

not completed until 2006.⁴ A claim under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), must be decided by an appellate officer, not by RAM.⁵ Therefore, in the IAD, RAM did not determine whether Appellant met the requirements of the unavoidable circumstance regulation.

I have carefully considered the record in this appeal and conclude that the record contains sufficient information upon which to reach a decision.⁶ I did not order a hearing because Appellant has not alleged facts that, if true, authorize NMFS to issue a charter halibut permit.⁷ I therefore close the record and issue this decision.

For the reasons that follow, I conclude that Appellant does not meet the requirements of the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), because it did not show that it held a specific intent to operate a charter halibut fishing business in 2004 or 2005 and did not show that the circumstance that it claimed thwarted its intent was unforeseen and reasonably unforeseeable. Appellant therefore does not qualify to receive a charter halibut permit through initial issuance.

ISSUES

1. Did Appellant show that it had a specific intent to operate a charter halibut fishing business in 2004 or 2005?
2. Did Appellant show that the circumstance that it claims thwarted its participation was unforeseen and reasonably unforeseeable?

FINDINGS OF FACT

1. On June 4, 2004, Appellant purchased an abandoned cannery in a remote location in Southeast Alaska with the intent to operate and construct a fishing resort on the property.⁸
2. Appellant completed the work in 2006. The work required construction of a new dock system, four cabins, a lounge and restoration of three cabins, one home and the power house.⁹

⁴ Application at 2 and attachments to Application (received Mar. 29, 2010).

⁵ 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), Changes from the Proposed Rule no. 19.

⁶ 50 C.F.R. § 679.43(g)(2).

⁷ 50 C.F.R. § 679.43(g)(3).

⁸ Statement by Appellant, Exhibit B-3 to Application (received Mar. 29, 2010); Statutory Warranty Deed, Exhibit A to Application.

⁹ Statement by Appellant, Exhibit B-3 to Application (received Mar. 29, 2010).

3. Appellant began offering guided fishing trips for halibut to resort guests in 2007. Appellant took fifty charter halibut fishing trips in 2007 under authority of its Alaska Business Owner License.¹⁰
4. In 2008, Appellant took thirty-six halibut logbook fishing trips under authority of its 2008 ADF&G Business Owner License.¹¹
5. Appellant timely applied for a charter halibut permit on March 29, 2010.¹²

PRINCIPLES OF LAW

The issuance of charter halibut permits is governed by regulations implementing the Charter Halibut Limited Access Program (CHLAP), which is codified at federal regulations 50 C.F.R. §§ 300.61, 300.66, and 300.67. The Secretary of Commerce adopted these regulations pursuant to section 773c of The Halibut Act.¹³

To receive a charter halibut permit, an applicant must be a person to whom ADF&G issued the Business Owner Licenses that authorized logbook fishing trips that met the minimum participation requirements for a permit.¹⁴

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, and a recent participation period, which is the sport fishing season for halibut in 2008.¹⁵

An applicant must prove different levels of participation for a non-transferable permit and for a transferable permit. To receive a non-transferable charter halibut permit, an applicant must have 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 trips must have been reported under the applicant's ADF&G Business Owner License.¹⁶

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 one year in the qualifying period (2004 or 2005), and fifteen halibut logbook fishing trips with the

¹⁰ Statement by Appellant, Exhibit B-3 to Application (received Mar. 29, 2010); email from NMFS Computer Specialist (Sep. 9, 2011).

¹¹ IAD at 2.

¹² Application (received March 29, 2010). The application period was February 4 – April 5, 2010. Notice of application period, 75 Fed. Reg. 1595 (Jan. 12, 2010).

¹³ Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

¹⁴ 50 C.F.R. § 300.67(b)(1)(ii).

¹⁵ 50 C.F.R. § 300.67(f)(6)-(7).

¹⁶ 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B). In 2004 and 2005, ADF&G did not require participants in the charter halibut fishery to report halibut specifically but did require participants to report halibut effort as bottomfish effort. Therefore, for 2004 and 2005, the regulation evaluates an applicant's participation by bottomfish logbook fishing trips, not halibut logbook fishing trips. Beginning in 2006, ADF&G required participants to report halibut specifically. Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009).

same vessel in the recent participation period (2008). The trips must have been reported under the applicant's ADF&G Business Owner License.¹⁷

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirement in one participation period.¹⁸ If an applicant meets a minimum participation trip level 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).¹⁹

Similarly, if an applicant meets a minimum participation trip level in the recent participation 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.²⁰

That is Appellant's situation. Appellant meets the minimum participation requirement in the recent period to receive a non-transferable permit. To prove a claim under the unavoidable circumstance regulation with respect to the qualifying period, an applicant must meet each requirement of the regulation. Section (i) through (iv) of 50 C.F.R. § 300.67(g)(2) requires that an 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, 2005);

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.

ANALYSIS

I conclude that Appellant has not shown that it had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period (2004 or 2005), as required by section (i) of 50 C.F.R. § 300.67(g)(2), and has not shown that the circumstance that thwarted its participation was unforeseen or reasonably unforeseeable, as required by section (ii) of 50 C.F.R. § 300.67(g)(2). Since an

¹⁷ 50 C.F.R. § 300.67(d)(1).

¹⁸ 50 C.F.R. § 300.67(g).

¹⁹ 50 C.F.R. § 300.67(g)(1).

²⁰ 50 C.F.R. § 300.67(g)(2).

applicant must meet each requirement of the unavoidable circumstance regulation to qualify for a permit based on the regulation, I do not analyze whether Appellant meets the other requirements of the regulation.

1. Did Appellant show that it had a specific intent to operate a charter halibut fishing business in 2004 or 2005?

Appellant has not demonstrated that it held a specific intent to operate a charter halibut fishing business in 2004 or 2005. Appellant has shown that it purchased an abandoned cannery in a remote location in Southeast Alaska in June 2004 and did intend to operate a charter halibut fishing business on that site at some point in the future. But Appellant introduced no evidence that it intended to operate a charter halibut fishing business from that site in 2004 or 2005. Appellant did not state that it had an ADF&G Business Owner License in either year. Appellant did not state it had a vessel, a vessel operator or a source of clients in either of those years.

Appellant was never ready to operate a charter halibut fishing business in 2004 or 2005, when an unavoidable circumstance removed an element necessary to operate the business. Nor did Appellant ever have a plan to be ready to operate a charter halibut fishing business in 2004 or 2005, when an unavoidable circumstance prevented an essential element of the plan from coming to fruition. From 2004 to 2006, Appellant was undertaking the considerable work necessary to turn the property into a fishing resort, namely construction of a new dock system, four cabins, a lounge and restoration of three cabins, one home and the powerhouse.²¹ Appellant was not ready to operate a charter halibut fishing business until the sport fishing season of 2007, the year it first offered guided charter halibut fishing trips to resort guests. I conclude that Appellant did not have a specific intent to operate a charter halibut fishing business in either year of the qualifying period.

2. Did Appellant show that the claimed unavoidable was unforeseen and reasonably unforeseeable?

Appellant states: "The need to participate in halibut fishing for 2004 and 2005 was unforeseen and unforeseeable to us."²² It is not clear what Appellant means. But the circumstance that must be unforeseen and reasonably unforeseeable is the circumstance that the applicant claims prevented its participation in the charter halibut fishery. Appellant was prevented from participating because it did not have the essential elements to operate a charter halibut fishing business in place.

Appellant purchased a site for its business which obviously needed substantial work before Appellant could operate a charter halibut fishing business from the site. The need to construct the lodge and renovate the property was foreseen by Appellant and reasonably foreseeable when Appellant purchased the site in 2004. I conclude that

²¹ Statement by Appellant, Exhibit B-3 to Application (received Mar. 29, 2010).

²² Statement by Appellant, Exhibit B-3 to Application (received Mar. 29, 2010).

Appellant's intent was not thwarted by a circumstance that was unforeseen by Appellant or reasonably unforeseeable by Appellant.

Appellant did not meet the minimum participation requirement in the qualifying period to receive a charter halibut permit and does not meet the unavoidable circumstance regulation with respect to its lack of participation in the qualifying period. I therefore conclude that Appellant does not meet the requirements in federal regulation to receive a charter halibut permit.

CONCLUSIONS OF LAW

1. Appellant did not show that it had a specific intent to operate a charter halibut fishing business in 2004 or 2005 within the meaning of the unavoidable circumstance regulation at section (i) of 50 C.F.R. § 300.67(g)(2).
2. Appellant did not show that the claimed circumstance – the need to construct and renovate the property – was unforeseen and reasonably unforeseeable within the meaning of the unavoidable circumstance regulation at section (ii) of 50 C.F.R. § 300.67(g)(2).
3. Appellant does not qualify to receive a charter halibut permit through initial issuance.

ORDER

The IAD that is the subject of this appeal is AFFIRMED. This decision takes effect on November 16, 2011, unless by that date the Regional Administrator reverses, remands, or modifies this decision pursuant to 50 C.F.R. § 679.43(k), (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, October 27, 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.


Mary Alice McKeen
Administrative Judge

Date Issued: October 17, 2011