

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of)
)
 MARK MEADOWS) OAH No. 05-0637-TAX
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DECISION AND ORDER

I. INTRODUCTION

This case has involved multiple issues and several parties. The remaining issue concerns Mark Meadows and the value for tax purposes of pink salmon he caught and processed himself during the 2003 fishing season. A telephonic hearing was held on October 28, 2009, with the record closing on December 23, 2009. Michele Kane, Assistant Attorney General, represented the Tax Division of the Alaska Department of Revenue (Division). Mark Meadows was represented by his attorney, Mark Scheer. The evidence at the hearing showed that the Division misapplied a regulation in assigning a value to the fish at issue.

II. FACTS¹

Mr. Meadows has been a fisherman since 1973, and has had his own permit since 1976. The 2003 Prince William Sound (PWS) fishing season was unusual because of the large number of pink salmon returning to spawn. In addition, the number of processors available to purchase pink salmon was lower than usual. At the conclusion of the traditional fishing season, there were still large numbers of pink salmon in the water. The Department of Fish and Game issued emergency regulations to allow these fish (Terminal Harvest Fish) to be caught next to the hatchery, in a Terminal Harvest Area (THA) and a Special Harvest Area (SHA)—areas normally not open to fishing. Those regulations also allowed processors to discard low quality fish and allowed roe stripping, which is the process of taking the salmon eggs and discarding the remainder of the fish.

The quality of pink salmon can be evaluated on a continuum. At one end are the high quality “bright” fish. These fish have bright skin color, pink flesh, and higher oil content. At the other end of the continuum are the “dark” fish. Their skin color is dark or mottled, the flesh is

¹ Unless noted, the facts stated are based on the testimony at the hearing.

pale, and the male fish develop humped backs. At the time of the emergency openings of the THA and SHA, those areas contained most dark, low quality fish.

Mr. Meadows fished the PWS seine fishery in 2003. At the beginning of the season he sold the fish he caught to a processor for 8½ cents per pound. This price included 5½ cents for the fish plus an additional 3 cents for having a vessel equipped with refrigerated sea water (RSW). RSW helps maintain the quality of the fish in the vessel's hold.

Later, Mr. Meadows participated in a roe stripping operation. Under the emergency regulations issued by the Department of Fish and Game, he caught dark, low quality fish in the THA and SHA areas near the Valdez hatchery. Mr. Meadows then processed the Terminal Harvest Fish he caught by taking the roe for resale and discarding the remaining portion of the fish. Mr. Meadows used special harvesting and processing techniques to roe strip these fish. Mr. Meadows caught the fish with a seine net close to the processing location to obtain any value from these fish, which was all in the eggs. These fish were so close to the end of their life cycle that the eggs would leak out of the fish if they were not processed immediately. Mr. Meadows set up his Terminal Harvest Fish fishing and roe stripping operation so that the fish received very little handling or transportation prior to processing.

III. DISCUSSION

Alaska taxes the value of fish caught by fisherman based on the price they receive when the fish is sold. When there is an arms-length sale, the value is the price paid for the fish to the fisherman.² For the period when Mr. Meadows was operating as his own processor, there were no arms-length transactions. To properly tax the fish caught, it was necessary to impute a market value to those fish. Market value means:

the prevailing value paid for fisheries resources of like kind and quality by fisheries businesses in the same market area to fishermen who own their own vessels.³

The parties disagree as to what is meant by “like kind and quality” in this regulation.

The Department uses the species of salmon in the PWS area as the “like kind” portion of this equation and it uses the gear type used to catch the fish as a proxy for the “like quality” portion. This was explained through the testimony of Dan Gray and a chart submitted as Exhibit 17. This chart is taken from a Department of Fish and Game publication and shows the average

² AS 43.75.290(7)(C); 15 AAC 75.300(6).

³ 15 AAC 75.300(3).

price paid per pound for each species of salmon taken in Prince William Sound, separated by gear type. A portion of that chart is reproduced below:

Table 3.—Mean price and estimated exvessel value of the total commercial salmon harvest by gear type, Prince William Sound, 2003.

Purse Seine					
Species	Number	Pounds ^a	Average Weight	Price ^a	Value
Chinook	120	1,925	16.04	\$0.48	\$924
Sockeye	306,186	1,194,319	3.90	\$0.71	\$847,966
Coho	66,838	539,569	8.07	\$0.42	\$226,619
Pink	38,552,942	142,885,067	3.71	\$0.08	\$10,716,380
Chum	1,481,727	10,100,491	6.82	\$0.17	\$1,717,083
Total	40,407,813	154,721,371			\$13,508,973
Drift Gillnet					
Species	Number	Pounds	Average Weight	Price	Value
Chinook	48,005	1,094,833	22.81	\$3.48	\$3,810,019
Sockeye	1,945,961	11,889,630	6.11	\$1.16	\$13,791,971
Coho	434,634	3,672,092	8.45	\$0.48	\$1,762,604
Pink	118,951	465,062	3.91	\$0.06	\$27,904
Chum	752,611	4,834,223	6.42	\$0.17	\$821,818
Total	3,300,162	21,955,840			\$20,214,315
Set Gillnet ^b					
Species	Number	Pounds	Average Weight	Price	Value
Chinook	0	0			\$0
Sockeye	215,733	1,337,573	6.20	\$0.80	\$1,070,058
Coho	663	3,357	5.06	\$0.48	\$1,611
Pink	28,537	105,393	3.69	\$0.06	\$6,324
Chum	6,265	39,658	6.33	\$0.17	\$6,742
Total	251,198	1,485,981			\$1,084,735

Mr. Meadows asserts that gear type-based values used by the Division are not based on like quality fish to the Terminal Harvest Fish he caught and processed in the roe stripping operation in 2003. Mr. Meadows submitted evidence that processors were paying only 4 cents per pound for dark salmon caught in the THA and SHA fishery that were of the same quality as the fish he caught and processed. Mr. Meadows and his witnesses explained that a majority of the fish caught in these areas had little or no market value. The processors who did not simply roe-strip these Terminal Harvest Fish were able to keep for resale some fish out of each delivery, but many others had to be discarded. Thus, a lower average price was paid for those fish. Mr. Meadows' position is that the THA and SHA salmon were not of a like quality to the bright fish caught during the regular season.

The Department's position is that it has interpreted the term "quality" in its regulation to mean "the condition of the fish caught as impacted by the fishing method used."⁴

AS 43.05.435 establishes the applicable standards of review and burdens of proof:

Sec. 43.05.435. Scope and standards for decision. The administrative law judge shall hear all questions *de novo* under AS 43.05.405-43.05.499. The administrative law judge shall

⁴ Department's Pre-Hearing Brief at 3, fn 2.

- (1) resolve a question of fact by a preponderance of the evidence or, if a different standard of proof has been set by law for a particular question, by that standard of proof;
- (2) resolve a question of law in the exercise of the independent judgment of the administrative law judge;
- (3) defer to the Department of Revenue as to a matter for which discretion is legally vested in the Department of Revenue, unless not supported by a reasonable basis.

The Department's interpretation of its own regulations is entitled to deference and will be upheld as long as there is a reasonable basis for the interpretation.⁵

At the hearing, the Department argued that it cannot control what information is gathered and reported by the Department of Fish and Game, and short of allowing evidentiary hearings to determine the quality of each delivered at various times during the season, there is no other available method for determining fish quality. Furthermore, using an average price across the fishing season will necessarily encompass a range prices paid based on the varying quality of the salmon as the season progresses.

The problem for the Department is that there was very little evidence at the hearing to show that it is reasonable to use gear type as a measure of quality for the unusual fisheries resource subject to taxation in this case.

The Department must tax based on the market or prevailing value.⁶ The Department is not required to determine the actual value of the fisheries resource taxed, nor is a taxpayer entitled to have his fish taxed at their actual value based on a simple showing that he would have received less than the prevailing value for his fish.⁷ The evidence shows that the Department correctly estimated the prevailing market value for the area, excluding the late season fish caught next to the hatchery referred to at the hearing as Terminal Harvest Fish.

“Like quality,” in the context of a determination of market value under 15 AAC 75.300(3), clearly means being of a quality that, all other things being equal, will fetch approximately the same price. It would not be reasonable for the Department to adopt an interpretation of 15 AAC 75.300(3) that measures quality differently than the buyers whose purchases established the prevailing price. Since the tax is based only the prevailing price, not

⁵ *Lake & Peninsula Borough v. Local Boundary Comm'n*, 885 P.2d 1059, 1062 & n.11 (Alaska 1994) (quoting prior authority); *see also Lakloey, Inc. v. University of Alaska*, 157 P.3d 1041, 1045 (Alaska 2007).

⁶ 15 AAC 75.300(3).

⁷ 15 AAC 75.300(3).

the exact price, it is reasonable to use broad measures of quality that buyers use to set the market price.

The evidence shows that the use of gear type was one of these broad measures and that the Department's use of gear type as measure of quality in determining the prevailing market value for this area, excluding Terminal Harvest Fish caught in the hatchery area, was reasonable. Mark Hansen testified that gillnet caught fish generally were of lower quality because the gillnet fleet did not use RSW on their vessels. He also testified that gear type and vessel type affected quality and that gillnet caught fish usually had more bruising which affected quality.

The Department's interpretation of 15 AAC 75.300(3) as it applied to the Terminal Harvest Fish, however, was not reasonable. Interpreting quality to mean the condition of the fish as measured by the fishing method is reasonable when evidence shows that buyers in the market area used fishing method to determine quality in setting the price they paid for a particular fisheries resource. The evidence does not support that finding for the Terminal Harvest Fish.

15 AAC 75.300(3) could read to allow the Division some latitude to subsume what might be characterized as slightly different market into a larger market when determining the market value for an area. It is not reasonable however, to read the scope of the Division's ability to generalize about the market value in an area in a way that ignores an unusual circumstance that creates a clearly distinct market for an unusual fisheries resource. In this case, the distinct prevailing market set much lower values for the Terminal Harvest Fish based on different criteria of quality than that used by the Division. It cannot reasonably be disputed that the prevailing value of the Terminal Harvest Fish was set by measures of quality other than gear type or fishing method that the Division used for the rest of the fisheries resources caught in the general area.

The Terminal Harvest Fish that Mr. Meadows caught were primarily dark fish from a special fishery area opened under an emergency regulation. The gear type used did not provide a reasonable measure of the like quality for the prevailing market of fish caught in this special fishery. The evidence showed that factors other than gear type set the market price. Special harvesting techniques had to be employed that included only one type of gear type – a seine net close to the processing location. Unlike the fish caught in the general area during the regular season, all of the value of Terminal Harvest Fish was in their eggs. Terminal Harvest Fish were so close to the end of their life cycle that the eggs would leak out of the fish if they were not processed immediately with little or no handling or transportation prior to processing.

The evidence showed that value of Terminal Harvest Fish purchased in an arms length transaction was only 4 cents per pound. Different measures of quality and other factors such as the exceptional oversupply influenced the prevailing price paid for these fish. In addition, the testimony showed that there was often no market at all for dark salmon caught in this special fishery even during the regular seasons, and once the percentage of these dark salmon increased, processors would typically simply stop buying altogether.

The Department argues that even if Mr. Meadows is allowed to establish a different price for dark, emergency opening fish, then he must present evidence from a broad array of processors to get an average price. Mr. Meadows presented competent evidence from the manager of one processor. He also presented his own testimony based on his lengthy experience in the PWS fishery. If there were other processors offering higher prices for dark fish during this time period, the Department could have presented evidence from one or more of those processors.

IV. CONCLUSION

But for the unusual circumstances surrounding the 2003 fishing season and the special fishery that allowed Mr. Meadows to harvest and process the Terminal Harvest Fish whose value is in dispute in this case, the Department's interpretation of 15 AAC 75.300(3) as applied to determining the market value of salmon caught in that area was reasonable. However, Mr. Meadows met his burden of proof to show that "market value," as defined in 15 AAC 75.300(3), of the Terminal Harvest Fish that he caught was \$0.04 per pound.

V. ORDER

The Department will recalculate Mr. Meadows' tax liability, interest and penalties to conform to the conclusions in this decision.

DATED this 9th day of June 2010.

By: Signed
Mark T. Handley
Administrative Law Judge

NOTICE

1. This is the hearing decision of the Administrative Law Judge under Alaska Statute 43.05.465(a). Unless reconsideration is ordered, this decision will become the final administrative decision 60 days from the date of service of this decision.⁸
2. A party may request reconsideration in accordance with Alaska Statute 43.05.465(b) within 30 days of the date of service of this decision.
3. When the decision becomes final, the decision and the record in this appeal become public records unless the Administrative Law Judge has issued a protective order requiring that specified parts of the record be kept confidential.⁹
4. A party may file a motion for a protective order, showing good cause why specific information in the record should remain confidential, within 30 days of the date of service of this decision.¹⁰
5. Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Statute 43.05.480 within 30 days of the date of this decision becomes final.¹¹

[This document has been modified to conform to technical standards for publication.]

⁸ Alaska Statute 43.05.465(f)(1).

⁹ Alaska Statute 43.05.470.

¹⁰ Alaska Statute 43.05.470(b).

¹¹ Alaska Statute 43.05.465 sets out the timelines for when this decision will become final.