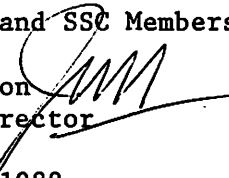


MEMORANDUM

TO: Council, AP and SSC Members

FROM: Jim H. Branson   
Executive Director

DATE: January 12, 1988

SUBJECT: Bering Sea Fishermen's Assn. Petition

ACTION REQUIRED

Consider Council support of the petition.

BACKGROUND

The Bering Sea Fishermen's Association has petitioned the Secretary of Commerce to adopt a rule establishing procedures for the enforcement of the MFCMA in the international waters of the North Pacific Ocean and Bering Sea. A copy of the petition is included as Agenda C-4(a). Henry Mitchell has asked the Council to consider sending a letter to the Secretary in support of the petition. The Secretary has extended the comment period on the petition to February 29.

JANUARY 1988

DONALD C. MITCHELL  
 1552 Orca Street  
 Anchorage, Alaska 99501  
 (907) 276-1681

Attorney for Petitioners

UNITED STATES DEPARTMENT OF COMMERCE  
 NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION  
 NATIONAL MARINE FISHERIES SERVICE

In The Matter Of The Petition Of The )  
 Bering Sea Fishermen's Association )  
 Requesting The United States Department )  
 Of Commerce To Adopt A Rule Establishing )  
 Procedures For The Enforcement Of The )  
 Magnuson Fishery Conservation And )  
 Management Act In The International Waters )  
 Of The North Pacific Ocean And Bering Sea. )

PETITION

Pursuant to 5 U.S.C. 553(e), the Bering Sea Fishermen's Association petitions the United States Department of Commerce to adopt the following rule establishing procedures for the enforcement of the Magnuson Fishery Conservation And Management Act (hereinafter "MFCMA") in the international waters of the North Pacific Ocean and Bering Sea:

50 C.F.R. Part 612

612.1 Purpose.

This Part governs foreign fishing for anadromous species in the international waters of the North Pacific Ocean and Bering Sea over which the United States exercises exclusive fishery management authority under the Magnuson Fishery Conservation and Management Act of 1976, as amended.

612.2 Definitions.

In addition to the definitions contained in the Act and in Part 611, the terms used in this Part shall have the following meaning:

(a) "Anadromous species" means salmon, herring and other species of fish which spawn in fresh or estuarine waters of the United States and which migrate to ocean waters outside the FCZ.

(b) "Foreign fishing for anadromous species" means fishing by a foreign fishing vessel for squid, pollock and other nonanadromous species in the international waters of the North Pacific Ocean and Bering Sea at times of the year and with gear that can reasonably be expected to result in the taking of anadromous species.

612.3 Duty To Prevent Foreign Fishing For Anadromous Species.

Pursuant to sections 204(a) and 311 of the Act, the Secretary and the Secretary of Transportation (the department in which the Coast Guard is operating) have a nondiscretionary duty to prevent foreign fishing for anadromous species in violation of the Act.

612.4 Foreign Fishing For Anadromous Species Prohibited.

After February 28, 1977, no foreign fishing vessel shall engage in foreign fishing for anadromous species unless such vessel has a valid permit on board issued under section 204 of the Act.

612.5 Monitoring Of Foreign Fishing For Anadromous Species.

The Secretary and the Secretary of Transportation shall monitor fishing by foreign vessels in the international waters of the North Pacific Ocean and Bering Sea to determine whether any foreign vessel is engaged in foreign fishing for anadromous species in violation of this Part. Monitoring shall include, but shall not be limited to, the placement of United States observers aboard, and the boarding and inspection of, foreign vessels which the Secretary or Secretary of Transportation reasonably believe may be fishing for anadromous species in violation of this Part. At each meeting of the North Pacific Fishery Management Council, the Secretary and the Secretary of Transportation shall report to the council on the results of monitoring activities undertaken pursuant to this section. The report shall include the identification of foreign vessels observed fishing in the international waters of the North Pacific Ocean and Bering Sea during the reporting period, the location in which each vessel was observed fishing, and a description of all efforts made by the Secretary and the Secretary of Transportation to determine whether such vessels were engaged in foreign fishing for anadromous species.

612.6 Anadromous Species Are Prohibited Species.

Unless a permit to do so has been issued under section 204 of the Act, the taking of anadromous species by a foreign vessel fishing in the international waters of the North Pacific Ocean and Bering Sea is prohibited. Any anadromous species taken without a permit is a prohibited species. Every foreign vessel which fishes in the international waters of the North Pacific Ocean or Bering Sea shall do so in areas, at times of the year, and with gear which, to the maximum possible extent, minimizes the catch of anadromous species which are prohibited species.

Each such foreign vessel shall sort its catch as soon as possible after retrieval of the catch and shall return any catch of anadromous species which are prohibited species or parts thereof to the sea immediately with a minimum of injury regardless of its condition. Each vessel shall also report the number, time and location of the taking of all anadromous species to the Secretary and Secretary of Transportation. It shall be a rebuttable presumption that any anadromous species which is a prohibited species which is found on board a foreign vessel fishing in the international waters of the North Pacific Ocean or Bering Sea was caught and retained in violation of this Part.

612.7 Observer Coverage, Inspection And Enforcement Of This Part.

No foreign nation shall be issued a permit under Part 611 authorizing its vessels to fish inside, or to participate as a member of a joint venture inside, the North Pacific Ocean or Bering Sea portion of the FCZ unless such nation agrees to:

(a) require its vessels fishing in the international waters of the North Pacific Ocean and Bering Sea to comply with section 612.6 and the other provisions of this Part;

(b) require its vessels fishing in the international waters of the North Pacific Ocean and Bering Sea to permit United States observers on board vessels the Secretary or the Secretary of Transportation believe may be engaged in foreign fishing for anadromous species in violation of this Part;

(c) require its vessels fishing in the international waters of the North Pacific Ocean and Bering Sea to permit representatives of the Secretary or the Secretary of Transportation to board such vessels to ensure that the vessels are not fishing for anadromous species in violation of this Part; and

(d) require its vessels fishing in the international waters of the North Pacific Ocean and Bering Sea to cease fishing in areas, at times or with gear the Secretary or the Secretary of Transportation believes will result in foreign fishing for anadromous species in violation of this Part.

612.8 Permit Suspension.

If a vessel of a foreign nation fishing in the international waters of the North Pacific Ocean or Bering Sea refuses to comply with the provisions of this Part, the Secretary shall immediately inform such foreign nation of its vessel's refusal to do so. If the foreign nation refuses to compel the vessel to immediately comply with the provisions of this Part, or if the foreign nation instructs the vessel to comply with the provisions of this Part but the vessel continues to refuse to do so, the Secretary shall immediately suspend all permits then in effect which authorize vessels of such nation to fish inside, or to participate as a member of a joint venture inside, the North Pacific Ocean and Bering Sea portions of the FCZ until such time as the vessel complies with the provisions of this Part.

612.9 Penalties And Forfeiture.

(a) Any person who is found by the Secretary to have committed an act in violation of this Part shall be liable to the United States for a civil penalty described in section 308 of the Act.

(b) Any person convicted of an offense prohibited by this Part shall be fined and/or imprisoned in the amount and for the duration described in section 309 of the Act.

(c) Any foreign vessel used in any manner in connection with the commission of any act prohibited by this Part shall be subject to forfeiture to the United States.

---

JUSTIFICATION FOR THE ADOPTION OF THE RULE

- A. The Bering Sea Fishermen's Association Is An Interested Person Who Has A Right To Petition The United States Department Of Commerce To Adopt The Proposed Rule.

5 U.S.C. 553(e) requires the United States Department of Commerce to give an interested person the right to petition for the issuance of a rule. The Bering Sea Fishermen's Association is a nonprofit corporation organized under the laws of the State of Alaska whose membership includes more than 1,500 fishermen who are residents of the State of Alaska, and who fish commercially and for subsistence uses for salmon and herring of United States origin which are being taken by foreign vessels in the international waters of the North Pacific Ocean and Bering Sea in violation of section 204(a) of the MFCMA. Consequently, the Bering Sea Fishermen's Association is an "interested person" as that term is used in 5 U.S.C. 553(e).

- B. The Magnuson Fishery Conservation And Management Act Imposes A Non-discretionary Duty On The Secretary Of Commerce And Secretary Of Transportation To Prevent Foreign Vessels From Fishing For Anadromous Species Of United States Origin In Violation Of The Act.

Section 204(a) of the MFCMA prohibits a foreign fishing vessel from fishing for anadromous species in the international waters of the North Pacific Ocean and Bering Sea unless such vessel has a valid permit on board issued pursuant to that

section. Section 311 of the MFCMA impose a nondiscretionary duty on the Secretary of Commerce and the Secretary of Transportation (in whose department the Coast Guard is operating) to enforce this prohibition.

Section 3(10) of the MFCMA defines the term "fishing" to include "any . . . activity which can reasonably be expected to result in the catching, taking, or harvesting of fish." Fishing for squid and groundfish is an "activity." Consequently, when a foreign vessel fishes for squid or groundfish in the international waters of the North Pacific Ocean or Bering Sea in areas, at times of the year and with gear that can reasonably be expected to result in the taking of anadromous species of United States origin, such vessel is engaged in "foreign fishing" as that term is defined in the MFCMA. If the vessel does not have a valid permit on board authorizing it to do so, section 311(a) of the MFCMA requires the Secretary of Commerce and Secretary of Transportation to take appropriate action to compel the vessel to stop fishing..

The intent of Congress reflected in the text of the MFCMA to require the Secretary of Commerce and Secretary of Transportation to do so is unequivocal. The legislative history of the enactment of the MFCMA is equally so. When the MFCMA conference report was debated on the House floor, for example, Representative Lenor Sullivan, the chairman of the House Committee on Merchant Marine and Fisheries which drafted the House version of the MFCMA, told her colleagues that:

Not only will the bill provide for regulations over these fisheries out to 200 miles from our shores - as it relates to both foreign and domestic fishermen - but it will also provide for regulations over anadromous species . . . beyond the zone to the extent of their range.<sup>1</sup>

<sup>1</sup>122 Cong. Rec. 8550 (March 30, 1976)(remarks of Hon. Lenor Sullivan). See also *Id.* (remarks of Hon. Robert Leggett) ("Foreign fishing . . . for anadromous species . . . beyond the zone would be prohibited unless the vessels of such foreign nation have on board a permit issued pursuant to an international fisheries agreement.").

However, in the ten years during which the Secretary of Commerce and Secretary of Transportation have had this nondiscretionary duty, they have refused to acknowledge that the duty exists, and have purposely refused to discharge their enforcement responsibilities in the manner the MFCMA requires.

When the Secretary of Commerce and Secretary of Transportation repeatedly refused to take action to prevent foreign vessels ostensibly fishing for squid in the international waters of the North Pacific Ocean from doing so in areas, at times and with gear the Secretary of Commerce knew was resulting in the taking of significant numbers of salmon of United States origin, in 1985 the Western Alaska Salmon Coalition (hereinafter "WASCO") filed an action in the United States District Court for the District of Alaska. The WASCO complaint requests the court to order the Secretary of Commerce and Secretary of Transportation to enforce the MFCMA in the international waters of the North Pacific Ocean and Bering Sea in the manner required by law.<sup>2</sup>

In response to the WASCO complaint, the federal government filed an answer which denied that the MFCMA imposes a nondiscretionary duty to prevent foreign vessels from fishing for squid and other nonanadromous species in the international waters of the North Pacific Ocean and Bering Sea which the Secretary of Commerce and Secretary of Transportation know is resulting in the taking of salmon of United States origin. The defendants then filed a motion to dismiss the complaint. As of the date of filing of this petition, the court has not issued a decision on the motion.

On October 9, 1985, the Senate Committee on Commerce, Science and Transportation held a hearing to determine what the federal government intended to do to stop the unlawful salmon

---

<sup>2</sup>See Western Alaska Salmon Coalition v. Baldrige, Civil No. A85-536 (September 24, 1985).

interceptions which had prompted the WASCO lawsuit.<sup>3</sup> The committee's first witness was Edward Wolfe, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs. In his opening statement, Secretary Wolfe stated:

In the last few years, Taiwan has had an unregulated squid gill net fishery in the North Pacific Ocean. With the assistance of concerned Congressional staff, we urge Taiwan to control its squid fleet, and in 1984 Taiwan informed us that they had promulgated regulations. These regulations prohibited both fishing for salmon on the high seas and exporting of their salmon products from Taiwan. However, there are still reports of their squid vessels taking high levels of salmon.<sup>4</sup>

Japan, the major factory (sic) in U.S. origin salmon interceptions, has approximately 520 squid gill net vessels operating in the North Pacific. Since 1981, Japan's squid gill net fleet has been regulated by time and area closures that protect most of the North American salmon stocks. Unfortunately, we still receive reports that the Japanese squid gill net fleet has violated the boundaries established to separate the squid fleet from salmon stocks. More severe penalties and increased surveillance may be necessary if we are to discourage the squid vessels from incidentally taking U.S. origin salmon.<sup>5</sup>

In response to a series of questions from Senator Stevens and Senator Slade Gorton inquiring what, if anything, the federal government was doing to stop the unlawful take of salmon which Secretary Wolf had admitted the federal government knew was occurring, Wolf and William Gordon, NOAA's Assistant Administrator for Fisheries, stated:

SENATOR GORTON. Mr. Gordon, I would like to follow up on an interesting subject which Senator Stevens began with you, and that is what is obviously the deliberate violation of the law and the lines on this map by ships which have their identification masked to the best of their ability to do so. What is the penalty under the law if a ship, a fishing vessel is caught under those circumstances?

---

<sup>3</sup>Hearing on Pelagic Driftnet Fisheries before the Subcomm. on National Ocean Study Policy of the Senate Comm. on Commerce, Science and Transportation, 99th Cong., 1st Sess. (1985).

<sup>4</sup>Id. at 8.

<sup>5</sup>Id. at 9-10.



MR. GORDON. Well, if we are able to intercept them, if they were not marking their vessels in the U.S. zone, and we encountered them, we could seize the vessel, bring it ashore, turn it over to the U.S. Attorney's Office, and seek the maximum penalty would be to take everything.

SENATOR GORTON. That is only within the zone?

MR. GORDON. Within the zone.

One of the big problems is identification of these vessels if we cannot intercept them, and we found the Japanese fisheries agency to be extremely helpful with information we turn over to them in terms of penalizing the violators back in the home island, and they have taken fishing privileges away.

So the government officials have been very helpful, but have to often identify the vessel adequately for them to carry out that act. They do have fishery patrol vessels out there trying to keep herd on these. As you can imagine, with that mass of an area and the number of vessels, it is a very difficult thing to do.

MR. WOLFE. Mr. Chairman, to follow up on that point from the international perspective, to the best of our ability from the Department of State no State has ever exercised jurisdiction beyond its EEZ or whatever their waters are called for anadromous species. That does not mean it cannot be done. We believe we have the ability to do that. We believe we have the

SENATOR STEVENS. You mean modern times? Remember that we did see the pelagic fur sealing vessels and burned them, and they took us to the World Court, and we thumbed our nose at the World Court even then.

MR. WOLFE. Were these anadromous species?

SENATOR STEVENS. They are anadromous mammals.<sup>6</sup>  
(Emphasis added)

Despite Secretary Wolfe's admission that "we have the ability to do that," the Secretary of Commerce and Secretary of Transportation filed an answer to WASCO complaint which denies that the MFCMA requires them to enforce the Act to prevent foreign fishing for salmon and other anadromous species in international waters, and high ranking, presumably knowledgeable,

<sup>6</sup>Id. at 36-37.

federal officials continue to refuse to acknowledge this duty.<sup>7</sup>

The purpose of the proposed rule is to establish a procedure pursuant to which the Secretary of Commerce and Secretary of Transportation can enforce the MFCMA in the manner Representative Sullivan and other members of the 94th Congress intended when they voted to assert the jurisdiction of the United States over anadromous species of United States origin throughout their range.

C. The Secretary Of Commerce And Secretary Of Transportation Have Actual Knowledge That Foreign Vessels Are Taking Anadromous Species Of United States Origin In The International Waters Of The North Pacific Ocean And Bering Sea In Violation Of Section 204(a) Of The MFCMA.

The benefit the United States will derive from the adoption and enforcement of the proposed rule is not theoretical. The Secretary of Commerce and Secretary of Transportation have actual knowledge that foreign vessels are fishing for salmon and herring of United States origin in the international waters of the North Pacific Ocean and Bering Sea in violation of section 204(a) of the MFCMA in at least two locations. But, to date, they have refused to enforce the MFCMA in the manner required by law.

The unlawful harvest of salmon in the international waters of the North Pacific Ocean by Japanese and other foreign squid fleets has been previously mentioned.<sup>8</sup>

In addition, the Secretary of Commerce knows that since 1980 the Japanese groundfish fleet has fished extensively for pollock in the international waters of the Bering Sea. In 1986, for

<sup>7</sup>On September 1, 1987, for example, the Anchorage Daily News interviewed James Branson, the executive director of the North Pacific Fishery Management Council, to obtain his reaction to a report that 16 Japanese squid boats had been observed unlawfully fishing for salmon of United States origin in international waters off Alaska. In pertinent part, the article stated: "When the squid boats are targeting salmon in international waters, U.S. Coast Guard boats can only monitor the activity, Branson said. The Coast Guard can cite the boats only if they stray within the 200-mile offshore economic zone claimed by the United States, he said." See Attachment "A" ("Stevens Says Japanese Still Intercepting Salmon," Anchorage Daily News, p. a-10 (September 1, 1987)).

<sup>8</sup>See Note 7.

example, the Japanese groundfish fleet took 698,000 metric tons of pollock in the international waters of the Bering Sea.<sup>9</sup> The Secretary knows that while fishing for pollock in this area the Japanese groundfish fleet may also have taken significant numbers of salmon and herring of United States origin.

The Secretary's knowledge in this regard is based on the fact that, at the request of the United States, the Government of Japan has agreed to close the same area to directed salmon fishing by the Japanese mothership fishery because salmon taken in the area are of United States origin. Yet not only have the Secretary of Commerce and Secretary of Transportation taken no action to stop the Japanese groundfish fleet from taking salmon and herring in the international waters of the Bering Sea in violation of the MFCMA, as of the date of the filing of this petition, the Secretary of Commerce has not even requested the Government of Japan to provide information on the number of salmon and herring that have been taken in the fishery.

If they were not being taken unlawfully on the high seas, the salmon and herring the foreign squid fleets and the Japanese groundfish fleet have taken, and, unless the proposed rule is adopted and enforced, will continue to take in violation of the MFCMA, would be taken by members of the Bering Sea Fishermen's Association and other United States fishermen.

Consequently, the Secretary of Commerce and Secretary of Transportation's purposeful refusal to enforce the MFCMA in the international waters of the North Pacific Ocean and Bering Sea has inflicted, and, unless the proposed rule is adopted and enforced, will continue to inflict, direct, immediate and irreparable damage on the petitioner and its members. For that reason, the rule should be adopted.

DATED: September 8, 1987

/s/ Donald C. Mitchell

Donald C. Mitchell  
Attorney for Petitioner

<sup>9</sup>See Attachment "B".

# Stevens says Japanese still intercepting salmon

By HAL BERNTON  
Daily News reporter

Sen. Ted Stevens said Monday that Japanese squid fishermen are violating laws intended to keep their driftnets from intercepting North American-bound salmon in international waters off Alaska.

In recent weeks, Coast Guard aircraft have spotted at least 16 squid boats fishing North Pacific waters that Japanese fishery laws have declared off-limits, Stevens

said. Some of the vessels concealed their identifying hull marks, but Coast Guard officials concluded the boats hailed from Japan.

"These sightings indicate that the Japanese fishing industry has a long way to go before we can place credibility in what they are saying to Alaska and to the rest of the world," Stevens said.

The squid fleet, with some 250 boats on the water, fishes with hundreds of miles of almost invisible netting that has become a major North Pacific pollution problem. Huge swaths of the non-degradable net have been lost in the ocean, where it continues to entrap salmon, porpoises, seals and thousands of sea birds.

That pollution problem has become a major congressional concern, Stevens said. He has proposed legislation to fund

more U.S. monitoring of the Japanese drift fleets. And the Japanese government has announced a new effort to step up its own surveillance of the drift fleet.

Kazuhiko Nagao, Japan's general consul in Alaska, said a Japanese government fisheries boat patrolled the fleet last month. And in the wake of the new U.S. allegations, a patrol boat would return soon to the squid fishing grounds.

Nagao said he didn't think the boats were fishing in areas where North American salmon might be caught. But the patrol boat "will conduct an investigation of the cargo at sea . . . and if they find any salmon on the vessel, they will take thorough measures to punish them," Nagao said.

The high-seas take of North American-bound salmon has been a continual source of tension between the U.S. and Japanese fishing industries. Alaska fishery officials say that the squid fleet, and a separate Japanese drift fleet that targets directly on salmon, annually intercept \$20

million to \$40 million worth of North American-bound salmon and steelhead trout.

Most of the driftnet fishing takes place in international waters, but the U.S. government opens a small section of U.S. waters within 200 miles of Alaska to the Japanese salmon fleet.

When the salmon is taken illegally by boats that are supposed to be fishing for squid, the fish may wind up in a black market. Last year, U.S. officials in Tacoma seized 600,000 pounds of black

market salmon that they said was caught by the Taiwanese squid fleet.

Taiwanese, South Korean and Japanese squid fleets frequently stray outside the squid fishing zone, said Jim Branson, executive director of the North Pacific Management Council, a federal board that guides fisheries management off Alaska. But the Taiwanese and South Korean squid fleets appear to be taking more illegal salmon than the Japanese, Branson said.

The Japanese fleet tend to

Anchorage Daily News  
Tuesday, September 1, 1987

stick closer to the prime squid fishing grounds, which are south of the major salmon fishing ground. "The legitimate squid fishermen — they catch relatively few salmon," he said.

When the squid boats are targeting salmon in international waters, U.S. Coast Guard boats can only monitor the activity, Branson said. The Coast Guard can cite the boats only if they stray within the 200-mile offshore economic zone claimed by the United States, he said.

ATTACHMENT B-1



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE

Northwest and Alaska Fisheries Center  
7600 Sand Point Way N. E. F/NWC  
BIN C15700  
Seattle, Washington 98115-0070

AUG 21 1987

August 18, 1987

MEMORANDUM FOR: The Record  
FROM: F/NWC - William Aron  
SUBJECT: Meeting with Mr. Kazuo Shima, Counselor  
Japan Fishery Agency

Mr. Shima made a special trip to Seattle to brief the Center on pollock catches by Japan in the international "donut" zone of the Bering Sea. Present were Mr. Kanaeyasu Ito (Seattle representative for the Japan Fisheries Association, Mr. Jay Hastings (attorney for Japan Fisheries Association, and Drs. Gary Stauffer, Loh-Lee Low, and R. V. Miller.

The purpose of Mr. Shima's visit was to alert us that the Japanese pollock catch in the donut area was 698,000 metric tons in 1986 - much higher than anyone has expected. He wanted to provide the data prior to INPFC when data would normally be released. He provided us with the following three attachments.

1. Japanese pollock catches from the donut in 1985-86.
2. Japanese industry views of donut area pollock stocks.
3. Comments by the Japan Fishery Agency on donut area pollock.

Provision of these data, well in advance of the INPFC meetings, appeared to be in the full spirit of cooperation, and with the idea of preventing unpleasant last minute surprises in Vancouver.

Mr. Shima readily agreed for the need for a multinational study of Bering Sea pollock populations to assess stock distribution and abundance. These studies must include the U. S., Japan, the Soviet Union and other nations fishing for pollock such as South Korea, Poland and Taiwan. We discussed the possibilities of developing such an international cooperative program. Mr. Shima appeared supportive and, in fact, agreed to help Dr. Low in obtaining some critical pollock data during Dr. Low's visit to Japan this month.



5

Fishing operation by the Japanese trawl vessels  
in the Bering high seas

August 10, 1987

year	number of vessels	catch(metric ton)
1985	61	137,000
1986	98	698,000

(note)

1. The number of vessels includes all the vessels operated in the area concerned, even for a short period.
2. The bulk of the catch consists of alaska pollock.