

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of)	Appeal No. 95-0029
)	
HENRY L. TOMINGAS,)	
Appellant)	
)	
and)	DECISION
)	
TIM O. RENSCHLER and)	
JOHN B. EARLE,)	
Respondents)	June 12, 1998
_____)	

STATEMENT OF THE CASE

This is an appeal of a March 20, 1995, Initial Administrative Determination [IAD] of the Restricted Access Management Program¹ [RAM] of the National Marine Fisheries Service [NMFS]. The IAD denied Appellant Henry L. Tomingas' Application for halibut Quota Share [QS] under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] program because he did not provide evidence that he owned or leased a vessel upon which legal landings were made during a QS qualifying year, 1988, 1989, or 1990.

Mr. Tomingas' appeal was timely filed on April 20, 1995, and he has adequately shown that his interests are directly and adversely affected by the IAD. Because the record contains sufficient information on which to reach a final decision, and because there is no genuine and substantial issue of adjudicative fact for resolution, no hearing was ordered. 50 C.F.R. § 679.43.²

Mr. Tomingas claims that he did not lease the F/V ROBBY to Mr. Earle during 1988, and that he leased the F/V LINDA D from Mr. Renschler during the QS qualifying period. Mr. Earle and Mr. Renschler were joined as Respondents in Mr. Tomingas' appeal, as the respective claimed lessee of the F/V ROBBY and the owner of the F/V LINDA D. The Respondents were afforded an opportunity to file a statement in opposition to Mr. Tomingas' appeal. No statements in opposition were filed.

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

²Formerly 50 C.F.R. 676.25(g). 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.

ISSUES

1. Whether Mr. Tomingas leased the F/V ROBBY to Mr. Earle during 1988.
2. Whether Mr. Tomingas leased the F/V LINDA D from Mr. Renschler during the QS qualifying period.

BACKGROUND

The F/V ROBBY

Mr. Tomingas claimed in his RFA, dated July 14, 1994, that he had owned the F/V ROBBY since 1981, and that he had not leased the vessel during the period of 1984-1991.

On or about October 24, 1994, he received a QS Data Summary indicating that he was ineligible for halibut and sablefish QS, and that he had until January 23, 1995, to rebut his ineligibility. He did not do so, and on March 20, 1995, he was issued an IAD, informing him that he had not qualified for QS.

Mr. Earle claimed in his RFA, dated May 12, 1994, that he had leased the F/V ROBBY from Mr. Tomingas during June 1988 through August 1990. His Application for QS, dated July 5, 1994, credited him with landings of halibut from the F/V ROBBY made during the halibut openings of June, September, and October, 1988.

As proof that he had leased the F/V ROBBY, Mr. Earle submitted with his RFA a notarized affidavit, dated May 9, 1994, which he and Mr. Tomingas signed and dated. The affidavit read in part:

Henry agreed to lease Robby to me for the 1988 Halibut season under the following terms: I, John B. Earle, supplied all gear for longline fishing, including but not limited to: hauler, bouyes, anchor, and other equipment related to longline fishing as supporting documents show. I was responsible for paying out crew wages, insurance fees, food, fuel/oils, bait, permit/licenses. In return, Henry Tomingas received 20% of the gross proceeds of the Halibut sales for use of the vessel Robby. The above was a "handshake" deal (though later, an agreement was signed in Homer, Ak. at the Porpoise Room Restaurant), relying on the honesty and integrity of John B. Earle and Henry L. Tomingas. The above is true and correct by my signatures.

On November 14, 1994, Mr. Earle was issued QS, in part, for the landings made under the purported lease.

Mr. Tomingas claimed in his April 20, 1995, appeal that he signed the affidavit of May 9, 1994, only to help Mr. Earle receive his due percentage of IFQ, and not to relinquish his own IFQ rights. He admits that the vessel was used by Mr. Earle in 1988.

The F/V LINDA D

Mr. Tomingas also claimed in his RFA of July 14, 1994, that he had leased the F/V LINDA D from Mr. Renschler, landing approximately 2,500 pounds of halibut. His claim was denied on March 20, 1995, when RAM issued an IAD informing him that he had not qualified for QS.

Mr. Tomingas appealed the IAD on April 20, 1995, alleging that he had leased the F/V LINDA D in 1988. He did not produce evidence in support of his appeal or state facts sufficient to substantiate his claim, other than a statement that the parties [to this appeal] had decided in 1988 that he would fish the F/V LINDA D.

Mr. Renschler stated in his RFA, dated April 18, 1994, that he had owned the F/V LINDA D from March 18, 1980, to August 30, 1989, and that he did not lease it to anyone during 1984-1991. Mr. Renschler's Application for QS indicated that he was eligible for halibut QS and that his eligibility was due, in part, to his ownership of the F/V LINDA D from December 8, 1983, to August 31, 1988. Mr. Renschler changed the ownership date on his Application for QS to read December 8, 1983, to August 31, 1989, and submitted a State of Alaska fish ticket with his Application for QS, which showed landings of halibut from the F/V LINDA D on June 21, 1988. Mr. Renschler was issued QS on January 4, 1995, for the halibut landings made from the vessel.

DISCUSSION

To qualify for QS under the IFQ program, as implemented by RAM, an applicant for QS may receive credit only for legal landings of Pacific halibut or sablefish made from a vessel owned or leased at the time of the landings. 50 C.F.R. § 679.40(a)(2).³ A notarized statement by the vessel owner and lessee attesting to the existence of a lease is conclusive evidence of a vessel lease between the parties. 50 C.F.R. § 679.40(a)(3)(iii).⁴ To be conclusive evidence, a notarized statement of a vessel lease must identify the leased vessel, the name of the lease holder, and the period of time during the which the lease was in effect. *Id.* Other evidence, which may not be conclusive, but may tend to support a vessel lease, may also be submitted. *Id.*

1. Whether Mr. Tomingas leased the F/V ROBBY to Mr. Earle in 1988.

This Office has issued several decisions regarding the extent written lease agreements may be considered conclusive evidence of a vessel lease.⁵ In one case, we found a notarized statement to be

³Formerly 50 C.F.R. 676.20(a)(1)(iii). 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.

⁴Formerly 50 C.F.R. 676.20(a)(1)(iii).

⁵*See, e.g., Treinen v. Scudder*, Appeal No. 95-0104, October 11, 1995, *aff'd* October 18, 1995; *Ocean Crest Fisheries, Inc. v. McKee*, Appeal No. 95-0101, October 13, 1995, *aff'd* October 19, 1995;

conclusive evidence of a vessel lease.⁶

The appropriate inquiry for determining whether a notarized statement should be conclusive evidence of a vessel lease is twofold: (1) whether the document is valid, void of fraud, duress, coercion, incapacity, or mistake; and (2) whether the document on its face refers to the existence of a valid vessel lease agreement for purposes of the IFQ program. To the extent these requirements are satisfied, no other evidence may be considered. If the Appeals Officer determines that a valid vessel lease agreement existed, then the next question is to determine when the lease agreement was in effect. In examining that question, the Appeals Officer will presume that the lease agreement was in effect for the term stated in the agreement, unless contrary evidence is presented.

Mr. Tomingas does not argue that the May 9, 1994, affidavit itself is invalid due to fraud, duress, coercion, or incapacity, or that he mistook the document as something else when he signed it. Nor does he argue that the affidavit's contents do not refer to a vessel lease agreement between himself and Mr. Earle, or that the affidavit is false. To the contrary, Mr. Tomingas knew of the affidavit's contents, and freely assented to it when he signed it. Mr. Tomingas argues, instead, that the affidavit should not be used against him because he did not intend to give up his IFQ rights when he signed it.

Mr. Tomingas' misunderstanding of the consequences of his signature is not the kind of mistake that may be used to void a document. Mr. Tomingas knew what the document contained, and he willingly signed it. Since he did not mistake the document, only its consequences, and since there is no proof of fraud, duress, coercion, or incapacity, I find the affidavit to be a valid document.

The affidavit on its face has all the necessary ingredients to be considered conclusive evidence of the existence of a vessel lease agreement. It is sworn to by both parties; it is notarized and dated; and it identifies the name of the leased vessel (the F/V ROBBY), the name of the lease holder (Mr. Earle), and the period of time the lease was in effect (the 1988 halibut season). Given that the affidavit is a valid document that clearly refers to the existence of a vessel lease agreement, and contains the necessary elements to be conclusive evidence of a vessel lease, I find that Mr. Earle leased the F/V ROBBY during 1988.

2. Whether Mr. Tomingas leased the F/V LINDA D from Mr. Renschler during 1988.

Mr. Tomingas claims in his appeal, as he did in his RFA, that he leased the F/V LINDA D during a QS qualifying year, 1988. However, despite being given every opportunity to do so, he produced no evidence in support of his claim. RAM's records do show that landings of halibut were made on Mr. Tomingas' fishing permit in June and September 1988, but that is marginal evidence of a vessel lease. The record contains no other evidence of a vessel lease.

Dittrick v. Weikal, Appeal No. 95-0109, October 20, 1995, *aff'd* October 24, 1995; and Vohs v. Hahler, Appeal No. 95-0051, October 28, 1995, *aff'd* October 30, 1995.

⁶See Patrick N. Norman, Appeal No. 95-0106, January 31, 1996, *aff'd* February 1, 1996.

Mr. Tomingas was given at least three opportunities during the application process, spanning over a year's period of time, to prove his claim that he leased the F/V LINDA D, yet he failed to do so. He was clearly instructed to provide proof of his lease of the vessel when he received his Application for QS,⁷ his QS Data Summary,⁸ and again in a letter from this Office following his appeal.

Mr. Tomingas has failed to provide proof, despite ample opportunity, that he had leased the vessel. Because there is no other evidence of a vessel lease (other than the landings made on his fishing permit), I find that the preponderance of the evidence shows that Mr. Tomingas did not lease the F/V LINDA in 1988 or during a QS qualifying year.

FINDINGS OF FACT

1. The signed, dated, sworn, and notarized statement of Mr. Tomingas and Mr. Earle attests to a lease of the F/V ROBBY by Mr. Earle during the 1988 halibut season.
2. The notarized statement of Mr. Tomingas and Mr. Earle is a valid document, free of fraud, duress, coercion, incapacity, or mistake.
3. Mr. Tomingas produced insufficient evidence, outside of the bare assertions in his RFA and in his appeal, to support his claim that he leased the F/V LINDA D from Mr. Renschler in 1988.
4. Mr. Tomingas was afforded at least three opportunities to provide evidence of a lease of the F/V LINDA D, and failed to do so on all three occasions.

CONCLUSIONS OF LAW

1. Mr. Earle's notarized statement is conclusive evidence of a lease of a vessel.
2. Mr. Tomingas leased the F/V ROBBY to Mr. Earle in 1988.
3. Mr. Tomingas did not lease the F/V LINDA D from Mr. Renschler during a QS qualifying year.

DISPOSITION

The IAD, which denied Mr. Tomingas' application for issuance of halibut QS is AFFIRMED. This decision takes effect on July 13, 1998, unless by that date the Regional Administrator orders review of the decision.

⁷See the *Application Information* packet accompanying Appellant's Application for QS, at 6-7.

⁸See the *Explanation and Instructions* packet accompanying Appellant's QS Data Summary, at 4-5.

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, June 22, 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 issuance of a Decision on Reconsideration.

Louis Agi
Appeals Officer

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

Randall J. Moen
Appeals Officer