determination because "[t]he information provided in no way indicates that you retained, through this Bill of Sale, any of the 'fishing rights' associated with [the F/V SABLEFISH]." RAM referred the case to this Office for filing as an appeal on June 5, 1996.

DISCUSSION

For a vessel to qualify to participate in the Moratorium Program, the vessel must have moratorium qualification. A vessel has moratorium qualification either because it is an original qualifying vessel or because it has received moratorium qualification by transfer from an original qualifying vessel.⁵ An original qualifying vessel is a vessel that made landings of moratorium crab or moratorium groundfish during the qualifying period, which is January 1, 1988 to February 9, 1992.⁶ Moratorium crab are Tanner and king crab harvested in the Bering Sea and Aleutian Islands area (BSAI). Moratorium

³ Although not specifically provided in the regulations, RAM perceived a clear need in the fishing industry for a document that reflected a vessel's moratorium qualification. Therefore RAM issued certificates of moratorium qualification, in addition to moratorium permits.

⁴ An application for moratorium qualification transfer must be signed by the person who is transferring the qualification and the person who is receiving it. 50 C.F.R. § 679.4(c)(8)(ii)(E).

⁵ 50 C.F.R. § 679.4(c)(7).

⁶ 50 C.F.R. § 679.2.

groundfish are species of groundfish, except sablefish caught with fixed gear, harvested in the Gulf of Alaska or in BSAI.⁷

Mr. Lockhart states that he made qualifying landings from the F/V SABLEFISH before he sold it to John Wisenbaugh in May 1991.⁸ When a vessel is sold after it has made qualifying landings, there will, in a sense, be two vessel owners: the vessel owner at the time the vessel made the qualifying landings, in this case Glen Lockhart, and the vessel owner during the application period, in this case John Wisenbaugh.⁹ Mr. Lockhart raises the question of which vessel owner is entitled to the moratorium rights that flow from the fishing history of the vessel.

The federal regulations for the Moratorium Program provide that a moratorium permit is to be issued to the owner of the vessel at the time of application.¹⁰ Both RAM and this Office have concluded that a vessel's moratorium qualification may be severed from the vessel and remain with the prior owner.¹¹ Both RAM and this Office have concluded that the regulations for the Moratorium Program require that the Vessel Moratorium Qualification remains with the vessel, unless otherwise specified in an agreement or contract.¹²

⁷ *Id.*

⁸ This Decision assumes that is true.

⁹ Actually, a boat could have more than two owners. A boat could have more than one owner during the qualifying period and could have made landings when owned by each. A boat could have more than one owner during the application period. This could present issues not raised by this appeal.

¹⁰ 50 C.F.R. § 679.4(c)(6), formerly 50 C.F.R. § 676.5(b). The former section in question specified that the moratorium permit is to be issued to "the owner of the vessel at the time of the permit application." 60 Fed. Reg. 40,763, 40,774 (1995). The new section eliminated that language and states that the permit will be issued "to the owner of a vessel" who submits a complete application that is accepted and approved. 50 C.F.R. § 679.4(c)(6)(i). This still means the owner at the time of application. First, it would be unreasonable to read into the current regulation the phrase the owner of the vessel "during the qualifying period." Second, the new regulation was promulgated as part of a renumbering and consolidation of the NMFS regulations in 1996. The summary of these new regulations in the Federal Register states: "This final rule does not make substantive changes to the existing regulations" 61 Fed. Reg. 31,228, 31,228 (1996).

¹¹ Yukon Queen Fisheries, LLP, Appeal No. 96-0009, September 17, 1998.

¹² RAM implicitly applied this rule in its IAD on Reconsideration on Mr. Lockhart's application and explicitly stated it in other cases. *See, e.g.,* Wallace Botsford, Appeal No. 96-0043 at 2, November 1, 1999; George Eliason, Appeal 96-0054 at 2-3, November 16, 1999. Yukon Queen relied on the preamble to the moratorium regulations which provides in part:

Moratorium qualification is presumed to belong to the current owner of the vessel that

The record contains no evidence or even a claim that Mr. Lockhart and Mr. Wisenbaugh agreed to separate the vessel's qualification from the vessel and agreed that Mr. Lockhart would retain the F/V SABLEFISH's moratorium qualification. Mr. Lockhart's only argument is that, since the bill of sale for the F/V SABLEFISH did not expressly include moratorium rights, the moratorium rights were not sold with the vessel. However, the regulations for the Moratorium Program require the opposite presumption, namely that if the sale does not expressly exclude a vessel's moratorium rights, the moratorium rights stay with the vessel and therefore belong to the new vessel owner.

Therefore I conclude, based on this record, that Mr. Lockhart is not entitled to a moratorium qualification based upon the landings of the F/V SABLEFISH.

I note that other federal fisheries programs use the approach that Mr. Lockhart implicitly advocates for the Moratorium Program. Notably, under the License Limitation Program, the person who owned the vessel as of June 17, 1995 is eligible to apply for that vessel's LLP rights. If a person who owned the vessel after June 17, 1995 claims a vessel's LLP rights, it is the subsequent owner who has the burden of proving, by the express terms of a written contract, that the vessel's LLP rights were sold with the vessel.¹³

made a legal landing of moratorium species from January 1, 1988, through February 9, 1992, unless otherwise specified in a purchase agreement or contract. The moratorium qualification of a vessel may be transferred from the owner of the vessel to another person by mutual agreement. For example, the moratorium qualification of a vessel may be retained by the vessel's owner for liquidation independently of the vessel. A vessel owner also may choose to retain the moratorium qualification of the vessel when it is sold, lost, or destroyed, so that he/she can obtain a moratorium permit for a replacement vessel. Regardless of the reason for transferring a moratorium qualification, valid documentation of the transfer is required before the transfer will be approved and a moratorium permit issued based on that moratorium qualification.

60 Fed. Reg. 40,763, 40,766 (1995), *quoted in Yukon Queen Fisheries, LLP*, Appeal No. 96-0009 at 3 n.3.

¹³ 50 C.F.R. § 679.2 (definition of "eligible applicant"). The summary of RAM's LLP qualifying information published at the NMFS website [<http://www.fakr.noaa.gov>] has Glen Lockhart as the owner of the F/V SABLEFISH, which means that the records available to RAM show Mr. Lockhart as the owner of the F/V SABLEFISH as of June 17, 1995. This is not to imply any suggestion by this Office as to whether Mr. Lockhart or Mr. Wisenbaugh or some as yet unidentified third person is entitled to LLP rights of the F/V SABLEFISH. This Decision simply notes that, under the regulations for the two different programs (the Moratorium Program and the LLP), it is possible for one person to be entitled to a vessel's moratorium rights and a different person to be entitled to that same vessel's LLP rights.

FINDINGS OF FACT

1. Mr. Lockhart was not the owner of the F/V SABLEFISH when he applied for the moratorium qualification of that vessel.
2. Based on the record in this appeal, Mr. Lockhart did not retain the right to the moratorium qualification of the F/V SABLEFISH when he sold the vessel to John Wisenbaugh.

CONCLUSION OF LAW

Mr. Lockhart is not entitled to a moratorium qualification based on the landings of the F/V SABLEFISH.

DISPOSITION

The IAD on Reconsideration that is the subject of this appeal is AFFIRMED. This Decision takes effect December 16, 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 by this Office not later than 4:30 p.m. Alaska time, on the tenth day after this Decision, November 26, 1999. 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.

Mary Alice McKeen
Appeals Officer