NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 97-0001
	)	
OLE G. HARDER,	)	DECISION
Appellant	)	
	)	April 9, 1998
	)	

STATEMENT OF THE CASE

Appellant Ole G. Harder filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Program[1] [RAM] on November 12, 1996. Mr. Harder claimed additional halibut and sablefish quota share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish, based on 30%[2] of the gross stock of the halibut and sablefish landed from the F/V PACIFIC LADY during 1985. The IAD denied his claim on grounds that he had executed a written lease of the vessel to Mr. David Vohs, and that pursuant to regulation, Mr. Vohs was entitled to credit for 100% of the landings made during the tenure of his lease.

On February 28, 1997, Chief Appeals Officer Edward Hein advised Mr. Harder in writing that an initial review of his appeal indicated there was no basis for granting relief, but that the file would be given additional scrutiny before a final decision was rendered. Mr. Harder was advised that if he had any additional information, it was to be delivered to this office by March 31, 1997. No response was filed. Because there is no genuine and substantial issue of adjudicative fact for resolution, no hearing was ordered.[3]

ISSUE

1. Whether Mr. Harder's IAD can be reversed on appeal, on grounds that implementation of IFQ regulation 50 C.F.R. § 679.40(a)(2) violates federal law.

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

[2]He also requested that consideration be given to increasing the percentage to 35% to compensate him for an unpaid loan he made to the lessee.

[3]*See*, 50 C.F.R. § 679.43(g), formerly 50 C.F.R. § 676.25(g)(3)(iii). All IFQ regulations were renumbered, effective July 1, 1996. *See,* 61 Fed. Reg. 31,270 (1996). The wording of the regulation was unchanged by the renumbering.

2. Whether Mr. Harder can receive additional QS for the landings of sablefish made under a written lease of his vessel.

3. Whether Mr. Harder can receive additional QS for the landings of sablefish made under a *de facto* partnership with Mr. Vohs.

BACKGROUND

On January 31, 1985, Mr. Harder, as owner, and Mr. David Vohs, as lessee, entered into a written agreement for the lease the F/V PACIFIC LADY between February 1, 1985, and July 31, 1988. The lease provided that Mr. Harder would receive 30% of the gross proceeds of the vessel's landings of halibut and sablefish. The vessel sank on or about September 1, 1985, while operated by Mr. Vohs. The vessel was a total loss. Mr. Vohs was awarded the QS for the sablefish landings made during the period of the lease, prior to the loss of the vessel.

During the application period, Mr. Harder claimed additional QS, based on 30% of the landings of halibut and sablefish made under the lease. There is no evidence that halibut landings were made during the period of the lease.

RAM denied Mr. Harder's claim for additional QS on grounds that the IFQ regulations [50 C.F.R. § 679.40(a)(2)][4] prohibit an owner of a vessel from receiving QS for landings made during the lease of the vessel.

On appeal, Mr. Harder claims that Mr. Vohs never paid him for the lease of his vessel, and that awarding Mr. Vohs QS for the portion of the lease he had breached violates 16 U.S.C. § 1851(a)(4), which requires that the allocation of fishing privileges (by NMFS) be "fair and equitable to all such fishermen." As a consequence, Mr. Harder argues that the IFQ regulations be set aside, and that the QS associated with the unpaid portion of the lease (which is 30% of the landings made under the lease) be issued to him.

Alternatively, Mr. Harder contends that he, as the vessel's owner, should receive all of the QS associated with the landings of the vessel in 1985, because the lease was materially breached and nullified by Mr. Vohs' failure to pay for the lease of the vessel.

Mr. Harder also claims additional QS based on a *de facto* partnership with Mr. Vohs, as evidenced by the contribution of his vessel and fishing gear, for the fishing of sablefish in 1985. Mr. Harder does not specify whether the *de facto* partnership leased the vessel from him. Nor does he specify the

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[4]All IFQ regulations were renumbered, effective July 1, 1996. *See*, 61 Fed. Reg. 31,270 (1966).

percentage of his ownership of the partnership.

Mr. Harder requested a hearing to prove that Mr. Vohs never paid what he had owed under the lease, and that he had provided his vessel and fishing gear for the *de facto* partnership. A hearing was not ordered because the facts, even if true, would have not affected the outcome of the decision in this case.

DISCUSSION

Under the regulations of the IFQ program, sablefish QS is calculated on a qualified person's best five of six years of sablefish landings made between 1985 through 1990.[5] To be considered a "qualified person" for QS, a person must have owned or leased a vessel that made legal landings of halibut or sablefish during the QS qualifying years (1988, 1989, or 1990).[6] As implemented by RAM, the owner of a vessel cannot receive QS for the landings of halibut and sablefish made during the lease of the vessel.[7] A former partner of a dissolved partnership who would otherwise be a qualified person may apply for QS in proportion to his or her interest in the dissolved partnership.[8] A written vessel lease agreement constitutes conclusive evidence of a vessel lease.[9] Because there is no evidence that landings of halibut were made from the F/V PACIFIC LADY in 1985, I shall confine the discussion to whether Mr. Harder is eligible for additional *sablefish* QS.

1. Whether Mr. Harder's IAD can be reversed on appeal, on grounds that implementation of IFQ regulation 50 C.F.R. § 679.40(a)(2) violates federal law.

Mr. Harder argues that the implementation of IFQ regulation 50 C.F.R. § 679.40(a)(2) in this case violates federal law because it would be unfair for Mr. Vohs to receive QS for the portion of the lease he had breached. Mr. Harder cites § 301(a) of the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. § 1851(a)(4)], which requires that fishing allocations to fishermen be "fair and equitable." Mr. Harder does not challenge RAM's interpretation of the IFQ regulation, only the legality of its implementation.

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[5]*See*, C.F.R. § 679.40(a)(4)(i). For halibut QS, it is the best five of seven years of landings of halibut between 1984 and 1990.

[6]*See*, 50 C.F.R. § 679.40(a)(2).

[7]Id.

[8]Id.

[9]*See*, 50 C.F.R. § 679.40(a)(3)(iii), formerly 50 C.F.R. § 676.20 (a)(1)(iii).

In several decisions,[10] we have stated that an Appeals Officer must presume the legality of an agency's own duly promulgated regulations. The IFQ regulations were duly promulgated through notice and comment rulemaking, pursuant to the requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1988).[11] Consequently, an Appeals Officer has no authority to disregard or invalidate IFQ regulations, on grounds that the regulations are unconstitutional or violate a particular U.S. statute. Such authority lies with the courts. I note that the IFQ regulations have been upheld as a permissible exercise of authority by the Secretary of Commerce.[12]

Because an Appeals Officer has no authority to disregard or invalidate an IFQ regulation, I must conclude that Mr. Harder's redress on this issue is in the courts, and not with this office.

2. Whether Mr. Harder can receive additional QS for the landings of sablefish made under a written lease of his vessel.

Mr. Harder contends that he, as the vessel's owner, should receive all of the QS associated with the landings made under the lease of his vessel, because the lease was materially breached (and therefore nullified) by Mr. Vohs' failure to pay for the lease of the vessel.

In Ocean Crest Fisheries v. McKee,[13] we ruled that breaches of a written lease do not invalidate the agreement or its status as conclusive evidence. Although evidence of a breach is relevant to the question of whether the lease terminated prematurely, such a breach would have had to fundamentally change the nature of the relationship between the parties or evidence a clear intent to terminate the agreement.[14] The termination of a vessel lease would occur, for example, if the lessee permanently relinquished possession and control of the vessel, evidenced an intent to cease using the vessel for commercial fishing operations, and returned the vessel to the owner.[15]

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[10]*See, e.g.*, Charles Petticrew, Appeal No. 95-0008, July 3, 1996, *effective*, August 2, 1996; George Ramos, Appeal No. 94-0008, Regional Director's Decision on Review, at 4, April 21, 1995.

[11]*See*, 58 Fed. Reg. 59,375 (1993).

[12]*See*, Alliance Against IFQs v. Brown, et al, Opinion No. 95-35077, May 22, 1996 (9th Cir. 1996).

[13]Appeal No. 95-0101, October 13, 1995, at 6-7, *aff'd* October 19, 1995.

[14]Id.

[15]*See*, Dittrick v. Weikal, Appeal No. 95-0109, October 20, 1995, at 6-7, *aff'd* October 24, 1995, in which the parties stipulated that the lessee had returned the boat and surrendered it early, thereby terminating the lease.

Mr. Harder admits in his appeal statement that he and Mr. Vohs entered into a written agreement for the lease of the F/V PACIFIC LADY, and that Mr. Vohs operated the F/V PACIFIC LADY until the loss of the vessel in September 1985. While Mr. Harder claims that Mr. Vohs never paid him for the lease of the vessel, there is nothing in the record that shows that his relationship with Mr. Vohs changed, or that Mr. Vohs ever relinquished control of the vessel, at any time from the inception of the lease until the vessel's sinking, including the period of time when the landings were made from the vessel in 1985. Therefore, even if it is true that Mr. Vohs did not make the required payments under the lease, I conclude that the lease was, nonetheless, in effect at the time of the landings made under the lease.

Given that the written lease is valid on its face, and that there is no evidence of fraud, mistake, or duress in the execution of the lease, I must conclude that the lease is conclusive evidence of a vessel lease between Mr. Harder and Mr. Vohs, and that Mr. Vohs is eligible for the QS associated with the landings made under the lease.

3. Whether Mr. Harder can receive additional QS for landings of sablefish made under a *de facto* partnership with Mr. Vohs.

Finally, Mr. Harder argues that he had a "*de facto* partnership" with Mr. Vohs, in which he provided the vessel and the fishing gear for the landings of the vessel. Even if a *de facto* partnership could be construed to have existed, there is no proof in the record that the partnership owned or leased the vessel.

In Vohs v. Piper,[16] we ruled that in order for a person to receive QS on the basis of a partnership, the person must show that the partnership owned or leased the vessel from which the landings of QS were made.

Given that the evidence does not show that the F/V PACIFIC LADY was owned or leased by a partnership, I conclude that Mr. Harder cannot receive QS for the landings made from the vessel, even if a partnership in fact existed.

FINDINGS OF FACT

1. Mr. Vohs operated the F/V PACIFIC LADY under the terms of a written vessel lease with the vessel's owner, Mr. Harder, from February 1, 1985, through July 31, 1988, until the sinking of the vessel in September 1985.

[16]Appeal No. 95-0051, October 28, 1995, *aff'd* October 30, 1995.

2. The relationship of the parties under the lease of the F/V PACIFIC LADY did not change, nor did Mr. Vohs relinquish possession and control of the vessel, prior to the sinking of the vessel in 1985.

3. If a *de facto* partnership existed between Mr. Harder and Mr. Vohs, it was for the operation, and not the ownership or lease, of the F/V PACIFIC LADY in 1985.

CONCLUSIONS OF LAW

1. An Appeals Officer does not have the authority to set aside the implementation of an IFQ regulation [50 C.F.R. § 679.40(a)(2)] on grounds that it violates federal law.

2. The written lease of the F/V PACIFIC LADY is conclusive evidence of a vessel lease agreement between Mr. Harder and Mr. Vohs.

3. The written lease of the F/V PACIFIC LADY between Mr. Harder and Mr. Vohs was in effect at the time of the landings made from the vessel in 1985.

4. Mr. Harder cannot receive QS on the basis of a partnership that did not own or lease a vessel.

DISPOSITION

The IAD denying Mr. Harder's application for additional QS is AFFIRMED. This decision takes effect on May 8, 1998, 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 the tenth day after the date of this Decision, April 20, 1998. 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 the issuance of a Decision on Reconsideration.

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James Cufley
Appeals Officer

I concur in the factual findings, legal analysis, and conclusions of law of this decision. I have reviewed this decision and the accompanying administrative record to verify the substantive accuracy of the decision and to ensure compliance with applicable laws, regulations, and agency policies, and consistency with other appeals decisions of this Office.

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Randall J. Moen
Appeals Officer