

Appellant's appeal.

I held a prehearing conference with Appellant on August 26, 2010, which resulted in an order scheduling a hearing on the appeal on November 9, 2010. On that date, I conducted an oral hearing, at which the Appellant testified, as did a representative of the company contracted to build the vessel, as well as three potential clients for the 2005 charter halibut fishing season. At the conclusion of the hearing I closed the record. The record contains sufficient information on which to reach a final judgment, as required by 50 C.F.R. 679.43(g)(2). This decision follows.

ISSUES

1. Does Appellant satisfy the requirements of the unavoidable circumstance regulation in 50 C.F.R. § 300.67(g)(2) with respect to his lack of participation in the charter halibut fishery in the qualifying period (2004, 2005)?
 - a) Did Appellant hold a specific intent to operate a charter halibut fishing business in the qualifying period?
 - b) Was Appellant's specific intent to operate a charter halibut fishing business in the qualifying participation period thwarted by a circumstance that was unexpected, unique to him, unforeseen and reasonably unforeseeable?
 - c) Did the circumstance actually occur?
 - d) Did Appellant take all reasonable steps to overcome the circumstance?
2. If Appellant satisfies the elements of the unavoidable circumstance regulation, should his permit be designated as transferable or non-transferable?
3. If Appellant satisfies the elements of the unavoidable circumstance regulation, for how many anglers should his permit be endorsed?

SUMMARY OF DECISION

The IAD is VACATED.

Appellant has proven, by a preponderance of evidence in the record, that an unavoidable circumstance (namely, the failure of a boat building business to build and deliver Appellant's vessel within the time frame agreed to) thwarted his specific intent to participate in the halibut charter fishing business in one year of the charter halibut qualifying period (2005). Appellant has satisfied all of the elements of the unavoidable circumstance regulation at 50 C.F.R. § 300.67(g)(2).

Appellant qualifies for a transferable charter halibut permit. He should be issued such a permit, endorsed for use in International Pacific Halibut Commission regulatory area 3A, and endorsed for six anglers.

FACTUAL BACKGROUND²

Appellant has been a resident of Alaska since 1979, and has owned and operated his charter halibut fishing business since 2006.

In 2004, Appellant and his spouse decided to change the routines of their working life³ and to pursue operating a charter fishing business. They were interested in taking their clients on multiday trips out of a port in western Prince William Sound, so choosing the right vessel, with the appropriate hull, propulsion, and interior configuration and furnishings, was a critically important early decision to be made.

To that end, Appellant consulted with experienced industry participants and concluded that he wanted to have a boat-building company in Anchorage, Alaska, (Company) build his vessel. In September 2004, after consulting with Company's vessel engineer, he submitted a lengthy list of design preferences.⁴

By early January 2005, the Company and the Appellant had agreed on the particulars of the vessel's configuration and other equipment and design features.⁵ Shortly thereafter the engines were ordered and delivered. The final agreement was signed by Appellant on March 4, 2005, the date on which Appellant made a down payment of \$25,879.00 to the boat building company.

The agreement called for the vessel to be delivered turnkey on "approximately June 15, 2005."⁶ As that date approached, Appellant relied on Company's known reputation in the industry and representations from Company personnel, and believed that the vessel would be completed in the summer of 2005.

So he continued his preparations for starting his business. He completed his U.S. Coast Guard licensing requirements, and he began to book clients.

He also attempted to monitor the construction of his vessel. He testified that he went down to the boat-builder's yard every week in the spring of 2005. The builder was busy constructing four other vessels, including three "bowpickers" that needed to be completed in time for the commencement of the Copper River commercial fishing season in mid-May, as well as another sport fishing vessel.

In spite of this other business, and the lack of progress on his boat, Company personnel continued to assure Appellant that the vessel would be completed on or near the agreed-upon delivery date. Given the size of the Company's staff, the fact that the Company already had the

² Unless otherwise noted, the information in this Background is derived from Appellant's letter to RAM (February 22, 2010), his appeal to OAA (July 15, 2010), and documents appended to those communications.

³ Appellant operated a taxidermy business (testimony, November 9, 2010).

⁴ Facsimile message from Appellant to boat-builder (September 13, 2004); "Addendum No. 1 Specifications (January 7, 2005).

⁵ "Addendum No. 1 - Specifications" (January 7, 2005).

⁶ Construction Contract No. 1200, between Appellant and Company (March 4, 2005).

motors, and the length of time to construct the boat (two months or less), Appellant believed he would have the boat in time to operate in the 2005 season. As Appellant stated in his testimony: “It might not be ready by the contract date, but if it could be completed by late June or July, I thought I could still use it in 2005.”⁷

By early June 2005, the vessel construction had not begun. At that point, Appellant realized that the vessel would simply not be ready in 2005, and that he would have to delay starting his business until 2006. Appellant contacted the clients who had already committed to use his services that summer and informed them that he could not operate his business as planned.

Vessel construction was finally completed in the spring of 2006, after which the Appellant committed it to his business. He has subsequently operated his charter halibut fishing business every season.

CHARTER HALIBUT LIMITED ACCESS PROGRAM

Under the Charter Halibut Limited Access Program [CHLAP], NMFS will award permits to applicants based on their reported charter fishing trips during two periods: [1] the *qualifying* period, which is the sport fishing period for halibut in 2004 and 2005,⁸ and [2] the *recent participation* period, which is the sport fishing period for halibut in 2008.⁹

NMFS will issue two types of charter halibut permits: transferable and non-transferable. A transferable permit may be transferred to another person, upon NMFS’s approval of an application to transfer. A non-transferable permit becomes invalid upon the demise of the permit holder.

If the applicant reported a minimum of five bottomfish logbook fishing trips in one year in the qualifying period (2004 or 2005), and a minimum of five halibut logbook fishing trips in the recent participation period (2008), the applicant will receive a non-transferable charter halibut permit.¹⁰ The trips must have been reported under the applicant’s Alaska Department of Fish & Game [ADF&G] Business Owner Licenses.

If the applicant reported a minimum of fifteen bottomfish logbook fishing trips with the same vessel in one year in the qualifying period (2004, 2005), and a minimum of fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008), the applicant will receive a transferable charter halibut permit.¹¹ The trips must have been reported under the applicant’s ADF&G Business Owner Licenses.

⁷ Appellant’s testimony at hearing (November 9, 2010).

⁸ 50 C.F.R. § 300.67(c)(6).

⁹ 50 C.F.R. § 300.67(c)(7).

¹⁰ 50 C.F.R. § 300.67(b)(1)(ii)(A) & (B).

¹¹ 50 C.F.R. § 300.67(d)(1)(i) & (ii). All fifteen trips within each period must be with one vessel but the applicant may have used a different vessel in the qualifying period and the recent participation period. 50 C.F.R. § 300.67(d)(1)(iii).

The regulations provide another way for an applicant to meet the minimum participation requirements. Under 50 C.F.R. § 300.67(g), if an applicant can show that an unavoidable circumstance thwarted the applicant's intent to participate during either the qualifying period or the recent participation period (but not both), NMFS may treat the applicant as though the applicant had actually participated.

THE UNAVOIDABLE CIRCUMSTANCE REGULATION

There are three subsections to the unavoidable circumstance regulation: (a) 50 C.F.R. § 300.67(g)(1), which applies to an applicant that meets the participation requirement for the qualifying period, but does not meet the participation requirement for the recent participation period; (b) 50 C.F.R. § 300.67(g)(2), which applies to an applicant that meets the participation requirement for the recent participation period, but not for the qualifying period; and, (c) 50 C.F.R. § 300.67(g)(3), which applies to an applicant that meets the participation requirement for the recent participation period but does not meet the participation requirement for the qualifying period because the applicant was assigned to active duty military service by the United States military, thus thwarting the applicant's specific intent to participate in the qualifying period.

Appellant's claim is premised on 50 C.F.R. § 300.67(g)(2), the section that applies to applicants who participated during the recent participation period, but not the qualifying period. To prevail, he must prove: [1] that he held a specific intent to operate a charter halibut fishing business during the qualifying period; [2] that his intent was thwarted by a circumstance that was unique to him, unexpected, unforeseen and reasonably unforeseeable; [3] that the circumstance actually occurred; and, [4] that he took all reasonable steps to overcome the circumstance.

The applicable unavoidable circumstance regulation provides:

(2) *Qualifying period.* An applicant for a charter halibut permit that meets the participation requirement for the recent participation period but does not meet the participation requirement for the qualifying period, may receive one or more permits if the applicant proves paragraphs (g)(2)(i) through (iv) of this section as follows:

(i) The applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period;

(ii) The applicant's specific intent was thwarted by a circumstance that was:

(A) Unavoidable;

(B) Unique to the owner of the charter halibut fishing business; and

(C) Unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business;

(iii) The circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred; and

(iv) The applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter

halibut fishing business in at least one year of the qualifying period.

(v) If the applicant proves the foregoing (*see* paragraphs (g)(2)(i) through (iv) of this section), the applicant will receive either:

(A) One non-transferable permit with an angler endorsement of four (4); or

(B) The number of transferable and non-transferable permits, and the angler endorsement on those permits, that result from the logbook fishing trips that the applicant proves likely would have been taken by the applicant but for the circumstance that thwarted the applicant's specific intent to operate a charter halibut fishing business in one year of the qualifying period and the applicant did not participate during the other year of the qualifying period.

For NMFS to treat the Appellant as though he operated a charter halibut fishing business in 2005, he must satisfy each requirement of the unavoidable circumstance regulation.

1. Does Appellant satisfy the requirements of the unavoidable circumstance regulation in 50 C.F.R. § 300.67(g)(2) with respect to his lack of participation in the charter halibut fishery in 2005? Yes.

The first requirement of the unavoidable circumstance regulation sets out the precondition for claiming an unavoidable circumstance in the qualifying period; namely, that the applicant “meets the participation requirement for the recent participation period but does not meet the participation requirement for the qualifying period.”

According to the official charter halibut record, Appellant reported thirty-one halibut logbook fishing trips in 2008. Appellant therefore meets the participation requirements for a transferable permit in the recent participation period. However, he did not participate in the halibut charter business in the qualifying period (2004, 2005). His claim that an unavoidable circumstance thwarted his intent to participate in 2005 allows him to pursue his permit application under the unavoidable circumstance provisions of the regulation.

His claim is analyzed below.

a) 50 C.F.R § 300.67(g)(1)(i): Did Appellant hold a specific intent to operate his charter halibut fishing business in 2005? Yes.

Appellant demonstrated his specific intent to operate his charter halibut fishing business during the 2005 sport halibut fishing season, by:

1. Arranging for the construction of a suitable vessel;¹²

¹² “Construction Contract 1200” between Appellant and boat-building company (March 5, 2005). The record contains an agreement that is signed by Appellant, but not by the company. The testimony by the Company’s engineer, and the entire course of conduct between the parties, including the Company

2. Engaging in extensive discussion with the boat-building company in the fall of 2004 and, by January 2005, agreeing on a custom package of design features for the vessel, including accommodation for longer-range trips (expanded water and fuel tankage, marine head and shower, and similar improvements);¹³
3. Agreeing with the boat-building company on the terms and conditions, and signing the agreement prepared by the company;
4. Making payments to the boat-building company for construction of the vessel, in the amounts of \$25,879.00 (on March 9, 2005 as a down payment) and \$32,100.00 (on April 1, 2005, for the engines for the vessel);¹⁴
5. Arranging trips for anglers, drawn from an extensive list of potential clients derived from clients of his taxidermy business;¹⁵
6. Preparing a brochure to advertise his charter services;¹⁶
7. Obtaining his U.S. Coast Guard license.¹⁷

The record contains plentiful evidence of Appellant's intent to purchase a vessel to use in the charter halibut fishery. He and his spouse knew the nature of the experiences they wanted to provide for their clients and spent considerable time researching their options in order to optimize vessel design and to insure availability. Finally, in the fall of 2004, they settled on a 30' x 10' [REDACTED] model charter vessel. It was to be custom built by the Contractor in Anchorage and would provide for range, seaworthiness, comfort, and safety. Appellant went over his expectations in detail, and recorded them with an Addendum to the agreement with the boat-building company.¹⁸

As further evidence of his intent to operate a charter halibut fishing business in 2005, he contacted potential clients and arranged for charters. When he had to cancel the 2005 arrangements, one disappointed client wrote:

delivering, and Appellant purchasing, the boat fabricated to the specifications in the contract, make it clear that the Company intended to fulfill its terms of the agreement.

¹³ "Addendum No. 2" to Construction Contract, as signed by Appellant (January 31, 2005).

¹⁴ Photocopies of Credit Union Checks [REDACTED], respectively, drawn on Appellant and his spouse. Appellant testified that the engines were available in the spring of 2005, and the company representative testified that, by spring 2006, the engines had been "sitting around" in the company's shop for "over a year." Oral hearing (November 9, 2010).

¹⁵ Testimony of Appellant, Oral hearing (November 9, 2010)

¹⁶ *Id.*

¹⁷ Defined in the Letter from Appellant to RAM (February 22, 2010), as "proper credentials."

¹⁸ "Addendum No. 1 – Specifications" for [boat-building company], (January 5, 2005).

We are sorry to hear that your boat will not be done this summer. We will not be coming to Alaska as planned. I have some very sad people. . . . We are all planning to come with you this next year. Have a great day.¹⁹

I conclude that Appellant held a specific intent to participate in the charter halibut fishing business in 2005.

b) 50 C.F.R. 300.67(g)(1)(ii)(A) through (C): Was Appellant's intent to participate thwarted by a circumstance that was unique to him, unavoidable, unforeseen, and reasonably unforeseeable? Yes.

Appellant had formed an agreement with the Company in early 2005. The agreement detailed the specifications of the vessel he was buying, and contained a clause providing for a turnkey delivery date of approximately June 15, 2005. Appellant and Company agreed to the terms of the agreement in good faith and Appellant had no reason to believe that Company would not deliver the vessel on schedule.

During the spring and early summer of 2005, Appellant found that Company had other projects that were of higher priority (specifically mentioned was the construction of three new "bow-pickers"²⁰ for participants in the commercial fisheries).

In early June 2005, when Appellant was made aware that construction of the vessel had not even been started, he was forced to abandon his charter fishing plans for that season and to cancel his agreements with the clients he had scheduled.

A Company representative ("Boat Engineer"), who was involved in each step of the process of designing and constructing Appellant's vessel, testified that during the time in question, the Company was building good boats but the Company's managers were not good businessmen. He indicated that there was confusion in the yard, that the Company was operating with a new business manager and that the Company's efforts were, as a result, disorganized. The Company has since gone out of business.²¹

Appellant was uniquely disadvantaged by the Company's failure to perform under the terms of the agreement. The circumstance did not impact all charter operators in the same way (in fact, it only affected the Appellant). Additionally, there was nothing Appellant could do to expedite the Company's performance.

In consideration of the above, I conclude that Appellant's intent to participate in the charter halibut fishing business in 2008 was thwarted by a circumstance that was unique to him, unavoidable, unforeseen and reasonably unforeseeable.

¹⁹ Letter to Appellant from charter client (June 10, 2005).

²⁰ A "bowpicker" is a purpose-built vessel used in the salmon and roe herring drift gill net fisheries. Completing those vessels was a priority for the company because of the pendency of the opening of the commercial salmon season in Prince William Sound. Testimony of company's Boat Engineer, (November 9, 2010).

²¹ Testimony of Company's Boat Engineer (November 9, 2010).

c) 50 C.F.R. 300.67(g)(1)(iii): Did the circumstance that thwarted Appellant's intent to participate actually happen? Yes.

There is no doubt that the circumstance occurred. The Company's Boat Engineer wrote: "I recognize the fact that we were not able to finish your boat as planned for the summer of 2005. We hope that it did not inconvenience you too much finishing it up in the spring of 2006."²² The evidence clearly shows that the circumstance actually occurred, and I so conclude.

d) 50 C.F.R. 300.67(g)(1)(iv): Did Appellant take all reasonable steps to overcome the circumstances? Yes.

In early June 2005, it became evident that Company would not complete his vessel in time for Appellant to realize his intent to operate his charter halibut fishing business in 2005. By that time, his options were severely limited.

Once he learned that the vessel would not be ready, he looked for other boats that he could use during the season. His business plan was to take clients on extended, overnight, trips, which was the expectation of the clients he had already recruited. Both the Appellant and the Boat Engineer (who has particular expertise in the field) testified that there were no such vessels available in 2005,²³ so he had no choice but to notify his clients of his dilemma and cancel the booked trips.

In consideration of the realities he faced, I conclude that Appellant took all reasonable steps to overcome the circumstance to operate his halibut charter fishing business in 2008.

2. Should Appellant receive a transferable or non-transferable permit? Transferable permit.

If an applicant satisfies the requirements of sub-sections (i) through (iv) of the unavoidable circumstance regulation, NMFS is instructed, in sub-section (v), as follows:

(v) If the applicant proves the foregoing (*see* paragraphs (g)(2)(i) through (iv) of this section), the applicant will receive either:

(A) One non-transferable permit with an angler endorsement of four (4); or

(B) The number of transferable and non-transferable permits, and the angler endorsement on those permits, that result from the logbook fishing trips that the applicant proves likely would have been taken by the applicant but for the circumstance that thwarted the applicant's specific intent to operate a charter halibut fishing business in one year of the qualifying period and the applicant did not participate during the other year of the qualifying period.

²² Letter from Company Boat Engineer to Appellant (February 2, 2010).

²³ Oral Hearing (November 9, 2010).

According to the official halibut charter record,²⁴ Appellant reported 31 halibut logbook fishing trips in 2008, thus satisfying the regulatory minimum for a transferable permit in the recent participation period.

Appellant testified that he reviewed his records of trips he had scheduled for the 2005 season and, based on that, he had already booked five three-day trips, for a total of fifteen bottomfish logbook fishing days.²⁵ Appellant offered detailed, credible, testimony from three prospective clients, who had planned trips in 2005, of five days, two days and five days respectively. Given that this number of trips was booked before the 2005 season started, and considering Appellant's client base from his taxidermy business and his advertising efforts, it is far more likely than not that Appellant would have reported at least 15 bottomfish logbook fishing trips in 2005, had his boat been ready for the 2005 season.

The conclusion that Appellant would likely have taken at least 15 trips in 2005 is supported by Appellant's actions in 2006 and 2007. Appellant testified that he took over 15 trips in 2006 and 2007. NMFS has records of Appellant's trips in 2007 and these corroborate Appellant's testimony, showing he took 30 halibut logbook fishing trips in 2007.²⁶ When the unavoidable circumstance was lifted – and the boat complete – Appellant participated at the fifteen-trip level.

Because Appellant meets the participation requirement for a transferable permit in the recent participation period, and because it is likely that he would have reported at least fifteen bottomfish fishing trips in 2005, but for the unavoidable circumstance that thwarted his intent to participate, I conclude that his charter halibut fishing permit should be designated as transferable.

3. For how many anglers should Appellant's permit be endorsed? Six.

Appellant testified that his charter fishing trips normally accommodate four client anglers, but that the vessel could comfortably carry five or six, which he has done.

During the oral hearing, a prospective client testified that he planned to bring six people, including himself, from Michigan to Alaska to charter with Appellant in 2005 because he had received funds from sale of property. He wanted to share the windfall with his family by taking them on a charter halibut trip of at least five days. He testified that, in addition to himself, he planned to bring his daughter, her boyfriend, his son, daughter-in-law and his wife. He was "extremely disappointed" when he could not make the trip because Appellant's boat was not ready but he did take the trip in a future year (either 2006 or 2007) when Appellant's business was operational.

²⁴ The *Official charter halibut record* means "the information prepared by NMFS on participation in charter halibut fishing in Area 2C and Area 3A that NMFS will use to implement the Charter Halibut Limited Access Program and evaluate applications for charter halibut permits." 50 C.F.R. § 300.67(f)(5).

²⁵ A trip of five days counts as five trips. 50 C.F.R. § 300.67(f)(4).

²⁶ Memorandum from Mukhya Khalsa, NMFS Information Technology Specialist (Feb. 25, 2011). NMFS does not have the 2006 logbook trip data.

Another prospective client testified in similar detail, namely that he had planned to take a halibut charter trip of a minimum of five days in 2005 because his son was graduating from high school. In addition to himself, he planned to take his sister, his parents, his son who was graduating and his other son. The client cancelled the trip for 2005, when the boat was not ready, and instead took it in 2006.

Accordingly, I conclude that the highest number of client anglers that Appellant would have taken halibut charter fishing in 2005, but for the unavoidable circumstances that thwarted his intent to operate his charter halibut fishing business, was six. Therefore, pursuant to 50 C.F.R. § 300.67(e),²⁷ I conclude that Appellant's charter halibut permit should be endorsed for six anglers.

For the reasons set out above, the conclusion is that Appellant qualifies for a transferable charter halibut permit for use in International Pacific Halibut Commission regulatory Area 3A,²⁸ and endorsed for six anglers.

FINDINGS OF FACT

I find, by a preponderance of evidence in the record, that:

1. Appellant reported 31 halibut logbook fishing trips in 2008.
2. Appellant held a specific intent to operate his charter halibut fishing business during the qualifying period (2004, 2005).
3. Appellant's intent was thwarted by a circumstance that was unique to him, unavoidable, unforeseen and reasonably unforeseeable.
4. The unavoidable circumstance actually occurred.
5. Appellant took all reasonable steps to overcome the circumstance.
6. But for the unavoidable circumstance, Appellant would have likely taken 15 or more bottomfish logbook fishing trips in 2005.
7. The highest number of anglers that Appellant would have likely taken on a bottomfish logbook fishing trip in 2005 was six.

²⁷ 50 C.F.R. § 300.67(e) provides: "*Angler endorsement.* A charter halibut permit will be endorsed as follows: (1) The angler endorsement number for the first transferable permit for an area issued to an applicant will be the greatest number of charter vessel anglers reported on any logbook trip in the qualifying period in that area."

²⁸ 50 C.F.R. § 300.61 provides: "*Area 3A* means all waters between Area 2C and a line extending from the most northerly point on Cape Aklek (57°41'15" N. latitude, 155°35'00" W. longitude) to Cape Ikolik (57°17'17" N. latitude, 154°47'18" W. longitude), then along the Kodiak Island coastline to Cape Trinity (56°44'50" N. latitude, 154°08'44" W. longitude), then 140° true."

CONCLUSIONS OF LAW

1. Appellant meets the participation requirements for a transferable permit in the recent participation period (2008).
2. Appellant satisfies the requirements of the unavoidable circumstance regulation in 50 C.F.R. § 300.67(g)(2) with respect to his lack of participation in the charter halibut fishery in the qualifying period (2004, 2005).
3. Appellant qualifies for a transferable charter halibut permit, endorsed for six charter anglers, for use in IPHC regulatory area 3A.

DISPOSITION AND ORDER

The denial of Appellant's application for a charter halibut permit, as set out on the May 27, 2010, IAD that is the subject of this appeal, is VACATED. RAM is ordered to issue a transferable charter halibut permit, endorsed for six charter anglers, for use in IPHC regulatory area 3A to Appellant. This Decision is effective on May 5, 2011, unless by that date the Regional Administrator orders review of the Decision.

The appellant or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska Standard Time, on April 15, 2011, the tenth day after the issuance of this Decision. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the administrative judge, and must be accompanied by a written statement in support of the motion.


Philip J. Smith
Administrative Judge

Reviewed and Approved:


Christine Coughlin
Chief Administrative Judge (Acting)