



Appellant was issued an Alaska Department of Fish and Game (ADF&G) Business Owner's License that authorized logbook fishing trips in 2004 or 2005.<sup>3</sup>

In its IAD, RAM reviewed Appellant's claim that an unavoidable circumstance occurred in 2004 or 2005, namely, the "business failure and subsequent foreclosure and negotiated settlement of the return of the business to ██████████ [hereinafter referred to as Original Owner] in November 2005." RAM noted that although Appellant did not make a successor-in-interest claim under the CHLAP regulations, RAM deemed it appropriate and relevant to analyze the issue because Appellant's unavoidable circumstance claim asserts that Appellant, by virtue of an existing lease between Appellant and Original Owner, entitles Appellant to stand in the shoes of the Original Owner when applying for a CHP, making Appellant entitled to any rights to the 2004 and 2005 charter fishing logbooks to which Original Owner is entitled.<sup>4</sup>

Prior to reviewing RAM's analysis of this issue, a brief review of the events leading to this appeal will assist the reader of this decision. The charter halibut business at issue in this appeal was operated, notably in 2004 and 2005, as a sole proprietorship by ██████████ (Former Operator) under the business name ██████████ (Lodge). Former Operator was the individual issued the ADF&G business owner's license that authorized logbook fishing trips in 2004 and 2005 under Lodge's business name. By January 2006, Former Operator had defaulted on his financial obligation to Original Owner (Former Operator had obtained a loan from Original Owner for the lodge and property) and transferred his rights, title, and interest in the lodge and property (including vessels) to Original Owner.<sup>5</sup> In November 2006, Original Owner entered into a *Commercial Lease and Agreement to Operate Fishing Lodge* (Lease) for Lodge with ██████████ who is the manager (Manager) of Lodge. Lease was for a period of 60 months and included in the definition of "property" all fishing log books, specifically ADF&G logbook data of the Alaska Sportfish division. Manager, in turn, entered into an *Assignment of Lease* (Assignment) in which he assigned Lease to Appellant, of which Manager is a member. Assignment was for a term of 60 days, commencing on November 1, 2006 and ending on October 31, 2011.<sup>6</sup>

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<sup>3</sup> Case File, Original File Tab, IAD dated August 26, 2010.

<sup>4</sup> Case File, Original File Tab, IAD dated August 26, 2010.

<sup>5</sup> Case File, Original File Tab, IAD Dated August 26, 2010, letters from Appellant's attorney dated May 23, 2010 and March 8, 2010, Estoppel and Solvency Affidavit, Bill of Sale, and Statutory Warranty Deed in Lieu of Foreclosure.

<sup>6</sup> Case File, Original File Tab, Lease dated November 1, 2006 and Assignment dated November 1, 2006, letter from Appellant's attorney dated May 23, 2010.

When RAM evaluated the successor-in-interest issue, it reasoned that if a successor-in-interest to Lodge existed, the successor would likely be Original Owner, who obtained Lodge through a Bill of Sale In Lieu of Foreclosure and who was issued a Statutory Warranty Deed in Lieu of Foreclosure for real property. RAM stated that “[Appellant], by its own admission, simply leases the property known as [Lodge] and operates a charter halibut business, known as [Appellant], from that physical location.” RAM stated that the evidence did not support, nor had claims been made to establish, that Appellant is in any way related to Former Owner’s sole proprietorship operating under the name of Lodge in 2004 and 2005. Consequently, RAM concluded that the successor-in-interest provisions under the CHLAP do not apply to Appellant.<sup>7</sup>

On appeal, Appellant argues that “Appellant’s direct relationship with its Lessor [Original Owner], who is the direct assignee of all rights of the 2004-2005 operator, is the basis for the Appellant’s right to apply for CHP(s) using 2004-2005 logbook records.” Appellant argues that the “release and conveyances signed by [Former Operator] and the [Lease] and [Assignment] conveying all rights to operate [Lodge] by Appellant as lessee show a well documented chain of title to Appellant’s right to claim 2004-2005 logged fishing trips on the CHP(s) Application. Logbook records for [Lodge] are specifically leased to Appellant and Appellant should be entitled to use that data in its application.”<sup>8</sup>

I have reviewed Appellant’s appeal and the case record and I have determined that the record contains sufficient information on which to reach final judgment. Accordingly, I close the record and issue this decision without ordering a hearing. See 50 C.F.R. § 679.43(g)(2) and (k).

## ISSUES

At issue in this appeal is whether Appellant is qualified to receive a CHP. To resolve this issue, I must evaluate whether Appellant has established by a preponderance of the evidence that he meets the minimum participation requirements to qualify for a CHP, as set out in 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B). If Appellant does not meet the minimum participation requirements, specifically participation in 2004 or 2005 and in 2008, then I must determine whether the unavoidable circumstance provision of the CHLAP regulations, set out in 50 C.F.R. § 300.67(g)(2), would enable Appellant to receive a CHP in lieu of meeting the participation requirement for the qualifying period.

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<sup>7</sup> Case File, Original File Tab, IAD dated August 26, 2010.

<sup>8</sup> Case File, Pleadings Tab, Appellant’s appeal submissions.

Additionally, I must examine whether the successor-in-interest provisions of the CHLAP apply to Appellant.

### FINDINGS OF FACT

1. Appellant did not operate a charter halibut fishing business in 2004 or 2005.<sup>9</sup>
2. In 2004 and 2005, Former Operator was issued an Alaska Business Owner's License and operated a charter halibut fishing business under Lodge's business name.<sup>10</sup>
3. By January 2006, Former Operator had defaulted on his financial obligation to Original Owner and transferred his rights, title, and interest in Lodge (including vessels) to Original Owner.<sup>11</sup>
4. In November 2006, Original Owner entered into Lease for Lodge with Manager. Lease was for a period of 60 months and included in the definition of "property" all fishing log books, specifically ADF&G logbook data of the Alaska Sportfish division.<sup>12</sup>
5. In November 2006, Manager, in turn, entered into Assignment in which he assigned Lease to Appellant, of which Manager is a member. Assignment was for a term of 60 days, commencing on November 1, 2006 and ending on October 31, 2011.<sup>13</sup>
6. In November 2006, Appellant was issued a certificate of formation as a limited liability company.<sup>14</sup>
7. In January 2007, Appellant was issued a certificate of business registration with Alaska.<sup>15</sup>

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<sup>9</sup> Case File, Original File Tab, CHP application dated March 9, 2010.

<sup>10</sup> Case File, Original File Tab, IAD dated August 26, 2010; See <http://www.commerce.state.ak.us/occ/bussearch/BusDetail.cfm?LicNum=253712>.

<sup>11</sup> Case File, Original File Tab, IAD Dated August 26, 2010, letters from Appellant's attorney dated May 23, 2010 and March 8, 2010, Estoppel and Solvency Affidavit, Bill of Sale, and Statutory Warranty Deed in Lieu of Foreclosure.

<sup>12</sup> Case File, Original File Tab, Lease dated November 1, 2006 and Assignment dated November 1, 2006, letter from Appellant's attorney dated May 23, 2010.

<sup>13</sup> Case File, Original File Tab, Lease dated November 1, 2006 and Assignment dated November 1, 2006, letter from Appellant's attorney dated May 23, 2010.

<sup>14</sup> Case File, Original File Tab, Certificate of Existence/Authorization of Appellant.

<sup>15</sup> Case File, Original File Tab, Alaska Certificate of Registration for Appellant.

8. In 2008, Appellant reported a sufficient number of halibut logbook fishing trips to meet the minimum requirements of the CHLAP for the recent participation period.<sup>16</sup>
9. On March 9, 2010, Appellant submitted to RAM a signed completed *Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A* (Application). Application reveals that Appellant did not operate in 2004 or 2005, but did operate in 2008. In Application, Appellant claimed eligibility for a CHP based on an unavoidable circumstance that occurred in 2004 or 2005.<sup>17</sup>

### PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS will issue a CHP if the applicant meets certain requirements. One such requirement is that the applicant is an individual, or non-individual entity, to which the ADF&G issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet minimum participation requirements.<sup>18</sup> Minimum participation requirements to qualify for a non-transferable CHP are as follows: an applicant must have reported five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and must have reported five or more halibut logbook fishing trips during the recent participation period, namely 2008 (for transferable permits the minimum number of trips that had to be reported in each period is fifteen).<sup>19</sup>

If the person is applying for a CHP as a successor-in-interest to the person to which ADF&G issued the Business Owner Licenses that authorized logbook fishing trips that meet the participation requirements described in 50 C.F.R. § 300.67(b)(1)(ii) for one or more charter halibut permits, NMFS will require the following written documentation: (A) If the applicant is applying on behalf of a deceased individual, the applicant must document that the individual is deceased, that the applicant is the personal representative of the deceased's estate appointed by a court, and that the applicant specifies who, pursuant to the applicant's personal representative duties, should receive the permit(s) for which application is made; or (B) If the applicant is applying as a successor-in-interest to an entity that is not an individual, the applicant must document that the entity has been dissolved and that the applicant is the successor-in-interest to the dissolved entity.<sup>20</sup>

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<sup>16</sup> Case File, Original File Tab, IAD dated August 26, 2010.

<sup>17</sup> Case File, Original File Tab, CHP application dated March 9, 2010.

<sup>18</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>19</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7); and 50 C.F.R. § 300.67(d)(1).

<sup>20</sup> 50 C.F.R. § 300.67(b)(1)(iii)(A) and (B).

An applicant for a CHP that meets the participation requirement for the recent participation period (2008) but does not meet the participation requirement for the qualifying period (2004 or 2005), may receive one or more permits if the applicant proves the following: the applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period; the applicant's specific intent was thwarted by a circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, and unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business; the circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred; and 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.<sup>21</sup>

The CHLAP regulations also provide that one logbook fishing trip made pursuant to one ADF&G Business Owner's License shall not be credited to more than one applicant.<sup>22</sup>

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A, which NMFS will use to implement the CHLAP and evaluate applications for charter halibut permits.<sup>23</sup>

## ANALYSIS

The first issue I must resolve in this appeal is whether Appellant meets the minimum participation requirements to qualify for a CHP. Under the CHLAP regulations, minimum participation requirements to qualify for a CHP require that an applicant reported five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and reported five or more halibut logbook fishing trips during the recent participation period, namely 2008.<sup>24</sup> My review of the record reveals Appellant does not meet such minimum participation requirements.

In 2004 and 2005 Appellant did not report any bottomfish logbook fishing trips. Thus, Appellant fell short of the minimum requirement to report at least five bottomfish logbook fishing trips as specified in the CHLAP regulations. In 2008, Appellant reported a sufficient number of halibut logbook fishing trips to meet the minimum participation

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<sup>21</sup> 50 C.F.R. § 300.67(g)(2)(i)-(iv).

<sup>22</sup> 50 C.F.R. § 300.67(b)(2)(ii).

<sup>23</sup> 50 C.F.R. § 300.67(f)(5).

<sup>24</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7).

requirements for the recent participation period.<sup>25</sup> Since Appellant did not meet the minimum participation requirements in both periods (2004 or 2005, and 2008) to qualify for a CHP, I must turn to the second issue presented in this case and determine whether the unavoidable circumstance provision of the CHLAP regulations enable Appellant to receive a CHP in lieu of his insufficient participation in 2004 or 2005.

The CHLAP regulations provide, specific to the issue at hand, that an applicant for a CHP that meets the participation requirement for the recent participation period (2008) but does not meet the participation requirement for the qualifying period (2004 or 2005), may receive one or more permits if the applicant proves certain elements contained in 50 C.F.R. § 300.67(g)(2)(i)-(iv).

The first element, found at 50 C.F.R. § 300.67(g)(2)(i), requires that the applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period, that is 2004 or 2005. The evidence in this record does not reveal that Appellant had a specific intent to operate a charter halibut fishing business in 2004 or 2005. Appellant did not own and operate a charter halibut fishing business until 2008, as reflected on Appellant's Application. Lease to operate Lodge, which included the lease of real estate property as well as vessels, was not executed and then assigned to Appellant until November 2006. Additionally, Appellant's certificate of formation (as a limited liability company) was not issued until November 2006. Further, Appellant's certificate of business registration with Alaska was not issued until January 2007. Thus, Appellant's preparation to begin operating a charter halibut fishing business did not take place before November 2006, well after the qualifying periods of 2004 or 2005. The totality of the evidence presented in this record does not establish that Appellant had a specific intent to operate a charter halibut fishing business in 2004 or 2005. Since resolution of this element is dispositive, I need not address the remaining elements of 50 C.F.R. § 300.67(g)(2).

I considered Appellant's arguments on appeal, which relate to claims of successor-in-interest. In essence, Appellant argues that it has a right to claim or use the 2004-2005 logged fishing trips Former Operator conducted under Former Operator's business in 2004 and 2005 because all rights, title, and interest in the charter fishing business (including the lodge and vessels) that Former Operator had was transferred to Original Owner, later leased to Manager, and then assigned to Appellant. However, the CHLAP regulations provide that if an applicant is applying as a successor-in-interest to an entity that is not an individual, the applicant must document that the entity has been dissolved

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<sup>25</sup> Case File, Original File Tab, IAD dated August 26, 2010, letters from Appellant's attorney dated May 23, 2010 and March 8, 2010.

and that the applicant is the successor-in-interest to the dissolved entity.<sup>26</sup> The evidence in this record does not establish that Former Operator's business entity has been dissolved and that Appellant has succeeded to that entity. By Appellant's own admission, it states it has insufficient knowledge of the 2004 and 2005 operator's choice of legal entity that was used to operate Lodge in 2004 and 2005 and, for this reason, did not apply as a successor-in-interest on its Application.<sup>27</sup>

Nevertheless, Appellant argues it is entitled to use the logbook records of Former Operator in 2004 and 2005. I note that Former Operator's Alaska Business Owner's License did not expire until December 31, 2005.<sup>28</sup> Thus, Former Operator maintained an active business license in 2004 and 2005 and was the person issued the ADF&G Business Owners License that authorized logbook fishing trips in 2004 and 2005 under Lodge.<sup>29</sup> The CHLAP regulations also state that one logbook fishing trip made pursuant to one ADF&G Business Owner's License shall not be credited to more than one applicant.<sup>30</sup> Accordingly, Appellant is not entitled to receive credit for the 2004 and 2005 logbook fishing trips Former Operator conducted.

#### CONCLUSIONS OF LAW

Appellant did not meet the minimum participation requirements to qualify for a CHP pursuant to 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B) since Appellant did not meet the minimum participation requirement for the qualifying period (2004 or 2005).

The unavoidable circumstance provisions of the CHLAP regulations do not enable Appellant to receive a CHP in lieu of such participation since Appellant has not proven all of the necessary elements to prevail in an unavoidable circumstance claim pursuant to 50 C.F.R. § 300.67(g)(2), namely with regard to specific intent to operate a charter halibut fishing business in at least one year of the qualifying period.

The successor-in-interest provisions of the CHLAP, as set out in 50 C.F.R. § 300.67(b)(1)(iii) are not applicable to Appellant.

#### ORDER

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<sup>26</sup> 50 C.F.R. § 300.67(b)(1)(iii)(A) and (B).

<sup>27</sup> Case File, Pleadings Tab, Appellant's appeal submissions.

<sup>28</sup> See <http://www.commerce.state.ak.us/occ/bussearch/BusDetail.cfm?LicNum=253712>.

<sup>29</sup> See also, Case File, Original File Tab, IAD dated August 26, 2010.

<sup>30</sup> 50 C.F.R. § 300.67(b)(2)(ii).

[REDACTED]  
Appeal No. 10-0079

The IAD dated August 26, 2010 is Upheld. This decision takes effect (30) days from the date issued, August 19, 2011<sup>31</sup>, and will become the final agency action for purposes of judicial review, unless a motion for reconsideration is made pursuant to <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>, or the Regional Administrator elects to review 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 Time, on the tenth day after the date of this Decision, August 1, 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 in support of the motion.

[REDACTED]  
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Christine D. Coughlin  
Administrative Judge

Date Issued: July 20, 2011

<sup>31</sup> 50 C.F.R. § 679.43(k) and (o).