

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 95-0030
)	
KENNETH F. TISON,)	DECISION
Appellant)	
)	November 5, 1997
_____)	

STATEMENT OF THE CASE

Appellant Kenneth F. Tison filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Program¹ [RAM] on February 27, 1995.² The IAD denied Mr. Tison's application for halibut and sablefish quota share [QS] under the Individual Fishing Quota [IFQ] program because he failed to prove that he owned or leased a vessel from which actual qualifying landings were made.

Appeals Officer Randall J. Moen ordered a written hearing on December 6, 1995. Mr. Tison responded with proof of vessel ownership, but supplied no proof of qualifying landings.³ On June 28, 1996, Mr. Moen ordered Mr. Tison to produce evidence of qualifying landings. Mr. Tison never responded to the order. On February 28, 1997, Chief Appeals Officer Edward H. Hein informed Mr. Tison that his file would be given additional scrutiny before a final decision was rendered. Mr. Tison was given additional time, until March 31, 1997, to provide additional proof. Mr. Tison never provided proof of actual qualifying landings of halibut or sablefish.

ISSUES

1. Whether a vessel owned or leased by Mr. Tison made qualifying landings of halibut and sablefish.
2. Whether Mr. Tison may receive QS credit for landings of halibut and sablefish not made because of hardship or special circumstance.

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

²In a previous decision we held that Mr. Tison's application for QS was timely filed even though it was faxed to the Division, rather than mailed or hand-carried. *See, Kenneth F. Tison*, Appeal No. 95-0002, January 30, 1995, *aff'd* January 30, 1995.

³He only alleged he *could* prove that he made qualifying landings in 1988 of sablefish and halibut harvested in federal waters.

BACKGROUND

Mr. Tison filed for QS based on the landings of halibut and sablefish made from the F/V EMERALD PACIFIC. As part of his claim, he asked for a "hardship exemption" due to the loss of the vessel in heavy surf in 1989. He explained that (1) he had fished sablefish and halibut since 1969, pioneering offshore sablefish fishing in Alaska; (2) the Japanese "froze" him out of his business in 1975 by refusing to purchase his sablefish; (3) he had landed approximately 300,000 pounds of fish in the summer of 1984 from the F/V C LADY; and (4) he did not fish during the last QS qualifying year (1990) because a federal court judge did not award him adequate compensation for the negligent repair of his vessel. He attempted to fish from another smaller vessel (the F/V LANCING), but said he was unable to compete financially.

The RAM official record shows that no QS qualifying landings of halibut or sablefish were made from the F/V EMERALD PACIFIC during the QS qualifying period of 1988, 1989, or 1990. While the record shows that sablefish landings were made on September 21, 1988, the State of Alaska fish ticket shows that the fish were harvested in statistical area 345701, and landed at Sitka from the F/V IDA LEE on Mr. Tison's permit card. Statistical area 345701 is an area managed under a State of Alaska limited entry program.

On appeal, Mr. Tison claims that he should qualify for QS based on his prior fishing history and the hardships resulting from the wreck and negligent repair of the F/V EMERALD PACIFIC. Because he had previously claimed in a letter to RAM that his September 21, 1988, landing was made in federal waters, this Office on June 28, 1996, requested such evidence, but he never provided any.

DISCUSSION

1. Whether Mr. Tison made landings of halibut and sablefish that qualify him for QS.

To qualify for QS under the IFQ program, as implemented by RAM, a person must have owned or leased a commercial fishing vessel that made legal landings of sablefish or halibut during a QS qualifying year, 1988, 1989, or 1990.⁴ The regulations specifically provide that sablefish harvested within Prince William Sound, or under a State of Alaska limited entry program, will not be considered in determining whether a person is a qualified person.⁵

⁴See, 50 C.F.R. § 679.40(a)(2); formerly, 50 C.F.R. § 676.20(a)(1).

⁵Id. *Halibut* harvested within Prince William Sound or under a State of Alaska limited entry program can be used in the determination and calculation of QS.

RAM's official record shows that no landings of halibut or sablefish were made from a vessel owned or leased by Mr. Tison during the QS qualifying period, other than a September 21, 1988, landing of sablefish harvested aboard the F/V IDA LEE in an area managed under the State of Alaska limited entry program. Given the evidence in the official record, and the absence of contrary proof, I find that the September 21, 1988, sablefish landing harvested aboard the F/V IDA LEE was the only fish landed from a vessel owned or leased by Mr. Tison during the QS qualifying period. Since sablefish harvested in an area managed under a State of Alaska limited entry program cannot be used for QS,⁶ I conclude that Mr. Tison may not receive QS for the landings of the fish.

2. Whether Mr. Tison may receive QS for the landings of halibut and sablefish not made because of hardship or special circumstance.

The North Pacific Fishery Management Council expressly rejected allowing allocation of QS on the basis of hardship or special or unavoidable circumstances.⁷ The Council determined that providing a three-year qualifying period and allowing applicants their best five years of fishing during the base years⁸ was sufficient to compensate applicants whose catch had been reduced as a result of circumstances beyond their control, and that no additional hardship provisions would be considered under the IFQ program.⁹ We have ruled in several decisions that QS must be based on actual, not hypothetical, landings, and that neither this Office nor the Division may use hardship or unavoidable circumstance to qualify a person for QS.¹⁰

Mr. Tison contends that he should receive QS because of his prior fishing history, and because of the wreck and subsequent negligent repair of his vessel. Because Mr. Tison has not submitted proof of actual landings during the QS qualifying period, I conclude that there is no basis for granting him relief.

⁶See, note 4.

⁷The Council made the decision at its September 28-October 5, 1994 meeting.

⁸The Council, in basing QS on an applicant's best of five of six or seven years (for sablefish and halibut, respectively), recognized the need to "discount the effects on a person's catch history of one or two years of relatively poor performance due to weather, injury, illness, the EXXON VALDEZ oil spill, or other unfortunate circumstance beyond the control of the fisherman." See, 57 Fed. Reg. 57,134 (1992).

⁹See, Charles J. Petticrew, Appeal No. 95-0008, July 3, 1996, effective August 2, 1996.

¹⁰See, e.g., Kenneth M. Adams, Appeal No. 95-0004, March 22, 1995, effective April 19, 1995; William E. Crump, Appeal No. 95-0024, June 27, 1995, effective July 27, 1995; Jimmy D. Hutchens, Appeal No. 95-0094, June 28, 1995, *aff'd* January 1, 1996; and Michael C. Hatten, Appeal No. 95-0136, January 30, 1996, *aff'd* January 31, 1996; Charles J. Petticrew, Appeal No. 95-0008, July 3, 1996, August 2, 1996; and Everett J. Lindholm, Appeal No. 95-0107, August 5, 1996, effective September 4, 1996.

FINDINGS OF FACT

1. Mr. Tison's September 21, 1988, landing of sablefish was harvested aboard the F/V IDA LEE in an area managed under the State of Alaska limited entry program.
2. Mr. Tison did not own or lease a vessel that made qualifying landings of halibut or sablefish during the QS qualifying years.

CONCLUSIONS OF LAW

1. The IFQ regulations do not allow for QS based on landings of sablefish harvested in state managed waters under a State of Alaska limited entry program.
2. Mr. Tison is not a qualified person for the purpose of receiving initial issuance of sablefish QS.
3. The IFQ regulations do not allow for QS based on landings of halibut or sablefish never made because of hardship or special or unavoidable circumstance.

DISPOSITION

The IAD denying Mr. Tison's application for QS is AFFIRMED. This Decision takes effect December 5, 1997, unless by that date the Regional Administrator orders review of the Decision.

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, November 17, 1997. 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 this 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 the issuance of a Decision on Reconsideration.

Randall J. Moen
Appeals Officer