



was an order scheduling a hearing on November 3, 2010. An oral hearing, at which the Appellant appeared and testified, was conducted on that date. Following the hearing, the record was closed.

On March 3, 2011, I reopened the record to include the State of Alaska, Department of Fish & Game, Division of Sport Fish "2005 Saltwater Charter Logbook and Vessel Registration" (including instructions for completing the logbook). Also on March 3, 2011, Appellant was asked to provide any objections or comment to the inclusion. On March 7, 2011, he responded as follows:

Upon receipt of your e-mail dated March 3, 2011 and our subsequent conversation of today, I am submitting the following comments:

- 1) In regard to logbook discrepancies some mistakes were made due to confusion on my part. The ADF&G instructions for completeing [*sic*] the 2005 logbook regarding halibut were confusing.
- 2) In prior correspondence and conversations, I stated and documented what my health issues and limitations were in 2005. I have also submitted documentation that I referred some of my halibut clients to other operators or asked them to postpone.
- 3) I submitted documentation of halibut/bottomfishing trips where either expenses were shared or I was not compensated because they were family and/or friends. These were people that could help my wife manage the deck and I felt comfortable with that. I was not aware that I was supposed to log fishing trips for which I was not compensated.
- 4) All of the other charters I did were basically four hour salmon fishing trips with my wife running the deck.

#### ISSUES

1. May Appellant's claims be adjudicated under the unavoidable circumstance regulation at 50 C.F.R. § 300.67(g)(2) with respect to his lack of reported participation in the charter halibut fishery in the qualifying period (2004, 2005)? If so,
  - 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 unique to him, unavoidable, unforeseen and reasonably unforeseeable?

c) Did the circumstance actually occur?

d) Did Appellant take all reasonable steps to overcome the circumstance?

#### SUMMARY OF DECISION

The IAD is AFFIRMED.

Appellant has not proven that an unavoidable circumstance (namely, his affliction of gout) thwarted his specific intent to participate in the halibut charter fishing business in one year of the charter halibut qualifying period (2005). Therefore, Appellant is not eligible to receive a charter halibut permit.

#### FACTUAL BACKGROUND<sup>2</sup>

Appellant has owned and operated his charter halibut fishing business since 1987. For some time before 2004, Appellant suffered from [REDACTED] (an average of twice annually), the pain from which he controlled [REDACTED]. However, in 2004, Appellant's pain was [REDACTED] so he visited a medical clinic. He was prescribed another medication which, although it controlled the pain to some degree, did not prevent the attacks.<sup>3</sup>

Throughout 2004 and 2005, Appellant operated his vessel and his charter business, but in a manner somewhat different from his prior practices. Whereas he had taken full-day and overnight charters before 2004, in both 2004 and 2005, he generally restricted his operations to half-day charters, with his spouse working on deck, and with a clientele drawn from the passengers off the large cruise ships that came through the town during the summer. Appellant reported no groundfish logbook fishing trips in 2004, and only one such trip in 2005.

In November 2006, Appellant visited another clinic, [REDACTED]. At that time, he was put on another medication that controlled [REDACTED].<sup>4</sup> Since that time, his operations have returned to "normal" (he reported sixteen halibut logbook fishing trips in 2008).

#### UNAVOIDABLE CIRCUMSTANCE PROVISION of the CHARTER HALIBUT LIMITED ACCESS PROGRAM

Appellant herein premises his claim on the provision of the unavoidable circumstance rule that pertains to applicants who reported halibut logbook fishing trips during the recent participation period, and who had intended to participate during the qualifying period, but who did not do so

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<sup>2</sup> Unless otherwise noted, the information in this Background is derived from Appellant's letter to RAM (March 8, 2010), his appeal to OAA (July 26, 2010), and documents appended to those and later communications.

<sup>3</sup> Record, medical clinic in Appellant's home community (June 30, 2004).

<sup>4</sup> Record, medical clinic in [REDACTED] November 29, 2006).

because of an unavoidable circumstance.<sup>5</sup> To prevail, Appellant must prove that: (1) he meets the participation requirement for the recent participation period but does not meet the participation requirement for the qualifying period; (2) he held a specific intent to operate a charter halibut fishing business during the qualifying period; (3) his intent was thwarted by a circumstance that was unavoidable, unique to him, and unforeseen and reasonably unforeseeable; (4) the circumstance actually occurred, and; (5) that he took all reasonable steps to overcome the circumstance.<sup>6</sup> Appellant alleges that the circumstance that prevented him from operating a charter halibut fishing business in 2005 was his gout.

**1. May Appellant's claims be adjudicated under the unavoidable circumstance regulation in 50 C.F.R. § 300.67(g)(2) with respect to his lack of reported participation in the charter halibut fishery in the qualifying period (2004, 2005)?**  
**Yes.**

The first requirement of the unavoidable circumstance regulation is that the applicant meets the participation requirement for the recent participation period but does not meet the participation requirement for the qualifying period. To meet that standard, an applicant must show he reported at least five halibut logbook fishing trips.<sup>7</sup>

According to the official charter halibut record, Appellant reported sixteen halibut logbook fishing trips in 2008. Therefore, Appellant exceeded the minimum participation requirement for 2008 of five halibut logbook fishing trips.

However, Appellant reported no bottomfish logbook fishing trip in 2004 and reported only one bottomfish logbook fishing trip in 2005. Since Appellant meets the participation requirements for 2008 but not for 2004 or 2005, he meets the first criterion of establishing eligibility for a charter halibut permit under the unavoidable circumstances provisions. I thus turn to the other requirement of Appellant's unavoidable circumstances claim.

**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:

- Obtaining appropriate 2005 licenses from the Alaska Department of Fish and Game (ADF&G), as well as the logbook required to record fishing effort;
- Engaging in guiding clients in the salmon and halibut sport fisheries during the summer of 2005;
- Actually fishing for bottomfish (including halibut) on at least one charter fishing trip in 2005, and;

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<sup>5</sup> 50 C.F.R. § 300.67(g)(1).

<sup>6</sup> See 50 C.F.R. § 300.67(g).

<sup>7</sup> See 50 C.F.R. § 300.67(b) and (g).

- Maintaining ownership of his vessel and actually operating his charter salmon and halibut fishing business in 2005.

In consideration of the above, I find by a preponderance of the evidence that Appellant had a specific intent to operate his 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? No.**

The evidence in the record shows that Appellant suffered from [REDACTED] during the 2004 and 2005 halibut sport fishing seasons. In June 2004, he sought treatment at a local clinic and received a prescription [REDACTED] which he took as needed to help relieve [REDACTED]

However, the record also shows that Appellant did not suspend his charter fishing business activities in 2005. In his March 8, 2010, letter to RAM, Appellant wrote:

I believe that I met the minimum of requirements of 15 bottom fishing trips during 2005. There were numerous occasions when salmon fishing was slow, I would drop the pick and bottom fish for a change of pace. Unfortunately, this is not recorded because either nothing was caught or no fish were retained. I have no idea how to confirm this other than personal logs and diaries. The ADFG log book requirements for 2004 and 2005 were confusing as to how to report the retention or release of halibut. Nevertheless I did make mistakes in my log book in regards to the reporting of bottom fishing.<sup>8</sup>

Appellant also sent a group of letters signed by various 2005 clients.<sup>9</sup> The clients wrote:

- On July 1, 2, 3, 4 and 5, 2005 we bottom fished . . . with (Appellant), and caught red snapper rock cod, lingcod, and halibut. (signed by two clients from Arizona);
- On July 1, 2, 3, 4 and 5, 2005 we bottom fished . . . with (Appellant), and caught red snapper, rock cod, lingcod, and halibut. (signed by two other clients from Arizona);
- We did fish with (Appellant) for halibut in June 2005 (signed by three clients, no address given);
- On June 1, June 29, July 17, July 27, and August 6, 2005, we bottom fished . . . with (Appellant), and caught rock cod and halibut (signed by two clients from Appellant's home community).<sup>10</sup>

<sup>8</sup> Appellant's letter to RAM, at 2 (March 8, 2010).

<sup>9</sup> Appellant's letter to Judge Smith, with attachments (October 11, 2010).

<sup>10</sup> The names of all of the signers to the four letters are identified in an attachment to Appellant's letter of appeal (July 26, 2010).

Appellant also sent letters from four potential clients, each of whom indicated that they had hoped to fish for halibut with Appellant during 2005, only to be told that he could not accommodate them because of his health issues.

Appellant’s medical condition may have altered the nature of the charter activities in which he engaged. Appellant testified that he shortened his trips to half-day fishing efforts, primarily to accommodate clients derived from cruise ship rosters who were only briefly visiting in his business location. This may explain why it was necessary to turn down some (but not all) clients.

In consideration of (a) Appellant’s statement that he believed he actually fished bottomfish on at least 15 trips in 2005; (b) Appellant’s statement that there were “numerous occasions” when salmon fishing was not productive so he dropped his anchor and fished for bottom fish; and, (c) witness statements detailing specific days in which they actually bottomfished with Appellant, I find by a preponderance of the evidence in the record, that Appellant’s medical problems did not thwart his intent to operate his charter halibut fishing business.

In reaching my decision, I have carefully considered the entire record, including Appellant’s concerns about his confusion as to how he should have reported his halibut charter activities in 2004 and 2005. NMFS (and NAO) is bound by the reporting requirements set out in the regulation at 50 C.F.R. § 300.67(b)(1)(ii)(A) & (B). NMFS explained the reporting requirement in the Final Rule, stating:

If a business owner did not comply with specified reporting requirements, then the fishing trip will not be counted as either a bottomfish logbook fishing trip during the qualifying period or a halibut logbook fishing trip during the recent participation period for purposes of this rule. Regardless of what any particular ADF&G personnel may say to an operator, each operator or business is responsible for complying with applicable Federal halibut fishery regulations and ADF&G reporting requirements.<sup>11</sup>

Further, the logbook instructions provided:<sup>12</sup>

<b>BOTTOMFISH</b>	
<b>Primary Stat. Area Fished (inc. Halibut)</b>	The 6-digit area code where you caught most of the bottomfish on this trip. If you fished for bottomfish, but caught none, write the 6-digit code for the location fished the most time on this date and trip.
<b>Maximum Rods Fished</b>	The maximum number of rods/lines fished when targeting bottomfish ( <b>inc. halibut</b> ) . . .
<b>No. Boat Hours Fished</b>	The number of boat hours that at least one rod/line was targeting bottomfish ( <b>inc. halibut</b> ) . . .

<sup>11</sup> 75 F.R. No. 2, 592 (January 5, 2010).

<sup>12</sup> For Instructions for Completing the 2005 Saltwater Logbook Forms, available at [http://alaskafisheries.noaa.gov/appeals/adfg\\_logbooks/2005.pdf](http://alaskafisheries.noaa.gov/appeals/adfg_logbooks/2005.pdf)

<b>Fish Kept and Released</b>	The total number of fish kept and released by client and crew in combination . . . <b>Halibut kept and released is no longer being collected in logbooks, but effort continues to be collected. . . .</b>
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<b>SPECIAL NOTES AND INSTRUCTIONS</b>	
<b>“Halibut”</b>	The number of halibut kept and released <b>is no longer requested</b> in the logbook. However, we ask that you continue to <b>record your effort</b> . Complete the first five columns on the far left of each logbook page and the first three columns under the Bottomfish section (stat area, no. rods, and boat hrs.).

Likewise, on page v of the instructions, a photocopy of a logbook page is provided, with explanatory statements relating to the various columns and required entries; in two separate places, the instructions state: (1) “Bottomfish Fishing effort information includes effort targeting halibut” and, (2) “Note: all clients targeted both salmon and bottomfish (halibut) for the entire trip. Even without a place holder to record the Halibut harvest, effort is still recorded.”

#### FINDINGS OF FACT

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

1. Appellant reported sixteen 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. Although Appellant’s business practices were altered in 2005, his intent to operate his charter halibut fishing business was not thwarted by an unavoidable circumstance.

#### CONCLUSIONS OF LAW

1. Appellant satisfies the minimum participation requirements in the recent participation period (2008).
2. Appellant failed to demonstrate that his specific intent to operate a charter halibut fishing business in the qualifying participation period was thwarted by a circumstance that was unique to him, unavoidable, unforeseen and reasonably unforeseeable.
3. There are no regulatory provisions by which Appellant can receive credit for the bottomfish logbook fishing trips in 2005 that were not reported in accordance with ADF&G requirements and instructions.
4. Appellant is not qualified to receive a charter halibut permit through initial issuance.

DISPOSITION AND ORDER

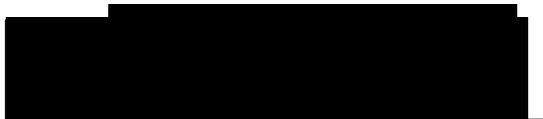
The denial of Appellant's application for a charter halibut permit, as set out on the June 17, 2010, IAD that is the subject of this appeal, is AFFIRMED. Appellant is not qualified to receive a charter halibut permit through initial issuance. This Decision is effective on June 27, 2011, unless by that 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 June 6, 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.<sup>13</sup>



Philip J. Smith  
Administrative Judge

Reviewed and Approved:



Eileen G. Jones  
Chief Administrative Judge

<sup>13</sup> The NAO "Procedures for filing Motions for Reconsideration" are published on the NMFS Alaska Region web site: <http://alaskafisheries.noaa.gov/appeals/reconsiderationpolicy.htm>