

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 07-0002
)	
SIGURD D. RUTTER,)	DECISION
Appellant)	
)	July 6, 2007
_____)	

STATEMENT OF THE CASE

On November 13, 2006, the Restricted Access Management (RAM) Program approved an application for the transfer of halibut quota shares (QS), submitted by Mr. Rutter as transferor and Mark S. Roberts as transferee, under the Individual Fishing Quota (IFQ) program for Pacific halibut and sablefish.¹ On February 12, 2007, RAM issued a 2007 fishing permit to Mr. Rutter for 12,474 pounds of halibut IFQ. Later, RAM determined that it should have added 736 pounds of underage to Mr. Rutter’s account and issued a new fishing permit to him for 13,210 pounds of halibut IFQ on February 21, 2007.

Mr. Rutter claims on appeal that his underage adjustment is 285 pounds short, and should be 1,021 pounds. He claims that his total 2007 IFQ allocation of area 2C halibut should be 13,495 pounds. Mr. Rutter filed a timely appeal with this Office on February 16, 2007. He can file an appeal because the IAD directly and adversely affects his interests, as required by 50 C.F.R. §679.43(b). An oral hearing was not held in this case because the material facts are not in dispute. The record has sufficient information to decide this appeal, as required by 50 C.F.R. §679.43(g)(2). I therefore close the record and decide this appeal.

ISSUE

Did RAM properly calculate Mr. Rutter’s halibut IFQ allocation for the 2007 season?

ANALYSIS

The question of whether RAM properly calculated Mr. Rutter’s halibut IFQ allocation for the 2007 season depends on whether RAM correctly applied the so-called “underage carryover” provision.² Underage refers to the portion of a QS holder’s annual IFQ allocation that was not fished during the season for which it was authorized. The underage provision reads as follows:

¹ 50 C.F.R. §679.2 (definitions); 50 C.F.R. §679.4(a), (d) (IFQ permits); 50 C.F.R. §679.40 (allocation and calculation of QS/IFQ); 50 C.F.R. §679.41 (transfer of QS/IFQ); 50 C.F.R. §679.43 (appeals).

² 50 C.F.R. §679.40(e).

(e) Underages. Underages of up to 10 percent of a person's total annual IFQ account for a current fishing year will be added to that person's annual IFQ account in the year following determination of the underage. This underage adjustment to an annual IFQ allocation will be specific to IFQ species, IFQ regulatory area, and vessel category for which an IFQ is calculated, and will apply to any person to whom the affected IFQ is allocated in the year following determination of an underage.

According to the way RAM implements the IFQ program, when Mr. Rutter transferred one block of his QS to Mr. Roberts in November 2006, by operation of law he automatically transferred to Mr. Roberts the right to a 2007 IFQ allocation associated with that block of QS, as well as the right to a proportionate share of the 2007 underage adjustment associated with that block of QS.

After approving the QS transfer to Mr. Roberts,³ RAM allocated the IFQ associated with that QS to his halibut IFQ account for the 2007 fishing season and adjusted his IFQ allocation with an underage carryover of 285 pounds of halibut IFQ.

The language of the underage provision provides that the underage adjustment applies to "any person to whom the affected IFQ is allocated." Because Mr. Roberts purchased a block of the QS, he was one of the persons "to whom the affected IFQ is allocated" for the 2007 fishing year, so his halibut IFQ account for 2007 shared in the underage adjustment.

Mr. Rutter argues that his own halibut IFQ account for 2007 should be credited with those 285 pounds of underage, and that those pounds should be removed from Mr. Roberts's IFQ account, because the parties to the transfer agreed that Mr. Rutter would retain all his remaining 2006 IFQ pounds and any underage that went with them. As Mr. Rutter states in his appeal, "The purchase agreement, and the transfer application were specific, in that, the transfer was for QS units only."⁴

RAM approved the transfer of QS without any transfer of IFQ pounds or underage adjustment pounds for the 2006 fishing year. RAM's approval of the QS transfer, however, did not confer on Mr. Rutter the right to retain the entire underage adjustment for 2007 that would ultimately result from his underfishing of those pounds during the 2006 fishing season. What Mr. Rutter retained in the transfer was one block of 2C halibut QS and the right or opportunity to fish all of his remaining pounds of halibut IFQ for the remainder of the 2006 fishing year.

³ RAM approved the transfer of the QS on November 13, 2006, two days before the end of the 2006 fishing season. *See* Letter from Philip J. Smith, RAM Program Administrator, to Mr. Rutter and Mr. Roberts, November 13, 2006. The halibut season ran from noon, March 5, 2006, to noon, November 15, 2006. *See* International Pacific Halibut Commission news release (Jan. 20, 2006) at: <http://www.iphc.washington.edu/halcom/newsrel/2006/nr20060120.htm>

⁴ Rutter Appeal at 1 (Feb. 24, 2007).

Underage adjustments are governed by regulation, not by the terms of a transfer application or sales agreement. Although 50 C.F.R. §679.40(e) provides that underages of “up to 10 percent of a person’s total annual IFQ account for a current fishing year will be added to *that person’s* annual IFQ account in the year following determination of the underage,” the regulation also provides that the underage adjustment “will apply to *any person to whom the affected IFQ is allocated* in the year following determination of an underage.” [Emphasis supplied.]

RAM reads this latter provision to mean that each person who owns QS, which in the previous year generated an allocation of IFQ pounds that were underfished, would be entitled to an underage adjustment for the next fishing year. When two or more persons separately own portions of the QS at the end of a fishing year, as a result of an approved QS transfer, RAM applies the underage adjustment to each person’s IFQ account in proportion to their respective ownership of the QS.⁵ This is true even when, as here, one person held all of the IFQ pounds in the previous year and that person was the only one who fished (or underfished) those pounds. Thus, underage adjustments for the next fishing season follow ownership of the QS that generate the affected IFQ accounts in that next fishing season.

Mr. Rutter argues that proration of an underage adjustment between the buyer and seller of QS is arbitrary and capricious.⁶ He asserts that there was no underage associated with the block of QS that Mr. Roberts purchased.⁷ Further, he asserts that Mr. Roberts did not expect to receive any underage adjustment as a result of buying the QS, and that Mr. Rutter did not authorize it.⁸

We believe RAM’s reading of the underage regulation is both reasonable and a practical necessity, and therefore is not arbitrary and capricious. This becomes more clear in a situation where a person transfers all their QS in a particular fishery, but retains all the associated IFQ pounds for the current fishing season and then has an overage. In the subsequent fishing year, the seller of the QS would have no IFQ account against which to debit the overage. Therefore, with regard to both underages and overages, RAM adjusts the IFQ accounts of the persons who own the QS that gave rise to the IFQ allocation which was underfished or overfished.

In RAM’s view, some of the underage from Mr. Rutter’s 2006 IFQ account is associated with the block of QS that he sold to Mr. Roberts because a proportionate amount of Mr. Rutter’s 2006 IFQ pounds had been generated by the block he sold. That the parties to the QS transfer did not expect Mr. Roberts to receive any underage adjustment in 2007 merely shows that neither of them understood how RAM calculates and applies underage adjustments. That Mr. Rutter did

⁵ Use of the term “ownership” in this context is not meant to suggest that holding QS is a right. It remains a privilege, not a right.

⁶ Rutter Appeal at 2 (Feb. 24, 2007).

⁷ *Id.*

⁸ *Id.*

not authorize the award of an underage adjustment to Mr. Roberts's 2007 IFQ account is irrelevant, as the parties to a QS transfer do not have the authority to direct RAM how to apply any underage or overage adjustments for the next fishing year. Nonetheless, as between themselves, the parties are free to provide by contract for compensation for an overage or underage.

One factor that may have led to some confusion for the parties is that the transfer application form states that "Pounds transferred includes (sic) a pro-rata share of any underage based on the QS held or transferred UNLESS OTHERWISE INSTRUCTED."⁹ According to Jessica Gharrett, acting RAM Program Administrator, the underage referred to in this application statement is the underage carried over from the previous fishing year, i.e., any pounds added to Mr. Rutter's 2006 IFQ account as an adjustment for a 2005 underage.¹⁰ Mr. Rutter was free to withhold from Mr. Roberts all of the 2006 adjustment pounds, along with all of the 2006 IFQ pounds, and he did so. The statement in the application, although possibly confusing, does not affect the manner in which RAM calculates and applies underage adjustments for the next fishing year.

We conclude that RAM properly calculated Mr. Rutter's halibut IFQ allocation for the 2007 season and that he is not entitled to an additional 285 pounds of underage adjustment to his 2007 IFQ account.¹¹

CONCLUSIONS OF LAW

1. RAM properly calculated Mr. Rutter's halibut IFQ allocation for the 2007 season.
2. Mr. Rutter is not entitled to an additional 285 pounds of underage adjustment to his 2007 IFQ account.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect on August 6, 2007, unless by that date the Regional Administrator takes further action pursuant to 50 C.F.R.

⁹ Application for Transfer of QS/IFQ at page 2, Block F, box 7 (Form revised June 23, 2005). This statement was lined through on Mr. Rutter's transfer application, presumably by Mr. Rutter himself.

¹⁰ Jessica Gharrett email to Ed Hein (July 5, 2007).

¹¹ RAM emphasizes that the timing of the QS transfer was critical in determining the amount of underage carryover available to Mr. Rutter. RAM states that if Mr. Rutter had delayed the transfer until after the new year's IFQ permit accounts and adjustments were created, his account would have received the maximum underage adjustment possible (which in this case would have been 1,021 pounds). *See* Letter from Jessica Gharrett, Acting Program Administrator, RAM, to Mr. Rutter and Mr. Roberts at 1 (Feb. 21, 2007).

§679.43(o).

The Appellant or 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 July 16, 2007, the tenth day after 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 Administrative Judges, and must be accompanied by a written statement in support of the motion.

Randall J. Moen
Administrative Judge

Edward H. Hein
Chief Administrative Judge