



Investigative Report
A2004-1331 Finding of Record
Public Report

*Edited to remove all confidential information or information
that would identify the complainant.*

May 4, 2005

SUMMARY OF COMPLAINT

A Kenai Peninsula man complained to the Office of the Ombudsman that the Department of Natural Resources (DNR) unreasonably awarded a lease for a set net site to another person less qualified than himself. The facts uncovered in the ombudsman investigation did not support the complainant's allegation.

INVESTIGATION

During 2001 and 2002, the complainant and another area resident applied for a shore fishery lease for the same tract of land. The complainant submitted evidence that he has fished the site regularly since 1998. The second resident submitted evidence that she had fished the site with an older relative from the late 1950's until 1997.

The state law governing shore fishery leases is found at AS 38.05.082. The agency relied on paragraph (b) for standards to apply to this situation:

If two or more applications are received for the same shore area, the director shall award the lease to the most qualified applicant. In determining the qualifications of applicants, the director shall consider the length of time during which the applicant has been engaged in set netting, the proximity of the past fishing sites of the applicant to the land to be leased, the present ability of the applicant to utilize the location to its maximum potential, and other factors relevant to the equitable assignment of the disputed area. If the director cannot determine a preference between conflicting applicants for the same lease site on the basis of qualifications, the director shall select between the applicants by lot. An aggrieved applicant may appeal to the commissioner within 30 days for a review of the director's determination.

On March 12, 2003, Mike Sullivan, a DNR manager, awarded the set net lease to the second resident. He wrote that his decision was formed by “the comparison of the time spent set net fishing, and more specifically, time spent set net fishing at the site in question.”

The complainant filed a timely appeal with the DNR commissioner, who upheld Mr. Sullivan’s decision on July 30, 2004, “based on the length of time during which [the second resident] has been engaged in set netting the land to be leased.”

The complainant raised several issues in his appeal: that the affidavits submitted by the other resident were from persons with a bias; that seven letters from persons involved in lower Cook Inlet fisheries did not place the second resident at the set net site during the years she claimed to have fished there; that documentation of the second resident’s work history was insufficient to show that she personally worked at the set net site; that the complainant’s evidence more clearly places him at the site; that the complainant received a state loan to invest in the fishery, and that he has a substantial financial investment at stake. Commissioner Irwin addressed these issues reasonably.

When the complainant brought his complaint to the ombudsman, investigator Mark Kissel told him that the ombudsman’s role would be to determine whether DNR had a reasonable basis for its decision. In the parlance of ombudsman standards, the investigator would look at whether the decision was “based on a mistake of fact,” “based on improper or irrelevant grounds,” or “unsupported by an adequate statement of reasons.” (AS 24.55.150)

Both Mr. Sullivan and Commissioner Irwin provided clear statements explaining their decisions. They also stated the grounds upon which they based their decisions and cited the authority of AS 38.05.082.

The facts in the case were not as easy to nail down. Although it is undisputed that the complainant fished the site since 1998, the second resident’s evidence was not as exact. This is illustrated by the different estimates of years fished cited in the two decisions: Mr. Sullivan calculated that the second resident fished the site in question for 41 years, while Commissioner Irwin counted 37 years. The second resident claims to have fished there with her uncle since 1959. One of her affiants swears that she fished there “before statehood,” and another swears that she was fishing the site when he arrived in the area in 1964. The second resident also provided documentary evidence in the form of fish ticket data, commercial fishing crew licenses, a transfer request for her relative’s commercial fishing permits, and commercial, vessel and gear licenses for about 10 of the years she claimed.

Looking at the second resident’s application in the worst light possible, it is still likely that she fished the sites at least twice as long as the complainant.

The standard used to evaluate all Ombudsman complaints is the preponderance of the evidence. If the preponderance of the evidence indicates that the administrative act

took place and the complainant's criticism of it is valid, the allegation should be found justified.

Ombudsman review showed that DNR clearly had evidence to support its decision to award the shore fishery lease to the second resident. Consequently, the ombudsman finds the allegation that DNR unreasonably awarded the lease for the set net site to a person less qualified than the complainant **not supported**.

A finding of “not supported” implies no criticism of your agency, therefore DNR was not required to respond to this investigative report.