

5. If [REDACTED] satisfies the elements of the unavoidable circumstance regulation, should his permit be designated as transferable or non-transferable, and for how many anglers should it be endorsed?

SUMMARY OF DECISION

The IAD is VACATED.

[REDACTED] has proven, by a preponderance of evidence in the record, that an unavoidable circumstance (namely, a business decision made by his only client, over which he had no control) thwarted his specific intent to participate in the halibut charter fishing business in the recent participation period (2008). Further, [REDACTED] has met all of the elements of the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)1.

[REDACTED] 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 BACKGROUND³

[REDACTED] has been in business continually since 1982, in Seldovia. In 2007, he entered into an agreement with [REDACTED], headquartered in Las Vegas, Nevada, whereby [REDACTED] would provide exclusive charter services for [REDACTED]'s clients and manage the "Salt Water end of their operation." Part of the arrangement with [REDACTED] was that [REDACTED] would run [REDACTED]'s boat, the [REDACTED] for charter fishing, which he did in 2007. In addition to its vessel, [REDACTED] owned a lodge in [REDACTED]. [REDACTED] had a multi-year (minimum of three years, expandable to five years) arrangement with [REDACTED], so, in 2007, he sold his own vessel, the [REDACTED].

In January of 2008, [REDACTED] renewed his State of Alaska Business License ([REDACTED]), his City of Seldovia Business License, and his Alaska Department of Fish and Game (ADF&G) Sport Fishing Business and Guide License. Because the [REDACTED] had experienced "massive mechanical problems" with its new engines during the 2007 season, she was hauled and dry docked at the [REDACTED] shop [REDACTED] where technicians from [REDACTED] ([REDACTED] diesel engine and Onan generator dealer) upgraded the engine computers to solve the problems.

By early 2008, [REDACTED] was prepared to operate his business under his agreement with [REDACTED] and fully intended to do so. However, in March 2008, [REDACTED] decided to cancel his commitment

³ Unless otherwise noted, the information in this Background is derived from letters from [REDACTED] to RAM, February 12, 2010, his Affidavit dated July 6, 2010, a letter from [REDACTED] ([REDACTED] Attorney) to OAA (July 15, 2010) and documents appended to those communications.

to the 2008 charter fishing season and to keep the Lodge in Soldotna closed. This was a result of the collapse of the housing market in Nevada and the resulting losses experienced by ██████.

██████ who had reasonably decided to sell the ██████ in 2007, was suddenly left without clients and without a vessel to carry them to the fishing grounds. Although he hoped that ██████ would reopen his Alaska operations in 2009, the opposite happened. After ██████ continued to experience losses in 2009, it decided to liquidate its Alaska property and equipment.

In July 2009, ██████ arranged to purchase another vessel, the 33.7 foot ██████ for his charter operations, and is now fully back in business.

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 2005,⁴ and [2] the *recent participation* period, which is the sport fishing period for halibut in 2008.⁵

NMFS will issue two types of charter halibut permits: transferable and non-transferable. A transferable permit may be transferred to another person, upon approval of the transfer by NMFS. 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.⁶ 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.⁷ The trips must have been reported under the applicant's ADF&G Business Owner Licenses.

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 that 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.

⁴ 50 C.F.R. § 300.67(f)(6).

⁵ 50 C.F.R. § 300.67(f)(7).

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

⁷ 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 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 qualifying period, but not for the recent participation 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.

██████████ claim is based on the subsection that 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. The regulation, 50 C.F.R. § 300.67(g)(1), provides:

(1) *Recent participation period.* An applicant for a charter halibut permit that meets the participation requirement for the qualifying period, but does not meet the participation requirement for the recent participation period, may receive one or more permits if the applicant proves paragraphs (g)(1)(i) through (iv) of this section as follows:

(i) The applicant had a specific intent to operate a charter halibut fishing business in the recent participation 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 last one year of the recent participation period.

(v) If the applicant proves the foregoing (*see* paragraphs (g)(1)(i) through (iv) of this section), the applicant will receive the number of transferable and non-transferable permits and the angler endorsements on these permits that result from the application of criteria in paragraphs (b), (c), (d), (e) and (f) of this section.

An applicant must satisfy each requirement of the unavoidable circumstance regulation for NMFS to treat the applicant as though he or she participated in 2008.

1. Does [REDACTED] satisfy the requirements of the unavoidable circumstance regulation in 50 C.F.R. § 300.67(g)(1) with respect to his lack of participation in the charter halibut fishery in 2008? Yes.

As explained below, I conclude by a preponderance of evidence in the record that [REDACTED] satisfies all of the elements of the unavoidable circumstance regulation.

50 C.F.R § 300.67(g)(1)(i): Did [REDACTED] have a specific intent to participate in the 2008 charter halibut fishery? Yes.

In early 2008 [REDACTED] was fully prepared to participate in the charter halibut fishing business. He had an operating agreement with [REDACTED] to use [REDACTED] vessel to provide fishing experiences to [REDACTED] clients.⁸ Because of the multi-year nature of the agreement with [REDACTED] had sold his own vessel in 2007 – [REDACTED] – in order to maximize the value of his agreement with [REDACTED]. In January 2008, to prepare for the upcoming charter halibut fishing season, [REDACTED] had:

- Renewed his Alaska Business License [REDACTED].⁹
- Obtained a City of Seldovia Business License for 2008,¹⁰
- Purchased his 2008 Sport Fishing Business/Guide License from the ADF&G.¹¹

Additionally, he had arranged for the [REDACTED] engines to be repaired, which was accomplished by [REDACTED] in preparation for sea trials in April 2008.¹²

I find by a preponderance of the evidence that [REDACTED] held a specific intent to participate in the charter halibut fishing business in 2008.

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

In describing [REDACTED] situation in 2008, the President [REDACTED] wrote as follows:

[REDACTED] did have an extended, exclusive agreement with [REDACTED] to provide Halibut Charter fishing services to [REDACTED] customers in 2008. We had used [REDACTED] as a back up to our personal boats for many years and had found them to very reliable and professional.

⁸ Letter from [REDACTED] To Whom It May Concern (February 12, 2010).

⁹ Photocopy of Online Business Licensing transaction and copy of Business License (January 7, 2008).

¹⁰ Photocopy of City of Seldovia Business License for 2008 (January 2008).

¹¹ Sport Fishing Business/Guide License application and photocopy of [REDACTED] bank check No. [REDACTED] January 7, 2008.

¹² Letter from Customer Support Manager for [REDACTED] To Whom it May Concern (February 15, 2010).

[W]e had plans to continue our Alaska trips for our customers into the future indefinitely. We had a large investment in our Alaska property and equipment. Nobody could have foreseen the economic crash that enveloped Las Vegas in late 2007. Our business went from vibrant to nearly nothing in a matter of weeks. There was no other option but to start eliminating costs and the Alaska side of things was painfully cut out in mid March of 2008. The initial intent was to only shut down for that year, but the losses for our company continued to mount through 2008 and into 2009 and we decided to liquidate the property and equipment and hope to come back after the economy recovers.

....

[I] know [REDACTED] was ready and available to fish in 2008. There was nothing he could have done to prevent what we had to do. It was a costly, painful, and unavoidable choice due to the economic situation here in Las Vegas.¹³

The President [REDACTED] corroborated [REDACTED] statement. [REDACTED] offered [REDACTED] clients, “[D]aily flights for fishing and flight-seeing trips and twice a day flights to Seldovia for [REDACTED]”¹⁴ The President went on to say:

[REDACTED] called us in January of 2008 and confirmed their bookings for the Summer, like they did every January. Then a couple months later we received notice that [REDACTED] would not be bringing their guests up from Las Vegas due to their companies economic losses. We compared notes with [REDACTED] and they had received the same notice. Because [REDACTED] had sold his boat and was using [REDACTED] he was now in a position of no boat. He had no chance to salvage the season.¹⁵

The circumstance was certainly unique to [REDACTED]. His business relied on the health of a housing construction market in a city some 2,000 miles from Seldovia. Although other Alaska charter fishing businesses are heavily dependent on the overall health of the economy in the “lower 48,” [REDACTED] reliance on one business as the source of his clients and his vessel was unique.

Likewise, [REDACTED] could not be expected to foresee the sudden loss of his clients and the vessel he used to provide them fishing experiences. He may have been generally aware of decline in economic stability in Nevada, but he had no way of knowing the effect of that decline on his business partner and, ultimately, on his own business.

In consideration of the above, I find that [REDACTED] 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.

¹³ Letter from President of [REDACTED] To Whom It May Concern (February 12, 2010).

¹⁴ Memorandum from President of [REDACTED] 2008 Operations (February 15, 2010).

¹⁵ *Id.*

50 C.F.R. 300.67(g)(1)(iii): Did the circumstance that thwarted [REDACTED] intent to participate actually happen? Yes.

There is no doubt that the circumstance (namely, that [REDACTED] cancelled its commitment to provide a vessel and clients in 2008) actually happened, and I so find.

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

On September 24, 2010, [REDACTED] attorney supplemented the record with a letter explaining the steps taken by [REDACTED] to overcome the circumstance he encountered in the spring of 2008. The letter, the contents of which were developed by [REDACTED] attorney in consultation with [REDACTED] explained as follows:

First, [REDACTED] considered buying a new boat and booking customers for the 2008 season. [REDACTED] reached the conclusion that this was not a financial option, because (a) [REDACTED] anticipated resuming his Alaska operations in 2009 and hiring [REDACTED] to be his exclusive provider of halibut charter services and operate his boat, and (b) [REDACTED] typically, by late March, has a fishing season 90% booked and has collected down payments for operating expenses during the season.

When [REDACTED] announced he was cutting his Alaska operations in mid March of 2008, his intent was to only shut down the Alaska operations for one year. Thus buying a new boat for 2008 was not rational because [REDACTED] planned to go back to work for and run [REDACTED] boat in 2009.

In addition, the timing of [REDACTED] announcement, coming in mid March of 2008, made it virtually impossible for [REDACTED] to try to book . . . customers for that season. . . . [I]t was common for clients to book, up to a year in advance, several days of fishing the next summer. . . . [REDACTED] would receive a 50% deposit on the bookings for the summer. By the end of March [REDACTED] would typically have about 90-95% of the fishing season booked in advance In March of 2008, [REDACTED] did not have any trips booked for the year Thus the idea of finding a boat for one season without any customers was not a reasonable choice.¹⁶

In late 2008, [REDACTED] decided to divest all of its Alaska operations, including its lodge and charter fishing vessel. [REDACTED] then realized that his agreement with [REDACTED] would not be renewed, and he began searching for another boat. Per the sales agreement with [REDACTED] [REDACTED] purchased [REDACTED] a 33.7 foot sport fishing charter vessel from [REDACTED] with proposed delivery July 7, 2009.

¹⁶ Letter from [REDACTED] attorney for [REDACTED], to Judge Smith (September 24, 2010).

I find, by a preponderance of evidence in the record, that ██████ took all reasonable steps to overcome the circumstance to operate his halibut charter fishing business in 2008.

2. Should ██████ 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)(1)(i) through (iv) of this section), the applicant will receive the number of transferable and non-transferable permits and the angler endorsements on these permits that result from the application of criteria in paragraphs (b), (c), (d), (e), and (f) of this section. [50 C.F.R. § 300.67(g)(1)]

The criteria in paragraphs (b), (c), (d), (e), and (f) are the participation requirements for the standard applicant – the applicant that met the actual participation requirements in both the qualifying period (2004, 2005) and the recent period (2008). NMFS cannot determine ██████ permits based on his actual participation in the recent period, because, as outlined previously in this decision, ██████ has shown that he did not participate in the recent period due to an unavoidable circumstance.

Under these circumstances, the regulatory history suggests that NMFS will substitute the applicant’s participation in the qualifying period for the applicant’s participation in the recent period. In the proposed rule, NMFS explained:

Missed recent participation period. An applicant who meets the participation requirements for the qualifying period (2004 and 2005) may claim that it did not meet the participation requirement in the recent participation period due to an unavoidable circumstance. Assuming the applicant is able to successfully demonstrate that it meets the criteria for an unavoidable circumstance, NMFS proposes to award the applicant the number and type of permits that the applicant would have received if its participation during the recent participation period had been the same as its participation during the qualifying period. The Council did not address this issue. However, NMFS determined that *substituting the qualifying period participation for actual participation during the recent participation period best reflects what the Council was trying to achieve by recommending that an unavoidable circumstance exception be included in this program.*¹⁷

Applying this standard to ██████ he met the participation requirement for a transferable permit in the qualifying period. ██████ reported more than fifteen bottomfish logbook fishing trips with one vessel in 2004 and 2005. In fact, according to the official halibut charter record,¹⁸

¹⁷ Proposed Rule, 75 Fed. Reg. 18,178, 18,187 (Apr. 21, 2009) (emphasis added).

¹⁸ 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

██████████ reported forty bottomfish logbook fishing trips with one vessel in 2004 and forty-one bottomfish logbook fishing trips with one vessel in 2005.

I therefore conclude that ██████████ meets the participation requirement for a transferable permit in the qualifying period and his charter halibut permit should be designated as transferable.

3. For how many anglers should ██████████ permit be endorsed?

The highest number of charter vessel anglers ██████████ reported on a bottomfish logbook in 2004 or 2005 was six. Accordingly, pursuant to 50 C.F.R. § 300.67(e),¹⁹ I conclude that ██████████ charter halibut permit should be endorsed for six anglers.

For the reasons set out above, I conclude that ██████████ qualifies for a transferable charter halibut permit for use in International Pacific Halibut Commission regulatory Area 3A,²⁰ endorsed for six charter anglers.

FINDINGS OF FACT

1. ██████████ reported forty bottomfish logbook fishing trips with one vessel in 2004 and forty-one bottomfish logbook fishing trips with one vessel in 2005.
2. ██████████ held a specific intent to operate his charter halibut fishing business during the recent participation period (2008).
3. ██████████ intent was thwarted by a circumstance that was unique to him, unavoidable, unforeseen and reasonably unforeseeable.
4. The unavoidable circumstance actually occurred.
5. ██████████ took all reasonable steps to overcome the circumstance.

Limited Access Program and evaluate applications for charter halibut permits.” 50 C.F.R. § 300.67(f)(5).

¹⁹ 50 C.F.R. § 300.67(e): *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. . . .

²⁰ 50. C.F.R. § 300.61: *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. [REDACTED] has satisfied the requirements of the unavoidable circumstances regulation, 50 C.F.R. 300.67(g)(1), with respect to his lack of participation in the recent period.
2. [REDACTED] met the minimum participation requirement for a transferable permit in the qualifying period.
3. [REDACTED] reported a maximum of six anglers on his bottomfish logbook reports during the qualifying period.
4. [REDACTED] 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 [REDACTED] application for a charter halibut permit, as set out on the June 10, 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 [REDACTED]. This Decision is effective on February 25, 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 February 5, 2011, the tenth day after 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.

[REDACTED]

Philip J. Smith
Administrative Judge

Reviewed and Approved:

[REDACTED]

for

Eileen Jones
Chief Administrative Judge