

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of ) Appeal No. 95-0082  
)  
OCEAN PROWLER PARTNERSHIP, ) DECISION (PART I)  
Appellant )  
) October 6, 1997  
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STATEMENT OF THE CASE

On May 31, 1995, the Ocean Prowler Partnership filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Program<sup>1</sup> [RAM] on January 24, 1995. The IAD denied the Appellant's claims to 143,306 qualifying pounds of sablefish that was based on a 1989 sales invoice, and to 1,614,026 qualifying pounds of sablefish harvested aboard the F/V OCEAN PROWLER during longline surveys conducted by the National Marine Fisheries Service in 1989 and 1990.

The two issues in this appeal, relating to the sales invoice pounds and the longline survey pounds, are distinct and severable. Because the first of these issues will require factual determinations that may necessitate a hearing, while the second issue involves only legal questions, I am severing these issues as a matter of judicial convenience. Thus, this Decision (Part I) will address only the issue of the longline survey pounds.

ISSUE

Whether IFQ credit of qualifying pounds for certain sablefish landings from the F/V OCEAN PROWLER in 1989 and 1990, involving fish harvested during research conducted under NMFS charters, were properly denied to the Appellant.

BACKGROUND

On June 2, 1989, NMFS chartered the F/V OCEAN PROWLER from the Appellant. The stated term of the charter was 75 days, beginning on or about June 26, 1989, and ending on or about September 12, 1989. A second 75-day charter [award date not specified] covered the same dates in

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

1990. [Charters, at 2; Affidavit of John R. Winther, 31 May 95, at 2].<sup>2</sup>

Under the terms of the charters, the Appellant was to provide the vessel F/V OCEAN PROWLER, as well as the crew, fuel, and equipment, “except for those items specifically identified as being provided by the Government.” Both charters include a hand-written notation that “the Ocean Prowler will pay all transportation costs of the government supplied fishing gear to and from the vessel before and after the charter.” [Charters at 6]

The charters provided that, in lieu of monetary compensation, the contractor would be “permitted to process and sell the catch after scientific observations and samples have been obtained.” [Charters, at 6] The charters further provided that the “scientific mission of this survey is the paramount consideration of the charter” and that “the opportunity to sell the catch is an incentive to provide the Government as reasonable a charter price as possible.” [*Id.*]

The longline surveys were conducted on a cooperative basis by staff from the NMFS Auke Bay Laboratory and the Resource Assessment and Conservation Engineering [RACE] Division. The charters specified 19 requirements relating to the size, configuration, capacity, gear, and capabilities of the vessel; eight requirements concerning electronic equipment for the vessel; and five requirements pertaining to the composition and experience of the crew. [1990 Charter, at 9-11] The charter provided for a scientific field party of up to four persons, headed by a government employee designated as Field Party Chief, who was to be responsible for implementation of a Scientific Operation Plan and supervision of the other government employees. [*Id.*, at 12]<sup>3</sup>

The vessel captain was to be responsible for all matters relating to safety of personnel, the vessel, and equipment operation. Work-day length and hours were to be determined by the Field Party Chief, in consultation with the vessel captain, but the Field Party Chief was given final authority “in all matters except those relating to safety of the vessel and personnel.” [1990 Charter, at 12, ¶F.3]

The Field Party Chief was responsible for the initial disposition of the catch. The catch was the property of the United States government until the Field Party Chief relinquished responsibility and turned the catch over to the Contractor. Components of the catch were to be turned over to the Contractor after being examined by the scientific party and after scientific samples had been obtained. Only then did the catch become the property of the Contractor. [*Id.*, at 12-13, ¶F.6]

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<sup>2</sup>John R. Winther, the managing partner of the Prowler Partnership, stated that the vessel was removed from the commercial fisheries from June 5 to October 7, 1989 and June 5 to October 8, 1990, because of “gear-up and gear-down time” in connection with the charters.

<sup>3</sup>Portions of the 1989 Charter are missing from the copy in the record. I will presume that the terms of that charter are substantially the same as, if not identical to, the terms of the 1990 Charter.

The Scientific Operation Plan is missing from the copies of the 1989 and 1990 Charters in the record. I will presume that the plan for these charters was similar to the Scientific Operation Plan found in the 1987 and 1988 Charters of the F/V PROWLER.<sup>4</sup> The Scientific Operation Plan under those charters specified the locations and depths where harvesting would occur, the amounts and types of gear to be used, and the methods of setting gear. There was at least one significant difference, however, in the way the surveys were conducted aboard the two vessels. With the F/V PROWLER, NMFS conducted testing at 47 sites, whereas from the F/V OCEAN PROWLER the number of sites was increased to 73. [1990 Charter, ¶ F.8, at 13]

## DISCUSSION

The IAD determined that the Appellant could not receive IFQ credit for the landings of sablefish harvested during the longline surveys because (1) the vessel was leased to NMFS when the surveys were conducted, and under 50 C.F.R. § 679.40(a)(2)(i)(B),<sup>5</sup> the owner of a vessel cannot receive credit for landings made from the vessel while it was leased to another; and (2) the harvesting was governed by the terms of the NMFS charters, rather than by commercial fishing regulations and, therefore, the resultant landings did not meet the definition of *legal landings* under 50 C.F.R. § 679.40(a)(2)(i).<sup>6</sup>

In its Appeal, the Appellant argues that:

1. The NMFS charters did not constitute vessel leases for IFQ purposes.
2. The harvesting and landing of sablefish constituted *legal landings* because they were in compliance with federal regulations.
3. The IAD was arbitrary and capricious because without a rational basis it distinguishes between standard commercial fisherman and those who harvest fish under contract with NMFS.
4. The IAD violated Equal Protection and Due Process because it treated similarly situated persons (commercial fisherman and those who harvest fish under contract with NMFS.)

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<sup>4</sup>See, Prowler Partnership v. Samuelson, Decision on Reconsideration (Part II), Appeal No. 95-0084, September 29, 1997, *aff'd*, October 2, 1997.

<sup>5</sup>Formerly 50 C.F.R. § 676.20(a)(1). 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.

<sup>6</sup>Formerly 50 C.F.R. § 676.20(a)(1)(v).

differently without a rational basis for doing so.

5. The IAD constituted an unconstitutional taking of property. The Appellant submitted additional arguments in support of its Motion for Reconsideration in Prowler Partnership v. Samuelson, which were also submitted in support of the instant appeal. [Appellant's Supplemental Memorandum of Authorities, at 2, f.n.2] In that memorandum, the Appellant made several arguments to support its contention that the harvesting of sablefish during the NMFS charters constituted commercial fishing, not *scientific research activity by a scientific research vessel* under § 3 of the Magnuson-Stevens Fishery Conservation and Management Act. [16 U.S.C. §§ 1801-1883 (1996)]

All of the Appellant's arguments in this part of the appeal were addressed and rejected in Prowler Partnership v. Samuelson<sup>7</sup> and in the Decision on Reconsideration (Part II) of that appeal.<sup>8</sup> Those Decisions serve as direct and controlling precedent in this appeal. Rather than repeat those discussion here, I incorporate them by reference into this Decision (Part I).

#### FINDINGS OF FACT

1. In 1989 and 1990 the F/V OCEAN PROWLER was chartered by NMFS and the activities of the vessel during those charters were under the control of NMFS.
2. NMFS's policy, at least since 1987, has been consistent with the definitions of *scientific research vessel* and *scientific research activity* that now appear in 50 C.F.R. § 600.10 (1996).
3. Title to the fish harvested during the 1989 and 1990 NMFS Gulf of Alaska longline surveys was transferred from the United States Government to the Appellant after harvesting as compensation for Appellant's participation in the surveys.

#### CONCLUSIONS OF LAW

1. The definitions of *scientific research vessel* and *scientific research activity* in 50 C.F.R. § 600.10 (1996) are applicable in this appeal.
2. The harvesting of fish during *scientific research activity conducted by a scientific research*

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<sup>7</sup>Appeal No. 95-0084, November 8, 1995.

<sup>8</sup>The argument concerning whether the charters constituted vessel leases under the IFQ program were not decided on appeal because the appeal was decided on other grounds. For the same reason, I do not decide that question here.

*vessel* does not constitute *commercial fishing*, even if the fish were intended for sale or were actually sold.

3. A *legal landing* for IFQ purposes requires that the harvesting and the landing be in compliance with applicable commercial fishing regulations.
4. The F/V OCEAN PROWLER was a *scientific research vessel*, as defined in 50 C.F.R. § 600.10, while under charter to NMFS in 1988 and 1990.
5. The NMFS Gulf of Alaska longline surveys are *scientific research activity* as defined in 50 C.F.R. § 600.10
6. The activities of the F/V OCEAN PROWLER during the 1989 and 1990 NMFS charters constituted *scientific research activity* as defined in 50 C.F.R. § 600.10.
7. The F/V OCEAN PROWLER was not engaged in fishing or commercial fishing during the 1989 and 1990 NMFS charters.
8. The sablefish landings at issue in this appeal do not constitute *legal landings* under 50 C.F.R. § 679.40(a)(2)(v).
9. The Restricted Access Management Division properly denied IFQ credit to the Appellant for landings of sablefish harvested aboard the F/V OCEAN PROWLER under the 1989 and 1990 NMFS charters for Gulf of Alaska longline surveys.

#### DISPOSITION

The Initial Administrative Determination that was the subject of this appeal is AFFIRMED as to those portions that relate to the issues addressed in this Decision (Part I) on the grounds stated in this Decision (Part I). This Decision (Part I) takes effect on November 5, 1997, unless by that date the Regional Administrator orders review of the Decision (Part I). The issues in this Decision (Part I) have been fully adjudicated and reconsidered in Prowler Partnership v. Samuelson and are, therefore, not subject to reconsideration by this Office.

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Edward H. Hein  
Chief Appeals Officer