

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE
NATIONAL APPEALS OFFICE

In re Application of) Appeal No. 10-0080
)
[REDACTED]) DECISION
)
)
Appellant) May 18, 2011
_____)

STATEMENT OF THE CASE

The National Appeals Office (NAO) is a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget. NAO operates out of NOAA's headquarters in Silver Spring, MD, and maintains an office in NMFS's Alaska Region. NAO is the successor to the Office of Administrative Appeals, Alaska Region (OAA), and is charged with deciding appeals that were filed with OAA. NAO decides these appeals pursuant to the procedure established in federal regulation 50 C.F.R. § 679.43.

On October 25, 2010, [REDACTED] (Decedent's Daughter), on behalf of the Estate [REDACTED] (Appellant), filed a timely appeal of an Initial Administrative Determination (IAD) issued by the Restricted Access Management (RAM) Program on August 25, 2010. [REDACTED] (Decedent) died on [REDACTED]. Decedent's Daughter can file this appeal because Appellant, Decedent's Estate, is directly and adversely affected by the IAD, as required by 50 C.F.R. § 679.43(b).

The IAD denied Decedent's Daughter's application for a charter halibut permit under the Charter Halibut Limited Access Program.¹ In the IAD, RAM made three determinations. First, RAM determined that Decedent did not take five halibut logbook fishing trips in 2008 and therefore did not meet the participation criterion for a charter halibut permit in the recent participation period. Second, RAM determined that Decedent's Daughter was not able to apply on behalf of Decedent because she had not been appointed personal representative of the Decedent's Estate. Third, RAM did not decide Decedent's Daughter's unavoidable circumstance claim because, under federal regulation 50 C.F.R. § 300.67(g), a claim of unavoidable circumstances must be decided by an appellate officer.²

In the appeal, Decedent's Daughter stated that Decedent's son and grandsons had been unable to continue Decedent's charter halibut fishing business after Decedent's death in [REDACTED]. Decedent's

¹ The Charter Halibut Limited Access Program is codified at 50 C.F.R. §§ 300.61, 300.66, and 300.67, available on the NMFS Alaska Region website: <http://www.alaskafisheries.noaa.gov/regs/summary.htm>.

² 50 C.F.R. § 300.67(g) ("Unavoidable circumstances claims must be made pursuant to paragraph (h)(6) of this section . . ."); 50 C.F.R. § 300.67(h)(6) ("An applicant that receives an IAD may appeal to the Office of Administrative Appeals (OAA) pursuant to § 679.43 of this title."). See Final Rule, 75 Fed. Reg. 554, 597 (Jan. 5, 2010), Change 19.

Daughter stated that the family had encountered difficulties and delays in getting her father's estate probated.³

I conclude that the record contains sufficient information upon which to decide this appeal.⁴ I did not order a hearing because the alleged facts, if true, would not authorize NMFS to issue a charter halibut permit.⁵ I therefore close the record and issue a decision.

FINDINGS OF FACT

I find the following facts by a preponderance of evidence in the record.

1. Decedent is an individual to whom the Alaska Department of Fish and Game (ADF&G) issued an ADF&G Business Owner License in 2004 and 2005.
2. Decedent reported thirty bottomfish logbook fishing trips under his ADF&G Business Owner License in 2004.⁶
3. Decedent reported thirty-five bottomfish logbook fishing trips under his ADF&G Business Owner License in 2005.⁷
4. Decedent died unexpectedly on [REDACTED] [REDACTED].⁸
5. Before his death, Decedent had executed a Living Trust and named [REDACTED] (Decedent's Son), as trustee and named Decedent's Daughter as Successor Trustee.
6. Decedent's Son signed an application for a charter halibut permit on March 17, 2010, based on the Decedent's participation in the charter halibut fishery.¹⁰
7. Decedent's Daughter submitted the application, signed by Decedent's son, to NMFS on March 25, 2010.¹¹
8. The application period for charter halibut permits, by notice established in the Federal Register, was February 4, 2010, to April 5, 2010.¹²
9. The probate of Decedent's estate has been delayed and no one has been appointed personal representative of Decedent's estate.¹³

³ Letter from Decedent's Daughter to OAA (Oct. 23, 2010).

⁴ 50 C.F.R. § 679.43(g)(2).

⁵ 50 C.F.R. § 679.43(g)(3).

⁶ Official Charter Halibut Record, Memorandum from NMFS Computer Specialist (May 12, 2010).

⁷ *Id.*

⁸ Certificate of Death ([REDACTED]) Letter from Appellant to OAAs (Oct. 23, 2010).

⁹ Letter from Decedent's Daughter to NMFS (May 21, 2010) with page 2 of Decedent's Living Trust.

¹⁰ Application (dated March 17, 2010, received March 25, 2010).

¹¹ *Id.*

¹² Notice of Application Period, 75 Fed. Reg. 1595 (Jan. 12, 2010).

ISSUES

1. Did Decedent meet the participation requirement in the recent period for a charter halibut permit?
2. May the heirs of the Decedent meet the participation requirement in the recent participation period (2008) by showing that the heirs were prevented from participating in 2008 by circumstances that met the requirement of the unavoidable circumstance regulation?

ANALYSIS

At the outset, I acknowledge that the IAD correctly concluded that Decedent's Daughter has not been appointed as personal representative of Decedent's Estate and that, to apply on behalf of a deceased person, an applicant must be the personal representative of the deceased person's estate.¹⁴ I do not decide this appeal on that basis because I conclude that, even if Decedent's Daughter were appointed personal representative of her father's estate, NMFS could not issue a charter halibut permit to the heirs of Decedent.¹⁵

1. Did Decedent meet the participation requirement in the recent participation period for a charter halibut permit?

The participation requirements for a charter halibut permit apply to two periods: a qualifying period, which is the sport fishing season for halibut in 2004 and 2005,¹⁶ and a recent participation period, which is the sport fishing season for halibut in 2008.¹⁷ An applicant must meet different levels of participation for a non-transferable permit and for a transferable permit.

To receive a non-transferable charter halibut permit, a person must have reported a minimum of five bottomfish logbook fishing trips in one year in the qualifying period (2004 or 2005),¹⁸ and a minimum of five halibut logbook fishing trips in the recent participation period (2008).¹⁹ The trips must have been reported under the person's ADF&G Business Owner Licenses.

To receive a transferable charter halibut permit, an applicant must have reported a minimum of fifteen bottomfish logbook fishing trips with the same vessel in the qualifying period (2004, 2005),²⁰ and fifteen halibut logbook fishing trips with the same vessel in the recent participation

¹³ Letter from Decedent's Daughter to OAA (Oct. 23, 2010).

¹⁴ See 50 C.F.R. § 300.67(b)(1)(iii)(A). The personal representative of an estate is sometimes called the executor.

¹⁵ If NMFS were able to issue a permit to the heirs of Decedent, I would give Decedent's Daughter the opportunity to be appointed Personal Representative of her father's estate.

¹⁶ 50 C.F.R. § 300.67(f)(6).

¹⁷ 50 C.F.R. § 300.67(f)(7).

¹⁸ 50 C.F.R. § 300.67(b)(1)(ii)(A).

¹⁹ 50 C.F.R. § 300.67(b)(1)(ii)(B).

²⁰ 50 C.F.R. § 300.67(d)(1)(i).

period (2008).²¹ The trips must have been reported under the applicant's ADF&G Business Owner Licenses.

Decedent reported thirty bottomfish logbook fishing trips under his ADF&G Business Owner License with the same vessel in 2004 and thirty-five bottomfish logbook fishing trips under his ADF&G License with the same vessel in 2005. Decedent met the participation requirement for a transferable permit in the qualifying period by his participation in either 2004 or 2005.

Decedent died in [REDACTED]. Decedent therefore reported no halibut logbook fishing trips in the recent period and did not meet the participation requirement in the recent period through historic, or actual, participation in the recent period.

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirement in the recent period.²² The regulation provides that, if an applicant specifically intended to participate in the recent period, but was thwarted from participating by a circumstance that was unavoidable, unique, unforeseen and reasonably unforeseeable, NMFS will treat the applicant as though the applicant participated.²³ The applicant must also prove that he or she took all reasonable steps to overcome the circumstance.²⁴

Assuming that the personal representative of a decedent's estate can submit a claim that the deceased person met the requirements of the unavoidable circumstance regulation, Decedent could not have met the requirements of the unavoidable circumstance regulation because he died in [REDACTED]. Therefore, I conclude that Decedent could not have had a specific intent to operate a charter halibut fishing business in the 2008 season.

Since Decedent did not meet the participation requirement in the recent period, either through actual participation or through intended participation that was thwarted by an unavoidable circumstance, I conclude that Decedent did not meet the participation requirement in the recent period for a charter halibut permit.

2. May the heirs of a deceased person meet the participation requirement for a charter halibut permit in the recent participation period (2008) by showing that the heirs were thwarted from participating in 2008 by circumstances that meet the requirement of the unavoidable circumstance regulation?

Initially, I note that if NMFS could issue a permit based on the application of a personal representative, NMFS would issue the permit to the persons who, according to the personal representative, are the proper persons to receive the permit under the laws that govern distribution of the assets of the deceased person.²⁵ Although "heirs" can have a technical

²¹ 50 C.F.R. § 300.67(d)(1)(ii).

²² 50 C.F.R. § 300.67(g)(1).

²³ 50 C.F.R. § 300.67(g)(1)(i), (ii).

²⁴ 50 C.F.R. § 300.67(g)(1)(iv).

²⁵ 50 C.F.R. § 300.67(b)(1)(iii)(A).

meaning,²⁶ I use the term “heirs” to mean the persons who would be the proper persons to receive a charter halibut permit from the estate of a deceased person, if NMFS were able to issue a permit. For purposes of this decision, I treat Decedent’s son and grandsons as Decedent’s heirs.

Decedent’s Daughter states that Decedent’s son was unable to operate his father’s charter halibut business in 2008 because due to circumstances facing the son: business conflicts, his upcoming marriage and the terminally-ill status of his future mother-in-law. Decedent’s Daughter further states that Decedent’s grandsons were unable to continue their grandfather’s fishing business until they graduate from high school in 2011 and 2012.²⁷ I assume these facts are true.

I interpret Decedent’s Daughter as arguing that Decedent’s heirs were unable to operate the Decedent’s charter halibut fishing business in 2008 due to unavoidable circumstances and that, under the unavoidable circumstance regulation, NMFS should treat Decedent’s heirs as having participated in the recent period. Then, Decedent’s Daughter would have to argue, NMFS should combine the actual participation by Decedent in the qualifying period with the thwarted participation of the heirs in the recent period to result in a unified history that met the participation requirements for a permit.

I conclude that the heirs of a deceased person may not meet the participation requirement for a charter halibut permit in the recent participation period through a showing of unavoidable circumstances because the heirs cannot meet the participation requirement in the recent participation period at all: either through actual participation by the heirs or through participation thwarted by an unavoidable circumstance. I reach this conclusion because I conclude that NMFS can only award a charter halibut permit to the heirs of a deceased person *if the deceased person met the participation requirements for a permit.*

The regulation that allows a personal representative to apply on behalf of a deceased individual states that the personal representative “is applying as a successor-in-interest *to the person* to which ADF&G Business Owner Licenses that authorized logbook fishing trips *that met the participation requirements* described in paragraphs (b)(1)(ii) of this section for one or more charter halibut permits.”²⁸ The “person” is the deceased person and the deceased person must have “met the participation requirements” in paragraphs (b)(1)(ii) of section 300.67. The participation requirements in paragraphs (b)(1)(ii) are the participation requirements for a non-transferable permit in both the qualifying period²⁹ and the recent participation period.³⁰ If the deceased individual died without meeting the participation requirements in both periods, the

²⁶ The technical meaning of heirs is persons who inherit property from a deceased person based on the laws of intestate succession. Alaska Statutes 13.06.050(21); Uniform Probate Code 1-201(20).
Devises are persons who inherit property from a deceased based on the provisions of a will. Alaska Statutes 13.06.050(11); Uniform Probate Code 1-201(11).

²⁷ Letter from Decedent’s Daughter to OAA (Oct. 23, 2010).

²⁸ 50 C.F.R. § 300.67(b)(1)(iii)(emphasis added).

²⁹ 50 C.F.R. § 300.67(b)(1)(ii)(A). Although the provisions in paragraph (b)(1) are the participation requirements for a non-transferable permit, any person that met the participation requirements for a transferable permit will have met the participation requirements for a non-transferable permit.

³⁰ 50 C.F.R. § 300.67(b)(1)(ii)(B).

deceased individual could not have “met the participation requirements” for one or more charter halibut permits.

The preamble to the proposed charter halibut regulation strongly supports that the deceased person must have met the participation requirements for a permit. In the preamble, NMFS explained:

Generally, the entity that applied for one or more charter halibut permits would be the same entity that held the ADF&G business owners license that authorized the trips that met the participation requirements in the qualifying period and in the recent participation period. The only exception to this requirement is if the entity that held these licenses is an individual who has died, or a non-individual entity, such as a corporation or partnership, that has dissolved.

*If an individual who met the participation requirements for a charter halibut permit has died, the personal representative of the individual’s estate may apply for the permit in place of the deceased individual. The applicant who applies as a personal representative must provide documentation of the individual’s death and documentation that the applicant has been appointed by a court as the personal representative of the deceased individual’s estate. If the decedent would have received any permits, the personal representative can instruct NMFS as to who, according to the applicant’s duties as personal representative, should receive those permits.*³¹

The successor-in-interest provision solves the problem that a deceased person cannot apply for a permit. The successor-in-interest provision allows the personal representative, as legal representative of the deceased’s estate, to stand in the shoes of the deceased person. The successor-in-interest provision allows NMFS to evaluate participation by the deceased person in the charter halibut fishery according to the same standard it evaluated other participants.

Thus, if the decedent would have received a permit, the regulation instructs NMFS to issue the permit to the person(s) who would be entitled to receive the permit under the laws governing the deceased person’s estate.³² If the decedent would not have received a permit because the decedent did not meet the recent participation requirement, NMFS does not have authority to issue a permit. NMFS does not have authority, under any regulation, to combine participation by the heirs –actual or thwarted participation – with participation by a deceased person.

I therefore conclude that the heirs to a deceased person may not meet the participation requirement for a charter halibut permit in the recent period by showing that the heirs were prevented from participating in 2008 by circumstances that meet the requirement of the unavoidable circumstance regulation.

³¹ Proposed Rule, 74 Fed. Reg. 18,178, 18,187 (Apr. 21, 2009) (emphasis added).

³² 50 C.F.R. § 300.67(b)(1)(iii)(A).

Since Decedent did not meet the recent participation requirement for a charter halibut permit, NMFS does not have authority to issue a permit to the heirs of Decedent.³³

CONCLUSIONS OF LAW

1. Decedent did not meet the participation requirement in the recent period for a transferable or non-transferable charter halibut permit.
2. Decedent could not have held a specific intent to participate in the recent participation period (2008) because he died in [REDACTED]
3. The heirs of a deceased person cannot meet the participation requirement in the recent period for a charter halibut permit through a showing that the heirs were prevented from participating in the recent period by circumstances that meet the requirements of the unavoidable circumstance regulation at 50 C.F.R. § 300.67(g)(1).
4. NMFS can only issue a charter halibut permit to the heirs of a deceased person if the deceased person met the participation requirements for a charter halibut permit.
5. NMFS does not have authority to issue a charter halibut permit to heirs of Deceased.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This decision takes effect on June 17, 2011, unless by that date the Regional Administrator orders review of the Decision.

Decedent's Daughter, on behalf of Appellant, or RAM may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Time, on the tenth day after the date of this Decision, May 31, 2011. A Motion for Reconsideration must be in writing, must allege one or more specific material matters of fact or law that were overlooked or misunderstood by the administrative judge, and must be accompanied by a written statement of points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.

[REDACTED]
Mary Alice McKeen
Administrative Judge

³³ I do not address whether, if the deceased person met the participation requirements for a non-transferable permit in both periods, NMFS could issue a non-transferable permit to the deceased person's heirs. That issue is not before me.