

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 96-0066
)	
KENNETH M. SIMPSON,)	DECISION
Appellant)	
_____)	April 22, 1999

STATEMENT OF THE CASE

Appellant Kenneth Simpson filed a timely appeal of an Initial Administrative Determination [IAD] issued on April 11, 1996, by the Restricted Access Management [RAM] program. The IAD denied Mr. Simpson's request for an additional 2,687 pounds of halibut Individual Fishing Quota [IFQ] "underage carryover" for the 1996 fishing season. Mr. Simpson has adequately shown that his interest is directly and adversely affected by the IAD. Because the record contains sufficient information on which to reach a final decision, and there is no genuine and substantial issue of adjudicative fact for resolution, no hearing was ordered. 50 C.F.R. § 679.43(g)(2) and (3).¹

ISSUES

1. Was Mr. Simpson entitled to have his halibut IFQ account for 1995 debited on the basis of actual head-off weight, rather than converted head-on weight?
2. Did NMFS's actions violate Mr. Simpson's rights to fair and equitable treatment under the Northern Pacific Halibut Act of 1982 and the Equal Protection Clause of the United States Constitution?

BACKGROUND

Mr. Simpson holds halibut quota shares [QS]. In September 1995, he made two IFQ landings of halibut at Cordova, Alaska. A NMFS enforcement agent in Cordova ordered that Mr. Simpson's fish be weighed at the dock, head-on, immediately after being unloaded from his vessel. In each instance, in accordance with IFQ regulations,² a conversion factor of 0.9 was applied to the head-on weight and the resulting amount was entered on an IFQ landing report and debited from Mr. Simpson's 1995 IFQ account. The loads of halibut were subsequently taken to a processor in Cordova, beheaded, reweighed, and recorded on fish tickets. The result was that the actual total head-off weight was 2,687

¹Formerly, 50 C.F.R. § 676.25(g)(2) and (3). 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.

²Former 50 C.F.R. § 676.22(c) (1995).

pounds less than the converted head-on weight. Mr. Simpson wants this amount of additional halibut IFQ added to his account as part of an underage adjustment (carryover) for a subsequent fishing season.³

In the IAD, RAM denied his request on the grounds that NMFS uses only the weights listed on IFQ landing reports to determine the amounts to be debited from a person's IFQ account. RAM stated that it lacks authority to premise its calculation of IFQ balances on documents (such as fish tickets) not specifically provided for in the IFQ regulations.

On appeal, Mr. Simpson argues that the regulations that were in effect in 1995 *do* allow the use of fish tickets to determine the amounts to be debited from IFQ accounts. Further, he argues that under the IFQ regulations, fishermen are given the option whether to report their product weights as head-on [product code 04] or head-off [product code 05] weights. Mr. Simpson argues that by requiring him to weigh the halibut head-on and report the converted weight to NMFS, the enforcement agent unlawfully denied him his preference to report the actual head-off weight, which would have resulted in fewer pounds being debited from his IFQ account. Mr. Simpson contends that such action by NMFS enforcement violated the Northern Pacific Halibut Act of 1982 [16 U.S.C. § 773(c)] and the Equal Protection Clause of the United States Constitution. He points out that fishermen in Kodiak at that time were allowed to deliver halibut head-off. He argues that refusing to allow him to deliver his halibut head-off is unfair and inequitable, and that there is no rational basis or compelling government purpose for treating Cordova fishermen differently than Kodiak fishermen. Finally, Mr. Simpson argues that his signature on the landing reports [noted in the IAD] does not represent his agreement that the weights on those reports should be used for debiting his IFQ account. He states that he signed the landing reports only because he is required to do so by regulation.

DISCUSSION

1. Was Mr. Simpson entitled to have his halibut IFQ account for 1995 debited on the basis of actual head-off weight, rather than converted head-on weight?

Mr. Simpson's argument that the IFQ regulations give him an option of how to report the product weight of his halibut landings is not persuasive. The regulation he cites in support of this view [50 C.F.R. § 676.22(c)(3)(ii) (1995)] provides:

The amount of halibut to be reported to NMFS for debit from an IFQ account will be the gutted, head-off weight determined by multiplying the initial accurate scale weight of the halibut obtained at the time of landing by the following conversion factors:

³See, 50 C.F.R. § 679.40(e); former 50 C.F.R. § 676.17(c).

<u>Product code</u>	<u>Product description</u>	<u>Conversion factor</u>
01	Whole fish	0.75
04	Gutted, head on	0.90
05	Gutted, head off	1.00

This regulation does not "clearly allow fishermen an option for determining their reported product weight," as Mr. Simpson asserts. The regulation merely provides a formula for arriving at a standardized "gutted, head-off weight" to be reported to NMFS for debiting IFQ accounts, regardless of whether the fish are weighed head-on or head-off.⁴ The regulation does not say who will decide which product code is to be used, and it does not expressly give fishermen any right to choose how product weights will be reported.

The lead-in language of this regulation⁵ states, in relevant part:

(c) Any individual who harvests halibut . . . with fixed gear must:

* * *

(3) Sign any required fish ticket or IFQ landing report for the amount of halibut . . . that will be debited against the IFQ associated with their IFQ card.

The above language anticipated that NMFS might use fish tickets or landing reports for IFQ account debiting purposes, and requires the fisherman to sign the ticket or report. This language does not give fishermen a right to choose whether a fish ticket or an IFQ landing report will be used by NMFS for account debiting. In fact, as stated in the IAD, NMFS has chosen to rely on IFQ landing reports for maintaining IFQ accounts and determining the amounts to be debited from each account.⁶

The regulation [50 C.F.R. § 676.22(c)(3)(ii) (1995)] clearly establishes that the amount to be debited from an IFQ account must be based on the "initial accurate scale weight obtained at the time of landing." Thus, the critical determinant of the amount to be debited is the weight obtained *initially*, regardless of whether that weight is reported on a landing report or a fish ticket. If the initial scale weighing is done head-on, that is the weight that must be used (after applying the conversion factor) for debiting the IFQ account. Under the regulation, once the fish have been weighed there is no choice

⁴Mr. Simpson correctly points out that product code 01, whole fish, can never be used because 50 C.F.R. § 301.16(b) (1995) requires that gills and entrails be removed from halibut before it is offloaded from a vessel. This fact was belatedly recognized by NMFS, and product code 01 is no longer included in the conversion table. *See*, 50 C.F.R. § 679.42(c)(2).

⁵50 C.F.R. § 676.22(c) (1995).

⁶IFQ regulations now make clear that IFQ landing reports will be the only source of information NMFS uses to debit IFQ accounts. *See*, 50 C.F.R. § 679.42(c)(2).

about which weight or product code is to be used for debiting purposes.

In Mr. Simpson's case, the initial scale weighing for both landings was at dockside, head-on. Those weights were the basis for the converted amounts reported on the landing reports. Mr. Simpson's signature on the IFQ landing reports is his acknowledgment that the reported weights were accurate, even if he did not agree that those amounts should be debited from his IFQ account. Thus, the amounts reported to NMFS were the *only* amounts that could be properly used under the regulation for debiting Mr. Simpson's IFQ account. Therefore, RAM was correct in the IAD when it said it lacked authority [at least in this case] to rely on anything but the landing reports to calculate the amounts to be debited from Mr. Simpson's account.

2. Did NMFS's actions violate Mr. Simpson's rights to fair and equitable treatment under the Northern Pacific Halibut Act of 1982 and the Equal Protection Clause of the United States Constitution?

The next question is whether the NMFS enforcement agent in Cordova acted lawfully when he ordered Mr. Simpson to have his halibut weighed head-on, and thereby denied him the opportunity to have the fish initially weighed head-off. Mr. Simpson argues that the NMFS enforcement agent violated his rights to fair and equitable treatment under the Northern Pacific Halibut Act of 1982 and the Equal Protection Clause of the United States Constitution. Mr. Simpson asserts that there was no rational basis or compelling government purpose for the enforcement agent's actions.

The 1995 IFQ regulations did not directly address this question. By contrast, the current regulations make clear that IFQ account debits will be based only on information in landing reports, and that the weight to be reported on the landing report shall be the initial accurate scale weight made at the time offloading commences, i.e., as the fish are being taken off the vessel.⁷ But as we have already discussed, back in 1995, when Mr. Simpson's fish were landed, the regulations specified that account debits would be based on the "initial accurate scale weight of the halibut *obtained at the time of landing.*" This less precise language arguably did not require that the initial weighing be done immediately as the fish were being offloaded. The language could reasonably be read to permit initial weighing either at dockside head-on or at the cannery head-off, as long as the weighing was done during the "time of landing." That, arguably, could be anytime within the six hours after the fish were landed and before shipment of the fish or departure of the vessel from the landing site, which was when the landing report had to be submitted to NMFS.⁸

So, in 1995, was it unfair, inequitable, or a violation of equal protection to require Mr. Simpson to initially weigh his fish head-on, despite his asserted preference that it be initially weighed head-off? To

⁷50 C.F.R. § 679.42(c)(2); 50 C.F.R. § 679.5(l)(2)(vi).

⁸Former 50 C.F.R. § 676.14(b) (1995).

decide this question, we must balance the interests at stake. Mr. Simpson has a financial interest in minimizing the product weight that is reported to NMFS for debiting his IFQ account. In this instance, he alleges that the enforcement agent's actions cost him approximately \$5,000 in lost revenue. Mr. Simpson has not identified a suspect class or fundamental right that is burdened by NMFS's enforcement actions. His livelihood is not at stake, only his desire to maximize his income. His interest is exclusively economic. Under traditional equal protection analysis, government impingement of economic interests alone is judged by a rational basis standard, i.e., whether the government's action is rationally related to the furtherance of a legitimate (not compelling) government interest or purpose.

On the other side of the scale, NMFS enforcement agents are charged by regulation with verifying IFQ landings.⁹ Verifying logically includes ascertaining the accurate weight of the fish that are offloaded from a vessel. The primary reason NMFS places enforcement agents at ports and directs them to verify landings is obviously to ensure compliance with the law and thereby further the government's goal of managing the commercial fisheries. Clearly, this is a legitimate government purpose.

In pursuit of this government purpose, it is certainly rational, perhaps even necessary, for NMFS to allow its agents at each port to exercise their good faith judgment in deciding when it may be necessary for fish to be weighed at dockside. An agent may reasonably require initial dockside head-on weighing if, in the agent's judgment, that is necessary to ensure that the accuracy of the landing weight is verified. It may be that, at a given port, allowing fish to be moved into a cannery and outside the agents' sight unacceptably compromises the agents' ability to do their job. In such a situation, requiring initial weighing at dockside is rationally related to the government's legitimate purpose of monitoring commercial catches and managing the fisheries.

Absent evidence that the Cordova enforcement agent acted in bad faith, it is reasonable to presume that the agent required fish to be weighed at dockside in order to more easily and surely verify the landings. The fact that the enforcement agent in Cordova required head-on dockside weighing, while agents in Kodiak did not, might be explained by differences in the physical layout of the docks and canneries at the two ports, or other factors that legitimately distinguish the two situations. Mr. Simpson did not produce any evidence that the circumstances at the two ports were substantially the same, i.e., that fishermen at both ports were "similarly situated," or that there could be no rational basis for the differing treatment at the two ports. Therefore, I conclude that Mr. Simpson has failed to establish that NMFS violated his rights to fair and equitable treatment under the Equal Protection Clause of the United States Constitution.

As for the Northern Pacific Halibut Act of 1982, Mr. Simpson cites 16 U.S.C. § 773c(c), which provides, in relevant part:

⁹Former 50 C.F.R. § 676.14(b)(2) (1995); 50 C.F.R. § 679.5(l)(2)(v).

If it becomes necessary to allocate or assign halibut fishing privileges among various United States fishermen, such allocation shall be fair and equitable to all such fishermen, based upon the rights and obligations in existing Federal law, reasonably calculated to promote conservation, and carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges .

...

The section in which this language appears describes the general responsibility of the regional fishery management councils under the Act. Reading the quoted passage in the light most favorable to Mr. Simpson, the section requires the allocation or assignment of halibut quota shares and IFQ to be fair and equitable, and that the IFQ program be carried out in such a manner that no one gets an excessive share.

I do not read Mr. Simpson's appeal as a challenge to the initial allocation of halibut QS that he or anyone else received, nor does he challenge the amount of 1995 IFQ originally allocated to his or anyone else's account. Nor, for that matter, does Mr. Simpson argue that the IFQ program has been carried out in a manner that gave him or anyone else an excessive share of the fishing privileges. Mr. Simpson's invocation of this section of the Halibut Act can only be relevant to the extent that the quoted passage can be read to require that the debiting of IFQ accounts must be fair and equitable. Having concluded that the debiting of Mr. Simpson's IFQ account in this instance passes muster under the Equal Protection Clause of the United States Constitution, I must also conclude that, for the same reasons, the debiting of his account is consistent with the similar requirements of 16 U.S.C. § 773c(c).

FINDINGS OF FACT

1. Mr. Simpson's signature on the IFQ landing reports is his acknowledgment that the reported weights were accurate, even if he did not agree that those amounts should be debited from his IFQ account.
2. The amounts reported to NMFS on IFQ landing reports were the only amounts that could be properly used under the regulation for debiting Mr. Simpson's IFQ account because the amounts were based on the initial accurate scale weight of his halibut.
3. Verifying IFQ landings logically includes ascertaining the accurate weight of the fish that are offloaded from a vessel.

CONCLUSIONS OF LAW

1. RAM lacked authority in this instance to rely on anything but the landing reports to calculate the amounts to be debited from Mr. Simpson's account.
2. Mr. Simpson was not entitled to have his halibut IFQ account for 1995 debited on the basis of

actual head-off weight, rather than converted head-on weight.

3. A NMFS enforcement agent may reasonably require initial dockside head-on weighing if, in the agent's judgment, that is necessary to ensure the accuracy of the IFQ landing weight.
4. In a situation where allowing fish to be moved into a cannery and outside the NMFS enforcement agents' sight unacceptably compromises the agents' ability to do their job, requiring initial weighing at dockside is rationally related to the government's legitimate purpose of monitoring commercial catches and managing the fisheries.
4. Mr. Simpson has failed to establish that NMFS violated his rights to fair and equitable treatment under the Equal Protection Clause of the United States Constitution or under the Northern Pacific Halibut Act of 1982.
5. Mr. Simpson is not entitled to additional pounds of IFQ underage carryover from the 1995 season.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect on May 24, 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 May 3, 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.

Edward H. Hein
Chief Appeals Officer