



THE STATE
of **ALASKA**
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Commercial Fisheries Entry Commission

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September 19, 2013

CERTIFIED RETURN RECEIPT
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C. Michael Hough, Attorney at Law
3691 Ben Walters Lane, Suite 2
Homer, AK 99603

Re: Fedor Z. Kuzmin, CFEC 98-009-A
Eros F. Kuzmin, CFEC 98-010-A
Applications for individual entry permits for the Prince William
Sound sablefish fixed gear fishery (C61E)

Dear Mr. Hough:

We are sorry to inform you that we have finally denied Fedor Z. Kuzmin and Eros F. Kuzmin's applications for individual entry permits for the Prince William Sound sablefish fixed gear fishery (C61E). Enclosed is a copy of our Final Commission Decisions on Administrative review explaining our reasons for denying these two applications.

Enclosed is a copy of 20 AAC 05.1850, the Commission regulation detailing the applicants' right to request reconsideration for a period of 30 days from the date of this letter. A request for reconsideration must set forth specifically the grounds upon which the decision is believed to be erroneous.

Also enclosed is that part of Appellate Rule 602 outlining the procedure for the applicants to seek judicial review of this decision. Under the appellate rule, the applicants have only 30 days from the date of this letter to file an appeal in Superior Court.

By Direction of the
COMMERCIAL FISHERIES ENTRY COMMISSION


Benjamin Brown, Commissioner
Bruce Twomey, Chairman

Enclosures

cc: Fedor Z. Kuzmin, Box 896, Delta Junction, AK, 99737 (7003 0500 0002 8882 5488)
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STATE OF ALASKA
COMMERCIAL FISHERIES ENTRY COMMISSION

In Re the Applications of:

FEDOR Z. KUZMIN and

EROS F. KUZMIN

for individual Entry Permits for the Prince William
Sound Sablefish Fixed Gear Fishery (C61E)

CFEC 98-009-A

CFEC 98-010-A

FINAL COMMISSION DECISIONS ON ADMINISTRATIVE REVIEW

COUNSEL

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I. INTRODUCTION

The applicants, Fedor Z. Kuzmin (the father) and Eros F. Kuzmin (the son) testified that they fished together in separate vessels, and both applied for limited entry permits in the Prince William Sound sablefish fixed gear fishery. In order to be eligible to apply for a permit in this fishery, an applicant must prove participation during any one of the years 1991 through 1994.

Although the applicants claimed to have participated in each of the four years, they failed to prove a single landing in the fishery during any of the four qualifying years. Therefore, the Commercial Fisheries Entry Commission (CFEC) paralegals found them to be ineligible to apply for limited entry permits.

The applicants appealed, and, represented by their two successive attorneys, participated in two evidentiary hearings. Having found (1) that the applicants failed to introduce a single fish ticket documenting a landing in the fishery during any of the four qualifying years and (2) that the applicants failed to prove a landing in the fishery, the hearing officer determined that the applicants failed to prove they were eligible to apply for permits and further failed to prove they were entitled to any points toward a limited entry permit.

The applicants petitioned for administrative review by the commissioners, and this decision follows. To aid our administrative review, we ordered that the audio recording of the hearings be transcribed, and the transcript is enclosed with this decision. In this final commission decision, we disavow some statements by the hearing officer that are unnecessary to support the hearing officer's overall conclusion which we believe is

sound: the applicants have failed to meet their burden of proof. Therefore, we finally deny these two applications.¹

II. FACTUAL SUMMARY

The father testified he began fishing for sablefish in Prince William Sound in 1987, and his son joined him on a separate vessel in 1991.² Prior to 1991, the father had fish tickets that recorded landings of sablefish in Prince William Sound.³ In contrast, the father's fish tickets during the four qualifying years (1991 – 1994) showed landings only in federal waters.

For 1991 and 1992, the applicants made general claims of having participated in the Prince William Sound sablefish fishery but failed to produce a single fish ticket documenting any landing within Prince William Sound, or any other corroborating evidence of their participation.

For 1993, the applicants again made a general claim to have participated in the Prince William Sound sablefish fishery but again failed to produce a single fish ticket documenting a landing within Prince William Sound. Additionally, in 1993, the son failed to prove he registered his vessel with the Alaska Department of Fish & Game (ADF&G) for participation in the Prince William Sound sablefish fishery, or that he obtained the requisite ADF&G permit for the fishery.⁴ The son's failure to register his vessel made any participation he might otherwise have established illegal and, therefore,

¹ Normally we would issue a decision addressing only a single application to avoid creating confusion for the reader and ourselves. We make an exception for these two cases, because their procedural histories are identical, and their facts are nearly coextensive. To be practical, this combined opinion will spare interested parties from having to read nearly the same decision twice.

² The hearing officer decisions addressing these two applications are nearly identical. For simplicity, we will cite only to the decision addressing the son's application. H.O. Dec. at 3.

³ *Id.* at 8 (citing Exhibit 8).

⁴ H.O. Dec. at 5, 11 & 23.

disqualified him from receiving any credit for participating, even if he had proven a landing.⁵

For 1994, the applicants failed to produce a single fish ticket documenting a landing in the Prince William Sound sablefish fishery. The applicants had fish tickets reporting catch in outside waters beyond the boundaries of Prince William Sound. However, the dates of their deliveries were all at times when the Prince William Sound sablefish fishery was closed.⁶

After the last qualifying year in 1994, the applicants had fish tickets reporting sablefish landings within Prince William Sound as well as in outside waters.⁷

During the Prince William Sound qualifying years, the father applied for a federal sablefish Individual Fishing Quota (IFQ) in the federal waters outside of Prince William Sound, but his application was finally denied. The years during which a fisher could establish the individual's eligibility for federal IFQ in the sablefish fishery are 1988, 1989, and 1990.⁸

The applicants failed to produce a single fish ticket reporting a sablefish landing within the boundaries of Prince William Sound over the four qualifying years from 1991 through 1994. During this period, the applicants did have fish tickets reporting landings in federal waters outside of Prince William Sound.

The applicants now claim sablefish catches within Prince William Sound that were not reported as required by law. Any such unreported catch would not have been

⁵ 20 AAC 05.778(a); 20 AAC 05.782; 20 AAC 05.786(3).

⁶ H.O. Dec. at 12 & 14.

⁷ *Id.* at 9, n.18 (citing Exh. 8, pp. 1 & 3).

⁸ Exhibit 18.

counted against the state's guideline harvest range for managing the Prince William Sound fishery and would thereby have contributed to the risk of overfishing.

To help the applicants locate evidence related to their claims in the course of their evidentiary hearings, the hearing officer (1) offered to subpoena employees of processors to whom the applicant and his father sold sablefish, and (2) requested the applicants and their attorney to supply an affidavit to identify which of their fish tickets reporting catch in outside waters might have included the sablefish they claimed to have caught inside of Prince William Sound.⁹ The applicants and their attorney failed to respond to either of these opportunities to clarify and supplement the record.

III. PROCEDURAL HISTORY

The CFEC received applications from the father and his son for their individual entry permits for the Prince William Sound sablefish fishery (C61E) on November 28, 1997. By its letters dated February 20, 1998, the CFEC paralegals notified the applicants that their applications were denied. Father and son both requested and were granted hearings to contest that determination.

On April 27, 1998 (before their first hearing), the hearing officer sent to the applicants and their attorney, copies of the applicants' original fish tickets that the hearing officer had retrieved from State Archives.

With the concurrence of the applicants and their attorney, their first hearing was conducted as a joint proceeding to address both applications for entry permits for the fishery.

⁹ Transcript at 11, 48-52.

The hearing officer conducted the first session of the joint hearing on May 11, 1998, in Anchorage, during which the hearing officer offered to subpoena employees of processors to whom the applicants sold fish. The applicants and their attorney never responded to this offer.

The hearing officer scheduled another session for September 24, 1998, in Anchorage, but only the father appeared. Their attorney, Steven Callison, requested a continuance, which the hearing officer granted. The parties agreed to conduct the second hearing in Homer, Alaska, on November 5, 1998. However, shortly before that date, Mr. Callison contacted the hearing officer to say that he was no longer representing the applicants. The scheduled hearing did not take place.

Subsequently, the hearing officer scheduled a hearing for December 7, 1998, in Juneau, Alaska. Shortly before that date, C. Michael Hough, Attorney at Law in Homer, advised the hearing officer that he had been retained to represent the applicants but would be unable to participate on the scheduled date and requested a continuance.

The hearing officer granted the continuance, and the parties rescheduled the hearing for Homer on January 28, 1999. However, the son was unavailable to attend that scheduled hearing. The hearing officer granted a further request for a continuance by Mr. Hough, and the parties rescheduled the hearing for February 26, 1999, in Homer. The parties agreed the hearing would be a joint proceeding where the applicants appeared together and testified.¹⁰

Near the conclusion of the hearing, the hearing officer requested the applicants and their attorney to produce an affidavit that would specify which fish tickets (among ~~their fish tickets all reporting catch only in federal waters outside of Prince William~~ Sound) that the applicants claimed to have included catch from waters inside of Prince

¹⁰ Transcript at 13.

William Sound. While the attorney agreed to the hearing officer's request, neither the applicants nor their attorney ever responded to the request.¹¹

The record remained open following the hearing, and on November 15, 2000, the hearing officer notified the applicants and their attorney that he proposed to close the record on November 29 but offered the applicants more time if they needed it. Absent a response to his offer, the hearing officer closed the record on November 29, 2000, a year and nine months after the conclusion of the hearing.

On December 29, 2000, the hearing officer issued his decisions respectively denying both applications and finding that the applicants had failed to prove that they had participated in the fishery at any time during the four-year qualifying period (1991 – 1994) and were, therefore, not eligible to apply for the permits, nor were they entitled to any points toward a limited entry permit. The hearing officer found the applicants failed to introduce a single fish ticket documenting a single catch within the fishery, failed to prove any facts that might excuse their failure to properly report their catch, and were not credible witnesses.

Pursuant to an extension of time requested by the applicants' attorney and granted by the commissioners, the applicants (through their attorney) appealed from the hearing officer's decisions by filing their Petitions for Administrative Review (hereinafter the Petition) received by the CFEC on March 29, 2001.¹²

These applications are the last two applications in this fishery before the commissioners.

¹¹ Transcript at 48-52.

¹² The two petitions are virtually identical. For simplicity, we will refer to "the Petition" and cite pages from the petition filed on behalf of the son.

This decision follows our review of the record, including the hearing officer's decisions and the arguments and requests made in the Petition.¹³

IV. DISCUSSION

A. Introduction

As we will discuss in detail below, the overall result reached by the hearing officer is soundly based on evidence the hearing officer painstakingly assembled for the record. We agree with the hearing officer's conclusion that the applicants failed to meet their burden of proving that they made a landing of sablefish in Prince William Sound during any of the 1991 – 1994 qualifying years. We also note that their claimed but unreported catch – if any – within Prince William Sound would not have been counted against the state's guideline harvest range for the Prince William Sound fishery, and, therefore, could contribute to the risk of overfishing.

While the hearing officer did a commendable job of developing and organizing the factual record,¹⁴ the hearing officer made a number of statements that we specifically disavow. Some of these statements include unnecessary affirmative findings.¹⁵ We object to other statements, because they appear to be speculative. For purposes of organizing our discussion, we will proceed chronologically through the hearing officer's

¹³ The hearing officer conducted two evidentiary hearings for the benefit of the applicants, during which, (1) he offered to subpoena witnesses on their behalf, and (2) he requested the applicants and their attorney to supplement the record with an affidavit addressing the fish tickets. In view of the fact that the applicants and their attorney failed to respond, we deny the petition's request for a third evidentiary hearing and request to supplement the record before the commissioners. *Crivello v. State, CFEC*, 59 P.3d 741, 747 (Alaska 2002). We have undertaken administrative review on our own motion to examine issues raised by the hearing officer's decision. The Petition alone would likely have not met requirements for Administrative Review, because it wholly fails to offer "an explanation as to why the new documentary evidence or testimony was not made a part of the record earlier." 20 AAC 05.1845(b)(7). Additionally, this record fails to show us "that the applicant . . . acted with due diligence in making claims and presenting evidence in the administrative hearing before the hearing officer" 20 AAC 05.1845(c).

¹⁴ Acknowledged by the Petition at 3-4.

¹⁵ We limit our conclusions to whether the applicants met their burden of proof, acknowledging Justice Rabinowitz's admonition with respect to substantial evidence, affirmative findings, and burden of proof, in *Kalmakoff v. State, CFEC*, 693 P.2d 844, 849 (Alaska 1985).

decision¹⁶ to identify the statements that we reject and do not consider in reaching our decision.

To the extent that the Petition takes issue with the same statements we disavow herein, our disavowal renders those arguments moot, and we did not consider them in our review of the hearing officer's decision. Additionally, as we proceed through the hearing officer's decision, we address other related issues from the Petition. We hope this approach will yield an inclusive and coherent discussion of our reasons for finally denying these two applications.

B. Accurate Reporting on a Fish Ticket is an Essential Requirement for a Legal Harvest and Conservation of the Fishery

1. The Applicant has a Legal Duty to Report the Location of Catch on a Fish Ticket

As this record makes clear, and as the hearing officer emphasized, the applicants' fish tickets fail to record a single landing of sablefish within Prince William Sound during the qualifying years (1991-1994).¹⁷ In contrast, the father reported catch from Prince William Sound both before and after the qualifying years.¹⁸ Moreover, the son (who began fishing in 1991) reported catch from Prince William Sound after the qualifying years.¹⁹

On the issue of the absence of any fish tickets to support the applicants' claims, the hearing officer made an abbreviated assessment,²⁰ as follows:

¹⁶ H.O. Dec. at 17-25.

¹⁷ H.O. Dec. at 19.

¹⁸ *Id.* at 8 (citing Exhibit 8).

¹⁹ *Id.* at 9, n.18 (citing Exhibit 8, pp.1 & 3).

²⁰ *Id.* at 19.

[The absence of any fish tickets], of course, is not necessarily fatal to Mr. Kuzmin's claims. He can still prevail if he can prove that legally harvested blackcod from the fishery were delivered on his fish tickets [reporting catch from waters outside of Prince William Sound].

We find this statement to be confusing and misleading, because the law (at the relevant time for this application and today) is explicit that a landing is legal only if it is properly reported, and the fisher has an affirmative duty to report accurately (among other things) the location of the catch.

AS 16.05.690(a) required as follows:²¹

Each buyer of fish shall keep a record of each purchase showing the name or number of the vessel from which the catch involved is taken, the date of landing, vessel license number, pounds purchased of each species, number of each species, and where possible, statistical area in which the fish were taken, and other information the department requires. Records may be kept on forms provided by the department. Each person charged with keeping the records shall report them to the department in accordance with regulations adopted by it.

AS 16.05.690(b) further required:

A person may not knowingly enter false information on a fish ticket or supply false information to a person who is recording information on a fish ticket.

Under this statute, the department's regulation 5 AAC 39.130(b) & (c) required (in relevant part with emphasis added) as follows:

²¹ We are quoting the law (and the regulations to follow) as they appeared in the 1994-1995 brochure provided to fishermen by ADF&G and included herein in relevant part as Attachment A.

(b) Each buyer of raw fish, each fisherman selling to a buyer not licensed to process fish (a catcher/seller), and each person or company who catches and processes his or her own catch or has that catch processed by another person or company, shall record each landing on an ADF&G fish ticket. A catcher/seller must complete an ADF&G form in order to obtain fish tickets. Fish tickets must be submitted to a local representative of the department within seven days after landing, or as otherwise specified by the department for each particular area and fishery. . . . The record must include the following:

- (1) the name of the individual or company buying the fish, the processor code assigned to each buyer by the department, and the signature of the buyer or his representative;
- (2) the full name and signature of the permit holder;
- (3) the name or the Coast Guard number of the vessel employed in taking the fish;
- (4) the date of the landing of the fish;
- (5) the permanent vessel license plate number or, for set gillnets and fish wheels, the fisherman's five-digit CFEC permit serial number;
- (6) the type of gear by which the fish were taken;
- (7) the nearest headland or bay or statistical catch area in which the fish were taken;
- (8) information applicable to the following species:
 - (A) the number and pounds of salmon by species;
 - (B) the number of pounds of king, Dungeness and Tanner crab;

- (C) the pounds of other fish or shellfish by species;
- (9) the CFEC permit number of the operator of the unit of gear with which the fish were taken, imprinted on the fish ticket from the valid permit card at the time of delivery only; the imprinting requirement of this paragraph may be suspended by a local representative of the department after presentation by the fisherman of documentation from the department or CFEC that the permit card has been lost, transferred or destroyed; if the above suspension is granted, then the buyer or fisherman shall write the permit number on the fish ticket at the time of delivery only;
- (10) other information the department may require.
- (c) Each fisherman shall furnish to the buyer factual catch data necessary for completion of reports required by the department.

Under AS 16.05.710(d)(1), the regulation is a "commercial fishing law" and even an unintentional violation is subject to strict liability, substantial fines, and forfeiture under AS 16.05.722.

The CFEC has taken the ADF&G fish ticket requirement very seriously over the years. For example, in *Scholz*,²² we stated:

²² CFEC 88-022-A (Final Comm. Dec. on Admin. Rev. 11/3/1989 at 7).

The applicant's largely unsupported claim that such violations [failure to file fish tickets for sales to private individuals] were common at the time, even if shown to be true, would not improve his position. The legislature intended the benefits of entry limitation to go only to those commercial fishermen in compliance with the law. See, for example, Simpler v. State, CFEC, 728 P.2d 227, 230 (Alaska 1986). This principle underlies all Commission regulations for evaluating claims to entry permits. See, for example, Arkanakyak, CFEC 75-488 (1989 at 6); Dudrick, CFEC 75-822 (Rec. Dec. at 3, 1983); Dupree, CFEC 75-298 (1979 at 2); and Wik, CFEC 75-259 (1977 at 3).

In fact, to be eligible to apply for a Prince William Sound sablefish fixed gear entry permit, 20 AAC 05.778(a) requires (with emphasis added) as follows:

To be eligible to apply for an entry permit in the Prince William Sound sablefish fixed gear . . . [fishery], an individual must have legally harvested the fishery resource while participating in the relevant fishery as a holder of an interim-use permit issued under AS 16.43.210 during at least one of the years 1991 – 1994.

Additionally, eligible applicants seeking participation points must satisfy 20 AAC 05.782, which requires (in relevant part with emphasis added) as follows:

Applicants who legally harvested sablefish from the fishery over the 1991 – 1994 time period will be awarded points for the seasons in which they participated. . . .

In turn, the CFEC specifically included the ADF&G reporting requirements in our definition of "legally harvest sablefish" set forth (with emphasis added) in 20 AAC 05.786(3) as follows:

“legally harvest sablefish” means the commercial harvest and sale of sablefish from the Prince William Sound Areas as a CFEC interim-use permit holder during fishing seasons established by the Alaska Department of Fish and Game under 5 AAC 28.210, using a vessel that had a valid State of Alaska vessel license as required by AS 16.05.490 and a vessel that had an Alaska Department of Fish and Game Prince William Sound sablefish permit as required by 5 AAC 28.220, using gear that were legal for the harvest of Prince William Sound sablefish under 5 AAC 28.050, 5 AAC 28.230, and 5 AAC 39.165, and while complying with all other applicable commercial fishing laws and regulations, and where the sablefish sales were in accordance with regulations governing the sale or use of commercially caught sablefish applicable at the sale, including regulations regarding proper completion of reports required of processors, buyers, and fishers. . . .

In light of these governing statutes and regulations, we reject the hearing officer’s statement (quoted above at the beginning of this subsection) implying that an unreported catch could somehow qualify as a legal catch.²³ The notion is directly contrary to the governing statutes and regulations, including CFEC’s (previously quoted) definition of a legal harvest of sablefish under 20 AAC 05.786(3).

2. Failure to Report Catch on a Fish Ticket Precludes Credit for Participation, Unless the Applicant can Prove Facts that Relieve the Applicant of Responsibility for the Failure

CFEC is obligated to follow Alaska law governing and administered by ADF&G. Consequently, the failure to report catch on a fish ticket can be excused only in cases where the fisher can prove facts that would relieve the individual fisher from responsibility for the failure.

²³ H.O. Decision at 19.

For example, we believe the CFEC reached a sound decision in *Huff*,²⁴ where the applicant proved that he and the processor correctly identified the location of his catch, but later, an ADF&G fish ticket editor mistakenly entered the wrong location over the original entry. Thus there was no misrepresentation by the fisher, and the CFEC allowed him credit for his landing.²⁵

In contrast, we now specifically overrule the policy set forth in *Svenson*,²⁶ where the CFEC allowed a hearing officer's decision to become final, in which the hearing officer authorized credit to an applicant who intentionally misrepresented the location of his catch for his own stated purposes of achieving an economic and political advantage over foreign fishers.

We also now specifically overrule the policy expressed in *Zenuhin*,²⁷ where the CFEC allowed a hearing officer decision to become final, in which the hearing officer had granted credit to a fisher who misrepresented the location of his catch, because he assumed he was in compliance with the law.²⁸ The applicant in *Zenuhin* failed to make a reasonable inquiry as to his catch reporting duties. In other cases, the CFEC has held fishers accountable for information that their reasonable inquiry would have yielded.²⁹

²⁴ CFEC 89-335-A (1998).

²⁵ Similarly in *Carder*, CFEC 88-233-A (1999 H.O. Dec. at 9 and 16), the applicant submitted fish tickets to report his crab sales but ADF&G rerouted the tickets for research purposes resulting in their absence from ADF&G's computer records. Also similarly sound are the CFEC cases addressed by the Alaska Supreme Court in *May v. State, Commercial Fisheries Entry Comm'n*, 175 P.3d 1211, 1217-1218 (Alaska 2007); *Krumal*, CFEC 90-105 (1994); *Ayojiak*, CFEC 75-514 (1983); and *Weis*, CFEC 00-038-A (2001).

²⁶ CFEC 89-212-A (1991).

²⁷ CFEC 98-125-A (1999).

²⁸ Similarly, we now overrule the policy conveyed by *Stewart*, CFEC 89-240-A (1995), in which the CFEC allowed a hearing officer's decision to become final where the hearing officer awarded points premised on the applicant's apparent negligent misrepresentation of the location of his catch.

²⁹ *Arkanakyak*, CFEC 75-488 (1/6/82 Comm. Dec. on Remand at 13).

In short, the CFEC will not excuse a willful or negligent failure to submit an accurate fish ticket that conforms to the law. The CFEC may excuse such failure only if the applicant proves facts that would eliminate the individual's responsibility for the failure.

3. The Applicants Have Failed to Prove a Harvest in Fact from Prince William Sound, But, if They Had Established an Actual Harvest, Their Failure to File a Fish Ticket Precludes Credit for Participation

An applicant before the CFEC bears the burden of proving each point claimed and proving by a preponderance of the evidence that a determination of the CFEC is in error.³⁰

In the case before us, fish ticket records fail to record a single landing within Prince William Sound by the applicants during the entire qualifying period from 1991 through 1994. In addition, the applicants have failed to produce any corroboration of their claims with respect to 1991 and 1992.³¹

The absence of a fish ticket to document the applicants' claimed landings within Prince William Sound is a fact in evidence that supports a strong inference a landing did not occur.³² In *May*, the Alaska Supreme Court commented on *May*'s failure to produce any corroborating statements from crewmembers or other witnesses,³³ stating as follows:

³⁰ *Suydam v. Commercial Fisheries Entry Comm'n*, 957 P.2d 318, 322 (Alaska 1998); 20 AAC 05.520(a); & 20 AAC 05.1820(d).

³¹ As we discuss below, while the applicants, to corroborate their testimony, introduced a single affidavit addressing 1993 and three affidavits addressing 1994, we assigned these affidavits little weight, because they were very short on detail, and the affiants were not subject to cross examination. Additionally, with respect to 1993 and 1994, we discuss other factors that disqualify or moot the applicants' claims.

³² *May*, 175 P.3d at 1222.

³³ *May*, 175 P.3d at 1221 & 1222.

Because May failed to produce fish tickets to demonstrate sale of black cod caught with pots, he must overcome the negative inference that results from his failure to produce fish tickets.

The court concluded May's statement alone was not sufficient to overcome the negative inference that no landing occurred,³⁴ stating as follows:

In this case, that statement is insufficient to overcome the negative inference that arises from his inability to produce fish tickets.

Similarly, in the cases before us, the applicants have failed to prove facts that would overcome the negative inference that arises from their failure to produce any fish tickets.

Alternatively, even if the applicants' claimed catch in fact occurred, their failure to produce any fish tickets would not result in credit toward a permit, because an unreported catch is generally illegal.³⁵ The applicants have not carried their burden of proving that failure to properly report their claimed catch would not be a violation of the law in this case.

4. Fish Tickets Are Necessary to Avoid Overfishing in a Fishery Managed by Quota

Although the practice is specifically prohibited by statute today,³⁶ in the terminal salmon fisheries like Bristol Bay,³⁷ there were instances where an applicant's catch in the

³⁴ *Id.* (footnote omitted).

³⁵ *Bowhay*, CFEC 89-338 (2000); *Wettengel*, CFEC 97-004 (1997); and *Carder* CFEC 88-232 (1992).

³⁶ AS 16.05.680(b).

³⁷ That is, those fisheries managed by in-river escapement and not by quota.

fishery was recorded on another skipper's fish ticket for the fishery. For the sake of management and conservation of a terminal salmon fishery, this error at least reports the amount of catch to be recorded from the fishery. In broad terms, this situation yields a fish ticket recording the amount of catch in the fishery.

The applicants' claims arise in a different and more consequential situation. The fishery outside of Prince William Sound in which the applicants participated is managed separately by the federal government under a separate federal quota. The Prince William Sound sablefish fixed gear fishery is managed independently under a separate state guideline harvest range. If in fact there were a catch in the inside state fishery reported as a catch in federal waters, that catch would not have been recorded against the state's guideline harvest range for the inside fishery. Failures to report any of the applicants' claimed Prince William Sound catches would create a risk of overfishing the state fishery and a threat to conservation of the resource.³⁸ (Conversely, the catch in the federal fishery would be over reported and the full quota might not be harvested as a result.)

The Alaska Supreme Court has highlighted the importance of conservation as a critical element in decisions under the Limited Entry Act. Upholding a CFEC optimum number decision, the Court stated,³⁹ as follows:

The fishery, as well as the fishers' livelihood, depends on a sustainable catch. Thus, CFEC wrote that it believed that "conservation of this resource is the primary consideration."

Similarly, concerning a CFEC maximum number decision, the court stated,⁴⁰ as follows:

³⁸ See discussion in *Petticrew*, CFEC 89-199-A (2008 at 12-14). Affirmed *Petticrew v. Alaska CFEC*, Superior Court Case Number 1JU-08-750 CI (June 29, 2009 Decision on Appeal).

³⁹ *Simpson v. State, Commercial Fisheries Entry Comm'n.*, 101 P.3d 605, 613 (Alaska 2004).

⁴⁰ *Johns v. Commercial Fisheries Entry Comm'n.*, 758 P.2d 1256, 1264 (Alaska 1988).

The CFEC's action was justified by resource conservation reasons. Imposing a limited entry system for these reasons is expressly authorized by article VIII, section 15 of the Alaska Constitution.

C. The Applicants Failed to Prove any Facts That Would Excuse Their Failure to File Fish Tickets

1. The Petition's Parade of Alleged Impracticalities is Unsupported and Unpersuasive

Without support in the record, the Petition asserts that the processors to whom the applicants sold fish employed a rule or practice against reporting more than one statistical area on more than one fish ticket per delivery.⁴¹ Similarly without support in the record, and apparently as excuses for failing to meet the legal duty to report accurately the information required on fish tickets,⁴² the Petition presents a parade of alleged impracticalities: "comply with the very complex federal, international and state laws, regulations, and customary practices"; "keep paperwork to a minimum"; "avoid delays in deliveries"; "maximize the quality"; "maximize the time the gear is fishing"; "limit turn-around time"; avoid having to "segregate their catch into at least six bins or holds"; or "have the dock worker . . . issue . . . one detailed fish ticket having multiple statistical areas".⁴³

In fact, the hearing officer offered to subpoena processors and their employees to determine what, in fact, may have taken place with respect to the catches reported on this record.⁴⁴ The applicants and their attorney never responded to this offer.

⁴¹ Petition at 11 & 12.

⁴² *Id.* at 1 & 2.

⁴³ In fact, as we note below, fish tickets were designed for this option. Exhibits 34 & 35.

⁴⁴ Transcript at 11.

Contrary to the Petition's claim, we have rarely seen compliance with the law give way to convenience – especially among individuals facing the risk of strict liability under AS 16.05.722.

Additionally, the Petition's parade of alleged impracticalities fails to consider the option of reporting reasonable estimates of the Prince William Sound portion of a delivery.⁴⁵ A reasonable estimate would not have been an overwhelming burden and would have avoided the failure to report the alleged Prince William Sound catch and consequent risk of overfishing.

Finally, the information appearing on the face of the fish tickets in the record is the result of conversations between the applicants and the individuals representing the processors who filled out the tickets.⁴⁶ If, in fact, the applicants told their processors that part of their delivery came from Prince William Sound and part from outside federal waters, that would reflect catch from two geographically separate fisheries, each under separate management, and each with a separate guideline harvest level. If only a copy of a single fish ticket reporting only a single statistical area were returned to the applicants, that should have prompted a reasonable enquiry by the applicants. *See Arkanakyak*,⁴⁷

2. The Applicants' Testimony With Respect to Their Fish Tickets is Unpersuasive

The testimony and evidence herein fail to excuse the complete lack of Prince William Sound fish tickets.

⁴⁵ Fish ticket forms provide this option in their upper right hand corner. Exhibits 34 & 35.

⁴⁶ Transcript at 33-34.

⁴⁷ CFEC 75-488 (January 6, 1982 Comm. Dec. on Remand at 13).

The failure of the applicants to produce sufficient evidence to meet their burden of proving a legal catch in fact occurred in Prince William Sound is not the fault of the hearing officer, who, at the first hearing, offered,⁴⁸ as follows:

HEARING OFFICER: Right. Okay. Give me the names of the people at these canneries and their addresses and I will send them a subpoena.

Similarly, CFEC retrieved the applicants' actual fish tickets from Alaska State Archives, entered them into the record, and shared them with the applicants. The fish tickets failed to report any landings within Prince William Sound during the four qualifying years (1991 – 1994). The fish tickets uniformly recorded landings in outside federal waters. In the face of this obstacle, the hearing officer repeatedly requested the applicants and their attorney to review each of the fish tickets and to develop an affidavit identifying the particular fish tickets they claimed represented catch that the applicants alleged was from within Prince William Sound.⁴⁹

The hearing officer thus called for potentially useful exercises relevant to the lack of any documented catch. However, the applicants and their attorney never responded to these opportunities.

The resulting record (which we discuss below) is marked by the applicants' testimony conveying a lack of detail and poor recollection.

⁴⁸ Transcript at 11.

⁴⁹ Transcript at 48-52.

While the hearing officer did a very thorough job of assembling the record and the facts in this case, we do wish to reject some of his statements and to emphasize that these statements will play no part in our reasoning to reach a decision. For example, we reject the hearing officer's statement⁵⁰ as follows:

The Kuzmins testified that they fished in state waters for sablefish because it was easier than fishing in federal waters and that they only went into federal waters after Prince William Sound closed. That testimony is demonstrably false.

Our major problem with the statement is that it makes a wholly unnecessary affirmative finding ("demonstrably false").⁵¹ The hearing officer's overbroad conclusion is also very awkward as applied to the two stated propositions: (1) where it was "easier" to fish and (2) when the applicants left Prince William Sound for federal waters.

From the applicants' testimony, we are persuaded that there were times when the weather made fishing in outside federal waters more difficult than fishing in Prince William Sound.⁵² Therefore, we reject the hearing officer's categorical conclusion that such a statement is "demonstrably false."

With respect to the second claim (that the applicants only went into federal waters after Prince William Sound closed), while we reject the hearing officer's statement, we find the applicants failed to meet their burden of proof. Our conclusion is based in part on the applicants' limited recollection and ambiguous testimony. For example, we highlight⁵³ the following:

⁵⁰ H.O. Dec. at 20.

⁵¹ See *Kalmakoff*, 693 P.2d at 849.

⁵² Transcript at 33.

⁵³ Transcript at 27, 45, 46, & 48.

ATTORNEY HOUGH: Right. So do you remember what you would do as far as fishing salmon, blackcod and halibut?

FEDOR KUZMIN: I don't remember exactly, but I was fishing blackcod and salmon, but I don't remember what I was doing – which first – which after.

* * *

HEARING OFFICER: Eros, do you have any recollection of what happened in '93 and '94 ...

EROS KUZMIN: No.

* * *

HEARING OFFICER: Was there ever an instance – was there ever an occasion where you caught only Prince William Sound fish and sold only Prince William Sound fish?

FEDOR KUZMIN: I don't remember. Shhhhhhh... I mean this is lots of years, I don't remember what I did.

* * *

HEARING OFFICER: Okay. Do you – do you believe that there are any of these fish tickets that we have here for '91, '92, '93 and '94 for you and Eros Are there any here that show only federal caught sablefish?

FEDOR KUZMIN: I don't remember.

HEARING OFFICER: Okay.

FEDOR KUZMIN: I don't remember about the fish tickets.

And outside federal waters appear to have afforded better fishing. From the father's following testimony,⁵⁴ we understand that catch rates were generally higher in federal waters outside of Prince William Sound:

ATTORNEY HOUGH: . . . So, why – why would you have, you know, fish in the state waters, go fish in federal waters, then go deliver it in Seward?

FEDOR KUZMIN: Because it's too long to go to Seward to deliver not much fish

The father is not the only applicant to observe better sablefish fishing in federal waters outside of Prince William Sound.⁵⁵ And the Petition reinforces this point,⁵⁶ as follows:

If he could set gear or retrieve gear in blackcod areas in the open, Gulf side because of weather, he would go to the area toward Middleton Island, the location at which he obviously did best

In any event, we reject the hearing officer's affirmative finding that the applicants' statements about when they chose to fish in Prince William Sound or in outside waters were "demonstrably false."⁵⁷ Therefore, the statement plays no part in our reasoning to reach this decision.

We also reject the hearing officer's statement⁵⁸ as follows:

They also testified that Prince William Sound was only open only 36-48 hours at a time. That, too, is demonstrably false.

⁵⁴ Transcript at 38.

⁵⁵ See *Frary*, CFEC 98-011-A (12/31/2003 H.O. Dec. at 6).

⁵⁶ Petition at 6.

⁵⁷ H.O. Dec. at 20.

⁵⁸ *Id.* at 21.

Again, we do not agree with the hearing officer's affirmative finding that the testimony is "demonstrably false." The father's testimony is ambiguous at best, and he fails to specify which years he is discussing even though the openings varied from year-to-year.⁵⁹ As we noted above, fishing in federal waters was desirable when the weather permitted.

In any event, we can limit our discussion, because the Petition has not challenged this statement by the hearing officer.

Additionally, we reject the hearing officer's statement of the inference to be drawn from the lengths of the applicants' fishing trips,⁶⁰ as follows:

All of those trips were suspiciously short. It's unlikely that any trip shorter than five days included fish caught in Prince William Sound.

In reaching his conclusion, the hearing officer has failed to state all of his assumptions (nothing about travel times or lengths of sets, for example). We cannot follow his reasoning, and we do not comprehend why only Prince William Sound would be implicated in his analysis.

3. Fish Tickets Fail to Support Landings in Prince William Sound

a. The Applicants Have Failed to Prove Their Rockfish Bycatch Theory

⁵⁹ Transcript at 32-33.

⁶⁰ H.O. Dec. at 21.

The hearing officer⁶¹ and the Petition⁶² focus on the father's May 20, 1993 delivery.⁶³

The Petition asserts that the fish ticket reports a catch of "at least five rockfish species found in Prince William Sound Inside waters and not found in outside waters." The Petition further asserts that the "deliveries were made to the delivery station closest to the traditional blackcod fishing areas of Prince William Sound."⁶⁴

In fact, the fish ticket reports a delivery in Seward of only four species of rockfish, three of which are slope rockfish (roughey, shortraker and redbanded) plus four pounds of demersal shelf rockfish (yelloweye).⁶⁵

The only related evidence in the record is the father's testimony which acknowledges rockfish are caught in federal waters,⁶⁶ as follows:

ATTORNEY HOUGH: That fish ticket has a statistical area of 475900 which is what I am point to. Could those roughey [rockfish] be caught out at 475900?

FEDOR KUZMIN: No. There - I used to fish for blackcod where there were just a few rough fish.

And the father further testified that he delivered sablefish to Seward after he fished federal waters.⁶⁷

⁶¹ H.O. Dec. at 22.

⁶² Petition at 5.

⁶³ Exhibit 34 (p. 1, fish ticket 299898).

⁶⁴ Petition at 5.

⁶⁵ Exhibit 34 (p.1).

⁶⁶ Transcript at 37.

⁶⁷ Transcript at 38.

The father's testimony cannot support an argument that rockfish are not caught in federal waters and are only caught inside Prince William Sound. In any event, a claim that rockfish may not have been caught in the particular federal statistical area identified on the fish ticket does not support an inference that they must, therefore, have been caught within Prince William Sound.

We also are not persuaded that a delivery in Seward raises an inference that fish were landed within Prince William Sound.⁶⁸ The father's testimony is that he ran from federal waters to deliver in Seward and that fishing in federal waters helped to ensure that they caught sufficient fish to warrant the run.⁶⁹

Also contrary to the theory that a delivery in Seward signifies a Prince William Sound catch are the facts that, in 1993, three deliveries to Seward were made when Prince William Sound was closed.⁷⁰

Similarly, in 1994, all four tickets show catches (landings), when Prince William Sound was closed, and the two May 30th tickets show delivery to Seward.⁷¹

At the same time we note the father's testimony, as elicited by his attorney, can be confusing. For example,⁷² as follows:

⁶⁸ Although without support in the record, the Petition twice asserts that the applicants could obtain better prices by delivering in Seward. Petition at 4 & 8.

⁶⁹ Transcript 38.

⁷⁰ Exhibit 34 (pps. 3-5)

⁷¹ Exhibit 35 (pps. 1-4).

⁷² Transcript at 51.

FEDOR KUZMIN: I don't understand much.

ATTORNEY HOUGH: ... you know, if you delivered in Cordova, you know it's not, you know, state water fish, maybe, I don't know ...

FEDOR KUZMIN: Right.

b. The Applicants' Concession Clarifies Their
Participation in Federal Waters

The Petition and testimony concede that a landing when the Prince William Sound fishery was closed would constitute a landing in federal waters. In the following exchange, the parties are examining one of the two May 30th, 1994 fish tickets⁷³ to consider how one can review the fish tickets reporting federal catch to determine which ones – if any – may have included fish that the applicants claimed they caught in Prince William Sound,⁷⁴ as follows:

ATTORNEY HOUGH: The first day is May 30th for blackcod.

FEDOR KUZMIN: Okay.

ATTORNEY HOUGH: We know it wasn't open in state waters.

FEDOR KUZMIN: Oh, I see.

ATTORNEY HOUGH: We're going to say, no that's federal. And there is others

⁷³ Exhibit 35 (pps. 3 & 4), showing fish tickets 297548 & 297547, which on their face show the date sablefish were caught (landed) to have been after the Prince William Sound fishery closed.

⁷⁴ Transcript at 51.

As the Petition⁷⁵ states:

not all deliveries included black cod from Prince William Sound, and some deliveries were at times precluding legal fishing in Prince William Sound.

This distinction prompts our reexamination of fish tickets landing sablefish for 1993 and 1994 showing federal waters catch at times when Prince William Sound was closed for sablefish.

For 1993, the federal waters catch reflected in tickets in 299890, 299874, and 299875,⁷⁶ all show rougheye catch. In fact, the first two show a relatively substantial catch of rougheye (867 and 913 pounds, respectively).

For 1994, the federal waters catch reported on ticket 297820 shows landings of rougheye and thornyhead rockfish as well as red snapper.⁷⁷ Two additional fish tickets, (297548 & 297547) reporting federal waters catch and dated May 30, 1994,⁷⁸ each show a catch of three species of rockfish (yelloweye, redbanded and shortraker) that looks very much like the distribution of catch in fish ticket 299898.⁷⁹ We note that the applicants' attorney relied upon fish ticket 299898 as the major premise for his argument – contrary to the face of the ticket – that the catch really took place within Prince William Sound and not federal waters as reported by the ticket.

⁷⁵ Petition at 6.

⁷⁶ Exhibit 34 (pps. 3-5).

⁷⁷ Exhibit 35 (p.1). Red snapper is a generic term, but in Alaska it normally refers to yelloweye rockfish, a demersal shelf rockfish.

⁷⁸ Exhibit 35 (pps. 3 & 4). One of these tickets was the subject of the exchange between the father and his attorney that conceded this was a federal waters catch. Transcript at 51.

⁷⁹ Exhibit 34 (p. 1).

We are not persuaded by the theory put forth by the applicant's attorney that a bycatch of rockfish in the sablefish fishery warrants assigning the catch to state waters in Prince William Sound. On this record, the applicants have not met their burden of proof.

c. Disavowal of Two More Hearing Officer Statements

In an alternative approach to explain why a 1993 fish ticket did not imply a catch within Prince William Sound, the hearing officer stated,⁸⁰ as follows (with emphasis in the original):

First, the trip began on May 15, two days before the fishery opened, and the delivery took place seven days later although the fishery had been open only four days (May 17-20). Obviously, he started in federal waters. Since he started there, he probably stayed there. Next, it's significant that all but one of his other fish tickets that show sales of rockfish followed short trips, suggesting that they took place entirely within federal waters

We disavow these statements, and we do not rely upon these statements in reaching our decision. We do not follow this part of the hearing officer's analysis as he appears to be making assumptions that we do not share.

Secondly, we note that the hearing officer correctly identified the boundaries of Prince William Sound.⁸¹ However, we disagree with the hearing officer's statement that the applicants and their affiants misunderstood the boundaries of Prince William Sound.⁸² We do not believe the evidence in the record supports the hearing officer's statement, and we disavow the statement.

⁸⁰ H.O. Dec. at 22 (examining 5/22/1993 fish ticket 299800, Exh. 34 at p.2).

⁸¹ H.O. Dec. at 23.

⁸² *Id.* at 23 & 24.

**d. Qualification of the Hearing Officer's Statement
Concerning IFQs**

We do not accept the hearing officer's statement concerning IFQ's,⁸³ as follows:

The possibility exists, of course, that the Kuzmins actually had landings in the fishery but reported them all as being in federal waters in the hope that they could obtain IFQ based on inflated figures.

We specifically disavow this speculative statement with respect to the motivation or the intent of the applicants, and, in its place, we would note that the qualifying years for federal sablefish IFQ (Individual Fishermen's Quota) were in 1988, 1989, and 1990.⁸⁴ The father applied for federal IFQ in March of 1994.⁸⁵ In March of 1995, the National Marine Fisheries Service (NMFS) denied the father's application, because he had no vessel with sablefish landings in the federal fishery during the qualifying years. NMFS allowed the father until May 19, 1995, to appeal from the denial.⁸⁶

We do not know if the father pursued an appeal, but he did testify about his IFQ application,⁸⁷ as follows (with emphasis added):

ATTORNEY HOUGH: How come you didn't get IFQ's?

FEDOR KUZMIN: Huh – good question. They didn't give me any.

ATTORNEY HOUGH: Well, you applied on time, right?

⁸³ H.O. Dec. at 24.

⁸⁴ Exhibit 18 (p.1).

⁸⁵ Exhibit 15 (p.1).

⁸⁶ Exhibit 18.

⁸⁷ Transcript at 41.

FEDOR KUZMIN: -- It looked like we had been late the years they took -- federal waters. We went for federal waters fishing later than they took the years.

HEARING OFFICER: Well IFQ's were based on the years 1988, 89 and 90 I guess, weren't they?

FEDOR KUZMIN: Well probably. I don't remember exactly what years, but we were already late. One year we had been late.

Due to the overlapping of the federal sablefish IFQ program and the state limitation of Prince William Sound sablefish, it is possible that an applicant could have had a misguided (in view of the different qualifying years) incentive to develop a federal waters fishing history. The CFEC made its initial decision to initiate limited entry for the Prince William Sound sablefish fixed gear fishery by adopting a maximum number of entry permits for the fishery in 1995.⁸⁸ The CFEC did not adopt a point system for the fishery until 1997.⁸⁹ Therefore, participants in the Prince William Sound fixed gear sablefish fishery during the years 1991 through 1994 would not have known at the time that these four years would become the qualifying years for the state limitation.

But in this case, the applicants have failed to meet their burden of proving a landing in fact within Prince William Sound during the qualifying years. Therefore, we do not need to enquire about their respective states of mind regarding fishing history in federal waters.

⁸⁸ See 20 AAC 05.320(e)(3)[Effective 11/6/2005, Register 176]; 20 AAC 05.778[Effective 12/15/1995, Register 136].

⁸⁹ See 20 AAC 05.782 [Effective 7/26/1997, Register 143].

**V. SUMMARY OF THE APPLICANTS' FAILURE TO PROVE
THEIR CLAIMS**

**A. Despite Support from the Alaska Department of Fish & Game and the
Commission, the Applicants Failed to Meet their Burden of Proving
that they Legally Harvested Sablefish in Prince William Sound
During 1991 – 1994**

Although the applicants reconstructed their fishing history with the help of ADF&G and the original fish tickets retrieved from State Archives by the CFEC, their testimony is marked by lack of detail and poor recollection.

The hearing officer attempted to help the applicants build the record by retrieving their actual fish tickets and by inviting them to name employees of their processors to which they sold their fish so that the hearing officer could subpoena testimony from those individuals.⁹⁰ The applicants and their attorney never responded to this offer.

Additionally, the hearing officer requested the applicants and their attorney to review the fish tickets provided by the CFEC and identify those tickets (all of which on their face report only catch in federal waters outside of Prince William Sound) that they claimed included landings in fact within Prince William Sound.⁹¹ The applicants and their attorney never responded to this request.

Under 20 AAC 05.778(a), the applicants could have established their eligibility to apply for a Prince William Sound sablefish fixed gear permit by proving their participation in any one of years 1991 through 1994. The following subsections will summarize the applicants' failure to prove their claims by year.

⁹⁰ Transcript at 11.

⁹¹ Transcript at 48-52.

B. The Applicants Failed to Prove Their 1994 Claims

The applicants introduced three affidavits to corroborate their claims to have fished in Prince William Sound in 1994. Anton Reutov and his son Ivan Reutov stated in their affidavits that they were "in the same catcher group" as the applicants and saw the applicants harvest fish within Prince William Sound during 1994.⁹² Additionally, Foka Kuznetsov stated that he crewed for Eros Kuzmin on the *Combine* during 1994 (and 1993), and they harvested fish from within Prince William Sound.⁹³

The three affidavits are executed on the same date, follow the same form, appear to have been written by the same individual,⁹⁴ and uniformly lack detail. The applicants failed to call their affiants as witnesses thereby depriving the CFEC of an opportunity to cross examine them as to (among other things) their ability to observe, their interest (if any) in the outcome of the proceeding (as a crewmember or member of the same catcher group), and whether their observations occurred when the Prince William Sound sablefish season was open.

We should also note that the Petition (without evidentiary support) asserts that the son fished and made deliveries separate from his father's fishing activities.⁹⁵ If these claims are true, they cast doubt on Foka Kuznetsov's opportunity (as the son's crewman) to have fully observed the father's fishing activity.

Finally, we note that the affidavits reflect the same lack of detail found in the applicants' testimony. Consequently, we assign very little weight to the affidavits.

⁹² Exhibits 10 & 11.

⁹³ Exhibit 29.

⁹⁴ See Transcript at 2, 4-5, 8-9. The affidavits appear to have been written by Steve Callison, the applicants' first attorney.

⁹⁵ Petition at 2.

Even if the CFEC were to assign greater weight to the affidavits, they would not improve the applicants' claims to credit for 1994 participation in Prince William Sound. All recorded landings attributed to the applicants during 1994 are reported as taking place in federal waters outside of Prince William Sound, and, as conceded, all of the reported landing dates were at times when Prince William Sound was closed to fishing sablefish. Additionally, although the hearing officer made the same finding the commissioners made,⁹⁶ the Petition did not challenge the finding (that the applicants failed to prove a single 1994 landing in Prince William Sound) and, thereby, conceded the absence of landings within Prince William Sound during 1994.

Additionally, the applicants⁹⁷ and their attorney conceded that their 1994 landings did not come from Prince William Sound.⁹⁸ The dates of the landings are evidence that the landings did not take place within Prince William Sound (or, if they did, that they were at times when Prince William Sound was closed for sablefish, and, therefore, illegal).

Therefore, under 20 AAC 05.778(a), 20 AAC 05.782, and 20 AAC 05.786(3), even if the claimed landings in fact occurred within Prince William Sound during 1994, they could not be credited toward the applicants' claims for that year.

C. The Applicants Failed to Prove Their 1993 Claims

Concerning 1993, the applicants have offered only Foka Kuznetsov's affidavit to corroborate their claims. Again, for the reasons stated above, we assign little weight to the affidavit. In any event, for 1993 the son failed to prove that he registered his vessel the *Combine* for sablefish fishing within Prince William Sound, or that he obtained the requisite ADF&G permit for the fishery.⁹⁹ The applicant's failure to register and to

⁹⁶ H.O. Dec at 12, 14 & 20.

⁹⁷ We note that the son adopted the testimony of his father. Transcript at 49.

⁹⁸ Transcript at 51 & Petition at 6.

⁹⁹ H.O. Dec. at 5, 11, & 23.

obtain the vessel permit, under 20 AAC 05.778(a), 20 AAC 05.782, and 20 AAC 05.786(3), renders any fishing he did illegal and not entitled to credit toward a limited entry permit.

Although the father did register his vessel in 1993, this fact fails to improve his claim to credit for 1993. The father failed to introduce a single fish ticket reporting a Prince William Sound catch for 1993. An unreported catch would be illegal and would not support credit toward a limited entry permit.

Additionally, under 20 AAC 05.782, even if the father were to prevail on his claim to have participated lawfully within Prince William Sound during 1993, a successful claim would yield only five points. For some time now, the CFEC has denied all applications in this fishery which have proven only five points toward their entry permits.¹⁰⁰ Given our denial of all of the father's other claims, his 1993 claim becomes moot.

D. The Applicants Failed to Prove Their Claims for 1991 and 1992

With respect to 1991 and 1992, the applicants have introduced no affidavits or other evidence to corroborate their testimony. Because the applicants failed to produce any fish tickets to demonstrate their sale of sablefish caught within the Prince William Sound fishery, they face the burden of overcoming the negative inference that no sale, in fact, occurred.¹⁰¹ We have weighed the applicants' testimony as evidence, but, in light of the hearing officer's sound conclusion that the applicants lacked credibility,¹⁰² we do not believe their testimony is sufficient alone to meet their burden of proof.¹⁰³ Additionally,

¹⁰⁰ Limited Fisheries Status Report: <http://www.cfec.state.ak.us/mnu/Limitations.htm>

¹⁰¹ *May*, 175 P.3d at 1222.

¹⁰² H.O. Dec. at 24. There is sufficient evidence in the record to support the hearing officer's credibility assessment without any reliance on the hearing officer's statement that the applicants were confused about the boundaries of the Prince William Sound fishery, which statement we rejected above.

¹⁰³ *May*, 175 P.3d at 1222.

because of their interest in the outcome of this proceeding, CFEC is entitled to be skeptical of their testimony.¹⁰⁴

Finally, we conclude the applicants have not carried their burden of proving their factual claims.

VI. CONCLUSION

We have disavowed certain statements of the hearing officer and do not rely on those statements in reaching our conclusion. None of the statements we reject were necessary to reach the hearing officer's overall conclusion that the applicants failed to meet their burden of proof. We adopt the hearing officer's overall conclusion that the applicants have failed to meet their burden of proof, but we adopt only those portions of the hearing officer's decision consistent with this opinion. To be clearly understood, this decision should be read together with that of the hearing officer.

We conclude the applicants failed to prove that they legally harvested sablefish while participating in the Prince William Sound sablefish fishery as holders of interim-use permits issued under AS 16.43.210 during at least one of the qualifying years from 1991 – 1994, as required under 20 AAC 05.778 to be eligible to apply for an entry permit. Even if there had been a landing in fact, it could not have been credited toward a limited entry permit for one or more of the following reasons: (1) the applicants failed to prove they reported a single Prince William Sound landing on a fish ticket; (2) the applicants failed to prove they had a landing when the Prince William Sound fishery was

¹⁰⁴ *State, CFEC v. Baxter*, 806 P.2d 1373, 1375 (Alaska 1991).

open; or (3) with respect to the son's 1993 fishing, he failed to prove that he registered his vessel for the fishery or that he obtained the requisite ADF&G permit for the fishery.¹⁰⁵

For the above-stated reasons, the applicants have failed to establish their eligibility to apply for a Prince William Sound sablefish fixed gear limited entry permit, and they have failed to meet their burden of proving any of their point claims toward an entry permit. Therefore, we finally deny these two applications.¹⁰⁶

DATED at Juneau this 19th day of September, 2013.

By Direction of the
COMMERCIAL FISHERIES ENTRY COMMISSION



Benjamin Brown, Commissioner
Bruce Twomley, Chair

¹⁰⁵ The applicants have failed to prove their factual claims. A reviewing court will apply the substantial evidence test to questions of fact. *Kuzmin v. CFEC*, 223 P.3d 86, 89 (Alaska 2009) [citing, amidst other authority, *Kuzmin v. State, Commercial Fisheries Entry Comm'n*, No. S-10947, 2004 WL 595608 at *4 (Alaska, March 24, 2004)].

¹⁰⁶ Attachment B addresses the time required for the CFEC to reach this decision.

Groundfish

1994-95
Commercial Fishing Regulations
Groundfish Fishery

Groundfish Fishery

Groundfish Fishery

Groundfish

Groundfish Fishery

Groundfish

Groundfish Fishery

SELECTED ALASKA STATUTES

(b) The commissioner may by regulation establish eligibility requirements for the issuance of a landing permit.

(c) The commissioner may authorize the Commercial Fisheries Entry Commission to issue landing permits for a fishery if the commissioner has made a written finding that the issuance of landing permits for that fishery is consistent with state resource conservation and management goals.

SEC. 16.05.680. UNLAWFUL PURCHASES. It is unlawful for a person, or an agent or representative of the person:

(1) to employ, in the harvesting, transporting, or purchasing of fish, a fisherman who neither is licensed under AS 16.05.480 nor is the holder of a permit issued under AS 16.43;

(2) to purchase fish from a fisherman who neither is the holder of a limited entry, interim-use, or landing permit issued under AS 16.43 nor is exempt under AS 16.05.660, or

(3) to purchase fish from an association other than one to which a permit has been issued under AS 16.05.662.

SEC. 16.05.685. PROCESSING ON COMMERCIAL CRAB FISHING VESSELS. (a) Crab of any species may not be processed on a commercial crab fishing vessel unless

(1) the vessel remains within one registration area from the time the crab is caught to the time of dock delivery;

(2) the operator of the vessel notifies the department of proposed changes in location before moving to another registration area; and

(3) the operator of the vessel provides quarters for inspectors of the department who may inspect the crab catch on the vessel at any time.

(b) The restrictions set out in (a) of this section do not apply to processing aboard the fishing vessel for and as donations to charity, for consumption aboard the vessel, or for dockside retail sales from the vessel.

(c) In this section,

(1) **process** means to butcher, cook, chill, or freeze crab for commercial use;

(2) **registration area** means a specific king crab registration area as designated by regulation of the Board of Fisheries.

SEC. 16.05.690. RECORD OF PURCHASES. (a) Each buyer of fish shall keep a record of each purchase showing the name or number of the vessel from which the catch involved is taken, the date of landing, vessel license number, pounds purchased of each species, number of each species, and where possible, statistical area in which the fish were taken, and other information the department requires. Records may be kept on forms provided by the department. Each person charged with keeping the records shall report them to the department in accordance with regulations adopted by it.

(b) A person may not knowingly enter false information on a fish ticket or supply false information to a person who is recording information on a fish ticket.

(c) A fish ticket recording the purchase of salmon must include the current price paid per pound for each species of salmon purchased.

SEC. 16.05.710. SUSPENSION OF COMMERCIAL LICENSE AND ENTRY PERMIT. (a) Upon the conviction of a person for a misdemeanor or felony violation of a commercial fishing law of this state, the court, in addition to other penalties imposed by law

(1) may suspend one or more of the person's commercial fishing privileges and licenses for a period of not more than one year, if the conviction is the person's first or second misdemeanor or felony conviction within a 10-year period for violating a commercial fishing law of this state or another jurisdiction; or

(2) shall suspend one or more of the person's commercial fishing privileges and licenses

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for a period of not more than three years, if the conviction is the person's third or subsequent misdemeanor or felony conviction within a 10-year period for violating a commercial fishing law of this state or another jurisdiction.

(b) Upon a first conviction of a person for a violation of AS 11.46.120—11.46.130 in which the property is commercial fishing gear as defined in AS 16.43.990, the court shall, in addition to the penalty imposed by law, suspend one or more of the person's commercial fishing privileges and licenses for one year. Upon a second or subsequent conviction for a violation of AS 11.46.120—11.46.130 or a similar law of another jurisdiction in which the property is commercial fishing gear as defined in AS 16.43.990, the court shall, in addition to the penalty imposed by law, suspend one or more of the person's commercial fishing privileges and licenses for two years.

(c) If proceedings in which commercial fishing privileges or licenses may be suspended under this section are pending against a limited entry permit holder, the permit holder's limited entry permit may not be permanently transferred, unless allowed by order of the court in which the proceedings are pending, and a permanent transfer of the permit, unless allowed by order of the court, is void. During the period for which a limited entry permit or the permit holder's right to obtain a limited entry permit or to engage in an activity for which a limited entry permit is required is suspended under this section, a permit card may not be issued to the permit holder and the permit holder's permit may not be transferred or sold.

(d) In this section

(1) **commercial fishing law** means a statute or regulation that regulates the conduct of a person engaged in commercial fishing activities by establishing requirements relating to fishing licenses and permits; catch records and reports; size, nature, or use of fishing vessels, sites, and gear; time, place, or manner of taking fishery resources; possession, transportation, sale, barter, or waste of fishery resources; or other aspects of commercial fishing;

(2) **commercial fishing license** means a limited entry permit or a crew member license;

(3) **commercial fishing privilege** means the privilege of participating in an activity for which a commercial fishing license is required and the privilege of obtaining a commercial fishing license;

(4) **limited entry permit** means an entry permit or an interim-use permit issued under AS 16.43.

SEC. 16.05.722. STRICT LIABILITY COMMERCIAL FISHING PENALTIES. (a) A person who without any culpable mental state violates AS 16.05.440 - 16.05.690, or a regulation of the Board of Fisheries or the department governing commercial fishing, is guilty of a violation and upon conviction is punishable by a fine of not more than

(1) \$3,000 for a first conviction; and

(2) \$6,000 for a second or subsequent conviction.

(b) In addition, the court shall order forfeiture of any fish, or its fair market value, taken or retained as a result of the commission of the violation. For purposes of this subsection, it is a rebuttable presumption that all fish found on board a fishing vessel used in or in aid of a violation, or found at the fishing site, were taken or retained in violation of AS 16.05.440 - 16.05.690 or a commercial fisheries regulation of the Board of Fisheries or the department. It is the defendant's burden to show by a preponderance of the evidence that the fish on board or at the site were lawfully taken and retained.

(c) A person charged with a violation under this section is entitled to a trial by court but not by jury, and is not entitled to representation at public expense.

SEC. 16.05.723. MISDEMEANOR COMMERCIAL FISHING PENALTIES. (a) A person who negligently violates AS 16.05.440 - 16.05.690, or a regulation of the Board of Fisheries or the department governing commercial fisheries is guilty of a misdemeanor and in addition to

punishment under other law is punishable upon conviction by a fine of not more than one year, or by both a fine and imprisonment, or by both a fine and imprisonment and by the market value, taken or may forfeit any vessel designed or employed to fish, or its fair market value, taken or retained in violation of the Board of Fisheries regulation of the Board of Fisheries by a preponderance of the evidence.

(b) If a person is convicted of a violation in addition to the penalty imposed by law, the gross value of the fish taken or retained is

(1) commercial fishing

(2) commercial fishing

(3) commercial fishing vessel designed or employed to fish

(4) commercial fishing vessel required by law or regulation

(c) Upon a third conviction of a person under this section, the court may impose, in addition to the fine imposed by law, a fine equal to \$10,000

SEC. 16.05.730. MANAGEMENT OF FISH STOCKS IN THE STATE AND MAY BE MANAGED

(b) In allocating enhancement projects to obtain in the state to achieve projects for brood stock enhancement projects stocks.

(c) The board may 16.10.400 and contracts to harvest and sell fish stock to obtain funds for may exercise its authority to provide a reasonable enhancement project to with sustained yield of provide fish to an enhancement project 16.10.450 or 16.10.480(

(d) In this section, e enhancement of fishery **SEC. 16.05.800. PUBLIC AND MATERIAL WHILE IN ATTRACTING, OR DECOYING**

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punishment under other provisions in this title, including AS 16.05.195 and 16.05.710, is punishable upon conviction by a fine of not more than \$15,000 or by imprisonment for not more than one year, or by both. In addition, the court shall order forfeiture of any fish, or its fair market value, taken or retained as a result of the commission of the violation, and the court may forfeit any vessel and any fishing gear, including any net, pot, tackle, or other device designed or employed to take fish commercially, that was used in or in aid of the violation. Any fish, or its fair market value, forfeited under this subsection may not also be forfeited under AS 16.05.195. For purposes of this subsection, it is a rebuttable presumption that all fish found on board a fishing vessel used in or in aid of a violation, or found at the fishing site, were taken or retained in violation of AS 16.05.440 - 16.05.690 or a commercial fisheries regulation of the Board of Fisheries or the department, and it is the defendant's burden to show by a preponderance of the evidence that fish on board or at the site were lawfully taken and retained.

(b) If a person is convicted under this section of one of the following offenses, then, in addition to the penalties imposed under (a) of this section, the court may impose a fine equal to the gross value of the fish found on board or at the fishing site at the time of the violation:

- (1) commercial fishing in closed waters;
- (2) commercial fishing during a closed period or season;
- (3) commercial fishing with unlawful gear, including a net, pot, tackle, or other device designed or employed to take fish commercially; or
- (4) commercial fishing without a limited entry permit holder on board if the holder is required by law or regulation to be present.

(c) Upon a third misdemeanor conviction within a period of 10 years for an offense listed in (b) of this section or any combination of offenses listed in (b) of this section, the court shall impose, in addition to any penalties imposed under (a) of this section, a fine equal to three times the gross value of the fish on board or at the fishing site at the time of the offense, or a fine equal to \$10,000, whichever is greater.

SEC. 16.05.730. MANAGEMENT OF WILD AND ENHANCED STOCKS OF FISH. (a) Fish stocks in the state shall be managed consistent with sustained yield of wild fish stocks and may be managed consistent with sustained yield of enhanced fish stocks.

(b) In allocating enhanced fish stocks, the board shall consider the need of fish enhancement projects to obtain brood stock. The board may direct the department to manage fisheries in the state to achieve an adequate return of fish from enhanced stocks to enhancement projects for brood stock; however, management to achieve an adequate return of fish to enhancement projects for brood stock shall be consistent with sustained yield of wild fish stocks.

(c) The board may consider the need of enhancement projects authorized under AS 16.10.400 and contractors who operate state-owned enhancement projects under AS 16.10.480 to harvest and sell fish produced by the enhancement project that are not needed for brood stock to obtain funds for the purposes allowed under AS 16.10.450 or 16.10.480(d). The board may exercise its authority under this title as it considers necessary to direct the department to provide a reasonable harvest of fish, in addition to the fish needed for brood stock, to an enhancement project to obtain funds for the enhancement project if the harvest is consistent with sustained yield of wild fish stocks. The board may adopt a fishery management plan to provide fish to an enhancement project to obtain funds for the purposes allowed under AS 16.10.450 or 16.10.480(d).

(d) In this section, **enhancement project** means a project, facility, or hatchery for the enhancement of fishery resources of the state for which the department has issued a permit.

SEC. 16.05.800. PUBLIC NUISANCES. A net, seine, lantern, snare, device, contrivance, and material while in use, had and maintained for the purpose of catching, taking, killing, attracting, or decoying fish or game, contrary to law or regulation of a board or the

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(5) written documentation that will substantiate other unavoidable circumstances that prevented meeting the deadline.

5 AAC 39.130. REPORTS REQUIRED OF PROCESSORS, BUYERS, AND FISHERMEN; TRANSPORTING REQUIREMENTS. (a) Each person, company, firm or other organization who is the first purchaser of raw fish, or who catches and processes, or has processed his own fish or byproducts of fish shall

(1) furnish to the department each calendar year before operating a written statement of intent to operate with a description of the nature, extent and location of the operation on forms available from the department; forms will not be processed and fish tickets will not be issued without certification that surety bonds as required by AS 16.10.290 - AS 16.10.296 have been posted with the Commissioner of Labor and that a valid Alaska Business License or Fisheries Business License has been issued by the Department of Revenue;

(2) submit, no later than April 1, an operator's accurate and complete summary of activity for each Intent to Operate form filed for the previous year or a signed statement of nonactivity on forms available from the department;

(3) furnish, verbally or in writing, purchasing or production records as requested by the department or its representative.

(b) Each buyer of raw fish, each fisherman selling to a buyer not licensed to process fish (a catcher/seller), and each person or company who catches and processes his or her own catch or has that catch processed by another person or company, shall record each landing on an ADF&G fish ticket. A catcher/seller must complete an ADF&G form in order to obtain fish tickets. Fish tickets must be submitted to a local representative of the department within seven days after landing, or as otherwise specified by the department for each particular area and fishery. The operator of a fishing vessel whose port of landing is outside Alaska, or who sells, transfers, or delivers fish in a Seaward Biological Influence Zone, shall submit a completed ADF&G fish ticket, or an equivalent document containing all of the information required on an ADF&G fish ticket, to the department before the fish are transported out of the jurisdiction of the state. The record must include the following:

(1) the name of the individual or company buying the fish, the processor code assigned to each buyer by the department, and the signature of the buyer or his representative;

(2) the full name and signature of the permit holder;

(3) the name or the Coast Guard number of the vessel employed in taking the fish;

(4) the date of the landing of the fish;

(5) the permanent vessel license plate number or, for set gillnets and fish wheels, the fisherman's five-digit CFEC permit serial number;

(6) the type of gear by which the fish were taken;

(7) the nearest headland or bay or statistical catch area in which the fish were taken;

(8) information applicable to the following species:

(A) the number and pounds of salmon by species;

(B) the number and pounds of king, Dungeness and Tanner crab;

(C) the pounds of other fish or shellfish by species;

(9) the CFEC permit number of the operator of the unit of gear with which the fish were taken, imprinted on the fish ticket from the valid permit card at the time of delivery only; the imprinting requirement of this paragraph may be suspended by a local representative of the department after presentation by the fisherman of documentation from the department or CFEC that the permit card has been lost, transferred or destroyed; if the above suspension is granted, then the buyer or fisherman shall write the permit number on the fish ticket at the time of delivery only;

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(10) other information the department may require.

(c) Each fisherman shall furnish to the buyer factual catch data necessary for completion of reports required by the department.

(d) Each shellfish fisherman shall furnish in writing to the department, directly or through the buyer, data necessary for reports required by the department.

(e) The following information regarding the transporting of unprocessed fish shall be transmitted to an authorized representative of the department either verbally, in writing, or by telephone:

(1) the number and species of salmon taken in any regulatory area shall be reported before being transported to any other area or out of the state;

(2) the numbers or pounds by species of all other fish shall be reported before being transported out of the state.

(f) Operators of floating fish processing vessels shall report in person, or by radio or telephone, to the local representative of the department located within the management area of intended operation before the start of processing operations. The report must include the initial processing location by district or subdistrict, the exact latitude and longitude of the location, and the date of intended operation. Before moving the operation and upon arriving at a new location, the operator shall notify the local department representative in person, or by radio or telephone, of the new location of operation by district or subdistrict and exact latitude and longitude of the location. The local representative of the department may waive all or part of the above requirements if he determines they are not necessary for the conservation or management of the fishery in that area.

(g) No person may possess a fish ticket that has been imprinted with a CFEC permit number until the time of delivery to the purchaser of the fish listed on the fish ticket.

(h) In the Arctic - Yukon - Kuskokwim area, a buyer or processor transporting salmon or salmon roe to the point of initial processing shall have in his or her possession, and display, upon request, to a peace officer of the state, a completed fish ticket, or a copy of it, for all salmon or salmon roe in the buyer's or processor's possession at the time. Such a buyer or processor, while transporting commercially caught salmon or salmon roe, may not possess or transport subsistence caught salmon or salmon roe.

(i) The owner and operator of each fishing vessel registered under the laws of the state and regulated under federal groundfish fishery regulations at Title 50, Code of Federal Regulations, Parts 672 and 675, and each person (as defined in AS 01.10.060) who is the first purchaser of raw groundfish shall comply with the recordkeeping and reporting requirements regulations codified at Title 50, Code of Federal Regulation, Parts 672 and 675, Sections 672.5 and 675.5, (1988), as amended 54 Fed. Reg. 18519 (May 1, 1989); 54 Fed. Reg. 50386 (December 6, 1989); 55 Fed. Reg. 1036 (January 11, 1990).

5 AAC 39.140. INSPECTION OF FISHING ESTABLISHMENTS AND VESSELS. (a) Representatives of the Department of Fish and Game or the Department of Public Safety shall have free and unobstructed access to all fishing vessels, canneries, salteries, and other land-based or floating processing establishments to inspect catch, equipment, gear, and operational compliance with AS 16 and regulations promulgated thereunder.

(b) Upon being approached by a vessel or aircraft under the control of a representative of the Departments of Fish and Game or Public Safety, the operator of a fishing vessel, catcher/processor, or floating processor shall be alert for, and immediately comply with, signals conveying enforcement intent. A vessel operator signaled to stop or heave to for boarding shall

(1) stop immediately and lay to or maneuver in such a way as to permit the representative and his party to come aboard;

(2) if requested, provide a safe ladder for the representative and his party;

(3) when necessary, illumination of the ladder;

(4) take such other action as may be necessary to facilitate the boarding of the party and to facilitate the boarding of the party;

(5) make every effort to maintain the proper navigation and control of the vessel, except that the owner or operator, and control of the vessel, proper navigation and control of the vessel.

(c) On a vessel which is subject to 5 AAC 39.845, the vessel must make those crab a

(d) Notwithstanding 5 AAC 33.393, upon a peace officer of the state, adipose-fin-clipped salmon and location of the catch

5 AAC 39.141. ONBOARD OBSERVERS IN PARTICULAR FISHERIES. In particular fisheries, management, primarily by facilities. Onboard observer enforcement mechanism as catcher/processors are of Fisheries, therefore, Game to implement or determines that it

(1) is the only person

(2) will not unduly

(3) can be conducted

(b) Every onboard observer shall have free and unobstructed access to all fishing vessels or the territories of the vessels delivering to the

(1) within waters

(2) taking or intending

(3) transporting or

(c) Onboard observer shall make the scheduling and

(d) Onboard observer shall have warrants to conduct the

(e) Onboard observer shall be appropriate to manage resources of the state.

(f) Onboard observer shall be random, at least twice in coordinates at any time not to interfere with no

(g) Every independent while employed by the that employment, may