

ANALYSIS

The regulations governing the subsistence harvesting of Pacific halibut in waters in and off Alaska took effect on May 15, 2003.⁴ Under these regulations, no person may engage in subsistence fishing for halibut unless the person qualifies for such fishing pursuant to 50 C.F.R. § 300.65(g) and holds a Subsistence Halibut Registration Certificate [SHARC] issued by NMFS under 50 C.F.R. § 300.65(i).

A person may receive a subsistence halibut certificate either as a resident of a rural community listed in the regulation or as a member of an Alaska Native tribe listed in the regulation.⁵ Mr. McLeod applied for a subsistence halibut certificate based on residence in a rural community.

The IAD relied on federal regulation 50 CFR § 300.65(g)(1) to deny Mr. McLeod a subsistence halibut certificate. That regulation provides:

A person is eligible to harvest subsistence halibut **if he or she is a rural resident of a community with customary and traditional uses of halibut listed in the following table:**

Halibut Regulatory Area 2C

Rural Community	Organized Entity
Angoon	Municipality
Coffman Cove	Municipality
Craig	Municipality
Edna Bay	Census Designated Place
Elfin Cove	Census Designated Place
Gustavus	Census Designated Place
Haines	Municipality
Hollis	Census Designated Place
. . . . [emphasis added, rest of list omitted]. ⁶	

Mr. McLeod stated that he lives in a remote cabin located at St. James Point in the Haines Borough and travels to town about ten times a year to resupply his mail.⁷ Mr. McLeod stated that

⁴ Final Rule, 68 Fed. Reg. 18,145 (Apr. 15, 2003), codified primarily at 50 C.F.R. §§ 300.61, 300.65, 300.66.

⁵ 50 C.F.R. § 300.65(g)(1) or (g)(2).

⁶ 50 C.F.R. § 300.65(g)(1).

⁷ Mr. McLeod’s Letter to RAM (July 18, 2008).

he lives “a subsistence lifestyle in every sense of the word.”⁸ But, in the IAD, RAM concluded that it did not have authority to issue Mr. McLeod a subsistence certificate because Mr. McLeod resided in the Haines Borough but not within the smaller Municipality of Haines.⁹ I reluctantly affirmed that conclusion in the original Decision because I believed that Mr. McLeod lived in the Haines Borough, but not the Haines Municipality.

After I issued the Decision, RAM staff informed me that RAM had learned that the City of Haines had been legally dissolved in an election on October 17, 2002.¹⁰ In that election, voters approved the dissolution of the City of Haines and the third-class Haines Borough and approved the formation of a new home rule Haines Borough, with greater legal powers than the prior third-class Haines Borough.¹¹ The State of Alaska dissolved the City of Haines and the former Haines Borough and consolidated both entities into the new Haines Borough.¹² I therefore find that no organized entity exists with the legal designation of the “Municipality” of “Haines.”

The boundaries of the new Haines Borough are the same as the boundaries of the old Haines Borough.¹³ Mr. McLeod states that he lives in the Haines Borough. The IAD accepted that as fact. I find that Mr. McLeod is a resident of the Haines Borough.

The provision that a person is eligible to harvest subsistence halibut if the person resides in a community listed in 50 C.F.R. § 300.65(g)(1) is therefore ambiguous when applied to a resident of Haines. The list in 50 C.F.R. § 300.65(g)(1) has the “Rural Community” of “Haines” and the “Organized Entity” as the “Municipality,” but there is no organized entity that has the legal designation as the Municipality of Haines. I see three possible interpretations of the language in 50 C.F.R. § 300.65(g)(1) that a person is eligible to harvest subsistence halibut if the person resides in the Organized Entity of the Municipality of Haines. I evaluate these three interpretations to determine which is the most faithful to the language of the regulation, construed in light of the purpose of the regulation.

⁸ *Id.*

⁹ IAD at 2 - 3.

¹⁰ Email from Tracy Buck, RAM Permit Supervisor, to Mary Alice McKeen (Oct. 8, 2008), with Statement by Deborah B. Sedwick, Commissioner of the Alaska Department of Community and Economic Development (Oct. 17, 2002)

¹¹ Notice of Consolidation of the First Class City of Haines and the third Class Haines Borough as the Home Rule Haines Borough, effective October 17, 2002, available on the Alaska Department of Commerce, Community and Economic Development website: <http://www.commerce.state.ak.us/dca/lbc/pubs/HainesNoticeofConsolidation.pdf> (last visited Oct. 15, 2008).

¹² *Id.*

¹³ *Id.*

The first interpretation of 50 CFR § 300.65(g)(1) is that since this regulation requires that a recipient of a subsistence halibut certificate be a resident of the “Municipality” of Haines, and since there is no Municipality of Haines, no resident of Haines can receive a subsistence halibut certificate. This interpretation leads to an absurd result completely at variance with the purpose of the regulation since the regulation clearly contemplates that persons who reside in some geographical area that corresponds to Haines should be eligible to harvest subsistence halibut.

The second interpretation is that 50 CFR § 300.65(g)(1) means that only residents of what used to be the city of Haines should receive a permit. That interpretation has several defects. It does not comport with the exact wording of the regulation. Even the City of Haines – pre-2002 – was not called the Municipality of Haines. And it does not comport with the language awarding subsistence halibut certificates to residents of the “organized entity” of Haines. The term “organized entity” communicates, at a minimum, that the entity should exist, or be organized as, a legal entity. Since 2002, the City of Haines has not existed as a legal entity.

Unless this interpretation furthered the purpose of the SHARC program, I would not say that, to receive a SHARC certificate today, an applicant must reside within the boundaries of an entity that no longer exists and, in fact, has been dissolved. This interpretation does not serve the purpose of the SHARC program because it excludes persons, like Mr. McLeod, who unquestionably live in a rural area, from a program designed to benefit persons living in rural areas.

The third interpretation is that the regulation gives NMFS the authority to issue subsistence halibut certificates to residents of the Haines Borough. I conclude this is the proper interpretation of 50 CFR § 300.65(g)(1) for four reasons. One, this interpretation is a reasonable reading of the language of the regulation. It interprets the “Organized Entity” of the Municipality of Haines as the Haines Borough. The Haines Borough is the only “organized entity” that exists in the Haines area today that has the designation of Haines.

Two, this interpretation is most consistent with the formation of the new Haines Borough as an organized entity in October 2002. The State Notice of Consolidation provided:

The Haines Borough, a home rule borough, was incorporated under AS 29.06.090 - 29.065.170, effective October 17, 2002. Concurrent with that incorporation, the City of Haines, a first class city incorporated on January 24, 1910, and the Haines Borough, a third class borough incorporated on August 29, 1968, were dissolved.

The corporate boundaries of the home rule Haines Borough are identical to those of the dissolved third class Haines Borough as those boundaries existed at the time of consolidation. . . .

Under AS 29.065.150(b), **the home rule Haines Borough succeeds to all**

rights, powers, duties, assets, and liabilities of the former City of Haines and the former third class Haines Borough. . . .¹⁴ [emphasis added]

The residents of the former City of Haines could receive subsistence halibut certificates. Allowing residents of the Haines Borough to receive subsistence halibut certificates is consistent with the State's notice that the Haines Borough succeeds to all the "rights, powers, duties, assets, and liabilities of the former City of Haines" and that the Haines Borough is the legal successor to the City of Haines.

Three, this interpretation is consistent with a memorandum from the NMFS Office of Law Enforcement [OLE] of the NMFS Alaska Region to RAM.¹⁵ In response to a request from RAM, OLE brought the 2002 election to RAM's attention. OLE staff thought that this meant that persons living in the Haines Borough could receive a subsistence halibut certificate. Although not a formal legal conclusion by OLE or the agency, the memorandum is some evidence in favor of interpreting 50 CFR § 300.65(g)(1) to allow residents of the Haines Borough to receive subsistence halibut certificates.

Finally, this interpretation furthers the purpose of the SHARC program, which is to enable residents of rural areas to engage in subsistence halibut fishing. I therefore conclude that the Organized Entity of the Municipality of Haines in 50 C.F.R. § 300.65(g)(1) means the Haines Borough. Since Mr. McLeod is a resident of the Haines Borough, I conclude that Mr. McLeod is eligible to receive a Subsistence Halibut Area Certificate as a resident of a rural community listed in 50 C.F.R. § 300.65(g)(1).

As I noted in the original decision, the North Pacific Fishery Management Council has recognized the problem facing persons throughout Alaska who reside in areas that are "too rural" to receive subsistence halibut certificates.¹⁶ The Council adopted a motion in June 2008 that would define all residents of Southeast Alaska, except for residents of Juneau and Ketchikan, as rural residents eligible to harvest subsistence halibut.¹⁷ NMFS plans to propose a regulation that adopts the Council Motion. Fortunately for Mr. McLeod, due to this new information about the legal status of the City of Haines and the Haines Borough, I am able to conclude that Mr. McLeod, as a resident of the Haines Borough, can receive a subsistence halibut certificate under 50 C.F.R. § 300.65(g)(1), as it is currently written.

¹⁴ *Id.*

¹⁵ Memorandum from Ron Antaya, Office of Law Enforcement, to Tracy Buck, RAM Permit Supervisor (Aug. 26, 2008).

¹⁶ Decision at 4 - 5.

¹⁷ Council Motion, available at the NPFMC website, Halibut subsistence motion, 6/08: http://www.fakr.noaa.gov/npfmc/current_issues/halibut_issues/halibut.htm (last visited Sep. 30, 2008).

FINDINGS OF FACT

1. No organized entity exists that has the legal designation the "Municipality" of "Haines."
2. Mr. McLeod is a resident of the Haines Borough.

CONCLUSIONS OF LAW

1. The Organized Entity of the Municipality of Haines in 50 C.F.R. § 300.65(g)(1) means the Haines Borough.
2. Mr. McLeod is eligible to receive a Subsistence Halibut Registration Certificate as a resident of a rural community listed under 50 C.F.R. § 300.65(g)(1).

DISPOSITION

The IAD that is the subject of this Decision is VACATED. This Decision on Reconsideration takes effect November 16, 2008, unless by that date the Regional Administrator orders review of this Decision or orders an earlier effective date. Mr. McLeod or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on the tenth day after this Decision, October 27, 2008. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that I overlooked or misunderstood, and must be accompanied by a written statement in support of the motion.



Mary Alice McKeen
Administrative Judge