

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)
)
RICHARD D. FOSS)
Appellant)
_____)
Appeal No. 95-0003
DECISION
August 6, 1996

STATEMENT OF THE CASE

Appellant Richard D. Foss filed a timely appeal of an Initial Administrative Determination [IAD]¹ issued by the Restricted Access Management Division [Division] on September 12, 1994. The IAD denied Mr. Foss's application² for Quota Share [QS] under the Individual Fishing Quota [IFQ] program because it was not filed by the July 15, 1994 application filing deadline. Mr. Foss 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)-(3).³

ISSUE

Whether NMFS should accept the Appellant's application as timely filed.

BACKGROUND

Richard Foss claims that he was the registered owner between 1980 and 1988 of the TAI-PAN, formerly the VICKI LEE. He claims that he made legal landings of halibut and sablefish from the vessel during years that would qualify him to receive QS under the IFQ program. Because Mr. Foss's application was denied as untimely, no findings have been made on the substantive merits of Mr. Foss's

¹There technically were two IADs. One IAD pertained to sablefish and the second pertained to halibut, but are identical in all other respects, including their titles: "Notice of Denial and Notification of Right to Appeal." This Decision will refer to both as the IAD in this matter.

²The document at issue is entitled "Request for Application" [RFA]. An RFA is the equivalent of an application for the meeting of the application filing deadline under the IFQ program. See, Keith A. Buehner, Appeal No. 94-0001, September 26, 1994, *aff'd* March 2, 1995.

³Formerly 50 C.F.R. § 676.25(g)(2)-(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.

application.

The Division received Mr. Foss's Request for Application [RFA] for QS on August 30, 1994, (45 days after the application filing deadline). The postmark of the envelope containing the RFA is dated August 24, 1994.

Mr. Foss claims that he did not receive actual and constructive notice of the IFQ program and the July 15, 1994 deadline for submitting an application until August 2, 1994. On August 2, 1994, Mr. Foss contacted the Division by telephone, and received the RFA form by telefax on the same day. A chronology of Mr. Foss's activities prior to that date follows. Significant dates of the IFQ program and the Division's actions with respect to Mr. Foss are juxtaposed in italics.

July-Aug. '88	Mr. Foss leaves the North Pacific halibut and sablefish longline fisheries to participate in the South Pacific tuna fishery.
Jan.-Apr. '89	Mr. Foss participates in South Pacific tuna fishery.
June 26, 1989	Mr. Foss checks in at Hawaii en route to fish in the North Pacific tuna fishery.
Oct.-Nov. '89	Mr. Foss visits islands in Washington and Hawaii for more than one month before returning to Fiji.
July 6, 1990	Mr. Foss returns to the United States to purchase a vessel in Miami and finalizes his divorce.
Dec. '90-Apr. '91	Mr. Foss participates in the South Pacific tuna fishery out of Fiji.
<i>December 1991</i>	<i>North Pacific Fishery Management Council decides to adopt the IFQ program for halibut and sablefish.⁴</i>
Dec. '91-Apr. '92	Mr. Foss participates in the South Pacific tuna fishery close to the South American coast.
Apr. '92-Nov. '93	Mr. Foss delivers his catch to Ecuador, and then remains living in Ecuador while a new vessel is completed.
<i>December 3, 1992</i>	<i>Proposed regulations for the IFQ program are published in the Federal</i>

⁴*Newsletter* (North Pacific Fishery Management Council) No. 6-91, December 19, 1991.

Register. 57 Fed. Reg. 47,234 (1992).

- Dec. 1992 Mr. Foss calls the International Pacific Halibut Commission [IPHC] asking about the status of regulations of halibut. He is told of the proposed IFQ program for halibut and sablefish and that nothing is imminent.
- November 9, 1993 *Final IFQ rules are published in the Federal Register. 58 Fed. Reg. 59,375 (1993).*
- Dec. '93 - Apr. '94 Mr. Foss participates in the South Pacific tuna fishery.
- December 20, 1993 *An RFA form and application materials are mailed to Mr. Foss at his last known address.*
- January 6, 1994 *The first official notice of the application period and deadline for filing applications under the IFQ program is published in the Federal Register. 59 Fed. Reg. 701 (1994).⁵*
- January 25, 1994 *The RFA form is returned undeliverable.*
- April 18, 1994 *The RFA form is resent to Mr. Foss.⁶*
- May 24, 1994 Mr. Foss departs from Fiji to participate in the North Pacific tuna fishery.
- July 15, 1994 *Deadline for filing application for QS.*
- July 28, 1994 Mr. Foss arrives in Hawaii.
- August 2, 1994 Mr. Foss telephones IPHC and then RAM Division regarding halibut and sablefish, and receives an RFA form by telefax.
- August 11, 1994 Mr. Foss signs the RFA form.
- August 24, 1994 Mr. Foss's RFA is placed in the U.S. mail.

⁵This notice was the "first legally sufficient notice of the application filing deadline. . . ." John T. Coyne, Appeal No. 94-0012, May 24, 1996 (Decision on Reconsideration).

⁶The Agency records do not show that this second mailing was returned as undeliverable. However, based on Mr. Foss's affidavit, I find that it was not delivered to him.

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Mr. Foss's RFA is received by the Division.

Mr. Foss testified in his affidavit that he was aware that the regulations concerning halibut and sablefish might change. He suspected that he would qualify for rights to engage in those fisheries. He testified in his affidavit: "Therefore, I tried to retain some contact with the limited access management developments in the longline fishery." [Foss Affidavit at 3, ¶ 4] Mr. Foss also testified that he read trade publications, such as Fisherman's News and Alaska Fisherman's Journal regarding issues such as whether the fishery would become limited entry. However, he does not testify that he continued reading those publications after he left Alaska. He apparently received the newsletter of the Western Fishboat Owners Association until 1990, when he was for a time removed from that organization due to a misunderstanding. Mr. Foss testified that there were fishermen engaged in tuna fisheries who also longlined in Alaska. However, he does not testify that he made any inquiries of his fellow fisherman regarding the status of IFQ program.

In addition to publication of the regulations in the Federal Register, the Division carried out an extensive campaign to publicize the IFQ program prior to the July 15, 1994 deadline. This effort included news releases, public service announcements, paid advertisements, media interviews, public information workshops, and presentations at public meetings.

In addition to publication in the Federal Register and its extensive publicity campaign, the Division also sent individualized notice of the program and RFA forms to many persons it believed might be eligible to apply for and receive QS. Those were persons listed in the Division's database as owners of vessels that made legal landings during the relevant years. Of that group, persons whose current addresses were in the Division's database would be likely to receive individualized notice of the program and the RFA form. While the Division attempted to give individualized notice to the likely eligible persons, its computer records prior to receipt of applications did not reflect those who were eligible based on leases of vessels or successors in interest to owners and lessees. Thus, large numbers of persons who submitted applications demonstrating their eligibility to receive QS never received individualized notices of the program.

Mr. Foss contends that the Division should have realized that he had departed from Alaskan fisheries because he did not purchase an Alaska license or permit since 1988. He contends that the Division should have informed the Western Fishboat Owners Association that the RFA form that it sent to him was returned undeliverable. He contends that the Division ought to have telephoned the phone number associated with the address where he had not resided since 1988 to determine if the person living at that address knew his whereabouts. He contends that notice of the IFQ program and deadlines should have been posted at the ports of call of fishermen who engaged in Alaska longline fisheries. He contends that those include Russia, New Zealand, Argentina, Chile, and the North and South Pacific. He contends that had the Division taken the above steps, he would have received actual notice of the application deadline.

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DISCUSSION

1. Challenge to the Legality of the IFQ Program

The regulations implementing the IFQ program provide that an application received after July 15, 1994, "will not be considered."⁷ The regulations do not require the Division to give individualized notice to every person who might be eligible to receive QS. Although the Division made extensive efforts to reach those who might be eligible, the regulations do not impose on the Division a duty to launch an investigation when mailings sent to last known addresses are returned undeliverable or post notices in foreign ports. Accordingly, Mr. Foss does not contend that the Division failed to comply with the regulations governing the IFQ program.

Instead, Mr. Foss challenges the IFQ regulations themselves. He contends that the program deprived him of his due process rights under the 14th Amendment to the United States Constitution and that the deadline for submitting an application was in violation of the Administrative Procedures Act, 5 U.S.C. § 553. However, Mr. Foss's challenge to the legality of the IFQ regulations is not within the purview of this Office. I must presume the legal validity of the agency's own duly promulgated regulations.⁸

2. Equitable Tolling

Mr. Foss does not contend that the Division received his RFA or that he mailed or telefaxed his RFA by July 15, 1994. Accordingly, the only way the Agency could accept the RFA is if the filing period is equitably tolled.⁹ In only one case has an applicant's RFA delivered after the July 15, 1994 deadline been accepted as timely under the equitable tolling doctrine.¹⁰

The Coyne decision found that the July 15, 1994 deadline was not jurisdictional in nature, and that the doctrine of equitable tolling could apply under proper circumstances. It stated:

Courts have used a variety of formulations to describe the nature of the circumstances that trigger equitable tolling. Usually the courts require extraordinary circumstances beyond the applicant's control that prevented the applicant from filing in a timely manner. [footnote

⁷59 Fed. Reg. 701, at 702 (1994).

⁸George M. Ramos, Appeal No. 94-0008, Regional Director's Decision on Review, at 4, April 21, 1995; Charles J. Petticrew, Appeal No. 95-0008, July 3, 1996.

⁹John T. Coyne, Appeal No. 94-0012, May 24, 1996 (Decision on Reconsideration) .

¹⁰*Id.*

omitted]. These include circumstances such as mental incompetence, chronic alcoholism, minority, war, acts of god, misconduct by an opposing party, and the failure of a government agency to provide statutorily required individual notice. [citation omitted] What all of these types of circumstances have in common is that they cause the applicant, for all or part of the application period, to be physically, mentally, emotionally, or legally unable to apply, or to be ignorant of the right or requirements of application and, thereby, effectively unable to apply.

In Coyne, the applicant "was placed in an unusually isolated environment as a result of his addiction to heroin." Mr. Coyne entered a treatment facility under the threat of imprisonment if he did not do so. He had been addicted to heroin for approximately three years. The Chief Appeals Officer found that Mr. Coyne's "heroin addiction and the resultant isolation in the . . . treatment program were extraordinary circumstances beyond his control that prevented him from learning of the IFQ application period and applying before the deadline expired." [footnote omitted].

I find that, in contrast to Coyne, Mr. Foss did not suffer any disability or circumstance beyond his control that effectively prevented him from timely applying. There was nothing extraordinary about Mr. Foss's circumstances. Indeed, he testified that other United States fishermen, some of whom are also longliners, participate in the South Pacific and North Pacific tuna fisheries.

There is nothing extraordinary about the fact that Mr. Foss did not receive mail at an address he had vacated several years earlier. The Division sent information about the application process and RFA forms to individuals it believed might be eligible at the last address known to the Division. Notices were sent by first class mail, which may be forwarded to addresses on file with the United States Postal Service, until the forwarding notice expires (generally after one year). Obviously, if an individual moves leaving no forwarding address with the United States Postal Service, or if the forwarding address has expired, or if for any other reason the RFA materials fail to arrive by mail, the individual is simply in the same position as the many other eligible persons who had to learn of the program and application requirements through means other than individualized notice. Equitable tolling of the filing deadline is inapplicable when the appellant can show only that he did not receive individualized notice of the program and an RFA form.¹¹

Mr. Foss's relative¹² isolation during the periods at issue were the result of his own choice. He knew of means, such as trade journals and telephone calls to the IPHC, to learn the status of the IFQ program, but chose not to avail himself of these means of communication for lengthy periods of time. He did not

¹¹Steven J. Eike, Appeal No. 95-0085, August 1, 1996.

¹²Mr. Foss is not the only individual often isolated from the rest of society by the fisheries he pursues or his choice of residence. The same general observation could be made of many of the individuals participating in the IFQ program.

make arrangements either for the Agency to know how he could be reached or for another person to contact him with information about the program. The fact that Mr. Foss resided in a foreign country and did not deliver his catch to the United States did not place him outside the sphere of modern communication. I note that Mr. Foss's partner in Ecuador, Boris Buenaventura Trujillo, lists a telefax number on his letterhead.

Even if Mr. Foss had made a threshold showing that the doctrine of equitable tolling could apply in his circumstances, he would have to show diligence in submitting his application after learning of the filing deadline. In Coyne, once the applicant "received actual notice of the deadline, he obtained, completed, and submitted an RFA as soon as reasonably possible." Mr. Coyne first received notice of the application period on July 18, 1994. The RFA was requested, completed, signed, and mailed to the Division on July 29, 1994, 11 days later, although Mr. Coyne was still a resident at a treatment center. In contrast, Mr. Foss received the RFA form on August 2, 1994, and it was not mailed until August 24, 1994, 22 days later. I accordingly can not find that Mr. Foss exercised diligence, even if his circumstances otherwise warranted application of the doctrine of equitable tolling.

For all of the above-stated reasons, I conclude that the doctrine of equitable tolling does not apply to the IFQ application period in this case. Accordingly, Mr. Foss's application for QS was not timely filed.

FINDINGS OF FACT

1. Richard Foss's request for application was mailed to the Division in an envelope postmarked August 24, 1994.
2. Richard Foss did not receive actual notice of the July 15, 1994 deadline for filing a request for application until August 2, 1994.
3. The Division sent application materials and an RFA form to Richard Foss prior to the deadline, but they were not received by Richard Foss.
4. Richard Foss did not suffer any disability that prevented him from timely applying for the IFQ program.
5. Richard Foss knew of means to learn about developments in the IFQ program, but made no inquiries concerning the program between December, 1992 and August 2, 1994.
6. Richard Foss's isolation from information concerning the IFQ program was the result of his own choice.

CONCLUSIONS OF LAW

1. The doctrine of equitable tolling does not apply to the IFQ application period in this case.
2. Richard Foss's request for application was not timely filed.

DISPOSITION

The Division's IAD denying the Appellant's application as untimely filed is **AFFIRMED**. This decision takes effect September 5, 1996, unless by that date the Regional Director orders review of the decision. Any party, including the Division, may submit a Motion for Reconsideration, but it must be received at this office not later than 10 days after the date of this decision, August 16, 1996.

Rebekah R. Ross
Appeals Officer

I concur in the factual findings of this decision and I have reviewed this decision to ensure compliance with applicable laws, regulations, and agency policies, and consistency with other appeals decisions of this office.

Randall J. Moen
Appeals Officer