NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 95-0084
	)	
PROWLER PARTNERSHIP,)		DECISION ON REMAND
Appellant	)	
	)	August 24, 2001
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STATEMENT OF THE CASE

This is our fourth Decision in the appeal brought by the Prowler Partnership under the Individual Fishing Quota program for Pacific halibut and sablefish.[1] This case involves three individuals – John Winther, Bart Eaton, and Gainhart Samuelson – who owned the fishing vessel F/V PROWLER from 1985 to 1989 and who operated the vessel through their joint venture called the Prowler Partnership. The ultimate issue in this Decision on Remand, as in our previous Decisions, is whether NMFS properly allocated the quota shares [QS] resulting from sablefish landings of the vessel during the period April 5, 1985 through June 9, 1989.

In the first Decision, this Office concluded that NMFS's Restricted Access Management [RAM] program had properly allocated 1/3 of the quota shares to Mr. Samuelson, and had properly denied that 1/3 portion to the Prowler Partnership. The partnership had argued that it owned and operated the vessel and, therefore, was entitled to all the QS in question. They argued that Mr. Samuelson, a former partner, should take nothing. I agreed with RAM's determination that the Prowler Partnership had never owned the vessel. I concluded that during the entire period in question the vessel was owned by John Winther, Douglas Bart Eaton (subsequently Omega-3, Inc.),[2] and Mr. Samuelson, as tenants in common, each holding a 1/3 interest. The other 2/3 were allocated to the Prowler Partnership, under which Mr. Winther and Mr. Eaton have continued to do business.[3]

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[1]The first three decisions were: In re Applications of Prowler Partnership and Gainhart Samuelson, Decision, November 8, 1995; Decision on Reconsideration (Part I), March 12, 1996; and Decision on Reconsideration (Part II), September 29, 1997.

[2]On September 2, 1986, Mr. Eaton transferred his 1/3 interest in the vessel to Omega-3, Inc., a Subchapter S Corporation of which he was apparently the sole owner. [U.S. Coast Guard abstract of title for F/V PROWLER; Deposition of Robert J. Gillman, C.P.A., October 24, 1997, at 7, 10. (Exhibit C)]

[3]RAM stated in the IAD that "it may have been administrative error to have issued QS resulting from uncontested qualifying pounds of sablefish to the Partnership; such an award should have been made, respectively, to John Winther (individually) and to Bart Eaton (Omega-3). . . . However, . . . I do not believe it would be appropriate at this time to revoke QS in the hands of the Prowler Partnership and to divide and reissue it to the partners in their respective individual and corporate capacities." [IAD at 12]

Because our first Decision found that the partnership had never owned the vessel, it was unnecessary to review RAM's determinations that (1) the partnership had been dissolved in 1989; and (2) even if the partnership had owned the vessel, the QS would properly be distributed 1/3 to each individual as former partners of a dissolved partnership.[4] [IAD at 12]

In a Motion for Reconsideration the partnership reasserted that it owned the vessel, but said that if it did not own the vessel, then it must have leased the vessel. Under the IFQ regulations, an applicant who leased the vessel at the time of the landings is entitled to the resulting QS instead of the vessel owner.[5] Since the Appellants made the lease claim for the first time on reconsideration, I rejected it as untimely. The Decision on Reconsideration (Part I) affirmed the conclusions of the first Decision.[6]

The Prowler Partnership appealed the Decision on Reconsideration to the United States District Court for the District of Alaska.[7] The court held that NMFS did not abuse its discretion in finding that Mr. Samuelson individually owned a 1/3 interest in the vessel during the period April 5, 1985 through June 9, 1989.[8] By implication, the court upheld the Appeals Officer's finding that the Prowler Partnership had not owned the F/V PROWLER during the period in question. The court determined, however, that Prowler Partnership's assertion that it had owned *and operated* the vessel was tantamount to a claim that it had leased the vessel. Therefore, the court said, the Appeals Officer should have considered the lease claim during the reconsideration, rather than rejecting it as untimely. The court reasoned that because a qualified person for QS may be a vessel owner *or* lessee, NMFS must consider who operated the vessel when making its initial allocations of QS. The court remanded the case to this Office "to consider if Prowler Partnership was the lessee of the vessel and thereby entitled to the initial QS. If so, the agency must also determine whether the Prowler Partnership is in other respects entitled

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[4]Under 50 C.F.R. § 679.40(a)(2)(iii) [formerly 50 C.F.R. § 676.20(a)(1)] former partners of a dissolved partnership, who would otherwise qualify as persons, may apply for QS in proportion to their interest in the dissolved partnership.

[5]50 C.F.R. § 679.40(a)(2)(i) and (ii) [formerly 50 C.F.R. § 676.20(a)(1)] provide: "(2) Qualified person. (i) As used in this section, a "qualified person" means a "person" as defined in § 679.2: (A) 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; or (B) That 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."

[6]Decision on Reconsideration (Part II) dealt with aspects of the appeal that are not the subject of this Decision on Remand.

[7]Prowler Partnership v. National Marine Fisheries Service, Case No. A96-126 CV (JWS).

[8]*Id.,*Order from Chambers, December 9, 1997, at 9.

to the full 3/3 of the initial QS which it seeks."[9]

After several months of delay by the Appellants, I set an oral hearing for September 2, 1998. The Appellants requested and were granted a continuance until after the October 1998 meeting of the North Pacific Fishery Management Council.[10] The Appellants stated that they would seek from the Council a "clarification" of when a partnership dissolves for purposes of initial issuance of QS, in light of our Silver Ice decision.[11] On December 14, 1998, I issued an Order to Produce Evidence and a brief. The Appellants requested and received an extension, and then filed their brief and exhibits on January 29, 1999. The Appellants notified this Office in September 2000 that no oral hearing was necessary.[12] Therefore, this Decision on Remand is based entirely on the written record without an oral hearing.

ISSUES

I. Did the Prowler Partnership lease the vessel F/V PROWLER from its owners during the period April 5, 1985 through June 9, 1989?

II. If so, was the Prowler Partnership dissolved, for purposes of 50 C.F.R. § 679.40(a)(2)(iii), when Mr. Samuelson sold his interest in the vessel to Mr. Winther and Mr. Eaton?

SUMMARY OF DECISION

This Decision on Remand concludes that the Prowler Partnership did not hold a lease of the vessel F/V PROWLER during the period April 5, 1985 through June 9, 1989. Because the vessel owners and the partners/venturers were the same three individuals, a lease between them would have amounted to an attempt by the owners to contract with themselves and, therefore, would have been legally invalid. Even if such a lease were legally possible, the preponderance of the evidence in the record showed that Prowler Partnership did not have a written or oral vessel lease, nor did it have a bareboat charter of the F/V PROWLER. Even if the Prowler Partnership had owned or held a lease of the vessel during the period in question, the partnership, consisting

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[9] *Id.,* at 10.

[10] Letter from Attorney Tren Wickstrom, August 4, 1998; Order Granting Request for Continuance of Oral Hearing, August 4, 1998.

[11] Silver Ice Fisheries Partnership v. Arctic Select Seafoods, Inc., Appeal No. 95-0114, October 30, 1996. In that decision, we upheld RAM's interpretation of the term "dissolved partnership" as used in 50 C.F.R. § 679.40(a)(2)(iii) [formerly 50 C.F.R. § 676.20(a)(1)], which is that a partnership dissolves when there is a change in partners.

[12] "As we have previously discussed, the facts presented by Prowler Partnership are undisputed and no oral hearing is necessary in this matter." Faxed message of Attorney Tren Wickstrom, September 26, 2000.

of Mssrs. Winther, Eaton, and Samuelson, was dissolved for purposes of 50 C.F.R. § 679.40(a)(2)(iii) on June 9, 1989, when Mr. Samuelson sold his interest in the vessel to Mr. Winther and Mr. Eaton. Therefore, the proper initial issuance of the sablefish QS generated by the vessel would have been 1/3 to Mr.Samuelson, 1/3 to Mr. Winther, and 1/3 to Mr. Eaton, all as former partners of the Prowler Partnership.

BACKGROUND

This is a unique vessel lease case. Every lease case we have decided until now involved two distinct parties – an owner and a claimed lessee – competing over which party should get quota shares.[13] This case involves three vessel owners who, as the only partners of the Prowler Partnership, are alleged to have leased their own vessel. As owners they have already received equal portions of all the quota shares generated by their vessel. On appeal, two of the owners, Mr. Winther and Mr. Eaton, are trying to obtain the 1/3 portion of the quota shares that was awarded to the third owner, Mr. Samuelson.[14] After the first Decision in this appeal determined that the partnership never owned the F/V PROWLER, the Appellants, in a Motion for Reconsideration, asserted for the first time that the partnership leased the vessel.

The Appellants state that at all relevant times they "believed and conducted the business of the F/V PROWLER as if [the partnership] were the owner" of the vessel.[15] [Appellants' Brief on Remand at 3] Because NMFS determined that the partnership never owned the vessel, the

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[13]In some cases, the claimed lessee asserted that he and the vessel owner fished as a partnership or corporation that leased the vessel from the individual owner. *See, e.g.,* Thomas L. Stewart, Appeal No. 95-0143, September 21, 2000; Duffus v. D&G Enterprises, Inc., Appeal No. 95-0102, October 15, 1997. In other cases the appellant claimed to have leased the vessel from the partnership that owned the vessel and of which he was a partner. *See, e.g.,* Seater v. Seater & Seater Partnership, Appeal No. 94-0010, June 6, 1995. In all these cases, unlike the instant case, there was at least one person who was not on both sides of the claimed lessor-lessee relationship. In Veerhusen v. McBride, Appeal No. 95-0118, June 26, 1997, both parties were the only members of a partnership that owned the vessel and of a corporation that Mr. McBride claimed had leased the vessel. Unlike the instant case, however, the parties to the alleged lease were distinct parties because the corporation had a legal identity separate from the shareholders.

[14]In fact, Mr. Samuelson will not be deprived of his QS as a result of this case, regardless of how it is decided. He is not a party to the District Court case, and the parties have stipulated that his QS is not in jeopardy. In the event that Prowler Partnership prevails, NMFS would issue additional sablefish QS to the partnership without rescinding Mr. Samuelson's QS. *See* Winther, et al. v. Samuelson, 10 P.3d 1167, 1170, fn. 13 (Alaska 2000).

[15]As of late last year, Mr. Winther was still asserting that the Prowler Partnership owned the F/V PROWLER. He argued in state court that under Alaska partnership law the vessel should have been considered partnership property. The Alaska Supreme Court rejected his argument as irrelevant because "for purposes of IFQ allocation, the federal government has already determined that the parties owned the vessel as individuals." Winther v. Samuelson, 10 P.3d 1167, 1171 (Alaska 2000).

Appellants argue that the partnership "must be a 'lessee' under the IFQ program." [*Id.*] The Appellants do not argue that they ever discussed or contemplated a vessel lease, or actually entered into a lease agreement with the co-owners. Instead, they argue that the arrangement the co-owners had among themselves for operating their vessel through a joint venture should be construed as a vessel lease for IFQ purposes.

Appellants further argue that the current Prowler Partnership, which no longer includes Mr. Samuelson, is the qualified person entitled to all the quota shares generated by the vessel. They contend that the partnership did not dissolve when Mr. Samuelson sold his interest in the vessel to them in June 1989, or any time thereafter. Therefore, they argue, all the quota shares generated by the vessel should have been initially issued to the Prowler Partnership as an active partnership, and not issued 1/3 to each of the three individuals as former partners of a dissolved partnership or as owners of the vessel during the period of time in question.

DISCUSSION

I. Did the Prowler Partnership lease the vessel F/V PROWLER from its owners during the period April 5, 1985 through June 9, 1989?

The Appellants assert that the initial issue in this case is whether the Prowler Partnership or the co-owners of the F/V PROWLER bore the financial risks and burdens of the fishing operations of the vessel. Appellants further assert that if the Prowler Partnership bore those risks and burdens, then it should be considered the lessee of the vessel. [Appellants' Brief on Remand, at 2] This is an incorrect statement of the initial issue that must be decided in this case.

The issue before us is whether the Prowler Partnership held a legally valid lease of the F/V PROWLER from the co-owners of the vessel during the period April 5, 1985 through June 9, 1989. Since we have already decided that the Prowler Partnership never owned the F/V PROWLER, the Appellants' only possible basis for claiming that the partnership is a qualified person, eligible for Mr. Samuelson's 1/3 portion of the QS, is if the Appellants can prove that they leased the vessel during the period of time in question and, if so, that the partnership was not dissolved (for IFQ purposes) when Mr. Samuelson sold his interest in the vessel to the other two owners.

In every decision involving an alleged vessel lease, we have required the claimed lessee to prove that it actually held a lease of the vessel, not merely that it "bore the financial risks and burdens of the fishing operations" or that it was an entrepreneur. Furthermore, to establish that the partnership is a qualified person by virtue of a vessel lease, it is not enough for Appellants to show that they operated the vessel; they must prove that they operated the vessel *as a lessee.* As we have previously stated, the regulations do not provide for the granting of quota shares to a partnership that operated and fished a vessel. The partnership must have leased (or owned) the

vessel to be considered a "qualified person" eligible to receive an initial issuance of QS.[16] In the absence of a lease, the qualified person can only be the owners of the vessel or the owners' successors-in-interest.

Appellants assert that their arrangement with the co-owners for use of the F/V PROWLER constituted a "lease" and a "demise" charter. [Appellants' Brief on Remand, at 2] Appellants further assert that their written Co-Ownership Agreement "together with statements and affidavits of the co-owners and partners may be sufficient to constitute 'conclusive evidence' of a lease." [Appellants' Brief on Remand, at 7] I interpret these assertions as three alternative lease claims: that the Co-Ownership Agreement constitutes a written vessel lease and thereby is conclusive evidence of the existence of a vessel lease under 50 C.F.R. § 679.40(a)(3)(iii); that the arrangement for use of the vessel, considering all the evidence in the record, constitutes an oral vessel lease; and that the arrangement, whether written or oral, constitutes a demise or bareboat charter, thereby qualifying as a vessel lease. Before I address each of these three claims, I will first address whether, as a matter of law, a valid vessel lease between the co-owners and the Prowler Partnership could have been formed in 1985.

A. Legality of a vessel lease under these facts

A vessel lease is a contract, subject to the rules of contract law. An essential requirement of a contract, written or oral, is that there be at least two contracting parties of separate identity. A person cannot contract with himself. In United States v. Alaska Steamship Co.,[17] the Ninth Circuit Court of Appeals stated:

> It is not possible under existing law for a man to make a contract with himself. This rule is one of substance and independent of mere procedural requirements. Even though a man has different capacities, as for instance as trustee, as executor, as partner, as an individual, it is impossible as [a] matter of substantive law for him by his own individual will or expression to contract with himself.

A contract may be formed between two or more persons acting as a unit and one or more *but fewer than all of these persons,* acting either singly or with other persons.[18]

Appellants here must prove that in 1985 the three co-owners of the vessel F/V PROWLER – John Winther, Bart Eaton, and Gainhart Samuelson – entered into a lease agreement with the Prowler Partnership, a joint venture consisting of John Winther, Bart Eaton, and Gainhart

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[16] Vohs v. (Piper) Hahler, Appeal No. 95-0051, October 28, 1995, at 7.

[17] 491 F.2d 1147, 1154 (9th Cir. 1974), *quoting* RESTATEMENT OF THE LAW, CONTRACTS § 15 (1932).

[18] RESTATEMENT 2D, CONTRACTS § 11 (1979).

Samuelson. Because the vessel owners and the partners/venturers were the same three individuals, such a lease would have amounted to an attempt by the owners to contract with themselves in a different capacity. Such an agreement is contrary to the fundamental principle of contract law that one cannot contract with oneself.
At common law, a partnership, unlike a corporation, is not a legal person separate from its partners. Under this aggregate approach, a partnership has no legal existence apart from the individuals running the business. A partnership is deemed to be merely the alter ego of the partners as individuals. A partnership is not a separate legal entity, for most purposes. State of Alaska v. ABC Towing, 954 P.2d 575, 577 (Alaska 1998). This aggregate approach is embodied in the Alaska Uniform Partnership Act.[19] By contrast, a corporation is a legal person with an existence separate from its shareholders. Unlike partners, the shareholders of a corporation are never considered as parties to a contract executed by a corporation. REUSCHLEIN & GREGORY, THE LAW OF AGENCY AND PARTNERSHIP, § 182 (2d ed. 1990).

It is true that today half the states, including Alaska, have adopted an entity approach to partnerships, as embodied in the Revised Uniform Partnership Act (RUPA). Under the entity approach, a partnership is considered an entity distinct from its partners.[20] With limited exceptions, the RUPA does not apply to Alaska partnerships formed before January 1, 2001.[21] Thus, the Alaska RUPA does not apply to the three-member Prowler Partnership (consisting of Mssrs. Winther, Eaton, and Samuelson), which was formed in 1985.

Under the Alaska UPA's aggregate theory of partnerships, a lease between the Prowler Partnership and the co-owners of the vessel would have the same parties on both sides of the transaction. The co-owners would be attempting to contract with themselves. Thus, as a matter of law, there could not have been, and I conclude that there was not, a valid vessel lease between the owners of the F/V PROWLER and the Prowler Partnership during the period April 5, 1985 through June 9, 1989.

B. Analysis of conclusive evidence of a lease

Although I have concluded that, as a matter of law, a valid vessel lease could not have been formed in this instance, I will nonetheless analyze the law and evidence relating to the Appellants' argument that the written "F/V PROWLER Co-Ownership Agreement" [Exhibit 4.5] constitutes conclusive evidence of a vessel lease.

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[19]Alaska Stat. §§ 32.05.010-32.05.995. The recent legislative repeal of the Alaska UPA does not take effect until January 1, 2004. 2000 Alaska Sess. Laws ch. 115, §§ 8, 13.

[20]RUPA, Section 201(a).

[21]The exceptions are a partnership that is continuing the business of a dissolved partnership and a partnership that elects to be covered by the RUPA. There is no evidence in the record that either exception applies to the three-member Prowler Partnership. 2000 Alaska Sess. Laws ch. 115, § 10(a).

Under IFQ regulations, 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, 1988-1990. 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. 50 C.F.R. § 679.40(a)(3)(iii).

Where, as in this case, the Appellants have submitted a written document said to be a vessel lease, the appropriate inquiry is whether that document on its face actually constitutes a vessel lease. In Treinen v. Scudder,[22] we stated that:

> The inquiry begins with an examination of the provisions in the document itself, rather than with other evidence concerning the intent or actual conduct of the parties. In the absence of evidence challenging the validity of the agreement, a document that contains provisions consistent with a vessel lease is conclusive evidence of the existence of a vessel lease between the parties, and the inquiry on that question need go no further.

This passage should not be read, however, to mean that a document containing some provisions *consistent* with a lease will necessarily *be* a lease. Certain provisions might be consistent with both a lease or some other type of contract or legal instrument. For example, a provision specifying who will captain the vessel could be part of a hired-skipper contract or management services contract, or it could be part of a lease that limits the lessee's use of the vessel as required by the owner's insurer. Therefore, we are really looking for provisions that are consistent *only* with a lease, such as a specified lease fee or rent for the use of the vessel, and provisions inconsistent with a lease, such as a provision transferring ownership of the vessel, or provisions naming the claimed lessee as an employee of the vessel owner and specifying a salary. We announced this distinction in Harper v. West,[23] but we may not have made it sufficiently clear that this represented a small yet significant refinement of the analysis we had developed through a series of lease cases. I now wish to make that clear.

In our previous decisions involving purported written leases we have looked for the presence of certain types of provisions as indicative of the existence of a vessel lease. We have considered whether the document uses lease or charter terminology, although terminology is not determinative. We have looked for provisions granting exclusive possession and control of the vessel to the lessee for a specified term; provisions for payment of a lease fee, rent, or charter hire for the use of the vessel, typically expressed as a percentage or share of the catch; and

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[22]Appeal No. 94-0104, October 11, 1995, at 3-4.

[23]Appeal No. 95-0105, July 17, 1997, at 24.

provisions imposing significant financial responsibility for the fishing venture on the lessee.[24] In addition, to constitute conclusive evidence of the existence of a vessel lease, the writing 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. 50 C.F.R. § 679.40(a)(3)(iii).

The "F/V PROWLER Co-Ownership Agreement" consists of 10 typewritten pages, signed by John R. Winther on May 16, 1985; Gainhart "Bud" Samuelson on April 28, 1985; and Douglas Bart Eaton on April 28, 1985. The three parties are referred to as "Co-Owners." I provide here a summary of all the provisions (20 sections) of the Agreement because it is the only contemporaneous document that spells out the terms of the arrangement under which the F/V PROWLER was operated.

Section 1 of the agreement recites that the parties own the F/V PROWLER as tenants-in-common, each owning an undivided interest in the vessel. The section provides that "The principal purpose of this Agreement is to define the respective rights, liabilities and obligations of the Co-Owners with respect to each Co-Owner's undivided interest in the Vessel." **Section 2** of the agreement describes the vessel, states the initial cost of the vessel, describes the amount and terms of a bank loan for purchase of the vessel, and specifies the initial capital contribution of each of the Co-Owners toward the purchase.

Section 3 of the agreement affirmatively states that "In no event shall the Vessel be considered to be owned *or operated* by a partnership composed of the parties and each party acknowledges that he is an independent contractor and not a partner or joint venturer with respect to the Vessel or to the management or operation thereof." The Appellants have stated, however, that they believed and acted as if their partnership did own the vessel, and they continue to assert now that the partnership operated the vessel during the period in question. [Appellants' Brief on Remand, at 6-8]

Further, the Appellants argue that the provision in section 3 stating that their partnership would not operate the vessel is "expressly superseded" by section 19. That section, titled "Buy and Sell Agreements," specifies how the co-owners may dispose of their interests in the vessel. Under subsection (d), titled "Cut and Choose Provisions," the agreement spells out procedures for a co-owner to buy out the interest of another co-owner. These include paragraphs (vii) and (viii), which recite that "The Co-Owners understand that separate from the Vessel each Co-Owner is an owner of an undivided interest in assets and liabilities of a joint venture which operates the Vessel." The Appellants argue that these references to "a joint venture which operates the Vessel" supersede the statements to the contrary in section 3 because of the final sentence of section 19, which states, in part, that "to the extent that any provision of this Agreement or of the

[24] *See, e.g.,* Wisner v. Schmitz, Appeal No. 95-0131, October 28, 1996; Ocean Crest Fisheries, Inc. v. McKee, Appeal No. 95-0101, October 13, 1995; Dittrick v. Weikal, Appeal No. 95-0109, October 20, 1995; Treinen v. Scudder, Appeal No. 95-0104, October 11, 1995; and C&M Partnership v. Ranweiller, Appeal No. 95-0064, March 21, 1996.

then existing law is inconsistent with the provisions of this Section 19, it is the stated intention of the Co-Owners that the provisions of this Section 19 shall control."

Section 4 of the agreement names the three Co-Owners and states that they each hold a 1/3 interest in the vessel. **Section 5** allocates the liabilities, debts, and profits or losses of the vessel among the three co-owners. **Section 6** provides the initial mailing address of the vessel in Petersburg, Alaska. **Section 7** sets the effective date of the agreement as March 18, 1985, but sets no specific ending date. Rather, the agreement was to continue "until the disposition of the Vessel and the distribution to the Co-Owners of the net proceeds thereof or until such other time as the parties hereto may agree in writing."

Section 8 of the agreement provides that decisions regarding the vessel are to be made by majority vote of the interests of the Co-Owners, with each exercising one vote for each full percentage of interest owned. The section also names John Winther as the initial "Managing Co-Owner," to serve until a successor is elected by majority vote.

Section 9 of the agreement makes each co-owner proportionately responsible for any additional capital contributions that the managing co-owner determines, in good faith, "are necessary to reasonably meet the requirements of the Vessel . . . considering the objectives and purposes of the Vessel." **Section 10** defines and spells out the consequences of default by a co-owner in paying capital contributions. **Section 11** provides that the co-owners waive their right to partition the vessel. **Section 12** places responsibility for maintaining the vessel's books and records with the managing co-owner, and allows the other co-owners the right to inspect and to order an audit. **Section 13** directs the managing co-owner to open and maintain bank accounts for the vessel.

Section 14 authorizes the managing co-owner to operate the vessel "in its ordinary course of business," and prohibits all co-owners, except by majority vote, from: borrowing or lending money on behalf of the vessel; entering into bonds or serving as surety or guarantor on behalf of the vessel; doing anything to subject the vessel to seizure, attachment, or execution; buying or leasing equipment over $5,000 on behalf of the vessel; entering into a lease with a term of more than one year or lease payments of more than $5,000 per year; assigning, mortgaging or encumbering an interest in the vessel; and engaging in any act or omission detrimental to the best interests of the vessel or that impairs the vessel from carrying on its ordinary business.

Section 15 of the agreement provides that the co-owners are liable in proportion to their interest in the vessel for all liabilities and expenses arising out of their ownership of the vessel, except for those due to unauthorized or tortious acts of any of the co-owners. Each co-owner is to indemnify, defend, and hold harmless the other co-owners for any third-party liability resulting from his own torts or unauthorized acts.

Section 16 of the agreement provides that any advance of money by a co-owner to the vessel in excess of the co-owner's required cash contribution does not increase that co-owner's interest in

the vessel, but is to be regarded as a loan made to the vessel. **Section 17** of the agreement prohibits the co-owners from receiving any fee, salary, or draw for services rendered as a co-owner, except for the normal and customary compensation for acting as the captain or crew member of the vessel. **Section 18** provides for co-owners' meetings upon 10 days' notice.

Section 19, in addition to the provisions already mentioned, defines the term "dispose" as including selling, assigning, transferring, pledging, encumbering, or conveying, unless caused by death, divorce, bankruptcy, court order, or by operation of law. This section also gives each co-owner a right of first refusal if any of the co-owners wishes to sell his interest in the vessel, and allows co-owners to transfer their interests to a newly organized solely owned corporation if the corporation assumes that co-owner's obligations and all the co-owner's obligations are fully and promptly paid.

Section 20 of the agreement, titled "Miscellaneous," contains only standard provisions and clauses, such as an integration clause, subject to the laws of the State of Alaska clause, time is of the essence clause, severability clause, written notice clause, etc.

The most significant feature of the Co-Ownership Agreement is that the Prowler Partnership is not a party to it. The only parties to the agreement are John Winther, Bart Eaton, and Gainhart Samuelson. This fact alone is sufficient to justify a conclusion that the agreement on its face does not constitute a vessel lease between the co-owners and the Prowler Partnership. But after reviewing all the provisions of the "Co-Ownership Agreement," I also find that:

- The agreement contains no lease terminology, such as "lessor," "lessee," "charterer," etc.
- The agreement contains no provision for the payment of a lease fee, rent, or charter hire for the use of the vessel.
- The agreement contains no provisions by which the co-owners of the vessel relinquish possession or control of the vessel to anyone other than themselves.
- The agreement contains no provisions imposing any financial obligation for the vessel on anyone other than the co-owners of the vessel.
- The agreement does not indicate the name of a lease holder, as required by 50 C.F.R. § 679.40(a)(3)(iii) to be conclusive evidence of a lease.
- The agreement lacks a definite term because its end date is open-ended. Therefore, the agreement does not indicate a period of time during which a lease was to be in effect, as required by 50 C.F.R. § 679.40(a)(3)(iii) to be conclusive evidence of a lease.
- The agreement contains no provisions consistent with a vessel lease, let alone consistent *only* with a lease.

The agreement has none of the earmarks of a vessel lease. Rather, it appears to be an agreement exclusively among the three individual co-owners concerning how they will own, manage, and ultimately dispose of their vessel. As the Appellants themselves state, "the Agreement looks much like a routine partnership agreement." [Appellants' Brief on Remand, at 9] Although

Section 19 of the agreement states that "each Co-Owner is an owner of an undivided interest in assets and liabilities of a joint venture which operates the Vessel," that statement does not make the Prowler Partnership a party to the agreement, nor does it turn the agreement into a lease. Nothing in the agreement distinguishes the joint venture *as a lessee*. Rather, the agreement leaves open the distinct possibility that the co-owners simply chose the joint venture or partnership form of business organization as a means to operate their vessel *as owners*.

I conclude that even if it were legally possible for a vessel lease to have existed between the co-owners of the F/V PROWLER and the Prowler Partnership, the written "Co-Ownership Agreement" does not constitute conclusive evidence of the existence of a vessel lease. Therefore, I conclude there was no written vessel lease between the co-owners and the partnership.

C. Analysis of other evidence of a vessel lease

If we determine that a written agreement does not constitute conclusive evidence of a lease, then we seek to determine from a review of all the evidence in the record, including the written agreement, whether the overall arrangement between the parties constituted a vessel lease.[25] Again, the question in this case is not merely whether the Prowler Partnership "bore the financial risks and burdens of the fishing operations" or was an entrepreneur. There must actually have been a vessel lease.

In determining whether the parties' arrangement constituted a vessel lease, we will analyze it using the various factors we have employed in other decisions, including most prominently, O'Rourke v. Riddle,[26] Kristovich v. Dell,[27] Smee v. Echo Belle, Inc.,[28] and Harper v. West.[29]

These factors include, but are not limited to:

(1) how the parties characterized their business arrangement at the relevant times;

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[25]*See* Thomassen v. Mechanics Service, Inc., Appeal No. 95-0088, July 29, 1998, at 9. This part of our analysis stems from federal regulation 50 C.F.R. § 679.40(a)(3)(iii), which provides that in the absence of conclusive evidence of a lease, "Other evidence, which may not be conclusive, but may tend to support the existence of a vessel lease, may also be submitted."

[26]Appeal No. 95-0018, May 18, 1995, *aff'd,* May 23, 1995.

[27]Appeal No. 95-0020, March 20, 1996, at 10, *aff'd,* March 27, 1996.

[28]Appeal No. 95-0076, August 1, 1996, at 7-8, *aff'd,* August 20, 1996, *aff'd, sub nom.* Smee v. N.M.F.S., C96-1512WD (W.D. Wash., June 9, 1997).

[29]Appeal No. 95-0105, July 17, 1997, at 32-33.

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

(3) whether the claimed lessee directed fishing operations of the vessel;

(4) whether the claimed lessee had the right to hire, fire, and pay the crew;

(5) whether the claimed lessee was responsible for the operating expenses of the vessel;

(6) 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; and

(7) whether the claimed lease had a set or guaranteed term.

In Smee[30] we also stated:

> These were intentionally called *factors*, rather than *elements*, because they are meant to be used as analytical tools or guideposts to help the Appeals Officer decide whether there was a vessel lease. Because neither the IFQ regulations nor the regulatory history provided a definition of *vessel lease*, and because of the great variety of business arrangements between owners and operators of fishing vessels, we have found it necessary to apply a flexible case-by-case analysis in these types of appeals. In each case, we are trying to determine whether the party who claims to have held a vessel lease had sufficient control of the fishing operations and assumed sufficient entrepreneurial risk from the fishing operations to qualify as a lessee for purposes of the IFQ program. [Emphasis in original]

I will now analyze the "other evidence" in the record to determine whether a vessel lease was actually entered into between the co-owners of the F/V PROWLER and the Prowler Partnership, assuming *arguendo* that a legally valid lease could have been formed in 1985.

1. How the parties characterized their business arrangement at the relevant times

The Appellants have presented no evidence that Mr. Winther, Mr. Eaton, and Mr. Samuelson, either in their capacity as co-owners or as partners, ever discussed among themselves or with others that the Prowler Partnership held a lease of the F/V PROWLER. Appellants state that they "routinely referred to themselves as 'partners'." [Appellants' Brief on Remand, at 6] Nowhere do they assert that they ever presented themselves or referred to themselves as "lessees." As I have already stated in this Decision, the "Co-Ownership Agreement" makes no reference to a lease, nor does it contain any lease terminology or lease provisions.

[30]Appeal No. 95-0076, August 1, 1996, at 6.

Appellants assert in their brief, as they have from the beginning of their appeal, that they believed and acted as if the Prowler Partnership owned the vessel, and operated it as the owner. [Appellants' Brief on Remand, at 9] There would have been no business reason or legal need to create a lease. As owners, with the right to operate the vessel as they pleased, it would have been incongruous and superfluous for them to lease their own vessel from themselves. Under these circumstances, it is unlikely that the partners even contemplated entering into a vessel lease. And if the co-owners *had* wanted to enter into a lease with their joint venture, with whom would they have negotiated the terms?

I find no evidence in the record that Mssrs. Winther, Eaton, or Samuelson characterized their business arrangement as a lease before or during the period April 5, 1985 through June 9, 1989. The record contains no evidence that anyone believed, discussed, or represented that the Prowler Partnership leased the F/V PROWLER until that claim was made for the first time in the Appellants' Motion for Reconsideration of our first Decision in this appeal.[31] The evidence under factor 1 weighs against the existence of a vessel lease.

2. Whether and to what extent the claimed lessee had possession and command of the vessel and control of navigation of the vessel AND

3. Whether the claimed lessee directed fishing operations of the vessel

In their brief, the Appellants argue under both factor 2 and factor 3 that the Partnership exercised full operational and management control over all fishing and business activities of the F/V PROWLER, and that the partners jointly, or John Winther as the managing partner, decided when and where to fish. The Appellants also state that Mr. Winther directed the vessel, arranged for vessel maintenance and repairs, directed offloading and transshipment of fish, and entered into contracts with brokers to sell the vessel's catch. In support of arguments under both factors the Appellants rely on the same documents: affidavits of Mr. Winther and a deposition of Mr. Samuelson. [Exhibits 8, 8.5, and 18]

The essence of the Appellants' argument here is that because most of the decisions regarding the vessel were made jointly by the three partners, or by Mr. Winther in his capacity as managing partner, this tends to show that the partnership leased the vessel. The flaw in this argument is that mere joint operation of a vessel does not mean there was a lease. In this instance, the partners or joint venturers were the co-owners of the vessel. That they operated their vessel through a joint venture or partnership in accordance with their "Co-Ownership Agreement" does not tend to prove that the partners or the partnership leased the vessel. They would not have needed a vessel lease to use the vessel in their fishing venture.

Because the co-owners and the partners were the same people, it is difficult, if not impossible, to

[31]The lease claim first appeared in the Appellants' Points and Authorities in Support of its Motion for Reconsideration, at pp. 2-7, dated and filed on December 19, 1995.

find that the partners had possession, command, and control of the vessel, and directed operations, and that the co-owners relinquished possession, command, or control of the vessel. Mr. Samuelson was skipper of the vessel for a portion of the time in question.[32] During that time he was both partner and co-owner. His acknowledgment that he operated the vessel not only for his own benefit, but also for the benefit of Mr. Winther and Mr. Eaton,[33] is consistent with being an owner and with being a partner.[34] But the question is not whether the partners had possession, command, and control of the vessel, and directed operations. The question is whether they did so *as lessees*. The evidence in the record relating to these two factors does not tend to prove that a vessel lease existed. To the contrary, one would not expect any of the co-owners to be aboard the vessel, especially as skipper, or to be in possession or control of the vessel, or directing operations if, in fact, they had leased the vessel out to another party. Therefore, I find that the preponderance of the evidence relating to factors 2 and 3 weighs against the conclusion that a vessel lease existed.

4. Whether the claimed lessee had the right to hire, fire, and pay the crew

The Appellants assert that the partnership provided, maintained and executed (or authorized the master to execute) all crew contracts, paid all crew settlements, and issued all 1099s to the crew of the F/V PROWLER. They assert that Mr. Winther, as managing partner, was responsible for hiring and firing the crew, including the master. In support of these assertions, they provide affidavits from Mr. Winther [Exhibit 4.5] and Ms. Sammy Parker, who handled the partnership's books from 1985 to 1991 [Exhibits 56 and 56.5].

The Appellants also provided a number of crew contracts for the F/V PROWLER [Exhibit 54], but none of these were from the period of time in question, 1985 - 1989. The parties to the crew contracts were "the owners and/or operators of the F/V PROWLER" and individual crew members. The contracts do not mention the Prowler Partnership or any of the partners or co-owners, nor are any of them signed by Mr. Winther or any of the other partners or co-owners.

A 1988 settlement sheet submitted with Ms. Parker's second affidavit [Exhibit 56.5] shows the shares paid to six crew members, but lists the vessel owner as "Samuelson, Winther, Eaton" rather than the Prowler Partnership. The partnership is not mentioned on the settlement sheet.

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[32]"I personally operated the vessel while it caught a good portion of the black cod that are at issue here." [Samuelson Affidavit, August 8, 1995, at 2 (Exhibit 7); *See also* Samuelson Deposition, at 18, 66, 92 (Exhibit B)]

[33]Samuelson Deposition, at 39 [Exhibit 18 and Exhibit B]

[34]"When I was running the vessel I operated it as an owner." [Samuelson Deposition, at 92 (Exhibit B)] Likewise, Mr. Winther's statement that, since 1985, the vessel has never been used by any of the co-owners individually, is not inconsistent with the co-owners operating their own vessel jointly through the joint venture or partnership, and does not tend to prove that the partners were lessees. [Winther Fourth Affidavit, at 2 (Exhibit 4.5)]

Exhibit 56.5 also includes a copy of a canceled check to Jim Freitas, dated June 14, 1988, which matches the amount listed on the settlement sheet. The check is written from the "F/V PROWLER Settlement Account," rather than by the "Prowler Partnership." A signature card for the account [Exhibit 41] shows that the account owners were Bart Eaton, Bud Samuelson, and Jerry Kennedy, and that the ownership of the account is by a partnership. The signature card is not dated and the word "Superseded" is hand-written over it. Another card photocopied on the same page is an "Agreement with First Bank" signed by John Winther and dated February 5, 1986.

The record also includes a photocopy of a Form 1099-Misc for 1986, paid by "F/V Prowler" to Gainhart Samuelson. [Exhibit 61] Although this document is not mentioned in the Appellants' brief in connection with factor 4, it may be evidence of compensation to Mr. Samuelson for his services as skipper of the vessel in 1986.

The affidavits of Mr. Winther and Ms. Parker, with regard to hiring, firing and paying crew members, support each other and they are not directly contradicted by any other evidence in the record. The crew contracts, settlement sheet and check, and other evidence relating to factor 4 is equivocal. The preponderance of the evidence, however, tends to support a finding that the Prowler Partnership was responsible for hiring, firing, and paying the crew of the F/V PROWLER during the period of time in question.

Nonetheless, because the partners and the co-owners were the same people, the fact that the partnership was responsible for crew matters does not demonstrate that the co-owners had relinquished responsibility for crew matters. More to the point, the evidence under this factor does not show that Mssrs. Winther, Eaton, and Samuelson, in their role as co-owners, acted as lessors, and that Mssrs. Winther, Eaton, and Samuelson, in their role as partners, acted as lessees. The partners and the partnership did not need to have a vessel lease in order to have or take responsibility for hiring, firing, and paying the crew. Therefore, I find that the evidence under factor 4 does not support the existence of a vessel lease.

5. Whether the claimed lessee was responsible for the operating expenses of the vessel AND

6. 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

With regard to factor 5, we stated in Smee:

> "Operating expenses of the vessel" are those expenses that are attributable to the fishing operations in question. These would include trip expenses, as well as other expenses necessitated by the fishing operations. [At 12]

* * * *

> As with other factors, a flexible approach is needed when considering responsibility for operational expenses. Because of the great variety in commercial fishing business arrangements, and in the way expenses and risks of fishing operations are allocated between the parties, no single expense or category of expenses is likely to determine whether the parties had a lease agreement or not. Whether or not they represent a capital investment in the vessel, operating expenses should be considered only to the extent that they shed light on the question of whether a vessel lease existed. The question is not which party invested more money in the fishing operations; rather, it is whether the payments, responsibilities, risks, and method of operation -- as evidenced by the handling of expenses -- were more consistent with a lease than some other arrangement, and whether they, therefore, tend to show that there was a lease. [At 13-14]

The Appellants assert in their brief that "all of the expenses of the F/V PROWLER (to the extent not shared by the crew) were paid by Prowler Partnership, not the co-owners. . . . Prowler Partnership bore those obligations in the event no fish were caught or if the vessel sank." [Appellants' Brief on Remand, at 12] The Appellants also state that the partnership treated the fishing operations and business as its own. [Appellants' Brief on Remand, at 12] In support of these assertions the Appellants rely on affidavits of Mr. Winther [Exhibits 8, 8.5], affidavits of Ms. Sammy Parker with attachments [Exhibits 56, 56.5], and partnership tax returns from 1985 - 1991, partnership distributions for 1988, hull and P&I insurance records showing the insured as Prowler Partnership, a security agreement, and bank records for the partnership's settlement account. [Exhibits 23-48]

Collectively this evidence shows that Mssrs. Winther, Eaton, and Samuelson ran their business as a partnership, maintained their business proceeds in a partnership account, paid operating expenses from a partnership account, and paid net profits to themselves as partnership distributions. These facts, however, do not tend to show that the partnership held a vessel lease, for the following reasons:

First, it is possible to run a fishing business as a partnership without leasing the vessel if, as here, all the partners are also individual co-owners of the vessel.

Second, although all the operating expenses were paid from the partnership's bank account, the partners (and therefore, the co-owners) remained personally liable for the debts and obligations of the partnership.[35] If factor 5 is to serve as a meaningful test of whether a party is a vessel

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[35]Section 15 of the "Co-Ownership Agreement" provides that the co-owners are liable in proportion to their interest in the vessel for all liabilities and expenses arising out of their ownership of the vessel. As partners, the co-owners also are jointly responsible for the partnership's debts and obligations. Uniform Partnership Act § 15. [Alaska Stat. § 32.05.100(a)] If the RUPA had been in effect in the 1980's, the co-owners would have been *jointly and severally* liable for all partnership debts and obligations, though only after the judgment creditor had exhausted the partnership's assets. RUPA, §§

lessee, it must be because that party has substantially relieved the owner from ultimate responsibility for operating expenses of the vessel. That is not the case here.

Third, because the partners and co-owners are the same people, it cannot be said that the partners were the entrepreneurs who bore the financial risks and burdens of the fishing operations, *but that the co-owners were not.*

In summary, there is nothing about operating the business and the vessel as a partnership that shifted the ultimate financial liability and responsibility away from the co-owners, or made them lessors and the partnership or partners a lessee. I find that the evidence relating to factors 5 and 6 does not support the existence of a vessel lease during the period of time in question.

7. Whether the claimed lease had a set or guaranteed term

The term of the agreement under which the F/V PROWLER was operated is governed by section 7 of the Co-Ownership Agreement. The Appellants assert that the partnership retained exclusive and unfettered control of the vessel as long as the Co-Ownership Agreement remained in effect, and that the co-owners could not terminate the partnership's right to operate the vessel unless the co-owners sold the vessel in its entirety and the net proceeds were distributed to each of the owners. [Appellants' Brief on Remand, at 14]

Section 7 of the Co-Ownership Agreement provides, however, that the agreement "shall continue until the disposition of the Vessel and the distribution to the Co-Owners of the net proceeds thereof *or until such other time as the parties hereto may agree in writing*." Thus, in fact, the co-owners could terminate their agreement at any time as long as they did so in writing. The Appellants state that because the co-owners and partners were the same, the co-owners could not sell the vessel without the partners' approval and that, therefore, the Prowler Partnership absolutely controlled the disposition of the vessel. [Appellants' Brief on Remand, at 14] They are suggesting that Mssrs. Winther, Eaton, and Samuelson could be of two separate minds as co-owners and as partners, as if one part of their collective minds could oppose and control the other part. This is absurd reasoning. Furthermore, the Co-Ownership Agreement, § 19, which is cited by the Appellants, clearly spells out the circumstances and procedures under which the co-owners, or any of them, (not the partnership or the partners) can dispose of their interests in the vessel.

Although the term in the agreement specifies a beginning date of March 18, 1985, it provides no definite ending date. This is not a set or guaranteed term. Therefore, I find that factor 7 weighs against the conclusion that a vessel lease existed during the period of time in question.

8. Whether the claimed lessee made a set payment or lease fee

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306(a), 307(d) [Alaska Stat. §§ 32.06.306(a), 32.06.307(d)]

The seven factors we have used in the analysis of lease claims are not exclusive factors. Appeals Officers have discretion to consider other factors that, in their judgment, help in determining whether a lease existed between the parties.[36] The Appellants have suggested an eighth factor for this case: the existence of a lease fee. A lease fee is an operating expense that is normally included under factor 5 of our analysis, but because the Appellants focus separately on the lease fee question, I will address it as an eighth factor.

The Appellants assert that vessel mortgage payments made from the partnership's settlement account constitute "set or guaranteed payment [sic] paid in consideration for the conveyance of control, possession and use" of the vessel by the partnership. The Appellants argue that these payments were a benefit to the co-owners because the vessel mortgage was *"arguendo"* an obligation of the individual "co-owners," and therefore should be considered to be a lease fee. [Appellants' Brief on Remand at 14] As evidence of the payments, the Appellants submitted a copy of one canceled check made out to First Bank (of Petersburg) in the amount of $24,711.75 and dated May 18, 1988. [Exhibit 56.5]

The "Co-Ownership Agreement" does not provide for a lease fee or any compensation to the co-owners for the use of their vessel by the Prowler Partnership. The Appellants have not produced any canceled checks or other evidence of lease payments made to the co-owners by the partnership. The Appellants state that all surplus profits were paid to Mssrs. Winther, Eaton, and Samuelson as partnership distributions. [Appellants' Brief on Remand at 13] Bookkeeper Sammy Parker stated that "No net profits have ever been distributed to the individual co-owners." [Exhibit 65.5]

The Appellants' argument that the partnership conveyed a benefit to the co-owners by making vessel mortgage payments, and controlling, maintaining, and improving the vessel, is based on the fiction that the partners are different people than the co-owners. Any benefit to the co-owners also benefitted the partners. Paying the vessel mortgage from a partnership account did not relieve Mssrs. Winther, Eaton, and Samuelson of any obligations or liabilities under the mortgage.

Rather than establishing the existence of a lease, paying the mortgage and other vessel-related expenses through the partnership account more likely reflected the co-owners' belief that the partnership owned the vessel. Absent any evidence that Mssrs. Winther, Eaton, and Samuelson as co-owners agreed that mortgage payments by the partnership would be made *specifically in consideration for the use of their vessel*, I will not infer that the payments constituted a lease fee. I find it more plausible that paying the mortgage from the partnership account simply reflected the partners' belief that the partnership owned the vessel. Therefore, I find that the evidence under factor 8 weighs against the existence of a vessel lease.

Summary of analysis of other evidence of a vessel lease

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[36] Smee v. Echo Belle, Inc., Appeal No. 95-0076, August 1, 1996, at 6.

The regulatory history of the IFQ program contains no suggestion that the North Pacific Fishery Management Council or NMFS ever contemplated that vessel owners would, in effect, "change hats" and operate their own vessels as lessees. The creators of the IFQ program would have foreseen no need to decide whether vessel owners should take their QS as lessees. Qualified vessel owners were intended to receive initial issuances of QS, except in those cases where their vessels were leased to *others*.

Likewise, our lease factors are based on an underlying assumption that vessel owners and lessees are different people, competing for the same QS. The factors were not designed to determine whether a vessel owner qualifies for QS as an owner or as a lessee. Some of the factors were awkward to apply and particularly unhelpful in this case because the Appellants have made it clear they do not sincerely believe the parties, in fact, entered into a lease. Rather, they argue that past events should be construed *as if* there had been a lease, and the partnership should be characterized as a lessee in order to achieve a reallocation of QS.

Despite the inadequacies of employing a lease factor analysis under these circumstances, I have done the analysis and made the following findings:

- The evidence under factors 1, 2 and 3 weighs against the existence of a vessel lease.
- The evidence under factors 4, 5 and 6 does not support the existence of a vessel lease.
- The evidence under factors 7 and 8 weighs against the existence of a vessel lease.

I find that the preponderance of the evidence under the "other evidence" analysis tends to show that there was no vessel lease in this case. Therefore, I conclude that the Prowler Partnership did not hold an oral lease of the F/V PROWLER during the period April 5, 1985 through June 9, 1989.

D. Analysis of evidence of a demise or bareboat charter

We have stated that "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."[37] Therefore, it is not necessary for a party to allege that a claimed vessel lease constitutes a demise or bareboat charter. On the other hand, we have also stated that "a bareboat charter would definitely constitute a vessel lease."[38] That is because the demise or bareboat charter is essentially the lease of a ship.[39] So, it is permissible for a party to argue and seek to prove that a bareboat charter existed. Where, as here, a party asserts the existence of a demise or bareboat charter as a separate argument, the Appeals Officer may examine separately whether such a charter, written

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[37] Seater v. Seater & Seater, Appeal Nos. 94-0010, 95-0006 (Consolidated), June 6, 1995.

[38] O'Rourke v. Riddle, Appeal No. 95-0018, May 11, 1995.

[39] 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 11-3 (2d ed. 1994).

or oral, existed. I do so notwithstanding my conclusions, so far, that a vessel lease did not exist in this case.[40]

In O'Rourke[41] we stated:

> 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 'completely and exclusively relinquished possession, command and navigation to the demisee [charterer].'"
>
> 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. [citations omitted]

While the "pivotal issue" in determining whether a bareboat charter exists "is whether the vessel owner has completely and exclusively relinquished possession, command, and navigation of the vessel,"[42] that factor alone is insufficient to establish the existence of a bareboat charter. A bareboat charter is a specialized form of contract and, as such, it is subject to all the rules and requirements of contract law.[43] Thus, to qualify as a bareboat charter, an agreement must have, among other things, two or more distinct parties, sufficient consideration, and mutuality of

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[40]In doing so, I am following the example of the U.S. District Court in West v. Harper, et al., Order from Chambers, Case No. A97-358 CV (JWS), at 20-21 (D. Alaska 1999).

[41]O'Rourke v. Riddle, Appeal No. 95-0018, May 11, 1995, at 11.

[42]Smee, at 23.

[43]SCHOENBAUM, *supra,* note 39, § 11-1; Great Circle Lines Ltd. v. Matheson & Co., Ltd., 681 F.2d 121 (2d Cir. 1982).

obligation.[44]

The Appellants argue that the Prowler Partnership's arrangement with the co-owners constituted a demise or bareboat charter under maritime law. They assert that the partnership held exclusive and unfettered possession, command and control of the navigation of the F/V PROWLER. [Appellants' Brief on Remand at 15-17]

It is difficult, if not impossible, to find that the co-owners completely and exclusively relinquished possession, command, or control of the vessel where the co-owners and partners were the same people, where one of the co-owners (Mr. Samuelson) was skipper of the vessel, and another co-owner (Mr. Winther) made most of the business decisions regarding the vessel. In addition, the record contains no evidence that the co-owners agreed that the partnership would pay them a "charter hire" (lease fee) – one of the principal interests that an owner retains in a bareboat charter.

Under maritime case law, the existence of a demise or bareboat charter relieves the vessel owner of liability for injury to a third party, and imposes liability on the charterer as owner *pro hac vice*.[45] The demise charterer, not the vessel owner, is also personally responsible for the fault or neglect of the crew, and is potentially liable for collision, pollution damages, and for loss or damage to the chartered vessel.[46] In this case, since the partners and the co-owners are the same people, entering into a bareboat charter with the partnership would not, in fact, relieve the co-owners of personal liability. Thus, under the facts of this case, an essential feature of a bareboat charter is lacking.

The alleged bareboat charter in this case lacked two distinct parties. It also lacked, among other things, mutuality of obligation: if the "charterers" chose not to abide by the terms of the alleged charter, the co-owners would have no legal remedy. Therefore, the alleged bareboat charter was not legally valid or enforceable.

For all the above reasons – failure of the co-owners to relinquish possession and control of the vessel, absence of a lease fee or charter hire, failure to relieve the co-owners of personal liability, a lack of two distinct parties, and no mutuality of obligation – I conclude that the Prowler Partnership did not hold a demise or bareboat charter of the F/V PROWLER during the period of time in question.

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[44]The Gleaner, 240 F. 163 (N.D. Calif. 1917).

[45]Lopez v. Atlanta-Schiffahrts-G.M.B.H., 259 F. Supp. 949, 951 (D.P.R. 1966).

[46]SCHOENBAUM, *supra,* note 39, §§ 11-1, 11-3.

II. Was the Prowler Partnership dissolved, for purposes of 50 C.F.R. § 679.40(a)(2)(iii), when Mr. Samuelson sold his interest in the F/V PROWLER to Mr. Winther and Mr. Eaton?

Although I have determined that the Appellants did not lease the F/V PROWLER, I will nonetheless decide whether the Appellants would be entitled to all the QS they seek if they had leased (or owned) the F/V PROWLER. The answer depends on whether the Prowler Partnership was dissolved when Mr. Samuelson sold his interest in the F/V PROWLER to Mr. Winther and Mr. Eaton. Under 50 C.F.R. § 679.40(a)(2)(iii), if a partnership was dissolved by the time of application, then the QS goes to the former partners in proportion to their interests in the dissolved partnership. In this case, if the Prowler Partnership was dissolved, then each of the three former partners would receive 1/3 of the QS generated by the F/V PROWLER – the same distribution they have already received on the basis of their ownership of the vessel.

The Appellants argue that the "Prowler Partnership Exists." [Appellants' Brief on Remand at 4] That is not the question. No one doubts that a partnership of Mr. Winther and Mr. Eaton called the Prowler Partnership exists. The question is whether, for the purpose of initial issuance of QS, that is a different partnership than the Prowler Partnership that consisted of Mssrs. Winther, Eaton, and Samuelson from 1985 - 1989.

The Co-Ownership Agreement [Exhibit 4.5] provided that when a co-owner sold his interest in the vessel, he would also withdraw from the joint venture that operated the vessel. [Section 19(d)(vii)] The value of the selling co-owner's interest in the assets and liabilities of the joint venture would be determined according to certain procedures, and subsequently would be paid in cash to the selling co-owner. [Section 19(d)(viii)] In an Agreement for Sale of Ownership Interest ("Sales Agreement") dated June 9, 1989, Mr. Samuelson sold his interest in the F/V PROWLER to Mr. Winther and Mr. Eaton. [Exhibit 70] Section 16 of the Sales Agreement specifically provided for the termination of the "joint venture partnership that operates the F/V PROWLER" on June 30, 1989, and laid out steps for the termination. [Exhibit 70 at 7-8]

Mr. Samuelson argued before RAM that Section 16 of the Sales Agreement had the legal effect of dissolving the partnership, and RAM agreed with this position. [IAD at 5, 12] On appeal, Mr. Winther states that after the purchase of Mr. Samuelson's interest, the Prowler Partnership continued to operate as before. [Third Winther Affidavit at 2 (Exhibit 8)] The Appellants argue that the partnership did not dissolve upon the buyout of Mr. Samuelson's interest. [Appellants' Brief on Remand at 17]

RAM has consistently interpreted 50 C.F.R. § 679.40(a)(2)(iii) to mean that *any* change of partners dissolves the partnership for the purpose of initial issuance of quota shares. This interpretation is based on Section 29 of the Uniform Partnership Act (UPA), which provides: "The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business."

Section 29 of the UPA is in effect in Alaska.[47] The National Conference of Commissioners on Uniform State Laws, which drafted the UPA, has stated that "Under UPA Section 29, a partnership is dissolved every time a partner leaves. That reflects the aggregate nature of the partnership under the UPA. Even if the business of the partnership is continued by some of the partners, it is technically a new partnership."[48] This Office has affirmed RAM's interpretation, and that is the agency's official view.[49]

The Appellants correctly point out that under the Revised Uniform Partnership Act (RUPA), the withdrawal of a partner does not necessarily cause the dissolution of the partnership.[50] Although the Co-Ownership Agreement and Sales Agreement, by their express terms, were governed by Alaska law, the RUPA does not apply to those agreements.[51]

RAM did review Alaska partnership law and the Uniform Partnership Act in 1994,[52] when it was deciding how to interpret 50 C.F.R. § 679.40(a)(2)(iii). RAM's interpretation is consistent with the Alaska UPA, but NMFS is not bound by Alaska law on this issue. As we have stated, "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."[53] We have also stated that NMFS is not bound by state law when defining and interpreting terms in the IFQ regulations.[54] The Alaska Supreme Court has recognized that IFQ allocations and the vesting of IFQ rights are solely within the jurisdiction of the federal government, and are not determined by state partnership law.[55]

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[47]Alaska Stat. § 32.05.240. The Alaska Uniform Partnership Act has been repealed, but the repeal does not take effect until January 1, 2004. 2000 Alaska Sess. Laws ch. 115, §§ 8, 13.

[48]Comment 1 to Section 801, Revised Uniform Partnership Act (Uniform Partnership Act of 1997).

[49]Silver Ice Fisheries Partnership v. Arctic Select Seafoods, Inc., Appeal No. 95-0114, October 30, 1996; Nettie H, Inc. v. Sugiura and Melling, Appeal No. 96-0075, January 16, 1997, at 4.

[50]*See* RUPA §§ 601, 701, 801 and associated comments at. [http://www.law.upenn.edu/bll/ulc/fnact99/1990s/upa97fa.htm]

[51]*See supra,* note 21 and corresponding text.

[52]Phillip Smith Memorandum, June 7, 1994. [Exhibit 3] Jonathan Pollard Memorandum, May 20, 1994. [Exhibit 4]

[53]Cadden v. Levenhagen and Pugh, Appeal No. 95-0013, January 17, 1996, at 6.

[54]Silver Ice Fisheries, at 3.

[55]Winther, et al.. v. Samuelson, 10 P.3d 1167, 1170-1171 (Alaska 2000).

NMFS must have the administrative discretion to choose a reasonable definition of the term "dissolved partnership" that can be applied uniformly to all applicants, regardless of the state in which the partnership was formed. To require NMFS to define "dissolved partnership" differently for every state and every partnership agreement would make administration of the IFQ program unduly burdensome, if not unmanageable.

The IAD in this case stated that:

> it is clear that the parties desired their prior association to end as of [June 9, 1989]. The apparent continuation of the operational particulars of the Partnership, and its continued use of the same IRS Identifying Number, indicate that the remaining partners did not terminate the business activity in which the Partnership was engaged. By the terms of their agreement with Mr. Samuelson, however, the remaining partners made it clear that their prior association was terminated. [IAD at 12]

RAM properly applied its interpretation of 50 C.F.R. § 679.40(a)(2)(iii) when it determined that the Prowler Partnership was dissolved as a result of the Sales Agreement.

As we have stated in another case:

> [RAM's] interpretation conforms with the Uniform Partnership Act, which recognizes that a change in partners dissolves a partnership, and creates a new partnership. . . . [RAM's] conclusion is reasonably related to an intended purpose of the IFQ program, which is to extend the initial benefits of the program to those who participated in the halibut or sablefish fishery during the QS qualifying years.[56]

I find this reasoning to be equally applicable in the present case. Mr. Samuelson participated in the sablefish fishery during the QS qualifying years. If the partnership had owned or leased the F/V PROWLER and the partnership had not been deemed dissolved, Mr. Samuelson would have been excluded from the benefits of the IFQ program, in spite of his interest in, and operation of, a vessel that made legal landings during the qualifying period.

The North Pacific Fishery Management Council's statement of intent

The Appellants argue that this Office must follow the "directive" of the North Pacific Fishery Management Council ("Council") [Exhibit E][57] and reverse both our decisional precedents and

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[56] Silver Ice Fisheries, at 4.

[57] Appellants referenced their Exhibit 66, which they identify as a "Transcript of October 11, 1998, NPFMC Meeting." I substitute Exhibit E, a transcript that this Office had prepared by a professional court reporting service.

the agency's long-established, consistently applied interpretation of its own regulation, 50 C.F.R. § 679.40(a)(2)(iii). Neither the Constitution nor general administrative law prohibits an agency from deviating from prior precedent, but an agency must adequately explain and justify a failure to follow prior policy.[58] Therefore, I will now analyze whether there is any justification for reversing our precedent regarding the interpretation of what constitutes the dissolution of a partnership for purposes of the initial issuance of QS.

On October 11, 1998, Mr. Winther and his attorney, Mr. Wickstrom, testified before the Council in Seattle and asked the Council to issue a statement retroactively clarifying its intent regarding the meaning of the term "dissolved partnership" for purposes of initial issuance of QS. In particular, Mr. Winther asked the Council to state that it had not intended "freezer vessel partnerships" to be considered dissolved when "remaining partners buy out a partner and continue the partnership business in the partnership name." [Exhibit E, at 1] In support of his position, Mr. Winther submitted to the Council six identically worded affidavits from one current and five former Council members. [Exhibit 65]

After discussing the matters covered by Mr. Winther's and Mr. Wickstrom's testimony, the Council approved the following motion: [59]

> [A]s an expression of the intent of Council, that the Council understands that at the time the IFQ program was written, that "a change in the corporation or partnership" was defined to include the addition of any new shareholder and that relative to the catcher boat class, the Council was anxious to see, over time, that fleet revert to an owner-operated fleet, but with regard to the freezer vessel class, since the regs are silent on the definition of "dissolution," that it would be our understanding that in the event of existing partners buying out another existing partner, that that would not result in dissolution of the partnership. [Exhibit E at 22]

The Appellants assert that the Council's approval of the motion constitutes an express directive to NMFS to change its interpretation of 50 C.F.R. § 679.40(a)(2)(iii), and requires this Office to conclude that a freezer vessel partnership does not dissolve, for purposes of initial issuance of QS, upon the buyout of a partner. Appellants further assert that a failure by NMFS and this Office to do so would violate the agency's statutory authority. [Appellants' Brief on Remand at 19]

Legal effect of the Council's statement of intent

The interpretation of 50 C.F.R. § 679.40(a)(2)(iii) that the Appellants want this Office to adopt is

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[58] 2-3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE §§ 5.67, 12.31 (2d ed. 1997).

[59] North Pacific Fishery Management Council *Newsletter*, October 19, 1998, at 6.

that a "freezer vessel partnership"[60] does not dissolve when it buys out one of the partners and continues the business using the same business name. As the Appellants have correctly noted, the term "dissolved partnership" is not defined in the IFQ regulations. NMFS has consistently interpreted the term "dissolved partnership" to mean that *any* change of partners dissolves the partnership. For purposes of initial issuance of QS under 50 C.F.R. § 679.40(a)(2)(iii), NMFS does not distinguish between "freezer vessel partnerships" and other partnerships, nor do we consider the reasons why there was a change in partners. Our interpretation applies equally to all partnerships.

Neither the IFQ regulations nor the regulatory history of the IFQ program support the different treatment the Appellants want for freezer vessel partnerships that have bought out one of their partners and continued operating under the same name, i.e., the Prowler Partnership. The only relevant documents the Appellants cite are the Council's 1998 statement of intent and the affidavits of Council members. The problem is that these documents do not justify or require NMFS to adopt the interpretation of "dissolved partnership" desired by the Appellants. Such a new reading of an existing regulation would require a substantive rule change (a "legislative" rule), which in turn requires notice-and-comment rulemaking in accordance with the federal Administrative Procedure Act (APA).[61] A mere statement of intent by the Council is not a legally authorized substitute for APA rulemaking.[62] There has been no such rulemaking in this instance, and for this Office to read the regulations as if there had been would be a violation of the APA.[63]

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[60]The term "freezer vessel partnership" does not appear in the IFQ regulations, and its meaning is not precisely clear. The Appellants state that "the Council expected freezer vessels to be owned by corporations and partnerships." [Appellants' Brief on Remand at 25] They also quote from the Supplementary Information, or Preamble, of the IFQ Proposed Rule: "The Council reasoned that most vessels in the freezer vessel fleet are corporate operations, unlike the more common owner/operator vessels in the catcher vessel fleet." 57 Fed. Reg. 57,133 (December 3, 1992). The implication is that a "freezer vessel partnership" is a partnership that owns a freezer vessel. The Prowler Partnership never owned the F/V PROWLER, so technically they are not a freezer vessel partnership with regard to that vessel. Even if I consider the term "freezer vessel partnership" to include a partnership that leased a freezer vessel, the Prowler Partnership still is not a freezer vessel partnership with respect to the F/V PROWLER. Nevertheless, for the sake of discussion, I will consider Prowler Partnership to be a freezer vessel partnership because the co-owners used the vessel in their partnership business.

[61]Administrative Procedure Act, § 553 (5 U.S.C. § 553).

[62]Nor, for that matter, is the comment of the Council chairman, cited by the Appellants, that if the Council's statement of intent was not sufficient "then we come back with a plan amendment, we just change the damned rules and go through the procedure again." [Appellants' Brief on Remand at 22, quoting from Council transcript, (Exhibit E at 30)]

[63]"An agency rule which violates the APA is void. . . . Agency action taken under a void rule has no legal effect." W.C. v. Bowen, 807 F.2d 1502, 1505 (9th Cir. 1987), opinion amended, rehearing denied, 819 F.2d 237 (9th Cir. 1987).

Even if the Council had proposed a new regulatory definition of "dissolved partnership," and it had been properly promulgated and adopted by the Secretary of Commerce, it could not be applied retroactively to this case.[64] A definition that incorporated the interpretation the Appellants' seek would be a legislative rule, not an interpretive rule, because it would be a dramatic change from the definition that NMFS has applied without exception to all IFQ applications involving partnerships since the program began in 1994.

I conclude that it is legally impermissible to adopt the interpretation of the regulation that the Appellants seek, and I decline to do so. I also conclude that the Council's statement of intent is not binding legal authority in this case. As for the Council members' affidavits, they are not a part of the regulatory history of the IFQ program and are not competent evidence to establish the meaning of the term "dissolved partnership" under 50 C.F.R. § 679.40(a)(2)(iii). I therefore give the affidavits no weight.

Even if I could give effect to the Council's statement of intent, I would not do so because, for several reasons, it serves as questionable support for the Appellants' interpretation of the regulation. First, Mr. Winther's request that the Council clarify its intent concerning the meaning of the term "dissolved partnership" was based on false statements. In his letter to Chairman Lauber, Mr. Winther stated that NMFS was proposing to revise the IFQ regulations concerning the dissolution of corporations and partnerships. [Exhibit 67 at 1] He also stated that "NMFS's proposal raises the fundamental issue of the Council's intended meaning of 'dissolution' of partnerships for IFQ purposes." [Exhibit 67 at 1]

Neither of those statements was true. The proposed NMFS amendment did nothing of the kind. The amendment concerned the definition of the phrase "a change in the corporation or partnership" under 50 C.F.R. § 679.42(j)(2). The amendment involved only the dissolution of estates and had no effect whatsoever on partnerships or corporations.[65] Thus, Mr. Winther's letter misrepresented the context in which he was making his request to the Council.

Second, the Appellants base their argument for a new interpretation of "dissolved partnership" on the regulatory history and rationale for 50 C.F.R. § 679.42(j). But this regulation has absolutely

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[64]Under United States Supreme Court decisions, a regulation may not be applied retroactively if doing so would attach new legal consequences to events completed before the regulation was adopted, unless such retroactive application is expressly authorized by the Congress. Landgraf v. USI Film Prods., 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994); Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). Landgraf dealt with the possible retroactive application of a statute, rather than a rule, but jurisprudence on the retroactivity of statutes seems to apply equally to rules. [1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 3.77, at 79 & n.11 (Supp. 1997)]

[65]NMFS's proposal was approved by the Council as Action 2, which is described as: "FMP language will be reivsed to add language to the definition of 'a change in the corporation or partnership' specific to estates." North Pacific Fishery Management Council *Newsletter,* October 19, 1998, at 5.

no application to freezer vessel shares or to the buyout of a partner. It provides (in relevant part) that when a partnership holding *catcher vessel* quota shares *adds* a new partner, that partnership can no longer hold its QS and must transfer it to a qualified individual. The Prowler Partnership does not hold catcher vessel shares and it did not add a new partner.

The Appellants argue that NMFS uses the terms "dissolution" and "change in partners" interchangeably, suggesting that the two regulations are connected and should be interpreted the same way. [Appellants Brief on Remand at 29] This is misleading. The term "dissolved partnership" under 50 C.F.R. § 679.40(a)(2)(iii) is interpreted to mean *any change in partners, either adding or removing a partner.* The phrase "a change in the corporation or partnership" under 50 C.F.R. § 679.42(j)(2) is specifically defined as being only the *addition of any new shareholder(s) or partner(s).*" The two terms are not interchangeable. They have different meanings, they appear in different regulatory sections, they serve different purposes, and they have no effect on each other. Federal regulation 50 C.F.R. § 679.42(j) has no application to the question of what constitutes a "dissolved partnership."

Third, the Council's rationale for treating the freezer vessel fleet differently than the catcher vessel fleet does not support the interpretation of "dissolved partnership" that the Appellants seek. The Preamble to the IFQ proposed rule states:

> The Council reasoned that most vessels in the freezer vessel fleet are corporate operations, unlike the more common owner/operator vessels in the catcher vessel fleet. Requiring new entrants to the freezer vessel fleet to be individuals would be excessively burdensome to the companies that own and operate freezer vessels and would ultimately change the character of the freezer vessel fleet. The Council has no intent to change the current character of either fleet.[66]

RAM's determination that the Prowler Partnership dissolved, for purposes of initial issuance of QS, does not change the "current character" of either fleet as of 1990, the last year of the qualifying period for IFQ eligibility. Mssrs. Winther and Eaton had already parted ways with Mr. Samuelson in 1989, and since then have operated without him. Declaring that their three-member partnership was dissolved in 1989 makes no change to the status quo as of 1990. RAM's determination does not require the Appellants to transfer their QS to a qualified individual. It does not prevent them from owning or operating the F/V PROWLER. RAM's determination does not affect any new entrants to the freezer vessel fleet, since neither the Appellants nor Mr. Samuelson are new entrants. Thus, the Council's rationale for treating freezer vessels differently than catcher vessels does not necessitate the conclusion that the Prowler Partnership was not dissolved in 1989.

For all the above reasons, I am unpersuaded that the Council's 1998 statement of intent justifies a reversal of NMFS's long-standing, consistently held interpretation of what constitutes a

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[66] 57 Fed. Reg. 57,130, 57,133 (December 3, 1992).

"dissolved partnership" under 50 C.F.R. § 679.40(a)(2)(iii), or a turning away from the precedents established by this Office. I conclude that the Prowler Partnership, consisting of Mssrs. Winther, Eaton, and Samuelson, was dissolved for purposes of 50 C.F.R. § 679.40(a)(2)(iii) on June 9, 1989, when Mr. Samuelson sold his interest in the F/V PROWLER to Mr. Winther and Mr. Eaton. Therefore, I also conclude that even if the Prowler Partnership had owned or leased the F/V PROWLER during the period in question, the proper initial issuance of the sablefish QS generated by the vessel would have been 1/3 to each of the former partners of the Prowler Partnership.

FINDINGS OF FACT

1. The Prowler Partnership is not a party to the Co-Ownership Agreement.

2. The only parties to the Co-Ownership Agreement are John Winther, Bart Eaton, and Gainhart Samuelson.

3. The Co-Ownership Agreement contains no lease terminology.

4. The Co-Ownership Agreement contains no provision for the payment of a lease fee for the use of the vessel.

5. The Co-Ownership Agreement contains no provisions by which the co-owners of the vessel relinquish possession or control of the vessel to anyone other than themselves.

6. The Co-Ownership Agreement contains no provisions imposing any financial obligation for the vessel on anyone other than the co-owners of the vessel.

7. The Co-Ownership Agreement does not indicate the name of a lease holder, as required by 50 C.F.R. § 679.40(a)(3)(iii) to be conclusive evidence of a lease.

8. The Co-Ownership Agreement does not indicate a period of time during which a lease was to be in effect, as required by 50 C.F.R. § 679.40(a)(3)(iii) to be conclusive evidence of a lease.

9. The Co-Ownership Agreement contains no provisions consistent with a vessel lease, let alone consistent *only* with a lease.

10. The record contains no evidence that Mssrs. Winther, Eaton, or Samuelson ever characterized their business arrangement as a lease before or during the period April 5, 1985 through June 9, 1989.

11. The record contains no evidence that anyone believed, discussed, or represented that the Prowler Partnership leased the F/V PROWLER until that claim was made for the first time in the Appellants' Motion for Reconsideration of our first Decision in this appeal.

12. The co-owners did not relinquish possession, command, or control of the vessel during the period April 5, 1985 through June 9, 1989.

13. That the co-owners operated their vessel through a joint venture or partnership in accordance with their "Co-Ownership Agreement" does not tend to prove that the partners or the partnership leased the vessel.

14. The Prowler Partnership was responsible for hiring, firing, and paying the crew of the F/V PROWLER during the period of time in question.

15. Because the partners and the co-owners were the same people, the fact that the partnership was responsible for crew matters does not demonstrate that the co-owners had relinquished responsibility for crew matters.

16. The partners and the partnership did not need to have a vessel lease in order to have or take responsibility for hiring, firing, and paying the crew.

17. Mssrs. Winther, Eaton, and Samuelson ran their business as a partnership, maintained their business proceeds in a partnership account, paid operating expenses from a partnership account, and paid net profits to themselves as partnership distributions.

18. It is possible to run a fishing business as a partnership without leasing the vessel if, as here, all the partners are also individual co-owners of the vessel.

19. Although all the operating expenses were paid from the partnership's bank account, the partners (and therefore, the co-owners) remained personally liable for the debts and obligations of the partnership. The partnership did not substantially relieve the co-owners from ultimate responsibility for operating expenses of the vessel.

20. Because the partners and co-owners are the same people, it cannot be said that the partners were the entrepreneurs who bore the financial risks and burdens of the fishing operations, but that the co-owners were not.

21. Although the term of the Co-Ownership Agreement specifies a beginning date of March 18, 1985, it provides no definite ending date. Therefore, the agreement has no set or guaranteed term.

22. Paying the vessel mortgage from a partnership account did not relieve Mssrs. Winther, Eaton, and Samuelson of any obligations or liabilities under the mortgage.

23. Absent any evidence that Mssrs. Winther, Eaton, and Samuelson as co-owners agreed that mortgage payments by the partnership would be made specifically in consideration for the use of their vessel, it will not be inferred that the payments constituted a lease fee.

24. Paying the mortgage from the partnership account reflected the partners' belief that the partnership owned the vessel.

25. The evidence under factors 1, 2 and 3 weighs against the existence of a vessel lease.

26. The evidence under factors 4, 5 and 6 does not support the existence of a vessel lease.

27. The evidence under factors 7 and 8 weighs against the existence of a vessel lease.

28. The preponderance of the evidence under the "other evidence" analysis tends to show that there was no vessel lease in this case.

29. The alleged bareboat charter in this case lacked two distinct parties and mutuality of obligation.

30. Neither the IFQ regulations nor the regulatory history of the IFQ program support the different treatment the Appellants want for freezer vessel partnerships that have bought out one of their partners and continued operating under the same name, i.e., the Prowler Partnership.

31. The Council members' affidavits are not a part of the regulatory history of the IFQ program and are not competent evidence to establish the meaning of the term "dissolved partnership" under 50 C.F.R. § 679.40(a)(2)(iii).

CONCLUSIONS OF LAW

1. A vessel lease is a contract, subject to the rules of contract law.

2. At common law, a partnership, unlike a corporation, is not a legal person separate from its partners. Under this aggregate approach, a partnership has no legal existence apart from the individuals running the business. A partnership is deemed to be merely the alter ego of the partners as individuals.

3. Because the vessel owners and the partners/venturers were the same three individuals, a lease between them would have amounted to an attempt by the owners to contract with themselves in a different capacity. Such an agreement is contrary to the fundamental principle of contract law that one cannot contract with oneself.

4. Under the Alaska UPA's aggregate theory of partnerships, a lease between the Prowler Partnership and the co-owners of the vessel would have the same parties on both sides of the transaction.

5. As a matter of law, there could not have been, and I conclude that there was not, a valid vessel lease between the owners of the F/V PROWLER and the Prowler Partnership during the

period April 5, 1985 through June 9, 1989.

6. Even if it were legally possible for a vessel lease to have existed between the co-owners of the F/V PROWLER and the Prowler Partnership, the written "Co-Ownership Agreement" does not constitute conclusive evidence of the existence of a vessel lease. Therefore, I conclude there was no written vessel lease between the co-owners and the partnership.

7. The Prowler Partnership did not hold an oral lease of the F/V PROWLER during the period April 5, 1985 through June 9, 1989.

8. The Prowler Partnership did not hold a demise or bareboat charter of the F/V PROWLER during the period April 5, 1985 through June 9, 1989.

9. IFQ allocations and the vesting of IFQ rights are solely within the jurisdiction of the federal government, and are not determined by state partnership law.

10. NMFS must have the administrative discretion to choose a reasonable definition of the term "dissolved partnership" that can be applied uniformly to all applicants, regardless of the state in which the partnership was formed. To require NMFS to define "dissolved partnership" differently for every state and every partnership agreement would make administration of the IFQ program unduly burdensome, if not unmanageable.

11. RAM properly applied its interpretation of 50 C.F.R. § 679.40(a)(2)(iii) when it determined that the Prowler Partnership was dissolved as a result of the Sales Agreement.

12. Neither the Constitution nor general administrative law prohibits an agency from deviating from prior precedent, but an agency must adequately explain and justify a failure to follow prior policy.

13. For purposes of initial issuance of QS under 50 C.F.R. § 679.40(a)(2)(iii), NMFS does not distinguish between "freezer vessel partnerships" and other partnerships, nor do we consider the reasons why there was a change in partners. NMFS's interpretation applies equally to all partnerships.

14. The North Pacific Fishery Management Council's 1998 statement of intent and the affidavits of Council members do not justify or require NMFS to adopt the interpretation of "dissolved partnership" desired by the Appellants. Such a new reading of an existing regulation would require a substantive rule change (a "legislative" rule), which in turn requires notice-and-comment rulemaking in accordance with the federal Administrative Procedure Act (APA).

15. A definition that incorporated the interpretation the Appellants' seek would be a legislative rule, not an interpretive rule, because it would be a dramatic change from the definition that NMFS has applied without exception to all IFQ applications involving partnerships since the

program began in 1994.

16. A mere statement of intent by the Council is not a legally authorized substitute for APA rulemaking.

17. There has been no rulemaking in this instance, and for this Office to read the regulations as if there had been would be a violation of the APA.

18. It is legally impermissible to adopt the interpretation of the regulation that the Appellants seek

19. The Council's statement of intent is not binding legal authority in this case.

20. The Council's 1998 statement of intent does not justify a reversal of NMFS's long-standing, consistently held interpretation of what constitutes a "dissolved partnership" under 50 C.F.R. § 679.40(a)(2)(iii), or a turning away from the precedents established by this Office.

21. The Prowler Partnership, consisting of Mssrs. Winther, Eaton, and Samuelson, was dissolved for purposes of 50 C.F.R. § 679.40(a)(2)(iii) on June 9, 1989, when Mr. Samuelson sold his interest in the F/V PROWLER to Mr. Winther and Mr. Eaton.

22. Even if the Prowler Partnership had owned or held a lease of the F/V PROWLER during the period in question, the proper initial issuance of the sablefish QS generated by the vessel would have been 1/3 to Mr.Samuelson, 1/3 to Mr. Winther, and 1/3 to Mr. Eaton, all as former partners of the Prowler Partnership.

DISPOSITION

The Initial Administrative Determination that was the subject of this appeal is AFFIRMED on the grounds stated in this decision. This Decision on Remand takes effect September 24, 2001, unless by that date the Regional Director orders review.

The appellant or 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 on Remand, September 4, 2001. 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 on Remand pending a ruling on the motion or the issuance of a Decision on Reconsideration.

Edward H. Hein
Chief Appeals Officer