



the official charter halibut record, Appellant took no bottomfish logbook fishing trips in either 2004 or 2005.

Appellant acknowledges this but states that he did not participate in 2005 due to an unavoidable circumstance, namely that he signed a contract containing a non-competition clause that prohibited Appellant from starting a charter halibut business in 2005.<sup>6</sup> Appellant contends that it was not until after 2005 that he could purchase F/V ██████████ and operate his business, ██████████.<sup>7</sup>

A claim under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), must be decided by an appellate officer, not by RAM.<sup>8</sup> Therefore, in the IAD, RAM did not determine whether Appellant met the requirements of the unavoidable circumstance regulation.

I held a hearing by telephone on March 12, 2012.<sup>9</sup> Appellant testified as did ██████████, Owner of ██████████ and ██████████ Owner of ██████████. I closed the record at the end of the hearing. I conclude that the record has sufficient information upon which to decide this appeal.<sup>10</sup>

In the decision, I will refer to the following individuals or businesses as indicated below:

- ██████████ is Appellant.
- In 2004, Appellant was employed as a charter captain for ██████████ operating the ██████████ ██████████ is Business 1. F/V ██████████ is Vessel 1.
- In 2005, Appellant was employed as a charter captain for Business 1 and operated the ██████████ is Vessel 2.
- ██████████ refers anglers to Business 1 and contracts with Business 1 to take anglers on charter trips. ██████████ is Business 2.
- ██████████ Business 2, refers anglers to approximately twelve charter operators in Sitka.
- ██████████ is Owner of Business 1. He is also Operations Manager for Business 2.

<sup>6</sup> Letter from Appellant to OAA (Oct. 28, 2010).

<sup>7</sup> Letter from Appellant to OAA (Oct. 28, 2010).

<sup>8</sup> 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 from the Proposed Rule.

<sup>9</sup> Order Scheduling Hearing (Feb. 9, 2012).

<sup>10</sup> 50 C.F.R. § 679.43(g)(2).

- [REDACTED] is Owner of Business 2.
- Appellant started his charter business in 2006 and has provided charter trips since 2006 with [REDACTED] is *Vessel 3*.
- [REDACTED] built *Vessel 3* in 2006. [REDACTED] is Builder.

For the reasons that follow, I conclude that Appellant has not shown that he meets the requirements of the unavoidable circumstance regulation with respect to his lack of participation in 2005.

### ISSUES

1. Did Appellant show by a preponderance of evidence in the record that he had a specific intent to operate a charter halibut fishing business in 2005?
2. Was Appellant's signing a non-competition clause an unavoidable circumstance?

### FINDINGS OF FACT

1. Appellant participated in commercial fishing in Sitka, Alaska, from 1987 to 2002, initially as a deckhand longlining for halibut and black cod. He then obtained a handtroll salmon permit and a power troll permit from the State of Alaska and owned a commercial vessel. He also worked as a commercial diver.<sup>11</sup>
2. For the 2004 season, Appellant was employed as a charter captain by Business 1 and took over ninety trips with *Vessel 1*. Appellant reported the trips by *Vessel 1* under the ADF&G Business Owner License issued to Business 1.<sup>12</sup>
3. For the 2004 season, Appellant signed a written contract with Business 1. Appellant made a commitment to be available as a charter captain (or sport fishing guide) for the May-September season on board a vessel or vessels provided by Business 1 in exchange for specified payment from Business and full client bookings.<sup>13</sup>
4. After the 2004 season, Appellant decided that he wanted to operate his own charter halibut fishing business by getting his own vessel as soon as bookings from Business 2

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<sup>11</sup> Statement of Appellant (Mar. 17, 2010); Letter from Appellant to OAA (Dec. 30, 2010).

<sup>12</sup> ADF&G Logbook [REDACTED] for *VESSEL 1* (2004). These were both salmon and bottomfish trips.

<sup>13</sup> Statement of Appellant (Mar. 17, 2010); Employment Agreement (May 10, 2005). Appellant stated that the 2004 contract was the same as the 2005 contract except that the 2005 contract had a non-competition clause. Statement of Appellant (Mar. 17, 2010). The record does not contain the 2004 contract.

allowed the Owner of Business 2 to guarantee clients to Appellant. This would allow Appellant to obtain financing for his own vessel.<sup>14</sup>

5. Before the 2005 season, Owner of Business 2 told Appellant that Business 2 did not have enough bookings to guarantee clients for Appellant for the 2005 season.<sup>15</sup>

6. On May 10, 2005, Appellant signed a written contract with Business 1 where Appellant agreed again to work as a charter captain for Business 1 for the May-September season on board a vessel or vessels provided by Business 1 in exchange for specified payment from Business 1 and full client bookings.<sup>16</sup>

7. The 2005 contract had a non-competition clause. The non-competition clause prohibited Appellant from owning, managing, operating, or controlling any business within sixty miles of Sitka that would compete with Business 1 for the term of the contract which was the May-September charter halibut season in 2005.<sup>17</sup>

8. For the 2005 season, Appellant operated *Vessel 2* on behalf of Business 1 and reported more than ninety trips with *Vessel 2* under the ADF&G Business Owner License issued to Business 1.<sup>18</sup>

9. Appellant sold his commercial vessel in June 2005 and was willing to put the proceeds from the sale of the vessel into starting his own charter business.<sup>19</sup>

10. In the fall of 2005, Owner of Business 2 advised Appellant that he would have enough bookings to refer clients directly to Appellant for the 2006 season.<sup>20</sup>

11. On January 3, 2006, Owner of Business 2 provided a letter to Appellant about the bookings that Owner could provide Appellant for the 2006 season: "This letter is to confirm that we will be providing charter bookings for [Appellant] on his new boat during the 2006 season. Based on current and projected bookings, we will probably be able to provide at least 100 days of full day fishing charters."<sup>21</sup>

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<sup>14</sup> Statement of Appellant with Application (Mar. 17, 2010).

<sup>15</sup> Statement by Owner of Business 2 (Feb. 17, 2010); Testimony of Appellant (March 12, 2012); Testimony of Owner of Business 2 (March 14, 2012).

<sup>16</sup> Statement by Owner of Business 2 (Feb. 17, 2010).

<sup>17</sup> Statement of Appellant (Mar. 17, 2010); Employment Agreement (May 10, 2005).

<sup>18</sup> Employment Agreement (dated May 10, 2005). The non-competition clause in the 2005 contract stated that it lasted during the term of the Agreement and two years after the term of the contract which would have been through the 2006 and 2007 charter season. The record shows that, when Appellant signed the contract in 2005, he had reason to believe that Business 1 would not enforce the non-competition beyond the 2005 season and that Business 1 and Business 2 would help Appellant get a vessel after the 2005 season, if bookings would support a new vessel in the Business 2's charter fleet, which is what happened. Statement by Appellant (Oct. 28, 2010).

<sup>19</sup> ADF&G Logbook [REDACTED] for *VESSEL 2* (2005). These are salmon and bottomfish logbook fishing trips.

<sup>20</sup> Letter from Appellant to OAA (Dec. 30, 2010).

<sup>21</sup> Statement by Owner of Business 2 (Feb. 17, 2010).

<sup>22</sup> Statement by Owner of Business 2 (Jan. 3, 2006).

12. The written promise of guaranteed bookings for the 2006 season from Owner of Business 2 enabled Appellant to secure financing for construction of his boat.<sup>22</sup>

13. In the fall of 2005, Appellant discussed specifications for a vessel with Builder. Builder finalized his price in December 2005. Appellant obtained financing. Boat construction began in February 2006. Appellant's vessel was completed in April 2006.<sup>23</sup>

14. Appellant reported ninety halibut logbook fishing trips with Appellant's vessel in 2006 pursuant to an ADF&G Business Owner License issued to him.<sup>24</sup>

15. Appellant reported over ninety halibut logbook fishing trips with Appellant's vessel in 2007 pursuant to an ADF&G Business Owner License issued to him.<sup>25</sup>

16. Appellant reported 107 halibut logbook fishing trips with Vessel 3 in 2008 pursuant to an ADF&G Business Owner License issued to him.<sup>26</sup>

17. On April 7, 2010, Appellant timely filed an application for a charter halibut permit.<sup>27</sup>

#### PRINCIPLES OF LAW

In March 2007, pursuant to section 773c(c) of The Halibut Act, the North Pacific Fishery Management Council (Council) recommended that the Secretary of Commerce adopt a program of limited entry for the charter halibut fisheries in IPHC Areas 2C and 3A.<sup>28</sup> Pursuant to section 773c of The Halibut Act, the Secretary of Commerce adopted the regulations implementing the Charter Halibut Limited Access Program (CHLAP).<sup>29</sup>

The CHLAP regulations are found at 50 C.F.R. §§ 300.61, 300.66, and 300.67. The following is a description of the features of the CHLAP relevant to this appeal.

To receive a charter halibut permit, an applicant must be a person to whom the Alaska Department of Fish and Game (ADF&G) issued a Business Owner License that

<sup>22</sup> Letter of Appeal by Appellant (Oct. 28, 2010): "I made a binding agreement to guide for [Business 1] until [Business 2] client/bookings warranted the addition of a new vessel to the [Business 2] fleet. Unfortunately, this would not happen until after the 2005 season. **(It was [Owner of Business 2's] letter of guaranteed income to the bank that I included in my first appeal which was able to secure my loan in 2005.)** I have since contractually worked exclusively for [Business 2] from 2006 to the present with guaranteed client/bookings extending beyond the 2011 charter season." (emphasis added)

<sup>23</sup> Statement of Builder (Mar. 10, 2010); Statement by Appellant (Mar 17, 2010).

<sup>24</sup> Statement by Appellant (Mar. 17, 2010); Appellant's copies of 2006 ADF&G Logbooks [REDACTED]

Statement by Appellant (Mar. 17, 2010); Appellant's copies of 2007 ADF&G Logbooks [REDACTED]

<sup>26</sup> Official Record Summary (created Jan. 26, 2010).

<sup>27</sup> Application (dated Mar. 14, 2010, received Apr. 7, 2010). The application period was February 4 – April 5, 2010. Notice of application period. 75 Fed. Reg. 1595 (Jan. 12, 2010).

<sup>28</sup> Proposed Rule, 74 Fed. Reg. 18,178, 18,182 (Apr. 21, 2009). See Council Motion on Charter Halibut Moratorium in Area 2C and 3A (Mar. 31, 2007), available on NMFS Alaska Region website, [http://alaskafisheries.noaa.gov/npfmc/current\\_issues/halibut\\_issues/CharterHalibutMotion307.pdf](http://alaskafisheries.noaa.gov/npfmc/current_issues/halibut_issues/CharterHalibutMotion307.pdf).

<sup>29</sup> Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

authorized logbook fishing trips that met the minimum participation requirements for a permit.<sup>30</sup> An applicant may receive credit for a logbook fishing trip only if it was reported under the applicant's ADF&G Business Owner License.

To receive a charter halibut permit, an applicant must prove participation through logbook fishing trips in two periods: a qualifying period, which is the sport fishing season for halibut in 2004 and 2005,<sup>31</sup> and a recent participation period, which is the sport fishing season for halibut in 2008.<sup>32</sup>

To receive a non-transferable charter halibut permit, an applicant must have reported a minimum of five bottomfish logbook fishing trips to ADF&G 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).<sup>33</sup>

To receive a transferable charter halibut permit, an applicant must have reported a minimum of fifteen bottomfish logbook fishing trips to ADF&G with the same vessel in one year in the qualifying period (2004, 2005), and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008).<sup>34</sup>

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirement in one participation period.<sup>35</sup> If an applicant meets a minimum participation requirement in the qualifying period (2004 or 2005), but not the recent participation period (2008), the applicant may claim to meet the requirements in the unavoidable circumstance regulation with respect to the applicant's lack of participation in the recent period (2008).<sup>36</sup>

Similarly, if an applicant meets the minimum participation requirement in the recent - period (2008), but neither year in the qualifying period (2004 or 2005), the applicant may seek to meet the requirements in the unavoidable circumstance regulation with respect to the applicant's lack of participation in the qualifying period.<sup>37</sup>

For the applicant who did not participate in the qualifying period, but did participate in the recent period, which is Appellant's situation, section (i) through (iv) of 50 C.F.R. § 300.67(g)(2) requires that the applicant show the following:

Section (i): the applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period (2004 or 2005);

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<sup>30</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>31</sup> 50 C.F.R. § 300.67(f)(6).

<sup>32</sup> 50 C.F.R. § 300.67(f)(7).

<sup>33</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A)&(B).

<sup>34</sup> 50 C.F.R. § 300.67(d)(1)(i)&(ii).

<sup>35</sup> 50 C.F.R. § 300.67(g).

<sup>36</sup> 50 C.F.R. § 300.67(g)(1).

<sup>37</sup> 50 C.F.R. § 300.67(g)(2).

Section (ii): the applicant's specific intent was thwarted by a circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, unforeseen and reasonably unforeseeable;

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

Section (iv): the applicant took all reasonable steps to overcome the circumstance.

An applicant must meet each of the requirements of the unavoidable circumstance regulation and must prove any facts to support a claim by a preponderance of evidence in the record.

## ANALYSIS

### **1. Did Appellant show he had a specific intent to operate a charter halibut fishing business in 2005?**

A specific intent is more than a general desire or interest to operate a charter halibut fishing business. An applicant who had a specific intent to operate a charter halibut fishing business in a particular season will either have all the essential elements to operate a charter halibut business in place, or will have a realistic plan to put all the essential elements in place, when a circumstance intervenes to remove the applicant's ability to secure or maintain one or more essential element and therefore prevents the applicant's participation.

Appellant did not state that he intended to operate his own charter halibut fishing business in 2004. Appellant states that he worked as a charter captain for the first time in 2004 and, after 2004, he decided that he wanted to continue in that line of work.<sup>38</sup>

Appellant states that he specifically intended to start and operate a charter halibut fishing business in 2005. Appellant has shown that, after 2004, he wanted to start operating his own charter halibut fishing business. He states that.<sup>39</sup> Owner of Business 2 states that Appellant wanted to do that.<sup>40</sup> Appellant sold his commercial vessel in June 2005.<sup>41</sup> Appellant had extensive commercial fishing experience operating his own vessel but he preferred charter fishing because he could be on the water during the day and home with his family at night.<sup>42</sup> Thus, I conclude that, after the 2004 season, Appellant had the interest, desire and a general intention to start and operate his own charter halibut business.

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<sup>38</sup> Statement by Appellant (Mar. 17, 2010).

<sup>39</sup> Statement by Appellant (Mar. 17, 2010).

<sup>40</sup> Statement by Owner of Business 2 (Feb. 17, 2010).

<sup>41</sup> Letter from Appellant to OAA (Dec. 30, 2010).

<sup>42</sup> Statement by Appellant with application (Mar. 17, 2010).

But the regulation requires that the applicant have “a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period.”<sup>43</sup> An interest and intention to operate a charter halibut business at some point does not equal a specific intent to operate a charter halibut fishing business in 2005. Appellant does not show that he specifically intended to operate his own charter halibut fishing business in 2005. Appellant does not show that he ever had a definite or realistic plan to start and operate his own charter halibut fishing business for the 2005 season.

Appellant had one of the essential elements to operate his own charter halibut fishing business in 2005. Appellant had the necessary marine and legal credentials to operate a charter vessel in 2005 and, in fact, he did that on behalf of Business 1. But Appellant did not have a charter vessel with which to operate his own charter halibut fishing business for the 2005 season and he did not show that he ever had a realistic or definite plan to obtain a charter vessel for the 2005 season.

Appellant’s written documentation, his testimony at the hearing and the testimony of the witnesses are consistent that Appellant’s plan was to get his own vessel when he could get financing for a vessel and that, to do that, he needed a guarantee of clients from the Owner of Business 2. The Owner of Business 2 could not, and did not, provide Appellant with a promise of clients for the 2005 season. Appellant therefore continued to work as a captain for the 2005 season.

The Owner of Business 2 did provide Appellant with a written statement guaranteeing clients for the 2006 season.<sup>44</sup> This enabled Appellant to secure financing for the vessel, enter into a contract with a builder in February 2006, complete construction of his vessel in April 2006 and take in excess of ninety charter trips with his vessel in 2006. But Appellant was not ready or able to do that for the 2005 season.

Appellant emphasizes that he sold his commercial fishing vessel in June 2005 and had those funds available to put toward starting his own charter halibut fishing business.<sup>45</sup> Appellant testified that, with the proceeds from the sale of his commercial vessel and permit, he could have raised money for a less expensive boat than the vessel he eventually got in 2006; he could have sought his own clients, rather than referrals from Business 1 and Business 2; and he could have gotten started in the charter fishery that way in 2005.<sup>46</sup>

It is possible Appellant could have had done those things but he did not. Appellant did not take steps to get started in the charter halibut business that way in 2005. The way Appellant decided to start his charter halibut business was by getting financing for a more expensive, larger, custom-built, charter vessel; by getting financing for the vessel based on the promise of clients for a full season of trips from Owner of Business 2; and then by operating his business based on referrals for a full season of trips from Business 1 and Business 2. Appellant successfully executed that plan. Appellant

<sup>43</sup> 50 C.F.R. § 300.67(g)(2)(i).

<sup>44</sup> Letter from Business Owner 2 to “To Whom This May Concern” (Jan. 3, 2006).

<sup>45</sup> Letter from Appellant to OAA (Dec. 30, 2010)

<sup>46</sup> Testimony of Appellant (Mar. 12 and 14, 2012).

entered the charter fishery as an owner/operator in 2006 and has had a mutually beneficial relationship with Business 1 and Business 2 ever since.<sup>47</sup>

Although Appellant would have liked to operate his own charter halibut business in 2005, I conclude that he has not shown that he had a specific intent to operate a charter halibut fishing business in 2005.

## **2. Was Appellant's signing a contract with a non-competition clause an unavoidable circumstance?**

Appellant states that the non-competition clause was an unavoidable circumstance that prevented him from operating his own charter halibut fishing business in 2005.<sup>48</sup> For a circumstance to be unavoidable it must have an element of being unexpected and beyond the control of the person who is affected by the circumstance, such as a vessel breakdown or an unexpected illness.

Appellant voluntarily signed the contract with the non-competition clause on May 10, 2005, at the beginning of the 2005 season. Appellant made a trade-off. Appellant agreed to the non-competition clause and got a vessel for the 2005 season, guaranteed bookings for the 2005 season and the possibility of assistance from Owner of Business 2 to buy his own vessel in a future season, when client bookings allowed.

The same reasons that led Appellant to sign the non-competition clause – the need for a vessel, the need for financing to get a vessel – would have been obstacles to him operating his own charter halibut fishing business even if he had not signed the non-competition clause.

Appellant is correct that, *after* he signed the non-competition clause, he was under a legal compulsion not to operate his own charter halibut business in 2005. But before he signed it, he was free not to sign it and Appellant has not shown that he signed it due to an unexpected or drastic event that derailed his plans to operate his own business in 2005. I conclude that Appellant's signing the contract with a non-competition clause was not an "unavoidable circumstance" within the meaning of unavoidable circumstance regulation.<sup>49</sup>

Since an appellant must meet every element of the unavoidable circumstance regulation, I do not examine the other provisions of that regulation.<sup>50</sup>

Appellant started his charter halibut fishing business in 2006, a mere two years after he first worked as a charter captain. It is apparent from the record that he is a skilled, energetic charter captain and business owner. But, unfortunately for Appellant, the

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<sup>47</sup> Testimony of Appellant (Mar. 12 and 14, 2012); Testimony of Owner of Business 1 (Mar. 14, 2012); Testimony of Owner of Business 2 (Mar. 14, 2012).

<sup>48</sup> Letter from Appellant to OAA (Oct. 28, 2010); Testimony of Appellant (Mar. 12 and Mar. 14, 2012).

<sup>49</sup> 50 C.F.R. § 300.67(g)(2)(ii)(A).

<sup>50</sup> 50 C.F.R. § 300.67(g)(2).

regulation does not grant permits, by initial issuance,<sup>51</sup> to persons that *began* operating a charter halibut fishing business in 2006, unless they fall within the limited exception in the unavoidable circumstance regulation.

I conclude that Appellant does not meet the unavoidable circumstance regulation with respect to his lack of participation in 2005. I therefore affirm the IAD that is the subject of this appeal.

### CONCLUSIONS OF LAW

1. Appellant did not show that he had a specific intent to operate a charter halibut fishing business in 2005 within the meaning of 50 C.F.R. § 300.67(g)(2).
2. Appellant's signing a non-competition clause was not an unavoidable circumstance within the meaning of 50 C.F.R. § 300.67(g)(2).
3. Appellant does not qualify for a charter halibut permit through initial issuance.

### ORDER

The IAD that is the subject of this appeal is AFFIRMED. This decision takes effect on April 30, 2012, unless by that date the Regional Administrator reverses, remands, or modifies this decision pursuant to 50 C.F.R. § 679.43(k) and (o).

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 Standard Time, on the tenth day after the date of this Decision, April 9, 2012. 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.

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Mary Alice McKeen  
Administrative Judge

Date issued: March 30, 2012

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<sup>51</sup> RAM's website has information on permit transfers under "Summary of CHP [charter halibut permit] Transfers: [http://www.fakr.noaa.gov/ram/charter/apps\\_permits.htm](http://www.fakr.noaa.gov/ram/charter/apps_permits.htm).