

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of)	Appeal No. 95-0013
)	
DAVID A. CADDEN,)	
Appellant)	
)	DECISION
and)	
)	
ROBBIN R. LEVENHAGEN and)	
DONALD L. PUGH,)	January 17, 1996
Respondents)	
_____)	

STATEMENT OF THE CASE

Appellant David A. Cadden filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] on January 17, 1995. The IAD denied his application for qualifying pounds of halibut landed from the F/V INGA E between January 1, 1984, and June 19, 1989, a period during which he did not own or lease the vessel. The qualifying pounds denied to the Appellant were allocated to the Respondents, who did own the vessel during the period in question. The Appellant has adequately alleged that his interests are directly and adversely affected by the IAD.

The Appellant requested a hearing to address the intent of the parties with respect to a vessel sales agreement. Because there are no genuine and substantial factual issues in dispute that would be determinative, no hearing was ordered.¹ Messrs. Levenhagen and Pugh were joined as Respondents on August 2, 1995. The record was closed on August 16, 1995. On September 25, 1995, the Appellant submitted a motion to reconsider the denial of his request for a hearing. The Respondents filed an opposition to the motion to reconsider on October 20, 1995. The motion was denied on January 16, 1996.

ISSUE

Whether a person may be a "successor-in-interest" to a qualified person who is still in existence on the basis of a vessel purchase agreement entered into with the qualified person.

¹As provided in 50 C.F.R. § 676.25(g)(3), a hearing may not be ordered unless, among other things, "There is a genuine and substantial issue of adjudicative fact for resolution at a hearing. A hearing will not be ordered on issues of policy or law." Nor will a hearing be ordered "on factual issues that are not determinative with respect to the action requested."

BACKGROUND

Respondents, Donald L. Pugh and Robbin R. Levenhagen, owned the vessel F/V INGA E from March 1983 until June 1989. Each held a 50 percent interest in the vessel.² In June 1989, the Appellant purchased the vessel from the Respondents. He renamed the vessel the F/V DOONBREEDIA and used it to fish halibut in 1990. The Appellant provided a copy of the "Vessel Sale Agreement" for the INGA E to the Division with his Request for Application (RFA) for Quotas Share (QS) and claimed the 1984-1989 catch history of the vessel. The Respondents claimed the same catch history on their RFAs on the basis of their 50/50 ownership of the vessel through June 1989, prior to the sale. The IAD allocated the qualifying pounds from 1984-1989 in equal parts to the Respondents.³

The Vessel Sale Agreement, which was drafted by Mr. Pugh and signed by all three parties, provides in ¶ 5.C. that the

Buyer warrants . . . [t]hat in the event a halibut limited entry permit of any kind is issued to Vessel during the time Buyer is owner of Vessel, Sellers are entitled to Thirty-Three Percent (33%) of any proceeds obtained by Buyer in the event said permit, or any privilege granted by the permit, is sold partially or entirely.

In his appeal, the Appellant states that ¶ 5.C. was placed in the agreement so that the Respondents would be compensated "for any future limited access rights which might be based on the vessel's prior participation in the fishing . . ." [Appeal, at 2.] The Appellant claims that the Respondents understood and intended that the sale of the vessel included "any and all present or future halibut rights, and the history of the INGA E. . ." In support of this claim, the Appellant submitted affidavits by the president of the documentation firm that handled the closing for the sale of the F/V INGA E and by a loan officer who discussed financing for the sale. On the basis of ¶ 5.C. of the Vessel Sale Agreement and these alleged understandings by the parties, the Appellant claims that he is the *successor-in-interest* of the Respondents and is therefore entitled to receive credit for 100 percent of the qualifying pounds for

²It is not entirely clear from the files whether the F/V INGA E was owned by the Respondents as individuals or as a partnership that was subsequently dissolved.

³Prior to the IAD, Mr. Levenhagen had been allocated one-half of the qualifying pounds for landings made from the INGA E during 1984-89, and issued the corresponding QS to him. The IAD suspended the use and transferability of Mr. Levenhagen's QS pending resolution of the conflict with the Appellant. A separate IAD, issued September 12, 1994, denied Mr. Pugh's RFA on the grounds that it had not been timely filed. On the basis of a subsequent decision by the Office of Administrative Appeals in another case, the Division vacated that IAD and processed Mr. Pugh's application. The IAD being appealed here allocated to Mr. Pugh one-half of the qualifying pounds for the INGA E for the disputed period. The QS was not issued to Mr. Pugh, pending resolution of this appeal.

halibut landings made from the F/V INGA E, including those made when the Respondents owned the vessel.

The Division concluded in its IAD that the Vessel Sale Agreement did not require the allocation of qualifying pounds and the resulting QS to the Appellant for the 1984-1989 period. It based this conclusion on its reading of the language of ¶ 5.C. and its view that it is not the Division's responsibility to enforce private sales agreements. Based on its interpretation of the regulations, the Division also found that the Appellant is not a *successor-in-interest* of the Respondents, and therefore refused to allocate the qualifying pounds in question to the Appellant.

In their opposition to the appeal, the Respondents state that the IAD was correctly reasoned and should be affirmed.

DISCUSSION

The IAD cites and interprets the IFQ regulations as they relate to the term *successor-in-interest*. The regulation that governs the initial allocation of QS is codified at 50 C.F.R. § 676.20(a)(1). It provides that the National Marine Fisheries Service (NMFS) Regional Director shall initially assign QS to *qualified persons*. A *qualified person* is one "that owned a vessel that made legal landings of halibut or sablefish, harvested with fixed gear, from any IFQ regulatory area in any QS qualifying year", i.e., 1988, 1989, or 1990. The regulation further provides that "[q]ualified persons, or their successors-in-interest, must exist at the time of their application for QS."

The term "successor-in-interest" is not defined in the regulations. There is no clarification of the concept and no discussion of the term in the Supplemental Environmental Impact Statements (SEIS) or Final EIS developed to analyze the IFQ program. Neither the commentary for the Proposed Rule⁴ nor the Final Rule⁵ for the IFQ program addresses the issue of successors-in-interest. Of the more than ninety comments received on the Proposed Rule, none raised issues concerning successors-in-interest or sought clarification of the term.

The IAD notes that the North Pacific Fishery Management Council unanimously passed a motion at its April 1994 meeting to "clarify" its intent that QS should only be awarded to the person(s) who owned a vessel during the qualifying and base years.⁶ The Council deliberately chose an individual fishing quota (IFQ) form of Individual Transferable Quota (ITQ). It never considered an Individual Vessel Quota

⁴December 3, 1992.

⁵November 9, 1993.

⁶*Id.*, footnote 5, at 5.

(IVQ), vessel-based ITQ program.⁷

Given this background, the IAD interprets the regulation and concludes:⁸

Section 676.20 (a) of those regulations provides that the Regional Director will allocate quota share to qualified persons. The term "successor-in-interest" appears only in section 676.20(a)(1),⁹ which states that qualified persons, or their successors-in-interest, must exist at the time they make their application for quota share. This construction indicates that the initial allocation of quota share is to be made to each qualified person, **unless that person no longer exists**, in which case the successor-in-interest to the qualified person may be issued the quota share. [Emphasis in the IAD.]

This regulatory language clearly implies that a qualified person and a qualified person's successor-in-interest cannot each exist at the same time. If the Council and the Secretary had intended to allow qualified persons still in existence to assign eligibility for initial issuance of quota share (either through application of the terms of some prior agreement, such as a vessel sales agreement, or through execution of a contemporary document to that effect) they would have made that intent explicit by providing (for

⁷Beginning in 1987, the North Pacific Fishery Management Council (the Council) solicited the views of the fishing industry and general public on current problems in the sablefish fishery and limited access alternatives for managing it. In December 1988, the Council concluded that the open access status quo was unacceptable for the fixed gear sablefish fishery and expressed a desire to explore the limited access options of license limitation and Individual Fishing Quotas (IFQ). At its meeting of January 16-19, 1989, the Council considered several ways to progress towards controlled access management. Among the options were IFQ and license limitation systems. The Council did not raise or address an Individual Vessel Quota (IVQ) system. None of the iterations of the Environmental Impact Statements (EIS), Supplemental EIS (SEIS), and Final EIS/SEIS for sablefish, halibut, and sablefish/halibut developed after this meeting refer to an IVQ system as an option for management. The four options which were considered in the impact statements were: (1) open access; (2) license limitation; (3) IFQ; and (4) annual fishing allotments which combined a modified open access and limited entry system. The Council was aware of other forms of Individual Transferable Quota (ITQ) other than IFQ during its consideration. The Government of Canada adopted a vessel-based IVQ system for halibut in 1990. The FEIS, dated September 15, 1992, notes that the "Individual Fishing Quota (IFQ) alternative would issue *individual rights* to fish to a group of past participants...Past participation would be defined on the basis of vessel ownership or via qualified lease of a vessel." (emphasis added), page 1-7.

⁸IAD, January 17, 1995, at 5.

⁹The parties correctly point out that *successor in interest* also appears in the definition of *person* found in 50 C.F.R. § 676.11, although this fact does not affect the reasoning of the IAD.

instance) that the Regional Director should initially assign quota share to qualified persons, or to any other person to whom the qualified persons assigned their eligibility. I do not feel that failure to do so was the result of inadvertence or oversight.

In the package that it forwarded to all individuals, including Appellant,¹⁰ the Division gave notice that it would adopt this interpretation of the term *successor-in-interest*.¹¹ The package included instructions to applicants and detailed information in a section entitled, "About Successors-in-Interest," which reads:

Under the regulations governing initial issuance of QS, only qualified persons or their "successors-in-interest" are eligible. Further, such persons or their successors-in-interest must exist at the time they submit their formal application for QS. This provision is intended to cover situations in which (for instance) a corporation or a partnership that owned vessels on which qualifying landings during the relevant years were made, had dissolved prior to the application period.

But there are many other potential "successor-in-interest" situations. For example, estates of deceased fishermen may apply. Likewise, corporations, partnerships, or other "persons" that evolved from the activities of individuals may be eligible. The general policy of NMFS/RAM is to treat each of these situations individually and to try, within the limits of the regulations, to satisfy your needs. Therefore, if you have questions regarding the eligibility of a successor-in-interest, please contact us.

One question that has arisen is whether or not the successor-in-interest provision allows existing persons to assign their interest in QS to another, otherwise ineligible, person. This situation could arise as the result of a vessel sale (the owner, eligible to apply, decides to sell the vessel and the rights to the QS to a new person), or in some other situation where the eligible applicant, for whatever reason, wished to assign his or her entitlement to the QS. Regulations do not allow these types of assignment of QS. To be awarded QS under initial issuance, the eligible entity must exist (and must be eligible) at the same time of its application for QS.

In short, NMFS/RAM cannot enforce private agreements on the distribution of

¹⁰Appellant was listed in the Division's official database as the post-1989 registered owner of the F/V DOONBREEDIA (formerly the INGA E). The Division sent him an applications package by the Division that included instructions for completing the application.

¹¹Application Information, Pacific halibut and sablefish, Individual Fishing Quota Program, at 8.

your QS to persons who are not eligible to receive it. If you entered into an obligation to dispose of your QS to another person, you can honor that obligation after your QS is issued by using the QS transfer procedures.

Again, this a complicated and confusing part of the rules. Individual situations will vary widely, so we urge you to contact NMFS/RAM for guidance. [Italics supplied.]

Thus, Appellant was on notice that the Division would not allocate to him qualifying pounds landed by the former owners of a vessel he had purchased in 1989. Nonetheless, Appellant filed a claim to these pounds and requested that the Division enforce his private agreement with the sellers of the vessel.

The Division bases its determination that the Appellant is not a successor-in-interest on its reading of the sentence, "Qualified persons, or their successors-in-interest, must exist at the time of their application for QS." 50 C.F.R. § 676.20(a)(1). The division reads this sentence to mean that a qualified person cannot have a successor-in-interest unless the person no longer exists. This construction reflects the apparent intent of the North Pacific Fishery Management Council, reflected in the regulatory history of the IFQ program and in the regulations themselves, that qualifying pounds should be allocated (and QS should be initially issued) to the "person" that owned or leased the vessel when the qualifying pounds were landed.

The sentence in question, however, does not appear to say precisely what the Division reads into it. Rather, the phrase "or their successors-in-interest" appears to have been inserted into the sentence to assure that eligibility for the initial issuance of QS would not necessarily expire if the original "qualified person" died (if an individual) or was acquired or merged (if a corporation) before applying for QS. Without the provision for successors-in-interest in the sentence, it is not clear that successors could be eligible for QS.

The term *successor-in-interest* has many meanings, which vary according to the context in which the term is used. It has been defined in numerous state and federal statutes and regulations. Each definition is specific to the purpose of the statute or regulation in which the term appears. One court has even said that the term "their successors in interest" should not be used because it is too vague and uncertain in meaning.¹² Nonetheless, a government agency is free to adopt its own reasonable definitions of undefined terms that appear in regulations governing programs the agency is charged with administering.

In determining who may be a successor-in-interest under the IFQ program, one must ask and answer the question, "successor-in-interest to *what*?" The Appellant, by basing his claim on his purchase of the F/V INGA E and the purported purchase of all the fishing rights of the vessel, implicitly argues that the term *successor-in-interest* means a successor to the interest in the vessel. The Division, on the other hand, obviously gives the term a larger meaning. Under the Division's interpretation, one must succeed to a qualified person's entire interest (at least as a

¹²*Missouri Pub. Serv. Co. v. Platte-Clay Elec. Co-op., Inc.*, 407 S.W.2d 883, 894 (Mo. 1966).

business entity) in order to be considered the person's successor-in-interest under the IFQ program.

Looking at the context of the regulations, I conclude that the Division's interpretation is the better-reasoned one. The sentence in question refers to successors-in-interest to *qualified persons*, not merely successors to an interest in a qualified person's vessel. The regulation does not say, for example, that QS should be initially assigned to qualified persons, *unless they have sold the vessel from which the qualifying pounds were landed*. The Division's reading is consistent with the fact that the IFQ program is person-based, not vessel-based (as discussed previously). As stated by the Division chief in the IAD, the Appellant's interpretation of *successor-in-interest* would allow applicants to circumvent the transfer and use restrictions set out in 50 C.F.R. §§ 676.21 and 676.22, thereby frustrating one of the purposes of the regulatory scheme.

In this case, the Appellant is a qualified person by virtue of his ownership in 1990 of a vessel from which legal landings of halibut were made. In his motion for reconsideration, the Appellant argues that because he is not "otherwise ineligible" for QS, he should not be prevented from receiving the allocation of the 1984-1989 qualifying pounds. That is to say, the Appellant argues that qualified persons should be allowed to assign eligibility for the initial issuance of QS to other qualified persons because that would not place QS in the hands of persons who are otherwise ineligible. While the Appellant is correct on this last point, his position fails to recognize that keeping otherwise ineligible persons from receiving an initial issuance of QS may not be the only reason that the Council did not provide for assignments of initial QS eligibility. It may be, for example, that the Council wanted qualified persons (or their business successors) to receive an initial issuance of QS only to the extent that they actually participated in the fishery. That purpose, in fact, is reflected throughout the regulations and regulatory history of the program. Because the Appellant is not a successor-in-interest to the Respondents, he cannot receive an initial issuance of QS based on the fishing history of the vessel during the period it was owned by the Respondents, even though the Appellant is a qualified person in his own right.

Having decided that the Appellant is not a successor-in-interest, it is unnecessary to decide whether the parties' vessel sale agreement transferred to the Appellant any fishing rights associated with the vessel. And in any event, the Division correctly stated in the IAD that it is not the Division's responsibility to enforce private vessel sales agreements. This is not to say that the Appellant has no remedy. As noted in the IAD, the Appellant may have an enforceable contractual interest. That question, however, must be decided in another forum.

CONCLUSIONS OF LAW

1. To be a successor-in-interest under 50 C.F.R. § 676.20(a)(1), one must succeed to a qualified person's entire interest (at least as a business entity) in order to be considered the person's successor-in-interest under the IFQ program.
2. The Appellant is not a successor-in-interest of the Respondents.

DISPOSITION

The Division's Initial Administrative Determination denying Appellant's claim to qualifying pounds landed from the F/V INGA E prior to Appellant's purchase of the vessel is AFFIRMED. This decision takes effect on February 16, 1996, unless, by that date, the Regional Director orders review of the decision.

In order to give the prevailing parties in this appeal, Donald L. Pugh and Robbin R. Levenhagen, as much time as possible to prepare for the 1996 halibut season, I recommend that the Regional Director expedite review of this decision and, if there is no substantial disagreement with it, promptly affirm the decision and thereby give it an immediate effective date.

Robin L. Tuttle
Appeals Officer

Edward H. Hein
Chief Appeals Officer