

STATE OF ALASKA

COMMERCIAL FISHERIES ENTRY COMMISSION

TONY KNOWLES, GOVERNOR

8800 GLACIER HWY, #109
JUNEAU, AK 99801
(907) 789-6150 Licensing Calls
(907) 789-6160 Other Business
(907) 789-6170 FAX
(907) 789-6180 BBS
INTERNET: www.cfec.state.ak.us

July 23, 1999

CERTIFIED—RETURN RECEIPT **Z 129 922 210**

James Vollintine
Attorney at Law
P.O. Box 113329
Anchorage, AK 99511-3329

Re: H. Blanche Kallstrom
Application for a Bristol Bay Drift Gill Net Entry Permit (S03T)
CFEC File No. 75-646
Final Commission Decision on Reconsideration

Dear Mr. Vollintine:

On reconsideration, we have completed our review of H. Blanche Kallstrom's application for a Bristol Bay drift gill net entry permit (S03T) in light of the arguments in Ms. Kallstrom's petition for reconsideration. We have concluded the application must be finally denied. Enclosed is a copy of the final commission decision on reconsideration, which finally denies this application.

Also enclosed is that part of Appellate Rule 602 outlining the applicant's right to seek judicial review of this decision. Under the appellate rule, the applicant has only 30 days from the date of this letter to file an appeal in Superior Court.

By Direction of the

COMMERCIAL FISHERIES ENTRY COMMISSION

Marlene Johnson, Commissioner
Mary McDowell, Commissioner
Bruce Twomley, Chairman

by: 

Enclosures

cc: H. Blanche Kallstrom, Box 550, Dillingham, AK 99576 (Z 129 893 617)

State of Alaska

Commercial Fisheries Entry Commission

In Re Application:

H. BLANCHE KALLSTROM

for a Bristol Bay Drift Gill Net Entry Permit
(S03T)

CFEC File No. 75-646

**FINAL COMMISSION DECISION ON
RECONSIDERATION**

COUNSEL

James Vollintine, Attorney at Law, P.O. Box 113329, Anchorage,
AK 99511-3329, attorney for the applicant.

Summary of the Case

Based upon a well documented fishing history prior to the January 1, 1973 qualification date, the entry commission granted Blanche Kallstrom's separate application for a Bristol Bay salmon set net entry permit in 1975.

In 1973, when the sliding gear scale authorized more units of gear to be fished by each additional gear license holder, the applicant held for the first time a gear license in the Bristol Bay salmon drift gill net fishery. As the applicant testified to the commissioners:

That was the year that everybody, we were limited I think to 25 fathoms. We all had to buy gear licenses, even had to license the children.

As the result of Isakson v. Rickey, 550 P.2d 359 (Alaska 1976), the applicant was authorized to submit an application for Bristol Bay salmon drift gill net entry permit in 1977.

Prior to the January 1, 1973 qualification date, the applicant had no documented participation in the Bristol Bay drift gill net fishery.

Seventeen points are required for issuance of a Bristol Bay salmon drift gill net entry permit. Commission staff initially found the applicant entitled to six points toward a drift permit as follows:

| POINTS | EXPLANATION |
|----------|---|
| 1 point | 1965 crew participation |
| 1 point | 1966 crew participation |
| 4 points | lack of availability of alternative occupations |

Following a hearing, a commission hearing officer found the applicant entitled to an additional point for 1972 crew participation bringing her point total to seven.

Following an oral appearance before the full commission, the commissioners found the applicant entitled to an additional three points as follows:

| POINTS | EXPLANATION |
|---------|--|
| 1 point | 1968 crew participation (unavoidable circumstances) |
| 1 point | 1970 crew participation |
| 1 point | 1971 crew participation |

The commissioners affirmed the hearing officer in denying the following remaining point claims of the applicant:

| POINTS | EXPLANATION |
|----------|--|
| 1 point | 1967 crew participation (no commercial license) |
| 1 point | 1969 crew participation (no commercial license) |
| 6 points | investment in a vessel |
| 3 points | investment in gear |

The commission's decision left the applicant with ten points toward a Bristol Bay drift gill net entry permit. Seventeen points are required to issue the permit.

Through her attorney, the applicant submitted a petition for reconsideration (hereinafter petition) of the commission's final decision. The petition challenged each point denial and added a new claim to one point for participation as a crewmember in 1964. We have reconsidered our decision and reviewed this record in light of the arguments presented by the petition. For the following reasons, we find we are not persuaded by the petition to award the applicant more than the ten points we granted in our final commission decision. Therefore, on reconsideration, this application is finally denied.

Discussion

(1) 1967 and 1969 Crew Participation

The petition (at 1-3) argues the commission should excuse the applicant's failure to have held a commercial (crew) license in 1967 and 1969 and award two crew participation points for those years.

Actually, the issue with respect to the applicant's 1967 participation is more fundamental. The applicant did not hold any fishing licenses in 1967. Except for her father, none of the applicant's family held a gear license in the drift net fishery for 1967. Her father also held a gear license for the set net fishery and his recorded landings were in the set net fishery only. Additionally, the applicant's husband held no fishing licenses in 1967. In 1967, none of the family members identified by the applicant had a recorded landing in the Bristol Bay salmon drift gill net fishery. Therefore, apart from her failure to hold a commercial license, the commission does not believe the applicant has met her burden of proving she participated in fact as a crewmember in the drift net fishery in 1967. Comm. Dec. at 3, 17-18.

In addition, as the petition (at 1) acknowledges, "Mrs. Kallstrom failed to hold a crew license" in 1967 and 1969. As noted, the petition argues the commission should excuse her failure and award the two crew participation points at issue.

Alaska's statutory requirement and the commission's policy are longstanding. See generally Arkanakyak v. State, CFEC, 759 P.2d 513 (Alaska 1988). Consistent with the majority opinion, dissenting Justices Matthews and Burke, *Id.* at 517, 518, commented:

the Commission's rule that adults who have fished as unlicensed crewmembers are ineligible to receive crew participation points . . . is readily justified in order to prevent fraud and because it is against public policy to reward illegal conduct.

The petition (at 2-3) cites State v. Templeton, 598 P.2d 77 (Alaska 1979), and Chocknok v. State, CFEC, 696 P.2d 669 (Alaska 1985), to support its argument. We note neither case addresses a failure to obtain a required license and resulting illegal fishing activity. In both cases, the issue was simply how to credit the fully legal participation of the applicants.

The petition (at 2) also argues the commission's policy unjustly discriminates against the applicant and is invalid because the commission has not adopted it as a regulation. The same arguments directed at another commission policy governing point awards were rejected by the Alaska Supreme Court in Chocknok, 696 P.2d at 676 n.10:

Appellants claim that by changing its longstanding policy . . . the Commission discriminated against them vis-à-vis similarly situated applicants whose cases were decided earlier. They argue that such changes in policy should be made through rule-making provisions of the Administrative Procedure Act. We find these arguments to be without merit. The Commission has not changed a regulation but has corrected a policy. It is well established that the choice between modifying an existing agency policy by rule or by individual ad hoc litigation is one that lies in the informed discretion of the agency. *See S.E.C. v. Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995, 2002 (1947).

We believe the Supreme Court's analysis applies with greater force in the instant case, because the commission is not changing or creating a policy. The policy in question has been a prominent part of commission practice since its inception.

The petition further argues (petition at 3), given the circumstances of the applicant, the commission should waive the license requirement as to her. According to the petition (at 3):

In Arkanakyak v. State, 759 P.2d 513 (Alaska 1988) the court held that to avoid unjust discrimination licensure should be waived for crew participation points. Arkanakyak stand for the proposition that one who believes in good faith that she is licensed should be awarded crew points.

We note first, the testimony provided in support of Mrs. Kallstrom's application fails to establish she believed in good faith she was properly licensed in 1967 and 1969. Additionally, Arkanakyak supports the commission's decision in this case.

In contrast to this applicant, Mrs. Arkanakyak did not speak or understand English, nor could she write in any language. Arkanakyak at 516. Nonetheless, the court did not require CFEC to create an exception to its policy (as the commission had done for the benefit of minor children dependent upon their parents or others for licensing). Instead, the court remanded for CFEC to determine whether Mrs. Arkanakyak's "factual circumstances . . . warrant granting an exception in her case to the commission's licensure requirement." Arkanakyak at 517 (footnote omitted). The Supreme Court added, Arkanakyak at 517 n.8, the following qualification:

Whether the CFEC's general policy of not awarding crewing points to unlicensed applicants is subject to exceptions for adults is in the province of the CFEC to decide on remand. We express no opinion as to whether unlicensed dependent adults are entitled to crew participation points; we simply hold that the Commission should consider this question

The Supreme Court also highlighted, *id.* at n.9, the following factual issue:

the parties . . . dispute whether Arkanakyak knew or should have known in 1971 and 1972 that she did not have a commercial fishing license. These factual determinations are for the CFEC to make

On remand of Mrs. Arkanakayak's application to the commission, we concluded "past Commission decisions suggest that a claimant for crew points (like a claimant for gear license holder participation points), who can demonstrate that he or she neither knew nor had reason to know of a failure to satisfy the licensing requirement, may be awarded the participation points at issue." Arkanakyak, CFEC 75-488 (1989 at 6-7, footnote omitted). After reviewing the record, we concluded (*id.* at 12-13) that Mrs. Arkanakyak had not met her burden of proving that an exception was warranted under her circumstances:

Although . . . there can be an exception to the licensing requirement for one who does not know nor have reason to know of a failure to obtain the proper license, Mrs. Arkanakyak has not met her burden on this point. This record does not allow the Commission to conclude that Arkanakyak was not aware of the licensing requirement. Nor can we infer that she was helpless when it came to determining whether she was properly licensed. Her own testimony and that of her daughter weigh against such a conclusion. Arkanakyak's own licensing history further weighs against the conclusion that she neither knew nor had reason to know of the licensing requirement and her failure to hold a license in 1971 and 1972 Neither does her language difficulty excuse an apparent failure to make reasonable inquiry to ascertain her licensing status. We do not believe that we can ignore information that a reasonable inquiry on the part of Mrs. Arkanakyak would have produced: namely, that she was not properly licensed to participate as a crew member in 1971 and 1972. Therefore, we do not believe the evidence in this record warrants excusing her failure to hold a commercial license in 1971 and 1972.

Based on this conclusion, we denied Mrs. Arkanakyak the two additional crew participation points she was seeking. Mrs. Arkanakyak did not challenge our 1989 decision.

Except for the fact that she is not burdened by a language barrier, this applicant's situation is like that of Mrs. Arkanakyak. In 1967, the applicant was 23 years old and married with her own family. After reviewing the record and testimony presented, we concluded (comm. dec. at 17) that the applicant had not proven she did not know nor have reason to know of the licensing requirement:

Based on this record we cannot conclude Ms. Kallstrom was not aware of the licensing requirements, nor could we infer she did not have reason to know of the licensing requirement Ms. Kallstrom was aware that appropriate licensing was required to participate in commercial fishing. She held commercial and gear licenses for the Bristol Bay set net fishery in 1965 and 1966 and again, in 1970, 1971 and 1972.

Like Mrs. Arkanakyak, this applicant has failed to prove she should be excused from the licensing requirement.

(2) **1964 Crew Participation**

Additionally, the petition (at 3-5) requested the opportunity to amend Ms. Kallstrom's application to claim one additional point for crew participation in 1964.

We deny the request, because the governing commission regulations have never authorized an award of crew participation points for 1964 for any applicant. For all applicants, the regulations authorize crew participation points only for the years 1965 through 1972. 20 AAC 05.630(a)(4).

Because the commission does not have authority to issue crew participation points for 1964, we decline to accept into the record the evidence with respect to 1964 attached to the petition.

Additionally, we note an award of crew participation points to an eligible applicant is not conditioned upon the applicant having held a gear license prior to the January 1, 1973 qualification date. The petition (at 4-5) asserts to the contrary that “20 AAC 05.630(a)(3) conditions the award of points for 1960-1964 crew participation on holding a gear license in 1972 or before” This is not the case under 20 AAC 05.630(a)(4), the regulation governing crew participation points.

Therefore, with respect to her 1964 crew participation claim, Ms. Kallstrom is not disadvantaged in any way by her failure to have held a gear license in the drift net fishery prior to the January 1, 1973 qualification date.

Additionally, the petition (at 4) claims:

In Isakson v. Rickey, 550 P.2d 359, 365 (Alaska 1976), the Supreme Court invalidated on equal protection grounds AS 16.43.260(d) which states that “an application shall be assigned a priority classification based solely upon the applicant’s qualifications as of January 1, 1973.”

This claim is based on a misreading of Isakson which did not strike down AS 16.43.260(d). In fact, Isakson reinforced and emphasized the importance of AS 16.43.260(d).

The plaintiffs in Isakson challenged only AS 16.43.260(a), because it precluded those who were first time gear license holders in 1973 and 1974 from applying for limited entry permits. Isakson, 550 P.2d at 361, 364. Only AS 16.43.260(a) was affected by Isakson, 55 P.2d at 366.

The Isakson decision had no effect upon the commission's hardship allocation criteria. According to the court, Isakson, 550 P.2d at 364, 365:

The challenged section, AS 16.43.260(a), was inserted at a late stage in the legislative process, and nothing in the committee records marshalled by the parties in the case at bar suggests an awareness of intent that AS 16.43.260(a), as revised, would alter the statute's central allocation criteria.

* * *

For these reasons we are of the view that AS 16.43.260(a) was not intended to modify the allocation policy of the legislation

In fact, AS 16.43.260(d) is a critical part of the hardship allocation criteria embraced by the court. Isakson, 550 P.2d at 363-364. The court in Isakson, 550 P.2d at 363 expressly shared the concern of the state that

this rush for gear licenses . . . meant more gear in already depleted fisheries, and that a heavy influx of gear into certain areas before entry permits were required in January of 1974 would result in detrimental economic and biological ramifications.

In the court's view, AS 16.43.260(d) was "the means for stopping the gear rush and its consequent harmful effects" Isakson, 550 P.2d at 363-364. As the court explained, Isakson 550 P.2d at 364 (footnote omitted):

The legislature had previously inserted the provision [AS 16.43.260(d)] that hardship would be determined as of January 1, 1973. Certainly few fishermen would be inclined to invest unnecessarily in gear if they were aware of the fact that it would not be considered by the Commission when entry permits were ultimately issued on the basis of hardship. This provision would clearly halt the gear rush that was taking place, thus obviating any potential harm to the fishing industry before entry permits were required on January 1, 1974.

Thus, Isakson requires those it authorized to apply for entry permits to be treated equally with other limited entry permit applicants under the statute's allocation criteria including the statutory January 1, 1973 qualification date under AS 16.43.260(d). Therefore, we believe the petitioner's argument is without merit.

(3) Gear

The petition notes the commission decision does not expressly address the applicant's claim to have owned drift net gear as of the January 1, 1973 qualification date.

In response, we note the hearing officer found the applicant failed to meet her burden of proof on the issue of gear ownership. In our final decision, we agreed and affirmed the hearing officer on his denial of the applicant's gear ownership claim. Comm. dec. at 2-19.

The petition (at 5) asserts the applicant claimed full ownership of gear in her own right. The record is not so clear.

The applicant did not include this claim on her original application, nor did she articulate this claim to the hearing officer. Additionally, as outlined by her attorney at the outset of her oral appearance, this claim was not before the commissioners. However, her testimony to the commissioners for the first time suggests such a claim.

Before the commissioners, the applicant testified she owned the skiff, ADF&G number 3659, built and given to her by her father. She further testified that around the time she married Robert Kallstrom on July 29, 1972, she gave the skiff back to her parents in exchange for nets.¹ However, this claim is contradicted by the affidavit (A-7) previously submitted by the applicant's mother that states the applicant was part owner of family drift nets and sole owner of the skiff, ADF&G number 3659, as of December 31, 1972.

Furthermore, three points are at issue for gear ownership under 20 AAC 05.630(b)(3). If the applicant were to prove she and another person owned gear in equal shares, she would be entitled to only one (1) point. 20 AAC 05.220(2). Given our denial of the applicant's other claims, by itself, the applicant's gear ownership claim is moot because, even if granted the full 3 points for gear ownership, the total point award would be insufficient for a permit.²

¹ She later testified it may have been during the winter that she acquired the nets.

² Additionally, we note the applicant actively pursued her claim to full ownership of a skiff used in the fishery, and we have discussed this claim in detail below. If the applicant were to prevail on her vessel ownership claim, she would not be entitled to an additional three points for gear ownership. 20 AAC 05.630(b)(3).

Because the gear claim is essentially moot, we will not attempt to resolve this conflict in the evidence.

(4) Vessel

The petition (at 5-6) asserts the applicant was one-half owner of the *Margaret K* together with Robert Kallstrom. Robert Kallstrom purchased the *Margaret K* under an installment agreement in 1969 or 1970. Robert married the applicant on July 29, 1972. In June of 1972, the applicant fished with Robert during the early king season. Then, when the main red salmon run began, the applicant went to help her mother and continued to do so during the peak of the red season. Subsequently, on July 29, 1972, the applicant married Robert Kallstrom.

To receive points for investment in a vessel, the applicant is required to prove her ownership of a vessel or part of a vessel by January 1, 1973. AS 16.43.260(d). On this record, we do not believe the applicant has proven she owned any portion of the *Margaret K* by the qualification date.

The petition (at 6) argues the applicant and Robert Kallstrom formed a fishing partnership and the “*Margaret K* was an asset of the partnership.” On this premise alone, the petition concludes the applicant owned one-half of the *Margaret K* as of the January 1, 1973 qualification date and should be awarded three (3) points.

We do not believe the existence of a fishing partnership has been established for 1972. Even if the partnership had been established by 1972, this record does not show us the *Margaret K* was more than Robert Kallstrom’s individual property at that time. We note Robert Kallstrom owned the *Margaret K* as his individual property before he married the applicant and before the alleged partnership came into existence. No facts in this record show the applicant to have acquired an interest in the *Margaret K* during 1972. The fact of a partnership, if proven, would not tell us which tools employed in the partnership were owned individually by particular partners. See AS 43.05.020 and AS 32.05.030.

This is particularly true in a fishing partnership, where differently equipped parties may get together in order to create a whole fishing operation. *See, for example, Merritt*, CFEC 75-758-A (1992). Additionally, to establish a marital fishing partnership, as the Alaska Supreme Court in *Chocknok v. State*, CFEC, 696 P.2d 669, 675 (Alaska 1985), directed:

it may be more appropriate for the Commission to focus on the actual ownership of the business property as evidence of partnership.

On this record, the applicant's proof of actual ownership of a portion of the *Margaret K* is lacking. All we know from this record is Robert Kallstrom purchased the *Margaret K* in 1969 or 1970. Subsequently, on July 29, 1972, Robert Kallstrom married the applicant. This record does not establish the applicant had an interest in the *Margaret K* as of the January 1, 1973 qualification date.

In the alternative, the petition (at 6) claims the full six points for sole ownership of the skiff, ADF&G #3659, built and given to the applicant by her father. As noted, the applicant's testimony to the commissioners undermines this claim by admitting she did not own the vessel on January 1, 1973. She testified she had given the vessel back to her parents in exchange for some gear near July 29, 1972.³ However, even if she did own the skiff on January 1, 1973, her claim must be denied.

Generally, 20 AAC 05.630(b)(3) awards points for investment in a vessel "used" in the fishery prior to the qualification date.

In 1972, the applicant licensed the skiff for the Bristol Bay set net fishery. She also purchased a commercial fishing license and Bristol Bay set net gear license for herself.

³ *But see* footnote number 1 above.

As noted, the applicant spent the major part of the 1972 season helping her mother. The applicant testified she and her mother employed the skiff for set netting and drift netting. However, like the applicant, her mother held a gear license only for the set net fishery in 1972.

In short, the applicant and her mother may have used the skiff in the 1972 Bristol Bay drift net fishery but neither the applicant nor her mother held a gear license for the fishery and this claim remains entirely undocumented in state records.

Participation in a fishery without a required license is unlawful and generally not entitled to credit toward an entry permit. Simpler v. State, 728 P.2d 227, 230 (Alaska 1986); Arkanakyak, 759 P.2d at 513. As the commission held in Baxter,⁴ CFEC 87-032-A (1988):

We will not credit a claim to ownership of a vessel used in an Alaska fishery when the asserted use does not conform to the requirements of Alaska law

The applicant's petition has not persuaded the commission to overturn this longstanding policy⁵ and to credit a use which was unlawful under Alaska law. Additionally, the applicant has failed to prove she still owned the vessel, ADF&G number 3659, as of the January 1, 1973 qualification date.

Conclusion and Order

On reconsideration, we do not accept into evidence the material appended to the petition for reconsideration. Additionally, we are not persuaded the applicant is entitled to any additional

⁴ Affirmed on other grounds, CFEC v. Baxter, 806 P.2d 1373 (Alaska 1991).

⁵ The applicant has failed to establish the vessel was lawfully used in the fishery prior to the qualification date, and the applicant has failed to show she fished consistently as a drift net gear license holder in 1972. Therefore, a vessel ownership claim under 20 AAC 05.620(2) is not authorized.

points toward her Bristol Bay drift gill net entry permit. Seventeen points are required for issuance of a Bristol Bay drift gill net entry permit. This application remains classified at ten (10) points and is finally denied.

DATED at Juneau this 23rd day of July, 1999.

By Direction of the
COMMERCIAL FISHERIES ENTRY COMMISSION
Marlene Johnson, Commissioner
Mary McDowell, Commissioner
Bruce Twomley, Chairman

by: 

STATE OF ALASKA
COMMERCIAL FISHERIES ENTRY
COMMISSION

TONY KNOWLES, GOVERNOR

8800 GLACIER HWY, #109
JUNEAU, AK 99801

(907) 789-6150 Licensing Calls

(907) 789-6160 Other Business

(907) 789-6170 FAX

(907) 789-6180 BBS

INTERNET: www.cfec.state.ak.us

May 4, 1999

CERTIFIED—RETURN RECEIPT
Z 129 922 232

James F. Vollintine, Esq.
Box 113329
Anchorage, AK 99511-3329

Re: M. Blanche Kallstrom
Application for a Bristol Bay Drift Gill Net Entry Permit (S03T)
CFEC File No. 75-646

Dear Mr. Vollintine:

On May 20, 1982, the hearing officer issued a decision which denied this application for a Bristol Bay drift gill net entry permit (S03T) and notified you of the applicant's right to ask the commissioners for further review of that decision.

In response to your request, we ordered administrative review. We have now completed our administrative review and enclosed is a copy of our final commission decision which, subject to our additional comments, adopts and affirms the result reached by the hearing officer. The effect of our decision is to finally deny the application for a Bristol Bay drift gill net entry permit (S03T).

Additionally, Ms. Kallstrom emergency transferred her 1999 interim-use permit for the Bristol Bay drift gill net fishery April 29, 1999. This decision will not affect her emergency transfer of the interim-use permit or the eligibility of the transferee to participate in 1999.

Enclosed is a copy of 20 AAC 05.1850, the Commission regulation detailing your 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 you to seek judicial review of this decision. Under the appellate rule, you 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

Marlene Johnson, Commissioner
Mary McDowell, Commissioner
Bruce Twomley, Chairman

by:  _____

Enclosure

cc: M. Blanche Kallstrom, Box 550, Dillingham, AK 99576 (Z 129 922 241)

STATE OF ALASKA

COMMERCIAL FISHERIES ENTRY COMMISSION

In Re Application:

M. BLANCHE KALLSTROM

for a Bristol Bay Drift Gill Net Entry Permit
(S03T)

CFEC File No. 75-646

FINAL COMMISSION DECISION ON ADMINISTRATIVE REVIEW

James F. Vollintine, Esq., Box 11329, Anchorage, AK 99511-3329, attorney for the applicant

Summary of the Case

Blanche Kallstrom applied for a Bristol Bay drift gillnet entry permit on September 29, 1977 based on her participation in 1973. Isakson v. Rickey, 550 P.2d 359 (Alaska 1976). Applications for this and all other originally limited salmon fisheries are governed by regulations adopted in 1974 that rank individual applicants according to their relative dependence on the fishery as of the January 1, 1973 qualification date.

The regulations allow credit for fishing from 1960 through 1972. Blanche participated in the Bristol Bay set net and drift net fisheries from 1965 to 1972 in a family fishing operation. She participated in the set net fishery in most years and received a limited entry permit by original issuance for the Bristol Bay set net fishery in 1975.

A commission hearing officer denied Ms. Kallstrom's application for a Bristol Bay drift

gillnet entry permit with insufficient points on May 20, 1982.¹ The commission conducted an oral presentation on behalf of the applicant on September 17, 1984.

After completing our review, we reverse the hearing officer in part and award three additional points for crew participation in 1968, 1970 and 1971, bringing the applicant's point total to ten. We affirm the hearing officer's denial of Ms. Kallstrom's remaining point claims and her application is finally denied due to insufficient points. To be understood this decision must be read with the decision of the hearing officer.

Factual History

Blanche (Palin) Kallstrom was born on xxxxxxxx, 1944.

The Andree family, including Blanche's parents, Al and Helena Andree and her brothers, Willie and Lanny, participated in the Bristol Bay drift and set net fisheries as part of a family fishing operation during the years 1965 - 1972. In 1960, the family had moved their set and drift operation to Coffee Point. During a typical season, Al Andree and one or both of the boys would operate a larger drift net skiff. Blanche and her mother would work at the family's set net site and help with the drift net fishing when they were needed. Coffee Point is very flat, so an 18 foot tide was needed to reach the set nets. Sometimes the high tide would only last one hour. If the fish did not hit the beach, the family would go to the channel and drift fish. Blanche would give her drift and sometimes set net caught fish to her father or one of her brothers, who would then sell it to the cannery on his gear license.

Blanche married Jim Palin in 1961.

¹ In his conclusion the hearing officer recommended Ms. Kallstrom's application should be verified with eight points. H.O. at 10. However, the hearing officer had really verified only seven points on her application: three points for crew participation in 1965, 1966 and 1972 and four points for availability of alternative occupations.

Blanche held a commercial license and participated as a crewmember in the Bristol Bay drift gillnet fishery in 1965 and 1966.

According to commission records, Blanche did not hold any fishing licenses in 1967. Neither Blanche's parents nor her brothers had landings in the drift net fishery in 1967. Al Andree held gear licenses for the set and drift fisheries, but had landings in the set net fishery only. Jim Palin and Lanny Andree did not hold any licenses in 1967. Willie Andree held a commercial license only.

On May 29, 1968, Ms. Kallstrom gave birth to a three pound, four ounce baby boy, born prematurely. She did not participate in the drift or set net fishery in 1968.

According to commission records, Ms. Kallstrom did not hold any fishing licenses in 1969. Helena Andree held only a commercial license in 1969. Al and Willie Andree held gear licenses for the Bristol Bay drift gillnet fishery and had landings attributed to their licenses. Lanny Andree and Jim Palin held only commercial licenses in 1969.

Ms. Kallstrom held a commercial license and a gear license for the Bristol Bay set net fishery in 1970, 1971 and 1972. Helena Andree held gear licenses for the set net fishery in 1970, 1971, and 1972. Al, Willie, and Lanny Andree held gear licenses for the set and drift net fisheries in those years.

Blanche and Jim Palin were divorced in June 1971.

Al Andree was also a boat-builder and built Ms. Kallstrom a 22 foot skiff, ADF&G #3659, and gave it to her as he had done with each of the other family members. She licensed the vessel for the Bristol Bay set net fishery in 1972.

Blanche married Robert Kallstrom on July 29, 1972. She fished with Robert in the drift fishery in June 1972 and also helped her mother during the red season in the drift and set net fisheries.

Procedural History

On October 5, 1977, the commission received Blanche Kallstrom's application for a Bristol Bay drift gill net permit. The applicant claimed 18 points towards the issuance of her permit. She claimed 6 points for participation as crew for the years 1965, 1966, and 1969 to 1972; 6 points for ownership of vessel and gear; 4 points for availability of alternative occupations; and 2 points for participation as a gear license holder in 1968 based on unavoidable circumstances.² The applicant also submitted two affidavits in support of her point claims.

On April 6, 1978, commission staff classified her application with 6 points: 1 point each year for crew participation in 1965 and 1966 and 4 points for availability of alternative occupations and denied the application for insufficient points. In the same notice, the commission offered the applicant an opportunity to request a hearing to challenge the point determination.

On May 18, 1978, the applicant through her attorney requested an administrative hearing. The applicant amended her point claims as follows: 6 points for crew participation for the years 1967 to 1972 including 1 point for crew participation in 1968 based on unavoidable circumstances; 3 points for ownership of nets; 3 points for joint ownership of a vessel or in the alternative 6 points for ownership of a vessel; and 10 points for 1971 and 1972 income dependence based on special circumstances.

On June 7, 1978, a commission hearing officer granted an administrative hearing.

On September 5, 1978, the hearing officer scheduled a hearing for October 6, 1978 in Dillingham, Alaska. On October 2, 1978, the hearing officer cancelled the hearing due to a conflicting trial.

² Only one point is available under the point system for participation as a gear license holder in 1968. 20 AAC 05.630(a)(2).

On October 17, 1978, the hearing officer scheduled a hearing for November 17, 1978 in Dillingham, Alaska. The hearing was held as scheduled and the applicant, her attorney, and witnesses, Hjalmar Olson, Freeman Roberts, Robert Kallstrom, Peter Nelson, Alfred Andree, Mary Olson and Ed Nicholson attended. The applicant submitted the affidavit of Lawrence Murphy, Sr., licensing applications, and medical records dealing with the birth of her son in 1968.

On December 4, 1978, the commission received Steve Muhic's affidavit regarding the applicant's participation in the years 1970 to 1972. On December 7, 1978, the commission received Earl Tilden's affidavit in support of the applicant's vessel ownership claim. On December 14, 1978, the hearing officer accepted both affidavits into evidence.

On December 21, 1978, the commission received Helena Andree's affidavit in support of the applicant's crew participation and vessel ownership claims. On January 17, 1979, the hearing officer accepted the affidavit into evidence.

On March 8, 1979, the hearing officer informed the applicant's attorney that the tape recording of the hearing might be damaged. On March 13, 1979, the hearing officer advised that the tape recording was repaired and no testimony appeared to be lost. He offered the applicant's attorney the opportunity to request a supplemental hearing if he thought the tape was defective.

On February 20, 1980, the commission received a letter from the applicant authorizing James Vollintine to represent her with regard to her application for a Bristol Bay drift gill net permit.

On June 18, 1980, a hearing officer acknowledged receipt of the authorization and summarized the status of the applicant's case.

On March 9, 1981, a hearing officer notified the applicant her file had been transferred to this hearing officer. On May 26, 1981, the hearing officer advised the applicant she had until September 1, 1981 to submit any additional evidence or to request a supplemental hearing. The applicant did not respond.

On May 13, 1982, a new hearing officer advised the applicant her file had been transferred to this hearing officer and further explained he was preparing a decision and notified her of her opportunity to disqualify the hearing officer and to request an oral presentation before the commission if she should object to the hearing officer's recommended decision.

On May 20, 1982, the hearing officer issued his recommended decision. The hearing officer verified 1 additional point for participation as a crewperson in 1972³ and denied the remaining point claims. The hearing officer rejected the applicant's claims that the birth of her son on May 29, 1968, prevented her from fishing in 1968 and that she co-owned a vessel with her husband Robert Kallstrom or that she owned a vessel that was used or to be used in the fishery.

On June 4, 1982, the commission received a request for an oral presentation before the commissioners. On June 22, 1982, the commission granted the request for an oral hearing.

On February 17, 1983, the commission scheduled an oral presentation for April 2, 1983 in Anchorage, Alaska. On February 22, 1983, the applicant's attorney called to ask that the hearing be rescheduled for the fall because of an upcoming trial.

On November 9, 1983, the commission scheduled the oral presentation for December 16, 1983 in Anchorage, Alaska. The applicant exchanged her hearing date with another applicant because of a scheduling conflict. The applicant's oral presentation was changed to December 15, 1983.

On August 17, 1984, the commission rescheduled the oral presentation for September 21, 1984 in Dillingham, Alaska. On August 30, 1984 the commission rescheduled the hearing for September 17, 1984 in Dillingham.

³ The hearing officer awarded one point for 1972 crew participation based on the applicant's participation with Jim Palin, whom she divorced in June 1971. However, on 29 July 1972, the applicant married Bob Kallstrom with whom she crewed in 1972. Thus, the applicant's award of one point for 1972 crew participation is unaffected by the apparent misstatement of the hearing officer and remains intact.

On September 13, 1984, Commissioner Smith withdrew from consideration of Ms. Kallstrom's application.

On September 17, 1984, the commission conducted an oral presentation on behalf of the applicant who appeared together with her attorney, her parents Al and Lena Andree, and her brother Lanny Andree.

On October 26, 1984, in a status memorandum to the file, Chairman Twomley accounted for the oral appearance and noted the applicant's attorney had asserted a claim for 1973 past participation points.⁴ The memo noted the record was closed and the case was now ripe for decision.

On December 1, 1984, the applicant through her attorney sent a cover letter with an enclosure, a letter from Dr. James S. Pinneo of Faith Hospital describing the birth and subsequent illness of the applicant's son in 1968. However, Mr. Pinneo's letter was not enclosed, but was later received on December 12, 1984.

As a general matter, a number of factors contributed to the time required to reach this final commission decision.

While the commission produces final decisions at the rate of more than 100 per year, large volumes of cases tend to arise at nearly the same time. Inevitably, both hearing officers and the commissioners have a substantial number of cases to address. For example, following this applicant's 1978 hearing, the commission had initiated special measures to advance many cases then pending before commission hearing officers. As a result, from late 1981 through 1982, over and above the commission's existing case load, hearing officers issued 382 recommended decisions and passed their decisions on to the commissioners for final review.

⁴ Commission regulation, 20 AAC 05.630(a), authorizes participation claims only through 1972, consistent with AS 16.43.260(d), which requires "an applicant shall be assigned to a priority classification based solely upon the applicant's qualifications as of January 1, 1973.

The procedure at the time authorized hearing officers to make only recommendations to the commissioners. To advance the process, in 1985, the commission adopted regulations requiring commissioners within 60 days of a hearing officer's decision to adopt the decision or order further administrative review. 20 AAC 05.1845. The commission reviews every hearing officer decision, but, to order further administrative review, an applicant must petition or the commission must act within this time limit. 20 AAC 05.1845

Additionally, during the pendency of this case, the Alaska Supreme Court decided a number of cases the court previously held in abeyance pending the outcome of State v. Ostrosky, 667 P.2d 1184 (Alaska 1983); appeal dismissed for want of a substantial federal question, 467 U.S. 1201, 104 S.Ct. 2379, 81 L.Ed.2d 339 (1984). Each case had a direct effect upon the Limited Entry program: for example, Forquer v. CFEC, 677 P.2d 1236 (Alaska 1984); CFEC, State, v. Byayuk, 684 P.2d 114 (Alaska 1984); Deubelbeiss v. CFEC, 689 P.2d 487 (Alaska 1984); Roehl v. CFEC, 684 P.2d 130 (Alaska 1984); Wickersham v. State, CFEC, 680 P.2d 1135 (Alaska 1984); Chocknok v. State, CFEC, 696 P.2d 669 (Alaska 1985).

Implementation of these cases (in particular, Byayuk required that a commission reversal must be applied retroactively) led to the reopening of a number of previously decided issues and previously closed applications. Consequently, during 1985, on its own initiative, commission staff reviewed all pending applications to identify any potential issues arising from the series of recent Alaska Supreme Court cases.

Subsequently, in 1988, the State and the plaintiff class reached a settlement in Wassillie v. Simon, No. 3AN 75-506 Civ., which authorized 275 new applications for entry permits in the original 19 limited salmon fisheries (which included the fishery in question). In contrast to applicants like Ms. Kallstrom who could continue to fish as long as their applications remain pending, applicants under the Wassillie settlement are not entitled to fish until they receive a favorable final decision. Therefore, the commission has given Wassillie applications priority in its

adjudications, as the commission does other claims where the immediate right to fish is at issue.⁵

Pendency of the Wassillie cases interrupted and postponed the commission's ability to complete its review of this and many other pending applications. As of the date of this decision, the commission has nearly completed all pending Wassillie applications. Near completion of the Wassillie cases has created the opportunity to complete our review of this application.

Additionally, while the Wassillie case has been pending and since 1984, the commission met its affirmative statutory duty by limiting 27 additional fisheries generating 3,579 applications for permanent entry permits in the newly limited fisheries. Each limitation requires the commissioners as rulemakers to develop a basic proposal, conduct public hearings, and, subsequently, develop and propose a point system for evaluating applicants, subject to further public hearings. Additionally, prior to initial issuance of any permits in a limited fishery, AS 16.43.270 now requires the commission to consider restricting individual fishing capacity.

As a result, at this time there are approximately 356 cases pending before commission hearing officers and approximately 235 cases pending before the Limited Entry commissioners.

Blanche Kallstrom has renewed her interim-use permit and fished each year through 1995. Beginning in 1996 the applicant has emergency transferred her permit each year due to a chronic medical condition.

Seventeen points are needed for issuance of a Bristol Bay drift gillnet entry permit.

⁵ The immediate right to fish is at stake in every request to transfer an entry permit submitted to the commission. Annually, the commission and its staff must rule upon more than 2,000 requests to transfer entry permits. CFEC 1997 Annual Report.

Findings and Conclusions

Crew Participation in 1968

The hearing officer rejected the applicant's claim that the birth of her son on May 29, 1968, prevented her from participating as a crewperson in 1968. The hearing officer found the applicant may have had a moral duty to care for her child, but that did not necessarily require her to not participate in the fishery. We reverse and award one point for participation as a crewperson in 1968.

Blanche Kallstrom delivered a premature baby boy weighing 3 pounds and 14 ounces on May 29, 1968. The hearing officer used the 3-part test to deny her claim. When an unavoidable circumstance is claimed, the commission has consistently held that the 3-part test may serve as a helpful test of causation only when its elements are relevant to the facts; the test cannot be applied uniformly in all cases. See Roehl v. CFEC, 684 P.2d 130 (Alaska 1984); Lesher, CFEC 85-030-A (1985); Anich, CFEC 88-067-A (1988); Wadsworth, CFEC 75-465-A (1990); Collier, CFEC 89-353-A (1995); Chiklak, 89-492-A (1997). For example, when an obstacle cannot be reasonably overcome, it is beside the point to talk about all reasonable efforts. See Roehl, *supra* (Compton, J., at 134 concurring).

In this case the birth of a baby and subsequent care of a newborn born prematurely on the eve of the fishing season is such an unavoidable circumstance. The effect of an unavoidable circumstance of this magnitude can be understood without recourse to an all reasonable efforts analysis. Guest, CFEC 89-539-A (1992); Kusegta, CFEC 89-361-A (1992); Byars, CFEC 89-352-A (1993); Collier, CFEC 89-353-A (1995).

Given Ms. Kallstrom's participation in the drift fishery in 1965 and 1966 and in subsequent years after 1968, we find that it is more probable than not that Blanche would have participated in 1968 but for the birth of her son.

Crew Participation in 1967, 1969-1971

The hearing officer found the record supported the applicant's claims that she participated as a crewperson in a family operation in either or both the drift and set fisheries in 1967 and 1969-1971. However, the hearing officer denied points for crew participation because neither Blanche nor her witnesses could remember exactly who she fished with in those years or the family member she did name did not have drift landings in that particular year. H.O. at 5.

Ms. Kallstrom testified that she crewed in 1967 and in 1969 - 1971 in the drift gill net fishery as part of a family operation. Ms. Kallstrom held a commercial license and a gear license for the set net fishery in 1970 and 1971. According to commission records she did not hold any licenses in 1967 or 1969.

At her hearing in 1978, Ms. Kallstrom testified she crewed in the drift fishery with her former husband, Jim Palin, and her mother, Helena Andree, in 1970. She claimed to have fished with her mother in 1971. However, neither Jim nor Helena had drift landings in 1970 or 1971. In 1970, Jim Palin held gear licenses for the drift and set net fisheries, but landings were attributed to his set net license only. Helena Andree did not hold a gear license for the drift net fishery in 1970 or 1971. At her oral appearance in 1984, Blanche recalled that she participated in the drift net fishery with her brother, Willie, and Jim Palin in 1970 and her mother in 1971. Al and Willie Andree, both had landings attributed to their drift permits in 1970 and 1971.

Given that Blanche's family fished together every year in both the drift and set fisheries, it is not surprising that there may have been some confusion about which family member she fished with in each year and who sold her fish.

A number of witnesses (both family and non-family members) did testify at both hearings or in affidavits that they saw the applicant participating in the drift fishery in 1970 and 1971 with family members. In an affidavit dated November 26, 1978, Steven Muhic, a tallyman for Peter Pan Seafoods in 1970, stated he saw Blanche fishing as a crewperson in the drift fishery with

members of her family in 1970. In 1971, while participating in the drift fishery Mr. Muhic saw Blanche Kallstrom drift gillnet fishing with her family.

The credible testimony of the applicant, her family and other witnesses establishes by a preponderance of the evidence Ms. Kallstrom participated in the drift gill net fishery as a crewperson in 1970 and 1971. Ekstrom, CFEC 89-101-A (1991); Shanigan, CFEC 92-105-A (1993); Gust, 89-445-A (1997). The applicant is awarded two additional points for crew participation in 1970 and 1971. Ms. Kallstrom's application is now verified with ten points.

The years 1967 and 1969 are more problematic. Ms. Kallstrom did not hold a commercial license in either year. She was married to Jim Palin during the 1967 and 1969 seasons, however; Jim held a commercial license only in 1969 and did not hold any licenses in 1967.⁶

According to testimony at the oral presentation, Al Andree purchased licenses for the family at the beginning of the year. Al told the cannery who was going to fish and what licenses he needed. Even though Blanche was married to Jim Palin until 1971, her father continued to take care of her licensing each year until she married Bob Kallstrom in 1972.⁷ Ms. Kallstrom and her family testified she fished every year except 1968. They did not know why there was no record of a gear or commercial license in 1967 or 1969.

Al Andree testified that sometimes there would not be a gear license for someone, but that was okay because he could always fish with someone else. There was usually plenty of gear for the family. Al said it was very important that everyone set net, that was what got them by, their "ace in the hole." He said that everyone went down to the beach and if he needed help with his

⁶ Under AS 16.05.940(2), a spouse of a licensed commercial fisherman did not have to hold a commercial license if she did not receive income separate and apart from that of her spouse as a result of her participation with him in the fishery. However, this law does not apply to the applicant in this case because Jim Palin did not hold a gear license for any fishery in 1967 or 1969. Ms. Kallstrom has also testified that she fished with her family in 1967 and 1969.

⁷ Blanche testified that she and Jim were separated during much of their marriage. She was married to Jim from December 1961 until October 1967 and again from December 1967 until June 1971.

drift operation he'd ask someone to help. Al testified he particularly liked fishing with Blanche because she was so good-natured and an extremely fast fish-picker. According to Al, they did not really pay much attention to whether everyone was legal or not, they would have fished anyway.

At the oral presentation in 1984, Blanche and her parents testified as follows regarding their knowledge of licensing requirements:

Commissioner Listowski: How come you didn't purchase a commercial license in 1967?

Applicant: With a family operation, I assumed that it wasn't needed as far as, ah, a crewmember.

Commissioner Listowski: But you had one in 1965 and 1966.

Applicant: If I drifted illegally, fished illegally, it was all supposed to have been taken care of by the cannery.

Al Andree: There you go.

Applicant: If, ah

Commissioner Listowski: When you're 23 years old? That's above the age of reason, it's a time when you're an adult and sort of responsible for taking care of some things in life, I would think. You know, you weren't like, I mean, you know we had these cases where there's children who depend upon their parents, but, you know when you're 23 years of age.

Applicant: Well, I still depend on my folks quite a bit. During the time I was married to my first husband, I was separated half the time. In fact, my kids stayed with my folks. I was back home most of the time, back and forth. It was still mostly family fishing operation. It was still more of a partnerships and everything still connected as if I were a single person.

Helena Andree: I was gonna say, in these years licenses and everything, whether our kids were at home or not Al always made arrangements with the canneries like the first of the year to sign them up and get their licenses and everything. So,

whether she used it or not, or any of the kids, they always had licenses.

Applicant: They even licensed grandchildren.

Helena Andree: Yeah and then she'd even double up and buy her own licenses without realizing that the cannery had it, or Al had it or something. It was automatically purchased every year since they were children.

Commissioner Listowski: Then how come it wasn't purchased in 1967?

Helena Andree: It must have been purchased.

Commissioner Twomley: Well Blanche what was your understanding about licensing at that time?

Applicant: My ex-husband also had a gear license and I understood that, too, that if the head of the household licensed or you're with the captain, then you didn't have to have a gear license. So, if somebody had a gear license that included you as far as crew participation. They didn't come out with all kinds of regulations, they changed'em so many times no one could keep up with the changes. I mean Fish and Game had us guessing and never knowing who was legal or who was illegal. I mean there wasn't a consistent pattern with the Fish and Game regulations.

Commissioner Twomley: Was it your understanding that if either your husband or the head of the family operation

Applicant: the captain yes

Commissioner Twomley: or the captain

Applicant: Yes, absolutely

Commissioner Twomley: That was sufficient.

Applicant: That's why so many wives and people, they weren't licensed, you know, if even when they were business partners, total business partners.

Commissioner Twomley: Where did you get your understanding, where did you get your information about licensing?

Applicant: Through Al.

Commissioner Twomley: Did you ever have occasion to go the cannery yourself and talk to the cannery about licensing?

Applicant: Usually it was all a package deal. You went to the cannery, under (indiscernible) book, your tally book, your licenses, your stickers, your tags, everything was from the cannery. I mean you went to the cannery for everything.

Commissioner Twomley: And I guess my question is who normally made those trips to the cannery. Did you do that yourself or did you leave that to another family member?

Applicant: Mostly Al did or Mom did, and then they'd, if there was times when I had to sign something, then it was brought to my attention and I'd go sign. Yes, I have made trips to the cannery.

Commissioner Twomley: Do you recall ever asking or being told anything about being licensed for drift fishing in addition to, did you hold a license for set netting? Did you have a gear license for setnetting yourself?

Applicant: Yes I have, I have a set net.

Commissioner Twomley: Did you get your set net permit?

Applicant: Yes, uh huh.

Commissioner Twomley: Do you remember anybody ever discussing with you or did you ever have any questions about whether or not you needed a drift gear license over and above your set net license?

Applicant: No, no because there's always somebody in the family that had the, why spend \$40, or \$20, \$30, \$40 whatever it was at that time. Even \$15 was like \$150, so why should we all, if I was going to be a crewmember or whatever, we would at least know who was licensed for the drift part.

Helena Andree: I don't know, it always seemed like we depended on the head of the household for, to take care of all of our licensing.

Commissioner Twomley: And that was Al?

Helena Andree: Yeah, because he was the one who always went to the cannery superintendent and made all the arrangements for nets and chart slips and stuff like that. So, actually we knew there was licenses somewhere and he had them and when we'd go up to the cannery, they'd remind us and say hey you got a packet here and we'd just go in and pick it up and give it to Al. We didn't realize it was that important I guess and that's the way it was with all the kids. Ah, he was the one that took care of all the licenses and we kind relied on that and until the law, Limited Entry, started coming in and had to make sure how things worked. I guess it was unawareness really. How important it was in those days.

Commissioner Twomley: Al, what was your understanding about licensing for your family in this operation?

Al Andree: Well, I've got a remark or two to make about that. You remember or you've got to realize that at certain times money was scarce and when you had a large family, the cannery, the cannery did it all and they would ask me how many are fishing and what licenses do you want for them. I had seven in my group including Willie, Blanchie, Freeman, Lanny, Grandma, Helena and myself. That's 21 parcels and it amounted to hundreds of dollars which we never had at that time in the spring. And so like Bob [Kallstrom] says when he got these papers, we didn't get our licenses until the fishing season, or just before the fishing season. But, ah, some of them were missing, some of them were not missing, so I'd, we'd look at a license and say how come so and so didn't get a gear license and then the co-sensus [sic] of opinion was, it don't make no difference anyway. We've got lots of gear anyway, she can help with somebody else. Or how come he didn't get a drifting permit, how come he didn't get the drift permit, well that's alright he can fish with me, we'll forget the drifting permit. So this is the way, this is the way it materialized year after year. And so, if the intentions was to buy a drifting permit and we never got, we'd drifted anyway. Illegal or not illegal, I don't know.

Al Andree: You mentioned here a moment ago that you couldn't visualize a person that was 19 years old and total maturity and quite capable of getting married, why she didn't get her own licenses, but the thing is this

Commissioner Listowski: She was 23.

Al Andree: It was just never a habit, just never a habit. I, this is my fault very possibly, because when they were ready to go out, the only thing they would say to me, well pop, Gretchy called me, a lot of them called me Grandpop. Well, grandpop am I legal, you're legal go ahead, that's all there was to it. And she never bought, I don't think until she got married or fished with Bob she never bought her own license because I took care of that.

The issue in this case is then whether Ms. Kallstrom did not know nor have reason to know of the licensing requirement. Arkanayak, CFEC 75-488-A (1989). The Commission has allowed exceptions to the licensing requirements when the applicant had a good faith belief he was properly licensed premised upon his justifiable reliance upon another to obtain the proper licensing. The Commission has consistently held that one exception to crewmember licensure is the minor who depended on his parent(s) to obtain the proper licensing. In this case Blanche Kallstrom was not a minor in 1967 or 1969. She was 23 years old in 1967.

Ms. Kallstorm testified that she depended upon her father, Al Andree, to obtain her licenses each year. Nonetheless, based on this record we cannot conclude Ms. Kallstrom was not aware of the licensing requirements, nor can we infer she did not have reason to know of the licensing requirements. Even though her father routinely acquired the licenses for the family, Ms. Kallstrom was aware that appropriate licensing was required to participate in commercial fishing. She held commercial and gear licenses for the Bristol Bay set net fishery in 1965 and 1966 and again, in 1970, 1971 and 1972.

Additionally, as noted in the factual summary, neither Blanche nor any family members

identified at her hearing had any recorded landings in the 1967 drift net fishery, and therefore do not appear to have participated in the drift fishery in 1967.

The points for 1967 and 1969 crew participation points remain denied.

Investment in Vessel and Gear

The hearing officer found the applicant owned a skiff given to her by her father, but she did not prove by a preponderance of the evidence that the skiff was "used or to be used" in the drift gill net fishery. Blanche purchased a vessel license for the skiff at the same time she obtained her gear license for the set net fishery. Blanche testified that she used the boat in the drift fishery while fishing with her mother in 1972. Blanche planned to fish with Robert the entire season, but only fished with him for the king season during the month of June because her mother needed her help when the reds started coming in. So Blanche fished with her mother during the peak of the red season in a set and drift operation. Blanche testified that she and Helena used Blanche's skiff, ADF&G # 3659 in the drift fishery in 1972. Helena Andree remembered an incident in 1972 where she and Blanche were on the skiff together drift fishing and the motor quit. A southeastern came up and they had to anchor. They did not have a way to call for help and they were almost swamped. Blanche and Helena took turns at the kicker and finally got it started and shot down the river.

Based on the testimony and commission records, it appears Al Andree built and gave his daughter, Blanche Kallstrom, a 22 foot skiff. Ms. Kallstrom testified that she fished with her mother in the drift and set net fisheries in 1972. However, Helena Andree was licensed for the Bristol Bay set net fishery only in 1972. Because, neither Blanche nor Helena held a gear license for the drift fishery in 1972, any drift fishing they did was illegal. Participation without a license is not lawful and is not entitled to credit toward an entry permit. Simpler v. State, 728 P.2d 227, 230 (Alaska 1986). As the commission held in Baxter, CFEC 87-032-A (1988)⁸:

⁸ Affirmed on other grounds, CFEC v. Baxter, 806 P.2d 1373 (Alaska 1991).

we will not credit a claim to ownership of a vessel used in an Alaska fishery when the asserted use does not conform to the requirements of Alaska law....

The points for investment in the vessel, ADF&G #3659, remain denied.

Ms. Kallstrom also claimed points for one-half ownership of the Margaret K. Robert Kallstrom purchased the Margaret K in 1969 or 1970. Robert was still making payments on the vessel in 1972. Robert and Blanche were married on July 29, 1972. Blanche is claiming ownership of the Margaret K based on a spousal partnership.

We do not believe the applicant has proven joint ownership of the Margaret K as of the January 1, 1973 qualification date. Nonetheless, even if the applicant were to prove her joint ownership of the Margaret K, she would be entitled to only three points. Chocknok v. State, CFEC, 696 P.2d 669 (Alaska 1985)⁹. Ms. Kallstrom's application is currently verified with ten points and 17 points are needed to receive a permit in this fishery. Therefore even a favorable decision by the commission on the applicant's claim of three additional points is moot, because her application would still be denied with insufficient points.

Conclusion and Order

The applicant is entitled to three additional points for crew participation in 1968, 1970 and 1971 bringing her final point total to ten points. All other point claims are denied. Because 17 points are required for issuance of a Bristol Bay drift gillnet entry permit, this application is finally denied.

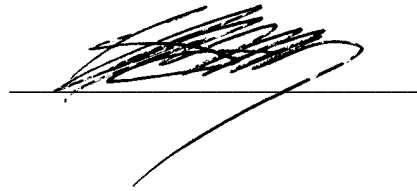
⁹ Two people co-owning a vessel and gear collectively should not fare better than one person. Chocknok at 676 n.10.

DATED at Juneau this 4th day of May, 1999.

By Direction of the
COMMERCIAL FISHERIES ENTRY COMMISSION

Marlene Johnson, Commissioner
Mary McDowell, Commissioner
Bruce Twomley, Chairman

by:

A handwritten signature in black ink, appearing to be "Bruce Twomley", written over a horizontal line. The signature is somewhat scribbled and includes a long, sweeping underline that extends to the right.

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

COMMERCIAL FISHERIES ENTRY COMMISSION

POUCH KB
JUNEAU, ALASKA 99811

May 20, 1982

CERTIFIED - RETURN RECEIPT

M Blanche Kallstrom
Box 193
Dillingham, AK 99576

File No: 75-646

RE: Application for a Bristol Bay Drift Gill Net Entry Permit

Dear Ms. Kallstrom

Enclosed is my recommended decision regarding your application for a Bristol Bay drift gill net entry permit. You have until June 3, 1982 to submit written comments on the recommendation. If you desire the opportunity to make an oral presentation to the Commissioners, you must notify the Chairman of the Commission in writing by June 3, 1982. Any written or oral presentation to the Commissioners shall be limited to the record before them

The Commissioners will adjudicate your application on or after June 2, 1982, if you do not request the opportunity for oral presentation.

By Direction of the
COMMERCIAL FISHERIES ENTRY COMMISSION


Larry McKinstry
Hearing Officer

LM tas
Enclosure

CC: Jim Vollintine, Esq.
420 L Street
Anchorage, AK 99501
(Certified with enclosure)

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

COMMERCIAL FISHERIES ENTRY COMMISSION

POUCH KB
JUNEAU, ALASKA 99811

May 20, 1982

M Blanche Kallstrom
Box 193
Dillingham, AK 99576

File No: 75-646

RE: Application for a Bristol Bay Drift Gill
Net Entry Permit

Following a timely Isakson application, the applicant was classified with six (6) of eighteen (18) points claimed. Points were verified for crew participation in 1965 and 1966, and for availability of alternative occupations. The applicant requested an administrative hearing, which was held in Dillingham on November 17, 1978. Present were David Ingram, Commission hearing officer; the applicant; James Robinson of Alaska Legal Services Corporation, Dillingham, attorney for the applicant; and Hjalmar Olson, Mary Olson, Freeman Roberts, Bob Kallstrom, Peter Nelson, Alfred Andree and Ed Nicholson, witnesses for the applicant.

The following documentary evidence was made a part of the administrative record, and was reviewed prior to the preparation of this recommended decision:

- A-1 Affidavit of Earl Tilden, dated November 17, 1978.
- A-2 Affidavit of Lawrence Murphy, Sr., dated November 16, 1978.
- A-3 Copy of applicant's 1972 vessel license (set net).
- A-4 Copies of the applicant's licenses 1970 through 1972.
- A-5 Affidavit of Alfred and Helena Andree, dated September 30, 1977.
- A-6 Affidavit of Steven Mihic, dated November 26, 1978.
- A-7 Affidavit of Helena Andree, dated December 14, 1978.
- A-8 Applicant's medical records, 1968.
- A-9 Commission licensing and landings records.
- A-10 Application, dated September 29, 1971.

ISSUES

1. Is the applicant entitled to additional points for crew participation in 1967 and 1969-1972, pursuant to 20 AAC 095.630(a)(4)?
2. Is the applicant entitled to additional points for crew participation in 1968, based on the theory of unavoidable circumstances, pursuant to 20 AAC 05.620(a)(5)?
3. Is the applicant entitled to additional points for investment in vessel and/or gear, pursuant to 20 AAC 05.630(b)(3)?

FACTS

The applicant testified that she participated as a crewman in her family's fishing operation every year between 1967 and 1972, except for 1968. In 1968, the applicant was pregnant. She delivered a premature baby boy on May 29 of that year.

According to the applicant, she fished as a crewmember on a number of different drift gill net vessels, spending most of the season with one person, but moving to other boats as she was needed. The applicant also claims to have participated in her mother's set net operation.

The applicant claimed on her application to have fished in 1967 with her mother and father, Al and Helena Andree. At the hearing, she testified that she had fished in 1967 with her brother Willie Andree. Commission records indicate that the applicant held no commercial license that year (A-9). Commission records also indicate that in 1967 Willie Andree held a commercial license only (A-9). Willie Andree died in 1975. On her application, the applicant claimed participation with her mother and father in 1969 (A-10). At the hearing, she stated that she had fished with her brother Willie in 1969, and that in either 1969 or 1970 she had fished with Jim Palin (her ex-husband) part-time. The applicant's mother stated in an affidavit that the applicant had fished with she and her husband in 1969 (A-5). Commission records show Willie Andree held a gear license and had landings in 1969 (A-9). Commission records indicate that Jim Palin, Helena Andree and Al Andree held only commercial licenses in that year (A-9). The applicant had no license in 1969 (A-9).

The applicant claimed in her application that in 1970 she had fished alone as a gear operator (A-10). However, at the hearing, she testified that she had fished with Jim Palin and her mother. Commission records reflect that in 1970 Jim Palin held both a set and drift license, but had landings attributed only to the set net permit (A-9). Helena Andree had only a set net gear license, while the applicant held a commercial license and a set net gear license (A-9).

The applicant claimed to have fished with her mother in 1971. She testified to such participation at the hearing. Commission records show that in 1971, the applicant's mother held only a set net gear license (A-9). During that year, the applicant had a commercial license and a set net gear license, according to Commission records (A-9).

The applicant testified that during 1972 she had fished with her husband Bob Kallstrom. During that year, the applicant held a commercial license, and Mr. Kallstrom held a gear license. Bob Kallstrom made landings in 1972, according to Commission records (A-9). At the hearing, Mr. Kallstrom testified that the applicant had been his crewmember during the 1972 season.

The record contains a number of general statements and affidavits concerning the applicant's participation (A-2, A-5, A-6 and A-7). Peter Nelson, Ed Nicholson, Freeman Roberts and Hjalmar and Mary Olsen testified that they remembered the applicant participating in the fishery as a crewmember in every year excluding 1968, but they could not assist the applicant in clarifying the identity of persons with whom she had fished in each year.

In his affidavit, Lawrence Murphy, Sr. stated that he had seen the applicant fishing "many years" (A-2). In another affidavit, Steven Mihic, a scow tallyman, stated that he had seen the applicant fishing in the drift fishery during the years 1970-1972, but could not specify who the applicant was fishing with at any particular time (A-6). Helena Andree, the applicant's mother, executed an affidavit in which she stated that the applicant had participated in the drift fishery in all of the years claimed, and had participated with the affiant, Al Andree, Willie Andree and Lannie Andree (A-7). Mrs. Andree could not remember with whom the applicant had fished in any particular year (A-7).

The applicant claims that she did not participate in the fishery in 1968 because of her pregnancy. Hospital records show that on May 29, 1968, the applicant entered premature labor and delivered a three pound, four ounce baby boy without complications (A-8).

The applicant testified that the only reason she did not fish in 1968 was that she had delivered a baby. She stated that she would have fished in 1968 had she not had a child that year.

The first vessel in which the applicant claimed an ownership interest is the MARGARET K, a 32' gillnetter. This vessel was sold to Bob Kallstrom "in 1969 or 1970" according to an affidavit from the seller, Earl Tilden (A-1). This affidavit shows the purchaser to be Bob Kallstrom

At the hearing, the applicant testified that as of the qualification date that she was a part-owner "of a 32' gillnetter my husband and I owned."

The applicant married Bob Kallstrom on July 29, 1972. Mr. Kallstrom testified that he and the applicant were buying the MARGARET K as of the qualification date, and that he did not pay the applicant a crew share but that "it was a joint family affair, we didn't say that this nickel was yours, this one mine." Mr. Kallstrom stated that the vessel was purchased through the NEFCO cannery, and paid for, he thought, in five years.

Mr. Kallstrom also testified that he purchased nets as needed through his cannery, and that as of the qualification date that he owned nets, and that he considered that because of the "family partnership" that he had with the applicant that she owned half of the nets and the vessel.

The applicant also claimed full ownership of a skiff used in the drift and set net fisheries. In her affidavit, the applicant's mother stated that the applicant owned a skiff (ADF&G #3659) as of the qualification date, and that the skiff had been built for the applicant by her father, Al Andree, who is a boat builder (A-7). Mrs. Andree stated: "The skiff belonged to [the applicant] alone, and not to the family in common. Al Andree customarily built a skiff each year, which he would give to one of the family members. Each of us had her own skiff."

The applicant testified that her father had built the skiff and had given it to her, and that it had been used in the drift fishery at Coffee Point. The applicant submitted a copy of a vessel license for 1972 showing the applicant registering herself as the only operator of this 22' vessel in the set gill net fishery (A-3). At the hearing, the applicant testified that she thought there had been two registration numbers on that skiff, which would have allowed it to have been used in the drift fishery.

The applicant's father, Al Andree, testified that he had built a skiff and given it to the applicant, and that the applicant had used the vessel in both the drift and set fisheries.

DISCUSSION

Under 20 AAC 05.520 and 20 AAC 05.820 the applicant bears the burden of proving by a preponderance of the evidence the validity of claims made on his/her application, and/or that a prior determination of the Commission was in error.

Crew Participation in 1967, 1969-1972

From the affidavits and testimony on the record, it appears as if the applicant did participate in either or both the drift and set net fisheries as a crewperson in the years in question, 1967, 1969-1972. However, except for the year 1972, the applicant was not sure with whom she had fished. None of the other witnesses were able to specify the gear license holder that the applicant had fished with in any particular year.

The applicant testified that in 1967 she had fished with her brother Willie. However, in that year Willie Andree did not hold a gear license, and the applicant did not hold a commercial license (A-9).

The applicant stated that she had fished with her brother Willie in 1969 and that either in this year or in 1970 she had also fished with Jim Palin. In 1969, the applicant held no commercial license, her brother had a gear license that year and landings were credited to that license (A-9). Mr. Palin did not have a gear license in 1969 (A-9). The applicant's mother claimed that the applicant had fished with she and her husband in 1969. However, Commission records reflect that neither of the applicant's parents held a gear license in this fishery that year (A-9).

The applicant testified that she had fished with Jim Palin and her mother in 1970. Mr. Palin held a drift gear license in 1970, but Commission records show landings on his set net license only (A-9). The applicant's mother had only a set license in 1970 (A-9). The applicant had a commercial license that year (A-9).

In 1971, the applicant had a commercial license, but claims to have fished with her mother, who had held only a set net license (A-9).

Based upon the foregoing record, I find that the applicant has not presented sufficient evidence for any of the years 1967, 1969, 1970 or 1971 which places her as a crewmember holding a commercial license and working for a gear license holder who had made landings in the drift

gill net fishery. As the applicant was neither a minor fishing with a parent, or a wife fishing with her husband at the time, she was required to hold a commercial license to claim crew points. None of the people she claimed to have fished for had gear licenses nor landings in this fishery in the same years that she held a commercial license. I find that the applicant has failed to prove her crew participation for these four years by a preponderance of the evidence. I recommend that no crew points be awarded for any of these four years.

In 1972, the applicant held a commercial license and claimed to have participated with Jim Palin. Mr. Palin held a gear license and was credited with landings (A-9). He also testified that the applicant had fished with him during that season.

I find that the applicant has proven her crew participation in 1972 by a preponderance of the evidence, and recommend that one (1) additional point be verified for such participation.

Crew Participation in 1968

The applicant has claimed that she was unavoidably prevented from participating as a crewmember in the fishery in 1968 due to her pregnancy. In order for an applicant to receive points for participation based upon a showing of unavoidable circumstances, he/she must meet the elements of a three-part test by showing:

- 1. That he/she held a specific intent to participate in the fishery applied for in the year(s) for which points are claimed;**
- 2. That an unavoidable circumstance prevented participation in the fishery in the year(s) claimed; and**
- 3. That he/she made all efforts reasonably possible to participate in the fishery in the year(s) claimed despite the existence of the unavoidable circumstances. [20 AAC 05.630(a)(5) and Case files 75-21 and 75-79.1**

In the present case, the applicant alleges that due to her pregnancy and subsequent delivery of a premature child on May 29, 1968, she was unavoidably precluded from participating as a crewmember in the fishery that year. She alleges that, but for the occurrence of her pregnancy she would have participated as a crewmember in the fishery in 1968.

Medical records submitted by the applicant indicate that she had entered the hospital in Glenallen on May 29, 1968 at 5:00 a.m and was discharged the following morning at 10:30 a.m, after giving birth to a

premature child (A-8). Entries in the hospital records reflect that there were no complications during the course of the delivery and that the applicant's condition was "good" after the delivery (A-8). There is no other evidence in the record concerning the condition of either the applicant or her child.

In prior cases, the Commission has found the existence of unavoidable circumstances based upon a showing of medical disability or illness. (See, Case files 75-26, 75-131, 75-149, 75-168.) Additionally, the Commission has held that certain factual situations may give rise to a "moral obligation" on the part of an applicant which qualifies the applicant for participation credit on the basis of an unavoidable circumstance. (See, Case files 75-6, 75-31, 75-45, and

Based upon the evidence contained in the record, I do not find that either set of circumstances existed in the present case.

The applicant gave birth to a premature child on May 29, 1968. She was released from the hospital the following day in good condition. There is nothing in the record to suggest that either she or the child were suffering from any long term or residual physical problems resulting from the pregnancy or delivery.

The Bristol Bay drift fishery normally takes place during the period from late June through the month of July. As indicated above, the applicant delivered her child at the end of May, 1968, some three to four weeks before the start of the 1968 season. Without specific evidence indicating any physical problems suffered by the applicant from the date of delivery through the end of the season, I cannot find that she was medically precluded from participating as a crewmember.

A closer question is raised as to the existence of the applicant's moral obligation to her child to refrain from participating in the fishery.

A mother and father of a newborn child undoubtedly owe a duty, both moral and legal, to provide adequate care and nurture to the child. This is especially true during the first months of the child's life. However, such a duty need not necessarily result in the inability of either parent to participate in employment which would require the parent's absence for short periods of time.

In the present case, there has been no evidence submitted which would support a finding that the applicant could not have been apart from her child for at least short periods during the fishing season. While one can certainly understand a mother's desire to refrain from being separated from a newborn child, especially one who was born

prematurely, such a desire is, in the majority of cases, a voluntary choice. In the applicant's case, there seems to be no reason why she could not have participated, at least intermittently, during the 1968 season. The evidence contained in the record indicates that her participation in the fishery had been as a crewmember in a family fishing operation. As such, there appears to be no barrier to her ability to restrict her participation to meet the needs of her child, as might have been the case were she crewing for a non-related gear operator.

In addition to the lack of evidence concerning any reasonable efforts the applicant might have made to participate, the record does not even reflect the applicant's presence in Bristol Bay in 1968.

Viewing the record as a whole, I find that the applicant abandoned any intent she may have had to participate in the 1968 season at the time she found she was pregnant. Her subsequent delivery of the child was without complication despite the fact that the child was born prematurely, approximately one month before the start of the season. Nothing in the record supports a finding that she was physically unable to participate in the fishery in 1968. Nor is there any evidence that she attempted to participate after the birth of her child in May of the year.

Although the applicant had a moral duty to care for her child, that duty did not necessarily require her non-participation in the fishery. While it may have been difficult, the applicant could have provided the necessary care for her child and participated to some extent in the fishery (See, Case File 75-10). I find therefore, that the applicant has failed to establish by a preponderance of the evidence that she was prevented from participating as a crewmember in the 1968 season by unavoidable circumstances.

Investment in Vessel and Gear

Vessel MARGARET K: The testimony of the seller was that he sold Bob Kallstrom this boat in 1969 or 1970 (A-1). The applicant first fished with Mr. Kallstrom in 1972, and they were married at the end of July of that year. Mr. Kallstrom testified that due to his marriage, he and the applicant were "family partners" and that they were buying the vessel together. The suggestion being that since the applicant had not been paid a crew share for her work in 1972, her contribution to the family income was also to be considered a contribution to the purchase of the vessel.

The Commission regulation which contains the standards for awarding points for vessel ownership [20 AAC 05.630(b)(3)] bases such an award upon the applicant's investment in the fishery as an indication of the

degree of his or her economic dependence upon the fishery. The regulation is specific in requiring ownership of a vessel or gear to indicate such investment.

The applicant has not shown any indication of actual ownership interest in the MARGARET K. Property owned by the applicant's husband before his marriage to the applicant would not pass to the applicant without some specific grant, no evidence of which is before us. The fact that the applicant worked without a salary in 1972 does not indicate that she was making a specific contribution to the purchase of the boat, but more likely indicates that she worked in her husband's business in the expectation that all of the profits of that business would go to the support of the family.

I find that the applicant had no ownership interest in the MARGARET K as of the qualification date.

Exactly the same argument was put forth for the applicant's ownership interest in Mr. Palin's gear, and I recommend the same finding of non-ownership as to that claim

The applicant has also claimed ownership of a skiff, built by her father. Both the applicant and her parents have testified as to the building of this skiff and the gift of the vessel to the applicant. This testimony coupled with the fact that she purchased a vessel license for the vessel in 1972, tends to confirm her ownership of the vessel. However, the 1972 vessel license indicates the intended use of the vessel in the set net fishery (A-9). The applicant has supplied no specific evidence to indicate that the vessel was ever used or intended to be used in the drift fishery. The relevant regulation [20 AAC 05.630(b)(3)] requires the vessel to be "used or to be used in the fishery for which the application is being made."

The applicant testified that the boat had been used to drift fish at Coffee Point, but did not state in what year or by whom. The applicant's father said that the applicant had used the boat for set and drift netting. However, given the fact that Commission records reflect that the vessel had never been licensed for the drift gill net fishery, these bare assertions are not sufficiently corroborated to rebut the presumption that Commission licensing records are correct. (See, Case files 75-56, 75-74 and 75-129.)

I find that the applicant has not proven by a preponderance of the evidence that this skiff was "used or to be used" in the drift fishery, and recommend that no points be awarded for its ownership.

The applicant has also claimed an ownership interest in fishing gear owned in common by her family. As the ownership of gear by anyone in the applicant's family has not been proven, and as there is no suggestion of the exact extent of the applicant's alleged ownership interest in any family-owned gear, I find that the applicant has not met her burden of proof concerning this claim and recommend that no points be awarded.

RECOMMENDED DECISION

That the applicant be awarded an additional point for crew participation in 1972, and that all other claims be denied for the reasons stated above. The applicant should be finally verified with eight (8) points.

By Direction of the
COMMERCIAL FISHERIES ENTRY COMMISSION


Larry A. McKinstry
Hearing Officer

LAM LS: tas

CC: Jim Vollintine, Esq.
420 L Street
Anchorage, AK 99501