

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of)	Appeal No. 95-0018
)	
JOHN L. O'ROURKE,)	RESCISSION OF ORDER AND
Appellant)	NOTICE OF HEARING;
)	
and)	ORDER DENYING MOTION FOR
)	ADDITIONAL TIME TO SUBMIT
PHILIP C. RIDDLE,)	DOCUMENTS; and
Respondent)	
)	DECISION
)	
_____)	May 18, 1995

STATEMENT OF THE CASE

Both John L. O'Rourke and Philip C. Riddle applied for Quota Share ["QS"] under the Pacific halibut and sablefish Individual Fishing Quota ["IFQ"] program, Mr. O'Rourke as the owner of the F/V Pacific Mist, and Mr. Riddle as lessee during, insofar as is relevant here, 1988. The Restricted Access Management ["RAM"] Division ["Division"] in an initial administrative determination ["IAD"] dated February 3, 1995, granted the Quota Share to Mr. Riddle on the grounds he was, in fact, a lessee. The IAD noted the absence of any supporting evidence from Mr. O'Rourke and the presence of considerable supporting evidence from Mr. Riddle.

Mr. O'Rourke subsequently filed a generally worded appeal letter on April 4, 1995, the last day of the appeal filing period. In the letter, Mr. O'Rourke alleges that Mr. Riddle was not a lessee, but was in fact a "hired skipper." This appeal stayed (i.e. "froze") the actual issuance of the Quota Share and the 1995 IFQ to Mr. Riddle. On April 13, 1995, the Chief Appeals Officer joined Mr. Riddle as a necessary party Respondent. Neither party requested a hearing.

During a telephone conversation with another Appeals Officer at the NMFS office in Juneau on April 13, 1995, Mr. O'Rourke stated that supporting documents would be forthcoming. Based on that representation, an oral hearing was scheduled for May 22, 1995. The Order and Notice of Hearing was issued on April 21, 1995. Another order was issued on April 27, 1995, which required the production of documents by 5:00 p.m., May 5, 1995. The only documents received by the May 5 deadline were irrelevant to the issue at hand. Therefore, as discussed later in this decision, the record was closed as of the deadline, the Order and Notice of Hearing for May 22, 1995 is rescinded, and the matter shall be decided without a hearing.

ISSUES

1. Has Mr. O'Rourke been afforded adequate opportunity to supplement his appeal?
2. Is an oral or written hearing necessary or advisable, and should the Order and Notice of Hearing for May 22, 1995 be rescinded?
3. Has Mr. O'Rourke met his burden of proving that the initial administrative determination was in error and that the Quota Share in question should be issued to him?

FINDINGS OF FACT

1. On February 3, 1995 Mr. O'Rourke was issued an initial administrative determination which denied his application for Quota Shares. Appeal instructions on that determination stated, in relevant part:

Your appeal must be submitted in original form (a facsimile transmission or a photocopy is not acceptable), and must include the following elements:

- 1) a full statement in support of your appeal; and
- 2) a concise statement that explains why the determination directly and adversely affects you, and why it should be reversed or modified.

The appeal must address your situation specifically. An appeals officer does not have the authority to consider appeals that merely challenge the legality or the fairness of the regulations that govern the IFQ program.

When you file your appeal you may also request that a hearing be conducted on factual issues that you have raised in the appeal. The purpose of such a hearing is to determine facts that are in dispute in order to reach a decision. A hearing may not be used to consider mere allegations, denials, or general opinions. You must present specific factual issues that are capable of being decided in a hearing. Therefore, if you request a hearing, the request must include:

- 1) a concise written statement that identifies genuine, important issues relating to disputed factual matters that could best be resolved through hearing; and
- 2) a list that identifies specific evidence or testimony that is reliable and available, and that would enable the appellate officer to resolve the

factual issues.

(A hypothetical appeal was attached to give guidance.)

2. (a) As stated in the IAD, Mr. O'Rourke did not indicate on his Request for Application form (RFA) whether he had leased his vessel to another person. Mr. O'Rourke did not respond to two letters sent by the Division on September 13 and September 19, 1994, which granted him 90 days in which to provide more information regarding his application or to reach an agreement with Mr. Riddle regarding the latter's claim to have leased Mr. O'Rourke's vessel. Mr. O'Rourke relocated his residence sometime in late 1994 or early 1995, but he failed to advise the Division of his new address until March 20, 1995, when he was contacted by telephone by the Chief Appeals Officer. During that phone conversation Mr. O'Rourke stated that he had not received the IAD. A second copy was sent to him c/o P.J.J. Fish Co. in South Beach, Oregon, and was received by him there on March 24, 1995. Certified mail return receipts (green cards) in the Division's files indicate that Mr. O'Rourke received the Division's letters of September 13 and 19, 1994, and copies of the IAD on February 17 and March 24, 1995.

(b) On April 4, 1995, the final day of his appeal period, Mr. O'Rourke's appeal letter was received by the Division. It states, in relevant part, that Mr. Riddle was a hired skipper, that Mr. Riddle did not have a lease, that Mr. Riddle never paid him any lease payments, and that Mr. O'Rourke "paid taxes on all expenses because I was not making any money off the F/V Pacific Mist, and I have the tax statements to prove it." During a telephone call on April 13, 1995, Mr. O'Rourke advised Appeals Officer John Gissberg in Juneau that supporting documents would be forwarded.

(c) Because the season had already commenced and the IFQ at issue could be used this year once the matter was resolved, an Order and Notice of Hearing was issued on April 21, 1995 in order to set an outer limit of thirty days (May 22, 1995) in the event a hearing was to be held. With the Order was sent a letter of explanation. At the time I issued that Order I was relying on Mr. O'Rourke's April 13, 1995 representations that he would send supporting documents.

(d) As no documents were forthcoming from Mr. O'Rourke and as attempts to contact him by telephone on April 26 and early on April 27, 1995 were unsuccessful, I issued an Order for Immediate Production of Documents on April 27. When Mr. O'Rourke called me later on April 27, I advised him of the general contents of that Order and the importance of submitting evidence by 5:00 p.m. on May 5. During the course of that conversation Mr. O'Rourke indicated he had obtained documents only up to 1985 as he understood only those were relevant. I advised him to submit documents through 1988 that supported his position that Mr. Riddle was a "hired skipper." Mr. O'Rourke stated he would obtain the necessary documents the next day and mail them as soon as possible.

(e) On May 4, 1995, Mr. O'Rourke advised me that he had recently mailed copies of three pages from his tax records that showed he had paid wages to Mr. Riddle while the boat was in Oregon in 1981 and 1982. I, in turn, advised him that 1988 should be the focus and that information from prior years would be relevant only to the extent that it gave an indication as to what the situation was in 1988. During that conversation Mr. O'Rourke expressed an interest in seeing an April 6, 1988 document that had been quoted, in part, in the IAD [see Finding No. 6, below]. I gave him several hours' opportunity to supply a fax number to which the document could be sent, but he failed to make further contact with me that day. Accordingly, I sent him a copy of the document by Express Mail late on May 4, 1995. In view of the approaching deadline, instructions accompanying the document stated that he should fax any response.

3. On the morning of May 5, 1995, Mr. O'Rourke faxed a transmittal sheet and a form he had been mailed earlier upon which he indicated he did not wish to waive 30 days Notice of Hearing. On the fax transmittal sheet he stated:

I was wrong about how much time it would take me to go to Philomath and back. They are working on the Hi-way. And J.C. Market does not have overnight mail, but here is there(sic) FAX No. they will hold a message for me--I am preparing another mailing.

The same documents that had already been sent to Mr. O'Rourke by Express Mail on May 4 were then re-sent to Mr. O'Rourke by fax on the afternoon of May 5. Mr. O'Rourke was advised (by that fax) that if he had any key documents it was critical that he fax them to me. Mr. O'Rourke later called and left a voice message on my fax number. The message stated that he was calling from a pay phone, asked if his faxes had been received, and stated that he could be reached through the J.C. Market because the friend whose telephone he had been borrowing from time to time was out. I then called the J.C. Market. The clerk checked, but could not find Mr. O'Rourke on the premises.

4. In the afternoon mail delivery on May 5, I received the three pages of bookkeeping records for 1981 and 1982 that Mr. O'Rourke had referred to during the May 4, 1995 conversation, as well as the hard copy of the form indicating Mr. O'Rourke did not wish to waive notice. Those documents show a total of \$570 paid to Mr. Riddle for such things as boatwork, labor, and "build fish----"(illegible).

5. At 9:00 a.m., Saturday, May 6, 1995, Mr. O'Rourke called me and stated the following:

(a) he was having a difficult time compiling his information, could not find his boat records, but wished to pursue the matter and send additional documents by mail;

(b) he has checks showing he sent money to Alaska;

(c) he understood Mr. Riddle had filed some papers with the State of Oregon in 1983,

(d) he had sent two \$500 checks to Alaska around 1983 for Mr. Riddle to draw from as operating funds;

- (e) his tax returns for 1988 show depreciation on the boat and equipment;
- (f) no wage payments were made to Mr. Riddle after approximately 1982-83;
- (g) he had purchased fishing gear for the boat, including crab pots and halibut longline gear for Mr. Riddle to take up on the boat in approximately 1982-83 and had also made subsequent purchases for gear, which was shipped to Alaska;
- (h) money he sent to Mr. Riddle for gear purchases, etc., was intended as a loan, but was never repaid;
- (i) the \$300 payment Mr. Riddle sent to him in approximately 1987 was payment for gear that Mr. O'Rourke had bought for him;
- (j) although the two had talked of a written agreement similar to one he had executed with a previous lessee, none was ever signed; rather they had a verbal agreement that in return for the use of the boat and gear, Mr. Riddle would pay Mr. O'Rourke 25 percent from each fish check for use of the boat and 25 percent for repayment of gear purchases;
- (k) he never did receive any payment on the loan or use of the boat save for the \$300 mentioned above;
- (l) he had checks only from 1981-1985 with him;
- (m) he has ledger records only to 1984; after that he hired an accountant, but he has not been in contact with the accountant to obtain copies;
- (n) it makes no sense to construe his April 6, 1988 letter as a lease.

I reminded Mr. O'Rourke that the deadline had passed. I made no promises or representations as to whether any additional documents (if sent) would even be considered. Later in the afternoon of Saturday, March 6, 1995 he faxed copies of 21 cancelled checks, of which 18 are dated 1982 and are made out to a variety of individuals (including Mr. Riddle); suppliers; the Port of Newport, Oregon, for "docking"; and the Oregon Dept. of Fish and Wildlife for an Oregon fishing license. Three checks are dated 1984 and are for crab pots and shrimp gear for the Pacific Mist, totalling \$5,450. On the transmittal sheet he stated he intended to send copies of additional checks.

6. During the relevant time period, the F/V Pacific Mist was owned by Mr. O'Rourke. In approximately 1983, Mr. Riddle, through arrangement with Mr. O'Rourke, took the vessel to Alaska, where he operated it until early 1989. Mr. Riddle maintains there was a written lease agreement providing for a 25 percent fee to Mr. O'Rourke, but he has no copy of it. However, in connection with his application, Mr. Riddle supplied the Division with a portion of an April 6, 1988 letter sent to him by Mr. O'Rourke. In relevant part, as previously quoted in the IAD, Mr. O'Rourke wrote:

. . . I have to have my money or I have to get somebody on the Pacific Mist that will fish her . . . When I was up in Alaska you said you could not pay me the 25% for the lease of the Pacific Mist we had agreed on four or five years ago so far I haven't received anywheres near that for the boat or my gear . . . [Exhibit 1]

In connection with his response to Mr. O'Rourke's appeal, Mr. Riddle submitted the original of the entire letter. It bears what appears to be Mr. O'Rourke's signature; the signature is notarized by an Oregon notary.

7. Other documents submitted by Mr. Riddle and referred to in the IAD include the following:

- (a) bank statements (showing an account opened in 1983 to "Pacific Mist Limited, Philip C. Riddle");
- (b) a copy of what appears to be an amendment to a lease document executed by Mr. O'Rourke with a prior lessee of the F/V Pacific Mist;
- (c) a 1987 postal money order for \$300 payable to Mr. O'Rourke, on which Mr. Riddle had written: "Payment of debt for lease fee;"
- (d) copies of International Pacific Halibut Commission licenses issued to Mr. Riddle (for 1985 and 1987);
- (e) account statements with a fish processor (a 1988 statement from Icicle Seafoods to Mr. Riddle for bait and gear, which indicated such was deducted from his fish checks);
- (f) a 1988 moorage statement to Mr. Riddle (for the F/V Pacific Mist from the Port Authority of the City of Petersburg, Alaska);
- (g) statements from crew members acknowledging receipt of crew share wages from Mr. Riddle (for 1987 and 1988 halibut openings);
- (h) bills for halibut longline and other gear addressed to Mr. Riddle (in 1987);
- (i) a photocopy of a postal money order receipt showing payment from Mr. Riddle to the Alaska Commercial Fisheries Entry Commission (date illegible).

8. Additional documents submitted by Mr. Riddle, specifically in opposition to Mr. O'Rourke's appeal, include the following:

- (a) a June 1988 moorage receipt from the City of Petersburg;
- (b) affidavits from deck hands attesting that Mr. Riddle bought fish gear and fuel and paid the crew in 1987 and 1988, etc.;
- (c) a signed statement from a marine supplier attesting that Mr. Riddle held an account with that firm and made both purchases and payments during the years 1983 through 1988;
- (d) a signed letter from Mr. O'Rourke to Mr. Riddle dated March 25, 1987, which expresses dissatisfaction that Mr. Riddle had to borrow more money from him (apparently to pay off a \$500 debt to Petersburg Cold Storage/Icicle Seafoods); the letter also states, in relevant part:

I would like to get a formal contract. I have been trying to get you to lite a minute so I could get it on paper for years. We did draw up a copy of a contract I had from another skipper if you remember -- but nothing formal between us.

[Exhibit 2]

- (e) a 1987 statement from Petersburg Cold Storage/Icicle Seafoods indicating, in part, that Mr.

O'Rourke paid \$500 on account on April 30, 1987;

(f) An April 6, 1987 invoice for \$939.35 from Petersburg Shipwrights for work performed on the F/V Pacific Mist in connection with drydocking, which Mr. Riddle states was paid by him;

(g) an August 31, 1988 account statement and individual fuel and accessory invoices addressed to the F/V Pacific Mist-Philip C. Riddle from The Trading Union of Petersburg;

(h) a document purporting to show that Mr. Riddle purchased licenses to fish in Alaska for various species beginning in 1983 and through 1988;

(i) several packets containing 1988 bills and invoices to Mr. Riddle in an amount exceeding \$27,000;

(j) copies of Mr. Riddle's federal income tax returns, Schedule C, for 1985 and 1986 showing the commercial fishing activities were operated as a sole proprietorship;

CONCLUSIONS OF LAW

1. **Mr. O'Rourke has been afforded adequate opportunity to supplement his appeal.** That the existence of a lease could raise an issue should have been apparent from the RFA form. As noted, in the initial administrative determination, Mr. O'Rourke made no response to that question on his RFA form. When the conflict became apparent, the Division gave him 90 days in which to supplement his application with additional information or to reach an agreement with Mr. Riddle concerning the characterization of their business relationship. Still, Mr. O'Rourke did not respond. Further, the IAD made it abundantly clear that the existence or non-existence of a lease was critical. The evidence then of record that supported Mr. Riddle's lease claim was adequately outlined in the IAD. Accordingly, Mr. O'Rourke should have been well aware at least as of the latter part of March 1995 (when he received the second copy of the IAD) that it was crucial he provide evidence to counter such.

Instead, his appeal consisted of a denial that there was any lease whatsoever and an allegation that Mr. Riddle was a "hired skipper." He made no comment about the "lease" language in the April 6, 1988 letter that was quoted specifically in the IAD. As noted, no supporting documents or lists of potential witnesses had been supplied by April 27, 1995, when the Order Requiring Immediate Production of Documents was issued. From the filing of his RFA in February 1994 until the May 5, 1995 deadline, the only documents or statements that Mr. O'Rourke submitted to NMFS that could tend to substantiate his assertion that Mr. Riddle was a hired skipper were ledger records of 1981 and 1982 -- a period when the vessel was in Oregon and before Mr. Riddle took it to Alaska. Over a year has passed since this process began. Mr. O'Rourke was given 60 days to file an appeal and another month after filing to submit additional evidence that he did not lease the vessel to Mr. Riddle. Despite several opportunities to provide such evidence, Mr. O'Rourke has failed to do so.

The content of the telephone call to me on Saturday morning, May 6, 1995 shall be considered as a request or motion to extend the time for submission of documents. The motion is denied for two reasons. One is that the deadline has passed and Mr. O'Rourke has had adequate time, as outlined

above, to produce or identify relevant evidence. Although he may have had difficulties finding the documents he needs in the past few days, he should have begun this process weeks ago. No emergency situation or circumstances beyond the reasonable control of Mr. O'Rourke have been asserted that would justify a time extension.

The other, and most important, reason is that, from the information provided by Mr. O'Rourke, I am not persuaded that the evidence would be pivotal in any event. Though he differs with Mr. Riddle as to some of the terms, Mr. O'Rourke acknowledges that an oral agreement existed at the time Mr. Riddle took the vessel to Alaska in (approximately) 1983. His position is that by the terms of the agreement Mr. Riddle was to pay him 25 percent for the use of the boat and 25 percent for gear payments. He does not allege that any wage payments were made to Mr. Riddle after the vessel left for Alaska. The income tax information he might have submitted regarding depreciation he claimed on the vessel and attached gear would not be inconsistent with an oral lease. Furthermore, the fact that money he may have sent to Mr. Riddle in Alaska or expended for gear to be sent to Alaska was intended as a loan to Mr. Riddle is similarly not inconsistent with the existence of a lease. To put it another way, Mr. O'Rourke has not identified any kind of evidentiary "smoking gun" that would justify delaying the resolution of this matter any longer.

2. It is neither necessary nor advisable to hold a written or oral hearing . Therefore, the Order and Notice of Hearing for May 22, 1995 is RESCINDED. Federal regulation 50 C.F.R. § 676.25(f) and (g) states in relevant part:

(f). . . If the applicant requests a hearing on any issue presented in the appeal, such request for hearing must be accompanied by a concise written statement raising genuine and substantial issues of adjudicative fact for resolution and a list of available and specifically identified reliable evidence upon which the factual issues can be resolved. The appellate officer will limit his/her review to the issues stated in the appeal; all issues not set out in the appeal will be waived.

(g) Decision Whether to Order a Hearing. The appellate officer will review the applicant's appeal and request for hearing, and has discretion to proceed as follows:

- (1) Deny the appeal;
- (2) Issue a decision on the merits of the appeal if the record contains sufficient information on which to reach final judgment; or
- (3) Order that a hearing be conducted. The appellate officer may so order only if the appeal demonstrates the following:

(i) 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 of law;

(ii) The factual issue can be resolved by available and specifically identified reliable evidence. A hearing will not be ordered on the basis of mere allegations or denials or general descriptions of positions and contentions;

(iii) The evidence described in the request for hearing, if established at hearing, would be adequate to justify resolution of the factual issue in the way sought by the applicant. A hearing will not be ordered if the evidence described is insufficient to justify the factual determination sought, even if accurate; and

(iv) Resolution of the factual issue in the way sought by the applicant is adequate to justify the action requested. A hearing will not be ordered on factual issues that are not determinative with respect to the action requested.

As previously noted, the Order and Notice of Hearing for May 22, 1995 was issued with the understanding that Mr. O'Rourke was in the process of sending substantive, relevant documents to support his appeal. Because QS cannot be issued until after this appeal is decided and the IFQ that would result from the award of QS might still be used this season, the Order was intended to set an outside time limit for a hearing to be held. The Order Requiring Immediate Production of Documents required that supportive documents or specifically identified evidence be received by 5:00 p.m., May 5, 1995. No such documents or evidence were received by the deadline. Even considering the representations made by Mr. O'Rourke in the telephone call of Saturday May 6, 1995, and the checks faxed on that afternoon, it remains clear that the requirements of 50 C.F.R. § 676.25(g)(3)(ii) and (iii) and, possibly, (iv) have not been met. Accordingly, the Order and Notice of Hearing for May 22, 1995 is RESCINDED.

3. Mr. O'Rourke has not met his burden of proving that the initial administrative determination was in error. The Division has administratively established a presumption that a vessel owner, as opposed to a claimed lessee, is entitled to the Quota Share that results from verified legal landings made from the vessel. This presumption in favor of the vessel owner is nowhere explicitly stated in the IFQ regulations. The presumption arises from the requirement that data regarding a lease supplied by an applicant must be compared with data compiled by the NMFS Regional Director. 50

C.F.R. § 676.20(d)(1). This compiled data is found in the Division's database, which initially contained no information regarding vessel leases; rather, the database was compiled from records of vessel ownership, permit ownership, and landings. The Division presumed that its database information was correct unless proven otherwise. Because the Division had no information about vessel leases, any vessel-owner applicant who stated that the vessel had not been leased during the period in question would be presumed correct. Any claim to the contrary by a competing applicant would be inconsistent with the Division's database information. Therefore, during the application phase, the Division initially places the burden of proof on the applicant who claimed a lease.

On appeal, factual issues are reviewed *de novo*. The Appeals Officer will review the evidence that the Division considered in reaching the initial administrative determination, as well as any additional evidence submitted during the appeal. In two-party cases in which the IAD has denied one party and made an award to the other, the burden of proof on appeal will be on the party who seeks to change the status quo -- the party whose claim was denied in the IAD. That burden includes both a burden of production and a burden of persuasion. In cases such as this one, in which the Division has determined that the claimed lessee met the burden of proof, the burden of proof shifts to the vessel owner during the appeal. To meet this burden, the vessel owner must produce evidence that the business relationship between the parties was something other than a lease and must persuade the Appeals Officer of this fact by a preponderance of the evidence.

Federal regulation 50 C.F.R. § 676.20(a)(1) provides in relevant part that QS may be awarded to a person:

... 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. A person is a qualified person also if (s)he leased a vessel that made legal landings of halibut or sablefish, harvested with fixed gear, from any IFQ regulatory area in any QS qualifying year. A person who owns a vessel cannot be a qualified person based on the legal fixed gear landings of halibut or sablefish made by a person who leased the vessel for the duration of the lease.

Federal regulation 50 C.F.R. § 676.20(a)(1)(iii) provides as follows:

Conclusive evidence of a vessel lease will include a written vessel lease agreement or a notarized statement from the vessel owner and lease holder attesting to the existence of a vessel lease agreement at any time during the QS qualifying years. Conclusive evidence of a vessel lease must identify the leased vessel and indicate the name of the lease holder and the period of time during which the lease was in effect. Other evidence, which may not be conclusive, but may tend to support a vessel lease, may also be submitted.

During the application phase of this case, Mr. Riddle did not produce a copy of a written lease document, although he contended that one exists, but that "John O'Rourke refuses to send me original copies . . ." IAD at 2. Nor did Mr. Riddle produce a notarized statement signed by both parties and attesting to the existence of a vessel lease. An argument could be made that the April 6, 1988 notarized letter of Mr. O'Rourke, coupled with a more recent notarized statement of Mr. Riddle submitted in connection with his application, constitutes "conclusive evidence" of the existence of such a lease. Nonetheless, the appropriate question here is whether a lease can be found to have existed from the surrounding circumstances, of which Mr. O'Rourke's letter is but one factor.

In order to determine whether a lease existed, it is necessary to establish the elements or at least describe the characteristics of a "vessel lease" as that term is used in the regulation. The term "lease" is not defined in the IFQ regulations. Some documents from the regulatory history of the IFQ program shed light on the intent of the North Pacific Fishery Management Council in providing for the allocation of Quota Share to vessel lessees. "The Council's rationale for this particular allocation [to vessel owners and lessees as opposed to processors and crew members] is that vessel owners and lease holders are *the participants who supply the means to harvest fish, suffer the financial and liability risks to do so, and direct the fishing operations.*" 58 Fed. Reg. 59,378 (November 9, 1993) (emphasis added). The language of the motion that the Council approved as part of the IFQ Management Plan included the following:

- (1) Initial assignments of Quota Shares shall be made to:
 - (i) a qualified person who is a vessel owner who meets the requirements in this section; or
 - (ii) a qualified person who meets the requirements of this section engaged in a lease of a fishing vessel (written or verbal) or other "bare-boat charter" arrangement in order to participate in the fishery. . . .¹

According to this regulatory history, the Council intended that both written and oral vessel leases be recognized. In addition, while a bareboat charter would definitely constitute a vessel lease, an arrangement in the nature of a bareboat charter but which does not necessarily meet all the elements of a bareboat charter could, under the Council's language, also constitute a vessel lease for purposes of the IFQ program.

A typical definition of a bareboat charter is a contract or agreement that involves "the transfer of full possession and control of the vessel for the period covered by the contract. The charterer obtains the right to run the vessel and carry whatever cargo he chooses. The ship is manned and supplied by the charterer as well. The legal test of a demise [bareboat charter] is whether the owner of the vessel

¹*Newsletter* (North Pacific Fishery Management Council) No. 6-91, December 19, 1991, at 13-14.

'completely and exclusively relinquished possession, command and navigation to the demisee [charterer].'" [Footnotes omitted.] 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 11-1, at 169-170 (2d ed. 1994).

A demise, or bareboat charter, has the practical and legal effect of shifting the possession and control of the vessel from the person of the owner to that of the demisee. It is true that the owner still has an interest in the vessel; but the principal interests that he has are in receiving the agreed hire and getting the vessel back at the end of the term. The demise is an interest for vesting in a specific person other than the owner of the vessel the faculties which are incidental to ownership without transferring the title of ownership itself.

In this type of charter, the principal obligation of the demisor is to furnish the vessel in a seaworthy condition at the time of the beginning of the term of charter. (citation omitted) On the other hand, the demisee's obligations are to redeliver the vessel in as good a condition, ordinary wear and tear excepted, as that in which he received her, and to pay hire. (citation omitted)

Lopez v. Atlanta-Schiffahrts-G.M.B.H., 259 F. Supp. 949, 950 (D.P.R. 1966).

The apportionment of obligations between vessel owner and lessee under a bareboat charter can vary. For example, there seems to be no absolute requirement that the charterer, as opposed to the owner, pay for repairs, although the texts make such a provision highly advisable. An oral agreement wherein the owner was to pay for hull insurance and a major overhaul of the vessel's engine, if needed, did not convert what was otherwise a demise ["bareboat"] charter into a joint venture. Brophy v. Lavigne, 801 F.2d 521 (1st Cir. 1986). In Marr Enterprises, Inc. v. Lewis Refrigeration Co., 556 F.2d 951, 957 (9th Cir. 1977), the court assumed a bareboat charter existed where a handwritten lease provided in part that the skipper and crew would provide for the fuel and the groceries and the owner would supply the nets and pay for boat maintenance, and each would be entitled to 50 percent of the gross from the boat. See also O'Donnell v. Latham, 525 F.2d 650 (5th Cir. 1976), which held that where a fishing party had rented a fishing vessel for one day and was to furnish its own supplies and crew, and where the owner did not exercise possession or control of navigation, a demise ["bareboat"] charter existed.

As stated earlier, a business arrangement between the parties need not rise to the level of a bareboat charter in order to qualify as a vessel lease under the IFQ program. If a claimed lease could not be characterized as a bareboat charter, what evidence might be used to establish that it was, nonetheless, a vessel lease? The Council staff provided some guidance on this question in the clarifying language it added to the IFQ Management Plan motion mentioned above. (This language was before the Council when it approved the motion.) The staff specified that:

Documentation proving such a lease existed will include the lease document itself if it

exists, or other proof that the lessee did in fact control the disposition of the vessel, its gear, crew, and catch.²

The RAM Division, in its instructions to applicants, stated that persons claiming they were lessees should submit documents proving that they "shouldered the financial burdens and risks of the fishing operation." As examples of such documents the instructions listed:

the receipt(s) for purchases of the license(s) used aboard vessel during the time period(s) for which you are claiming credit;

tax returns that show that you claimed a business deduction for vessel lease expenses during the time period(s) for which you are claiming credit;

tax returns or other documents that show that you paid the crew expenses during the time period(s) for which you are claiming credit; and/or

other authentic and contemporary documents demonstrating the nature of your investment in the fishing operation during the time period(s) for which you are claiming credit.³

Having considered all of the above-mentioned views on what constitutes or demonstrates a vessel lease, it appears that the Council intended to allocate Quota Share to those who acted like entrepreneurs in controlling and directing the fishing operations that produced the legal landings in question. An entrepreneur is one who organizes, operates, and assumes the risk in a business venture in expectation of gaining the profit.⁴ This is the kind of person the Council seems to have had in mind when it decided that vessel lessees, as well as vessel owners, could be "qualified persons." The RAM Division, too, appears to have envisioned a lessee as one who was an entrepreneur with respect to the fishing operations.

In deciding whether a vessel lease existed between the parties, an Appeals Officer should, therefore, consider a variety of factors. These include, but are not limited to:

(1) whether and to what extent the claimed lessee had possession and command of the vessel and control of navigation of the vessel;

²*Id.* at 14.

³Application Information: Pacific halibut and sablefish Individual Fishing Quota Program, at 7.

⁴WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 436 (1988)

- (2) whether the claimed lessee directed fishing operations of the vessel;
- (3) whether the claimed lessee had the right to hire, fire, and pay the crew;
- (4) whether the claimed lessee was responsible for the operating expenses of the vessel; and
- (5) whether the claimed lessee treated the fishing operations in which the vessel was used as his/her own business for federal income tax and other purposes.

The record before the chief of the RAM Division contained ample evidence that in 1988 (as well as in the immediately preceding years) Mr. Riddle had exclusive possession and command of the vessel, directed fishing operations, expended considerable sums in operating the vessel, hired and paid the crew, and treated the operation as a sole proprietorship. Since Mr. O'Rourke filed his appeal, Mr. Riddle has provided scores of additional receipts for moorage, gear, fuel, etc., paid by him in 1988. All of these represent prima facie evidence of the existence of an oral vessel lease between him and Mr. O'Rourke.

On the other hand, Mr. O'Rourke has failed to meet his burden of proof. Neither the evidence of record nor documents thus far alluded to by Mr. O'Rourke persuade me that the IAD was in error. Although I acknowledge that Mr. O'Rourke spent considerable sums in the enterprise, these expenditures were, by his own admission, intended as loans. Although Mr. O'Rourke may never have been paid any lease fee (other than \$300 in 1987, which he argues was actually a repayment for a loan advance), that fact does not retroactively negate what otherwise appears to have been an oral lease agreement. As an analogy, a tenant who fails to pay rent according to an agreement is nevertheless still a tenant until such time as he or she is evicted. Finally, although Mr. O'Rourke obviously feels that his business arrangement with Mr. Riddle turned out to be highly unsatisfactory to himself, it is not the purpose of the IFQ program to use resource allocations as a means to redress or make up for past business failings or private disputes between the parties.

DISPOSITION AND ORDER

The Order and Notice of Hearing for May 22, 1995 is **RESCINDED**. The motion of Mr. O'Rourke for additional time to submit documents is **DENIED**. The RAM Division's initial administrative determination granting qualifying pounds to Mr. Riddle and denying the claim of Mr. O'Rourke is **AFFIRMED**. This decision takes effect on June 16, 1995, unless, by that date, the Regional Director orders review of the decision.

James Cufley
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.

Because the QS to which the Respondent is entitled has been assigned to the quota share reserve under 50 C.F.R. § 676.20(d)(3), the Respondent still has an opportunity to receive QS and the corresponding IFQ for the 1995 fishing season. Therefore, 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.

Edward H. Hein
Chief Appeals Officer