

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 95-0108
)
ROGER ATTWOOD,) DECISION ON RECONSIDERATION
Appellant)
_____) May 5, 1999

This Office issued a Decision in this appeal on April 2, 1999, which affirmed the Initial Administrative Determination [IAD] of the Restricted Access Management [RAM] program. The result is that Mr. Attwood was denied his request that his halibut quota shares [QS], which were issued in vessel category "C", be reassigned to category "A" [freezer vessels]. On April 6, Mr. Attwood called this Office and stated that he had received the Decision. He asked that we review the Decision, in particular our finding that he did not comply with all the state requirements applicable to halibut processing in June 1988. It was on the basis of that finding that we had concluded that Mr. Attwood is not entitled to have his QS reassigned to vessel category "A". In response, I issued a stay of the effective date of the Decision on April 12, 1999, pending receipt of a written Motion for Reconsideration and determination on the motion. A written motion was received in this Office before the close of business on April 12, 1999, and was, therefore, timely filed.

In the motion, Mr. Attwood stated that in 1988 salmon trollers were not required by the state to obtain a fisheries business license from the Alaska Department of Revenue, or to file an intent to operate with the Alaska Department of Fish and Game. He stated that he was among the first trollers to get a fisheries business license.

In response to Mr. Attwood's phone call, I contacted Herman Savikko of the Alaska Department of Fish and Game on April 9, 1999. Mr. Savikko stated that he began working in the department in 1988, and he confirmed that Mr. Attwood is correct in his statements. Mr. Savikko stated that in 1988 very few individual fishermen were engaged in processing, and that his department was not requiring trollers to file an intent to operate in order to freeze their catch. Mr. Savikko stated that the department was uniformly advising trollers at that time that they didn't need an intent to operate. He acknowledged that the ADF&G ultimately (within a few years) realized that it was wrong on this point, and that this was "negligence on our part." Mr. Savikko stated that the ADF&G recognized that the freezing of fish by trollers was a long-standing practice in the Sitka area, which is where Mr. Attwood sold his catch.

Mr. Savikko also stated that his department worked closely with the Alaska Department of Revenue, and that Revenue was aware of the advice ADF&G was giving out in 1988 and was not requiring trollers to obtain a fisheries business license. I then contacted Edie Bundy of the Department of Revenue's Income and Excise Audit Division, which issues the fisheries business license. Ms. Bundy told me that she has been working in the department since before 1988, and that her recollection differs from Mr. Savikko's. She stated that the Department of Revenue has always held that a person has to

have a fisheries business license to lawfully process (freeze) fish aboard a vessel. She stated that there was no penalty provided in the statute until 1990. She did a search of department archives to see whether any notations were made in Mr. Attwood's file, but she reported back to me that his file has been destroyed because it is more than 10 years old.

On the basis of the statements obtained, as described above, I do not find sufficient evidence to support a conclusion that Mr. Attwood was in compliance with Alaska laws and regulations regarding the fisheries business license and the intent to operate that were in effect at the time of his 1988 halibut landing. The language in the statutes and regulations is clear that both the license and intent to operate were required. The personal recollections of two state employees more than 10 years after the fact about whether, and the degree to which, the state enforced the legal requirements are not an adequate basis for finding that Mr. Attwood was in compliance, despite the language of the statutes and regulations. Even so, the two statements from the state employees are in conflict, and Mr. Savikko admits that his department's initial interpretation of the law was incorrect. Furthermore, Mr. Attwood did, in fact, comply with the state requirements, albeit more than a month late, which suggests that at the time he understood the need to obtain the fishery business license and to file an intent to operate. For all the above reasons, I conclude that Mr. Attwood was not in compliance with state laws and regulations at the time his halibut was processed and, therefore, his processing cannot be recognized as lawful for purposes of vessel category reassignment under the IFQ program.

DISPOSITION

The Decision in this Appeal is **AFFIRMED**. This Decision of Reconsideration incorporates the Decision by reference, and it takes effect June 4, 1999, unless by that date the Regional Administrator orders review of the Decision of Reconsideration.

Edward H. Hein
Chief Appeals Officer