

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 94-0012
	)	
JOHN T. COYNE,	)	DECISION ON RECONSIDERATION
Appellant	)	
_____	)	May 24, 1996

STATEMENT OF THE CASE

Appellant John T. Coyne filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] on August 22, 1994. The IAD denied the Appellant's application for Quota Share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish because it was not filed by the July 15, 1994, application filing deadline. The Appellant has adequately shown that his interest is directly and adversely affected by the IAD. An oral hearing was held December 21, 1995, before this Appeals Officer. The record was closed immediately after the hearing. A decision was issued January 31, 1996, which vacated the IAD and ordered the Division to process the Appellant's application as if it had been timely filed.

On March 15, 1996, this office granted the Division's motion to reconsider the decision. A second oral hearing was held on March 26, 1996, in Seattle, Washington, before me. Present at the hearing were the Appellant; his attorney, Steven Plowman; Ed Savage, the Appellant's counselor<sup>1</sup> at the SEADRUNAR drug treatment program in Seattle; Elizabeth Coyne, the Appellant's ex-wife<sup>2</sup>; and Haddon Salt, a commercial fishing vessel owner, via telephone from California.

The Division's motion to reconsider argues that evidence on the record at the time the appeal decision was issued was insufficient to support three of the four findings of fact and the two conclusions of law. The second hearing was held to gather additional evidence relating to (1) the Appellant's knowledge or lack of knowledge regarding the application filing period and deadline; (2) the circumstances surrounding the Appellant's entrance into and participation in the SEADRUNAR program; and (3) the Appellant's condition and circumstances during the period summer 1993 through summer 1994. These areas of inquiry all relate to the ultimate issue in this appeal: whether the Appellant's application should be accepted as timely filed. This decision on

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<sup>1</sup>Mr. Savage is certified as a chemical dependency specialist with the State of Washington and through the National Association of Alcohol and Drug Abuse Counselors. He is also a certified Alcohol and Drug Information School instructor.

<sup>2</sup>The Appellant stated that he was married to Elizabeth Coyne from 1989 until 1991. [John Coyne Affidavit, at 2] She testified that their divorce became final in August 1993. [Hearing, March 26, 1996]

reconsideration will reexamine that issue in light of additional evidence gathered at the hearing, and will address arguments raised in the motion to reconsider.

## ISSUE

Whether NMFS should accept the Appellant's application as timely filed.

## BACKGROUND

The Division received the Appellant's Request for Application [RFA] for QS on August 2, 1994, (18 days after the application filing deadline), and summarily rejected it without substantive review or consideration on the merits. During the entire six-month application period, the Appellant was a patient in the Seattle Drug & Narcotic Center [SEADRUNAR], a private residential treatment program for drug and alcohol addiction in Seattle. He entered the treatment facility on January 13, 1994 -- four days before the start of the IFQ application period -- and continued in-patient treatment until October 1994. He completed all aspects of treatment on April 19, 1995.

The Appellant was in the treatment program as a result of his addiction to heroin. The Appellant testified that he was a successful commercial fisherman, owning a series of vessels, employing as many as 100 people, and grossing, at his peak, some \$12 million annually. His drug and alcohol dependence contributed to three failed marriages, the loss of all his vessels and other property, and the closure of his commercial fishing businesses. By the fall of 1993, the Appellant had been homeless and impoverished for more than a year. In late November of that year, he found himself in jail, charged with felony possession of heroin and theft. As part of a plea bargain that resulted in a conviction, the King County Superior Court allowed the Appellant to enter the treatment program rather than remain in jail and ultimately made successful completion of the program a mandatory condition of his sentence. [Exhibit 4]

The Appellant resided at SEADRUNAR for nine months.<sup>3</sup> During that time, his movements and contacts with persons outside the program were severely restricted and were subject to prior approval and supervision. The Appellant asserts that when he entered the treatment program he

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<sup>3</sup>"John Coyne entered our agency as a client (patient) on January 13, 1994. He was assessed as appropriate for a program of this duration and intensity, due to the degree of his addiction to drugs and consequent lifestyle deterioration. . . . When Mr. Coyne entered treatment he exhibited symptomology [sic] of late (chronic) stage addiction progression. Aside from obvious signs such as visible "track marks", apparent malnutrition, sleep deprivation and physical withdrawals (cravings, cramps, runny nose), Mr. Coyne reported other aspects of personal destruction. Although he was somewhat disoriented and had difficulties with recall and other cognitive faculties upon entry, Mr. Coyne reported significant financial, legal, social and marital problems, as well. . . . Mr. Coyne experienced post-drug impairment syndrome; dysphoria, compromised affect, and various seemingly unpleasant states characteristic of psychoactive drugs and opiate dependency." Ed Savage letter, June 8, 1995.

was not aware that the IFQ program was about to be implemented and that he did not receive notice of the application period and the application filing deadline until shortly after the deadline had passed. Once he did learn of the deadline, he acted quickly to obtain and file an application. The Appellant asserts that his lack of awareness of the IFQ application period and filing deadline resulted from his drug addiction and his isolation in the drug treatment program during the entire application period. He argues that the doctrine of equitable tolling should be applied to the IFQ application period in his case and that his late application should be deemed to have been timely filed.

## DISCUSSION

NMFS established July 15, 1994, as the application filing deadline for this IFQ Program.<sup>4</sup> By its terms, the agency's notice of the application period required that a completed application form be received at the Division's office in Juneau by the close of business on July 15. The Division had initiated a preliminary step in the application process by requiring the filing of an RFA form before submitting the application itself. After announcing the filing deadline in the Federal Register, the Division announced that for the purpose of meeting the deadline, it would accept a completed RFA in lieu of an application, so long as the RFA was received by the deadline. Ultimately, the Division decided to accept as timely filed any completed RFA that was postmarked on or before July 15, 1994.<sup>5</sup> The Division has interpreted the July 15 deadline as essentially requiring that an applicant either deliver an RFA to the agency by that date or otherwise take decisive action by that date to complete the application filing, as by depositing an RFA in the mail.<sup>6</sup> This appeal involves an applicant who did not take any action to file his application until after the July 15, 1994, deadline. It raises the questions of whether the Appellant received timely notice of the filing deadline and whether the doctrine of equitable tolling applies to the application filing period in this case.

### **1. Did the appellant receive timely notice of the application deadline?**

The Appellant testified that he filed his RFA late because he did not receive the notices sent by the Division and did not otherwise learn of the application period dates and filing deadline until three days after the deadline had passed, when he received a phone call from Elizabeth Coyne. At that time he was still a resident at SEADRUNAR.

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<sup>4</sup>"Applications must be received during the application period beginning January 17, 1994, and ending at close of business on July 15, 1994. . . . Applications for initial allocation of QS received after the close of business on July 15, 1994, will not be considered." 59 Fed. Reg. 701, 702 (1994)

<sup>5</sup>Policy announced July 26, 1994, by Memorandum of Philip J. Smith, Chief, RAM Division.

<sup>6</sup>Michael B. White, Appeal No. 94-009, decided January 17, 1995, *aff'd* January 20, 1995, at 4.

## The RFA mailings

The record shows that the Division had included the Appellant in its database and mailed an RFA form to him in late December 1993. The RFA was sent to his last address on record at that time with the Alaska Commercial Fisheries Entry Commission -- 1511 Bigelow Ave. N., Seattle, Washington. The RFA mailing was sent by bulk rate, which is not forwarded by the U.S. Postal Service. Each envelope that the Division sent in that mailing was marked "Return Postage Guaranteed," which directs the Postal Service [for a fee] to return undelivered envelopes and provide a forwarding address, if available, and an explanation for non-delivery. The record indicates that this first RFA mailing to the Appellant was not returned to the Division. A second RFA was sent to the Appellant at the same address in June 1994, but it was returned by the Postal Service with the notation "undeliverable." The second RFA packet was sent by first-class mail, which is normally forwarded by the Postal Service if they have a current forwarding address on file.

Both the Appellant and Elizabeth Coyne testified that they had owned the house on Bigelow and lived there together. They stated that the house had been repossessed in November 1991 and they had not lived there since then. The Appellant and Elizabeth Coyne both testified that they did not receive any mail from NMFS forwarded from the Bigelow address. Elizabeth Coyne stated that the house had remained empty for several months after they left and speculated that mail dropped in the mail slot may have gone uncollected until new occupants arrived.

Public records in the State of Washington indicate that the property was purchased by John Coyne and Elizabeth Harrington (Coyne) on April 14, 1989. The records further show that the property was purchased from Key Bank of Washington by Stephen C. Ross on June 29, 1992, and is still owned by him. [Exhibit 1] In a telephone conversation with me, Mr. Ross stated that he does not know the Coynes and has never had any contact with either of them. He stated that he did receive mail for John Coyne that had an Alaska return address, but he does not remember whether any of it was from NMFS. Mr. Ross stated that he gave the mail back to the postal carrier. [Memo to file, May 8, 1996]

The Appellant's counselor, Mr. Savage, testified that mail for the Appellant while at SEADRUNAR was channeled through him, and his recollection is that no mail was forwarded there from the Bigelow address.

If the Division had sent the first RFA packet to the Appellant at a then-current address, the fact that the packet was not returned to the Division would have raised a presumption that it had been delivered to the Appellant. But because (1) the address used was more than two years old, (2) the packet was sent by bulk mail, which is not forwardable, and (3) the testimony of the Appellant and Elizabeth Coyne that neither of them received mail forwarded from the Bigelow address was not contradicted by the statements of Mr. Savage and Mr. Ross, it appears more likely than not that the first RFA packet was discarded or misplaced by the U.S. Postal Service. I, therefore,

find that the Appellant never received the first RFA packet that the Division sent to him in December 1993.

The second RFA packet, which the Division sent to the same address on June 15, 1994, via forwardable first-class mail, was returned to the Division on July 11, 1994, marked "undeliverable." Therefore, it is clear from the record that the second packet was not delivered to the Appellant. The record shows that on July 21, 1994, Elizabeth Coyne called the Division and requested that an RFA be sent to the Appellant in care of her address. On or about the same day, the Division mailed a third RFA packet to the Appellant in response to this request. I find that this third mailing was the only RFA packet that the Appellant received.

### **Prior knowledge of application deadline**

The Appellant stated that when he entered the treatment program in January 1994 he was not aware that the IFQ program was about to be implemented. He and Elizabeth Coyne said that they had testified before the North Pacific Fishery Management Council in 1990 in opposition to any IFQ program and that they were left with the impression at that time that the council had decided not to adopt an IFQ system. In fact, the council at an August 1990 meeting tabled discussion of IFQs until January 1991.<sup>7</sup> The Appellant claims that by then [January 1991] he was in the throes of a heroin addiction. He also testified that after his fisheries businesses folded in early 1991, he no longer kept abreast of developments in the IFQ program<sup>8</sup>

The council did not adopt an IFQ management system until December 1991. Proposed regulations were published in the Federal Register in December 1992, and the final rule was not

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<sup>7</sup>57 Fed. Reg. 57,132 (1992).

<sup>8</sup>At the March 26, 1996, hearing the following testimony took place:

Q: Considering that you had been actively aware of the debate about how the fisheries were going to be managed and, according to Elizabeth's testimony, you and she had both testified before the Council in opposition to quota shares, . . . how do you account for the fact that you were not aware of the application period and deadline until, as you say, Elizabeth contacted you?

A: I was a heroin addict. . . . I guess there's no simpler way to put it . . . I was addicted to heroin for that whole period of time. And that's a full-time project. I didn't think about the fishing business, care about the fishing business, or really care much about my family, my friends, or myself during that period of time. The last thing in the world that was on my mind was any possibility that they might resurrect a quota share program. And being a good addict, I believe that had I any suspicion that I might get some money out of the deal, I would have pursued it with the same endeavors that I pursued other money-making propositions put in front of me. But the plain fact of the matter is, I had a single focus for that period of time. I was entirely wrapped up in this addiction, and I was just totally unaware.

published until November 1993. The first official notice of the application period and deadline for filing applications under the IFQ program was published in the Federal Register on January 6, 1994 -- one week before the Appellant entered the treatment program.<sup>9</sup> I take judicial notice of the fact that notices in the Federal Register are published in Washington, D.C., and printed copies typically take considerably more than a week to arrive by mail at libraries on the West Coast. Thus, even if the Appellant had attempted to find the official notice of the IFQ application deadline at libraries in Seattle before he entered the SEADRUNAR program on January 13, 1994, he would not have succeeded.

The Appellant stated that he had worked as a crewmember on other people's boats for brief periods during 1991, 1992, and the spring/early summer of 1993. [Hearing, December 21, 1995; Exhibits 2 & 3] The Appellant testified that he does not recall discussing the IFQ program with anyone while working as a crewmember. He stated that in June 1993 he was fired as a crewmember of the F/V AUGUSTINE because he was caught shooting up heroin while aboard the vessel. He testified that during the approximately seven months from the time he was fired until he entered the SEADRUNAR program, he did not work in the fishing industry in any capacity. The Appellant stated that although he was generally aware that the IFQ program had been contemplated, when he entered the SEADRUNAR program on January 13, 1994, he was not aware of that the IFQ program was being implemented and did not know about the application period dates or the filing deadline.

It is not clear what the Appellant knew about developments in the IFQ program during the period 1991 - 1993. The only evidence on this point is the Appellant's testimony that he was aware at that time that IFQs had been considered by the North Pacific Fishery Management Council, but that he thought they had abandoned the idea in 1990. He stated that when he was told about the application period and deadline in July 1994, he was surprised that the council had actually adopted an IFQ program and had already begun implementing it. I find it difficult to believe that, during this entire three-year period, the Appellant did not hear or read anything about the coming IFQ program. But the question is not what the Appellant knew about the IFQ program generally; rather, the question is, when did he learn of the application period and deadline, or when did he have sufficient information so as to impose on him a duty to inquire about the application period and deadline.

The first legally sufficient notice of the application filing deadline was published in the Federal Register on January 6, 1994.<sup>10</sup> Therefore, it cannot be said as a matter of law that the public had

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<sup>9</sup>59 Fed. Reg. 701, 702 (1994).

<sup>10</sup>NMFS announced the IFQ application period in a news release dated December 30, 1993. The release was distributed to "a variety of print and broadcast media" and was posted on the NMFS electronic bulletin board. [Phil Smith memorandum, August 11, 1994, at 1] The record does not indicate which media outlets, if any, published or broadcast the announcement of the application period and

been notified of the application deadline before that date. Mere rumors about how soon the IFQ program might be implemented, assuming that the Appellant had even heard them, do not constitute legal notice of the application period and filing deadline. There is no evidence in the record that the Appellant knew of the application period before it was announced in the Federal Register.

Given that (1) the Federal Register notice was not available to the general public in Seattle before the Appellant entered SEADRUNAR, (2) the Appellant testified that he did not learn of the deadline until July 18, 1994, (3) the Appellant testified he was using heroin until one or two days before entering SEADRUNAR, and (4) there is no evidence in the record that contradicts the Appellant's testimony, I find by a preponderance that the Appellant did not receive actual or inquiry notice of the application period and filing deadline during the seven days between publication of the Federal Register notice and his entering the SEADRUNAR program.

### **Opportunity to learn of the application deadline while in drug treatment**

Mr. Savage testified that during the first 90 days of treatment, clients are placed in a "blackout." This is a status in which clients are restricted in their contacts with anyone from outside the program. Mr. Savage added that the blackout is "pretty much the same for the whole first six months." In an affidavit accompanying his appeal, the Appellant stated that during his blackout period he did not have communication with family, friends, or previous acquaintances, received no mail, and did not make or receive telephone calls. [John Coyne Affidavit, at 3] Mr. Savage testified that the Appellant was under strict blackout for at least a full month or more after entering the program.

Mr. Savage stated that clients typically enter SEADRUNAR with an assortment of medical, legal, financial, and other problems that are intertwined with the addiction problem for which they seek treatment. He stated that it is not unusual for clients to be taking care of legal matters while in the program, and the blackout restrictions are relaxed when necessary to allow them to do this. The Appellant entered the program with the heroin possession and theft charges still pending. Civil matters having to do with bankruptcy and creditors of his former fishing businesses arose while the Appellant was at SEADRUNAR. Mr. Savage testified that the

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deadline. Under 50 C.F.R. § 676.20(d), notice of the application period was authorized to be published in "other information sources that the Regional Director deems appropriate" in addition to the *Federal Register*. The regulation does not require or specify such additional notice and, absent evidence that the Appellant received actual notice from such a source, this optional method of publication cannot be the basis for charging the Appellant with notice. This is true even if the Appellant had been a subscriber or regular reader (viewer, listener) of the source in which the announcement appeared. In any event, discussion of the issue of constructive notice is obviated by the discussion and application of the doctrine of equitable tolling, *infra*, which has been applied even in cases where a person received actual notice.

Appellant did not deal with his legal problems in any concrete way for the first couple of months he was in the program. He stated that sometime in late February or March of 1994 the Appellant had his first contact with an attorney at SEADRUNAR. Mr. Savage testified that the Appellant on several occasions was driven by a staff member to and from the offices of a Seattle law firm, and that every hour or so the Appellant would call him or he would call the Appellant to verify the Appellant's whereabouts.

The Appellant testified that while in the treatment program he was taken on several occasions to the law offices of Helsell, Fetterman, Martin, Todd & Hokanson (Seattle), who represented his creditors. He stated that he gave 11 days of depositions at their offices. He testified that the IFQ program was never discussed by the lawyers or anyone else during the course of handling his legal matters. The Appellant also testified that he attended three or four criminal hearings prior to a May 20, 1994, sentencing hearing on the drug and theft charges. Mr. Savage stated that he was present with the Appellant at the sentencing hearing. The Appellant testified that he did not file any tax returns during the IFQ application period.

Peter Ramels, an attorney at Helsell, Fetterman, stated during a telephone call to this office that the Appellant attended depositions at the firm's offices on nine occasions between March 23, 1994, and May 26, 1994, and may also have been in the office prior to that to review documents and prepare for depositions. [Memo to file, April 22, 1996] Mr. Ramels stated in another phone call that the depositions were part of an adversarial bankruptcy proceeding involving the Appellant's former partner, a Japanese corporation, and dealings that took place from 1989 to 1991. Mr. Ramels stated that, according to the law firm's records and the recollections of the attorneys involved, the subject of IFQs was never discussed with the Appellant or even raised by anyone. [Memo to file, April 22, 1996]

Mr. Savage testified that residents at SEADRUNAR had daily access to the *Seattle Post-Intelligencer* and a television during a "constructive activities" hour. The Appellant testified, however, that because he worked at SEADRUNAR's recycling plant during that hour, he did not have the same access to news that others in the program did. The Appellant acknowledged that he had opportunities on Sundays to read a newspaper and see television news, but that he did not regularly do so and that, in any event, he did not learn of the IFQ application period from the media.

The question here is whether the Appellant, during his first six months at SEADRUNAR, knew that the IFQ application period had begun or had sufficient information so as to impose on him a duty to inquire about the application period and deadline. There is no evidence in the record that he did. The Appellant's testimony is that he did not know about the application period and filing deadline until July 18, 1994. He stated that he did not inquire about the IFQ program during this period because he simply did not suspect or have reason to believe that such a program had been adopted and was being implemented. The Appellant testified, "I had spent several years, first believing that they'd never go quota share, and then being so wrapped up in my addiction as to

continue that belief." [Hearing, March 26, 1996]

The Appellant's testimony is not contradicted by the testimony of Mr. Savage or Elizabeth Coyne, or by any other evidence in the record. Mr. Savage testified that he has no reason or basis to doubt the Appellant's credibility with respect to his claim that he did not learn of the IFQ application deadline, or that the application period was running, until at least July 18, 1994. While I would have expected the Appellant to have heard about the IFQ program when he worked as a crewmember between 1991 and the summer of 1993, he testified that he did not, and there is no evidence in the record to the contrary. I can only speculate about what most crewmembers might have known about developments in the IFQ program as of July 1993, the last time the Appellant worked as a crewmember before the application period. There is no evidence in the record that anyone in the fishing industry at that time knew when the final rule would be adopted or how soon the application period would be held. There is no evidence in the record that, during his first six months at SEADRUNAR, the Appellant had any contact with commercial fishermen or others in the industry who would have had reason to know that the IFQ program was being implemented and that the application period had begun. Elizabeth Coyne testified that she had contact with the Appellant at SEADRUNAR (either by phone or in person) a few times before July 18, 1994. But the evidence is that she, too, was unaware that the IFQ program was moving forward and applications were being taken. Thus, she would not have been able to inform the Appellant about the application period before the deadline had passed. I find that she did not do so.

### **Elizabeth Coyne's telephone call**

The Appellant testified that he first learned of the application period some three days after the filing deadline, when his ex-wife, Elizabeth Coyne, told him that she had just been informed about the program by a Mr. Haddon Salt, who had sold a fishing vessel to the Appellant in 1987.

At the March 26, 1996, hearing, Mr. Salt testified that he called Elizabeth Coyne from Sonoma, California, shortly after the IFQ application filing deadline. He said that he called her in an effort to locate former crewmembers that he had fished with in 1990 and that the Appellant and Elizabeth Coyne knew. Mr. Salt stated that he had had difficulty finding both Elizabeth and John Coyne. He said he found Elizabeth with the help of her parents, and that she was surprised and upset that he called her. Mr. Salt testified that, during the phone conversation, he mentioned that he needed to contact the crewmembers in connection with his IFQ application, and that Elizabeth then asked him a lot of questions about IFQs. Mr. Salt stated that he was surprised that Elizabeth did not appear to know anything about the IFQ program. He said it also surprised him when Elizabeth said that John probably didn't know about IFQs either because he was in some sort of rehabilitation program. Mr. Salt testified that he told Elizabeth that he agreed with her that John should be informed about the IFQ program quickly. Mr. Salt stated that he called Elizabeth again about a week to 10 days later to follow up on the first call, but that she still did not have or would

not provide the information he wanted. He testified that he has not spoken to Elizabeth since then and that he did not contact the Appellant at any time between September 1993 and the end of the IFQ application period.

Elizabeth Coyne was not in the hearing room when Haddon Salt testified. Her testimony was that Mr. Salt called her shortly after the application deadline, in mid-July 1994. She said that she was very surprised to hear from Mr. Salt because he was friends with Robert Harrington, who had been the Appellant's business partner and who had been her husband before she married the Appellant. She stated that when she and Mr. Harrington were married they purchased a vessel from Mr. Salt. Elizabeth testified that when Mr. Salt called her, she had been pursuing a business degree at the university and was out of the fishing business. She said that she had not been associating with people in the fishing industry, but that creditors had been trying to contact her and she was still dealing with debts remaining after filing for bankruptcy. She said she also tried to stay away from anyone that used to have contact with the Appellant during his severe addiction phase. She had been separated from the Appellant since some time in 1991, and their divorce was finalized in the fall of 1993.

Elizabeth testified that in 1990 she and the Appellant had spoken before the North Pacific Fishery Management Council in opposition to a quota share system. She said that when Mr. Salt called, she was surprised to learn that in the intervening years a quota share system had been adopted and was already being implemented. She said that she had not been following developments in the IFQ program after she left the fishing business.

Elizabeth said that, when Mr. Salt called, he wanted information about the crew that had been on one of his vessels that she and John had managed. When he mentioned that he was applying for quota shares for that vessel, Elizabeth said she asked him a number of questions, including how he would be eligible for quota shares for a vessel that she and John had operated. She said she quickly recognized that she and John might be in conflict with him over the quota shares and that she didn't want to get into a fight with him over the telephone. She said that she realized that she needed more information about the IFQ program to determine whether there was even a chance that she and the Appellant would be eligible for quota shares.<sup>11</sup> Elizabeth said she decided to obtain more information about quota shares from other sources. She does not recall Mr. Salt mentioning an application deadline, but remembers that he was pressuring her to get the information on the crewmembers quickly, so she deduced that he was under time constraints for completing his IFQ application.

Elizabeth testified that after receiving the phone call from Mr. Salt, she contacted the Appellant

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<sup>11</sup>At the outset of her testimony, Elizabeth confirmed that she does not have an agreement or understanding with the Appellant that she would share in any quota shares that he might ultimately receive. She believes, however, that she has an ownership interest as his ex-wife and former "silent partner" in the businesses he operated.

at SEADRUNAR.<sup>12</sup> She stated, "I called John to see if we had any chance at all. The only way that the vessels that I had any interest in would be able to get any quota would be if he applied." [Hearing, March 26, 1996] She said that it was difficult to reach the Appellant there because his phone calls were screened and logged, he could use the telephone only at certain times, and he was constantly busy with meetings, counseling, and other activities. She stated that she did contact the Appellant before her second phone call from Mr. Salt, which was within a week to 10 days after the first call from him. The Division's records show that Elizabeth called the Division on July 21, 1994, to request an RFA packet for John Coyne. Therefore, it appears that her telephone conversation with the Appellant, following the first call from Mr. Salt, would have occurred sometime between July 18 and July 21, 1994.

Elizabeth testified that when she did speak to the Appellant, she told him that Haddon Salt had called and that the fishing industry had "gone to quotas" for halibut and sablefish. She asked the Appellant whether he was in any condition to follow up on this and whether he recalled if their vessels had caught fish during the relevant years. Elizabeth testified that she does not recall whether she and the Appellant discussed a deadline for applying during that first phone call. She stated that her first priority was to determine whether they would qualify for quota shares and whether they could even apply. "We tried to do it as fast as we could to get our application in," she said. [Hearing, March 26, 1996]

Elizabeth stated that the Appellant was shocked to learn that an IFQ program was in effect, and that he was very interested when she told him. She stated that she was not surprised that he did not already know about IFQs because "when he was involved in his drug addiction, he had a very narrow focus and just focused on his priorities of the addiction." Elizabeth said that when the Appellant was active in the fisheries business he had kept aware of regulations and other matters that affected the business. "He was a good fisherman. . . . He knew what was happening, knew of opportunities, and tried to prepare for them and take advantage of different opportunities in the industry. Those same skills were then applied to his addiction and he did very well at that, too. . . . The addiction interfered with his life, certainly, then overwhelmed it. . . . When he had to close the business in December of '90, January of '91, he was nonfunctioning in his business role." [Hearing, March 26, 1996]

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<sup>12</sup>Elizabeth Coyne testified that she had not been in contact with the Appellant for some time before he entered SEADRUNAR, and that she was unaware in January 1994 that he was entering the program. She stated that after their 1993 divorce, her first contact with him was in connection with the bankruptcy proceedings and their former businesses. The creditors' attorneys had contacted her in early 1994 and the Appellant was present the first time she went to the attorneys' offices. She recalled two contacts with the Appellant while he was at SEADRUNAR, prior to the phone call she received from Mr. Salt in July 1994. Elizabeth testified that it was difficult for her to be around John again, but that she was pleased that he was getting treatment for his heroin addiction and was responding to it. "It was a miracle that he was alive," she said. [Hearing, March 26, 1996]

Elizabeth testified that, after contacting the Appellant about the IFQ program, she tried to help him with his application as much as possible "because he was in a lockdown facility and did not have freedom to have outside activities." Elizabeth said that she obtained vessel information from Coast Guard records and that she mailed the application to the Division. The envelope in which the application was received at the Division's office was sent by certified mail and bears a July 29, 1994, postmark from Seattle.

The statements of Elizabeth Coyne, Haddon Salt, and Ed Savage are consistent with each other with respect to significant details. They do not contradict the Appellant's assertions that he did not know about the IFQ application period and filing deadline until he was contacted at SEADRUNAR by Elizabeth Coyne, on or about July 18, 1994. On the whole, the record supports the Appellant's contentions. Perhaps the strongest inference regarding the Appellant's lack of timely notice of the application period and deadline can be drawn from two things: 1) the Appellant's statement that if he had had any inkling at the time that the IFQ application period had begun, he would have aggressively pursued his claims before the deadline, and 2) the fact that once he did learn about the application deadline shortly after it had passed, he promptly and diligently obtained and filed his RFA. I find it credible that the Appellant's failure to file his RFA by July 15, 1994, was due to his lack of timely notice of the deadline and not because of any intentional delay. I also find that his failure to inquire about the IFQ program before the filing deadline was not merely excusable neglect; rather, it resulted from his addiction to heroin and consequent isolation in the drug treatment program that coincided with the running of the application period. From a review of all the relevant evidence in the record, I find that the Appellant, as a result of his unique circumstances, did not know or have reason to know about the IFQ application period and filing deadline prior to receiving the telephone call from Elizabeth Coyne on July 18, 1994.

## **2. Does the doctrine of equitable tolling apply to the IFQ application period in this case?**

The widely recognized doctrine of equitable tolling permits an administrative agency, under limited circumstances, to toll the running of a federal application period while an applicant is suffering from a disability or incompetency that prevents the person from complying with the application deadline requirements.<sup>13</sup> In determining whether the equitable tolling doctrine can be applied in a given case, the threshold inquiry is whether the period in question is tollable. Under Irwin v. Department of Veterans Affairs, 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990), tollability is presumed. This presumption may be rebutted where the language of the relevant statutes or regulations expresses an intent that the period not be tollable. The language of the IFQ regulations setting a time period for applying for QS is found at 50 C.F.R. § 676.20(d), which states, in relevant part, that the period of application shall be *no less than 180 days* and

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<sup>13</sup>See, David D. Doran, "Equitable Tolling of Statutory Benefit Time Limitations: A Congressional Intent Analysis," 64 Wash. L. Rev. 681 (1989).

directs the NMFS Regional Director to specify the particular dates by notice in the *Federal Register*.

Under an analysis similar to that used for determining whether to toll statutes of limitation, courts have found that an application period is not tollable if the filing deadline is jurisdictional in nature, i.e., if timely filing is a substantive qualification for obtaining a benefit. One way the courts determine whether a deadline is intended to be jurisdictional is to look at both the substance of the relevant language and the context in which it appears. If timely filing is listed as one of several requirements for eligibility, then the time period will be deemed jurisdictional and nontollable. The applicable provision relating to qualifications for participation in the IFQ program appears at 50 C.F.R. § 676.20(a)(1); the language specifying a minimum 180-day application period is listed in a different subdivision. The dates of the application period are specified separately in a notice in the *Federal Register*. Section § 676.20(a)(1) is a definition of "qualified person," which provides that to qualify for participation in the IFQ program, a person must have owned or 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. This provision does not state that a person must file a timely application to be "qualified."

The *Federal Register* notice of the application period dates states that applications received after the close of business on July 15, 1994, *will not be considered*. Yet, in a substantial number of cases, the Division accepted RFAs in lieu of applications for purposes of meeting the filing deadline. The corresponding applications for those persons *were considered* even though they were received after the deadline stated in the *Federal Register* notice. Beyond that, a number of other RFAs that arrived at the Division's office after the deadline, but which had been postmarked by the deadline, were accepted as timely filed. Their corresponding applications were considered well after July 15, 1994. Thus, in practice, the Division interpreted and applied the timely filing requirement with some flexibility. Yet, to my knowledge, none of these applicants (whose applications were considered after the filing deadline) received QS unless they met the definition of "qualified person." Thus, timely application for the IFQ program is a procedural requirement, not a substantive qualification for QS eligibility and not jurisdictional.

This view is further supported by the fact that the regulations require that applicants be given *not less than* 180 days to apply. This minimum time requirement demonstrates a concern that applicants receive an adequate opportunity to respond after receiving notice of the program -- a concern that is inconsistent with an intent that the application period not be tollable under any circumstances. Therefore, I conclude that the IFQ regulations do not express an intent that the application period not be tollable, and that the doctrine of equitable tolling can be applied to the IFQ application period.

The next question is whether the Appellant's unique circumstances support the tolling of the application period in this case. Courts have used a variety of formulations to describe the nature of the circumstances that trigger equitable tolling. Usually the courts require extraordinary

circumstances beyond the applicant's control that prevented the applicant from filing in a timely manner.<sup>14</sup> These include circumstances such as mental incompetence, chronic alcoholism, minority, war, acts of god, misconduct by an opposing party, and the failure of a government

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<sup>14</sup>The Division assumed that the original appeals decision in this case had established a five-point test for determining whether the doctrine of equitable tolling applies. [Motion to reconsider, at 5] No such five-point test was intended.

agency to provide statutorily required individual notice.<sup>15</sup> What all of these types of circumstances have in common is that they cause the applicant, for all or part of the application period, to be physically, mentally, emotionally, or legally unable to apply, or to be ignorant of the right or requirements of application and, thereby, effectively unable to apply.

In this case, the Appellant was placed in an unusually isolated environment as a result of his addiction to heroin. He did not enter the SEADRUNAR program voluntarily, but under the threat of imprisonment if he did not do so. At the time he entered the treatment program, the Appellant had been addicted to heroin for approximately three years. He had been out of the fishing industry for the previous six months, homeless, arrested, and in jail -- all as a result of his addiction. As a consequence of his addiction and these resultant circumstances, the Appellant was unaware of the impending IFQ application period when he entered SEADRUNAR. The Appellant's treatment at the residential facility encompassed the entire application period. For at least his first month at SEADRUNAR, the Appellant was in a strict "blackout" status, unable to communicate with anyone outside the program. For the remainder of the application period, the Appellant's movements and contacts outside the program were severely restricted. He did not learn of the IFQ application deadline until three days after it had passed. Based on the evidence in the record, I find that the Appellant's heroin addiction and the resultant isolation in the SEADRUNAR treatment program were extraordinary circumstances beyond his control that prevented him from learning of the IFQ application period and applying before the deadline expired.<sup>16</sup>

Before concluding that the doctrine of equitable tolling can be applied to the application period in this case, I must consider two additional factors: 1) whether the Appellant was diligent in submitting his application after learning of the filing deadline; and 2) whether his application was received at the Division so long after the filing deadline that accepting it at that time would have significantly harmed or frustrated the agency's ability to implement the IFQ program.

The doctrine of equitable tolling is generally not applied where the party who seeks tolling has

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<sup>15</sup>See, e.g., Scott v. United States, 847 F. Supp. 1499 (D. Hawaii 1993), in which the court found that an applicant's chronic alcoholism constituted a mental incompetency that supported tolling of a one-year period for filing a claim for a tax refund.

<sup>16</sup>Although not raised in the motion to reconsider, I note here that this appeal is not a "hardship case" of the kind the North Pacific Fishery Management Council voted to reject in 1994. The hardship cases under consideration by the council involved persons who did not fish halibut or sablefish during the qualifying years, 1988-1990, and who wanted to substitute other years' landings history or to estimate what they might have caught. The council was unwilling to authorize issuing such compensatory QS to unqualified applicants. Those hardship cases, however, did not include applicants, such as the Appellant, who had actually fished halibut or sablefish during the qualifying years and who meet the definition of a "qualified person." [Council meeting, September 15, 1994, agenda item C-3(b) and accompanying NMFS report on "Hardship Cases Under the Halibut and Sablefish IFQ Program."]

failed to exercise due diligence in pursuing a claim after the disability has been removed. In this case, once the Appellant received actual notice of the deadline, he obtained, completed, and submitted an RFA as soon as reasonably possible. The Appellant first received notice of the application period on July 18, 1994. An RFA was requested on his behalf from the Division on July 21, 1994. It was completed and signed by the Appellant on July 29, 1994, and was mailed to the Division on the same day. The RFA was received at the Division's office in Juneau on August 2, 1994 -- 18 days after the July 15, deadline. Especially considering that the Appellant was, at that time, still a resident at SEADRUNAR, where his movements and ability to communicate with people outside the treatment program were restricted, I find that the Appellant acted with due diligence in completing and filing his RFA.

In deciding whether equitable tolling applies in this case, I must consider what effect tolling might have on the Division's ability to implement the IFQ program. In its motion to reconsider, the Division states that "orderly implementation of the program will be seriously compromised if his [the Appellant's] application now must be processed and the harvesting privileges that have already been awarded to others (who applied in a timely manner) are put at risk." The Division's objection is misplaced. The question is not whether implementation of the program will be harmed or frustrated if the Appellant's application is processed *now*. The appropriate question is whether implementation would have been harmed if the application had been processed when it was submitted. The council anticipated and intended that the Division would take further administrative action when applicants are granted relief on appeal, and the IFQ regulations provide no deadline for deciding appeals. The Division's actions can include (and have, in fact, included) processing applications for the first time, correcting the official record, issuing new QS, and enlarging the QS pools -- all after the first calculation of IFQ for the 1995 fishing season. These Division actions in response to appeals decisions are an integral part of program implementation, not a "serious compromise" to implementation.

The Appellant's application was submitted on August 2, 1994 -- only 18 days after the filing deadline and almost six months before the first annual IFQ calculation required under 50 C.F.R. § 676.20(f). The Division accepted and processed numerous applications received after the filing deadline (but postmarked by the deadline) without apparent delay or disruption of program implementation. Likewise, the applications of several persons who were granted relief on appeal have been processed for the first time long after the filing deadline with no noticeable harm to the implementation of the program.<sup>17</sup> Notwithstanding the Division's stated objections and that the Appellant claims landings from seven vessels, the Division's actual performance in implementing the program leads me to find that processing the Appellant's application when it was originally submitted would not have delayed or "compromised" implementation of the program.

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<sup>17</sup>For example, the application of Wayne Brosman, Appeal No. 94-0007, was received by the Division 11 weeks after the filing deadline and was first processed after the appeal decision was affirmed by the Regional Director on January 13, 1995.

The Division's additional objection that granting relief to the Appellant would "prejudice the interests of the fishing fleet" is irrelevant. First, the "fishing fleet" is not a party to this appeal, nor could they be a party. The fleet, collectively, has no interest that is directly and adversely affected by the IAD issued to the Appellant, which relates only to the timeliness of his application filing.<sup>18</sup> That the quantity or value of harvest privileges of entire classes of QS holders might be diminished if new QS is ultimately issued to the Appellant is, at most, an indirect effect on their interests. Such an effect on current QS holders would be distributed proportionately among the members of each affected class. Any individual QS holders who might suffer special harm by the eventual issuance of QS to the Appellant (i.e., those whose shares might be revoked) will be allowed to become parties to further administrative appeals regarding his claims, should any such appeals arise.

Second, current QS holders, as a group, do not have standing to complain that the value of their QS would be diminished if the Division correctly calculates and issues QS to a successful appellant who meets all the qualifications for QS. It was always intended that such applicants be allowed to participate in the IFQ program. Current QS holders cannot be heard to say that issuing QS to such applicants unfairly diminishes their own interests. If anything, the current QS holders benefitted from a windfall by the absence of some qualified applicants from the 1995 QS pools.

Third, as the Division noted in its motion to reconsider, QS has already been added to the 1996 reserve pool in anticipation of the possibility that the Appellant may receive QS and IFQ for this season. Actually issuing QS and IFQ to the Appellant would not diminish the value of QS in the pools any more than it has already done, at least for this year.

For all of the above-stated reasons, I conclude that the doctrine of equitable tolling applies to the IFQ application period in this case; that the deadline for filing an application [RFA] was tolled for the Appellant until at least August 2, 1994; and that the Appellant's application was timely filed as a matter of law.

#### FINDINGS OF FACT

1. The Appellant never received the first RFA packet that the Division sent to him in December 1993.
2. The third mailing from the Division, on or about July 21, 1994, was the only RFA packet that the Appellant received.
3. The Appellant did not receive actual or inquiry notice of the application period and filing

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<sup>18</sup>Under 50 C.F.R. § 676.25(b), only a "person whose interest is directly and adversely affected by an initial administrative determination may file a written appeal."

deadline during the seven days between publication of the *Federal Register* notice and his entering the SEADRUNAR program.

4. During his first six months at SEADRUNAR, the Appellant had no contact with commercial fishermen or others in the industry who would have had reason to know that the IFQ program was being implemented and that the application period had begun.

5. Elizabeth Coyne did not inform the Appellant about the IFQ application period before the filing deadline had passed.

6. The Appellant, as a result of his unique circumstances, did not know or have reason to know about the IFQ application period and filing deadline prior to receiving the telephone call from Elizabeth Coyne on July 18, 1994.

7. The Appellant had no actual notice of the IFQ application filing deadline until July 18, 1994.

8. The Appellant's failure to file his RFA by July 15, 1994, was due to his lack of timely notice of the deadline and not because of any intentional delay.

9. The Appellant's failure to inquire about the IFQ program before the filing deadline resulted from his addiction to heroin and consequent isolation in the drug treatment program that coincided with the running of the IFQ application period.

10. The Appellant's heroin addiction and the resultant isolation in the SEADRUNAR treatment program were extraordinary circumstances beyond his control.

11. The Appellant was prevented by extraordinary circumstances beyond his control from learning of the filing deadline and submitting an RFA by July 15, 1994.

12. The Appellant acted with due diligence in submitting an RFA as soon as possible after learning of the filing deadline.

13. Processing the Appellant's application when it was originally submitted would not have delayed or "compromised" implementation of the program.

#### CONCLUSIONS OF LAW

1. Timely application for the IFQ program is a procedural requirement, not a substantive qualification for QS eligibility and not jurisdictional.

2. The IFQ regulations do not express an intent that the application period not be tollable

3. The doctrine of equitable tolling applies to the IFQ application period in this case.
4. The period for filing an application [RFA] was tolled for the Appellant for at least 18 days.
5. The Appellant's RFA was timely filed as a matter of law.

#### DISPOSITION AND ORDER

The Division's IAD denying the Appellant's application as untimely filed is VACATED. The Division is ORDERED to process the application as if it had been timely filed. This decision takes effect June 24, 1996, unless by that date the Regional Director orders review of the decision. This decision on reconsideration supersedes the original decision, issued January 31, 1996.

In order to ensure that QS and Individual Fishing Quota [IFQ] is issued to the Appellant for the 1996 season, I recommend that the Regional Director expedite review of this decision and, if there is no substantial disagreement with it, promptly affirm the decision and thereby give it an immediate effective date.

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Edward H. Hein  
Chief Appeals Officer