

Agenda Item IX-4
August, 1979

MEMORANDUM

DATE: August 21, 1979

TO: Council Members, Scientific & Statistical Committee and
Advisory Panel

FROM: Jim H. Branson, ^{Mark} Executive Director

SUBJECT: Funding Proposal: Eastern Bering Sea Surf Clam Fishery
Legal Analysis of Leasing Proposal

COUNCIL ACTION

Approval of concept for funding.

BACKGROUND INFORMATION

On May 3rd we sent a request for a proposal to the University of Washington and University of Oregon Law Schools for a study of leasing as a management principle for the clam fishery in the eastern Bering Sea. We asked for an analysis of leasing as it could be applied to the fishery management plan: i.e. what are the problems and what are the alternatives? We asked that the investigation include an analysis and comparison of state and federal marine leasing regulations and practices as they would relate to a surf clam fishery in the eastern Bering Sea. The University of Oregon declined to respond due to the press of other business while the University of Washington responded with a proposal by John O'Shea and Curt Epperson. The total cost of their proposal was \$19,890. It appeared to be a thorough proposal but probably devoted too much time and money into a preliminary investigation of federal statutes that were probably not relevant.

We asked NOAA General Counsel Kim White to review the proposal. Kim suggests several places where a summary of the results reached in existing literature would suffice without original research. The review also discusses deleting state jurisdiction problems if the analysis were to focus on the federal aspects of the program. The review also discusses those federal statutes which need no research as they have no relevancy to the problem. Generally, the comments by Kim led us to believe the scope and the cost could be cut in half.

Subsequent to that, Mr. George Utermohle, Extended Jurisdiction Section of ADF&G, expressed an interest in exploring the State's statutes and limitations on this problem. His letter of July 12 to Curtis McVee, Director, Bureau of Land Management, indicates the State's expressed

view in attacking this problem which may provide an alternative solution to the University of Washington proposal.

CONCLUSION

The Management Plan Drafting Team has used leasing as a management alternative. Because the fishery occurs in state and Federal waters the leasing management alternative should be more thoroughly explored.

Three alternatives exist, they are:

1. A contract with the University of Washington in the original amount of their proposal of \$19,890.
2. A contract with the University of Washington for a negotiated proposal of reduced scope and reduced funding.
3. Encourage the Office of NOAA General Counsel and Extended Jurisdiction, Alaska Department of Fish and Game to develop a Council position paper on the matter.

A choice in concept is needed to initiate either a contract or the framework for the joint NOAA/State position paper.

Attachments:

- May 23rd, 1979 letter to Jim Branson from John O'Shea and Curt Epperson
- May 3rd, 1979 letter from Jim Branson to Jim Crutchfield
- June 21st, 1979 memo from James K. White to Jim Branson
- May, 1979 proposal from John O'Shea and Curt Epperson
- July 12, 1979 letter to Curtis McVee from George Utermohle

MIH

John T. O'Shea
Curt N. Epperson
University of Washington
School of Law, Room 606
Mail Stop: JB-20
Seattle WA 98105

May 23, 1979

Mr. Jim H. Branson
Executive Director, North Pacific
Fishery Management Council
P O BOX 3136 DT
Anchorage, Alaska 99510

RE: Eastern Bering Sea Surf Clam Fishery Legal Analysis
of Leasing Proposal

Dear Mr. Branson:

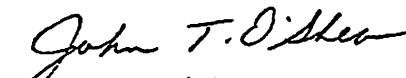
Please find enclosed the original and two copies of the research proposal prepared in accordance with the RFP sent to us on May 3, 1979. We have detailed what we consider to be the nature of the problem and the legal approaches to the problem, as identified by preliminary research and investigation.

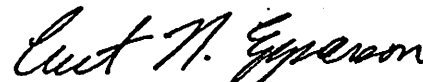
Also enclosed are our resumes for the Council's review.

While at the University of Washington, Mr. O'Shea worked in close association with Professor Ralph Johnson and Mr. Epperson worked in close association with Professor William T. Burke. In both cases the work involved research funded by the federal government through Sea Grant. The nature of that work is discussed in further detail in the personnel qualifications portion of the proposal.

If any additional matters require our attention, please advise. If the cost of this proposal exceeds the budgetary restraints, it may be possible to reduce the scope of the study.

Sincerely yours,


John T. O'Shea
Co-Principal Attorney


Curt N. Epperson
Co-Principal Attorney

Enclosures
Proposal - 3
Resumes - 2

COPY

700-

May 3, 1979

Dr. James A. Crutchfield
Department of Economics
University of Washington
301 Savery Hall
Seattle, WA 98195

Dear Dr. Crutchfield:

We are soliciting proposals for a study of leasing as a management principle for the clam fishery in the eastern Bering Sea.

The North Pacific Fishery Management Council is preparing a Fishery Management Plan/Draft Environmental Impact Statement for Surf Clams in the Eastern Bering Sea. The management plan will govern the conduct of this new commercial fishery. The fishery will be conducted both in the Fishery Conservation Zone (3 to 200 miles) and in the territorial waters of the State (0 to 3 miles). Completion of the first draft of the fishery management plan is not expected until August with an implementation date expected for June, 1980.

We need an analysis of "leasing" as it could be applied to the fishery management plan: i.e. what are the problems and what are the alternatives? The investigation must include an analysis and comparison of state and federal marine leasing regulations and practices as they would relate to a surf clam fishery in the eastern Bering Sea. I have included a copy of the Fishery Conservation and Management Act and would draw your attention to Section 2, "Findings, Purpose and Policy", Section 3 "Definitions", Sections 101 and 102, and Sections 301, 303, 306 and 307.

Instruction for preparation of proposals:

1. Proposals should be submitted so as to have an easily distinguishable section dealing with technical aspects and a section dealing with business management. The technical proposal should not make any reference to pricing data in order that evaluation may be made strictly on the basis of technical merit. The proposals must be specific on the technical approach proposed to satisfy the requirements and not merely paraphrasing the specifications in this RFP. One copy of the technical proposal and one copy of the cost proposal will be required for submission and signed by someone authorized to legally bind the offerer.

2. Proposals shall be submitted so as to be received at the address of the Council not later than 5 p.m. local time on June 4th, 1979.
3. Negotiations and Award: Award will be made to the responsible offerer in accordance with the criteria set forth in this RFP and consistent with the North Pacific Fishery Management Council's procurement standards and dependent on funding approval by NOAA. Issuance of this solicitation does not constitute an award commitment on the part of the government or the Council. This request does not commit the North Pacific Council to pay for costs incurred in submission of a proposal or for any other costs incurred prior to the execution of a formal contract unless specifically authorized in writing by the Executive Director. Attention is invited to the fact that a Contracting Officer/Executive Director is the only individual who can legally commit or obligate the government or Council to the expenditure of public funds should a contract result by reason of a response to this Request for Proposals.
4. Criteria: All proposals will be reviewed by the Council staff, members of the Council's Scientific and Statistical Committee, selected members of the Council's Advisory Panel and members of the Council's Finance Committee. Each proposal will be ranked against all proposals according to the price of the contract, soundness of approach, capability of staff and past performance and pertinent experience of the staff. In general proposals will not be considered where there appears to be a problem with either confidentiality of statistics or from a competitive company within the industry. Proposals in general will also not be considered which do not conform to schedule or objectives. Because of the specialized nature of this project proposals submitted should demonstrate sufficient local knowledge, prior pertinent experience and/or specialized key personnel.
5. Level of Funding: Negotiable.
6. To aid in the evaluation of the proposal it is desirable that all proposals follow the same general format. Therefore proposals shall at a minimum contain the information specified below in accordance with the following general format:
 - a. Table of Contents
 - b. Short Introduction Summary

- c. Technical Discussion of Approaches
- d. Program Organization
- e. Program Schedules
- f. Personnel Qualifications
- g. Supporting Data and Other Information
- h. General Cost Proposal

Should you have any questions do not hesitate to contact us.

Sincerely,

Jim H. Branson
Executive Director

MIH



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
OFFICE OF GENERAL COUNSEL
 P.O. Box 1668, Juneau, Alaska 99802

FILE	ACT	INFO	ROUTE TO	INITIAL
			Exec. Dir.	
			A. Exec. Dir.	
			Adm'n. Off.	
			Exec. Sec.	
			Writer/1	
			Writer/2	
			Sec. Recap.	
			Sec. Typist	
			JUL 2 1979	

DATE: June 21, 1979

TO : NPFMC - Jim H. Branson

FROM: *for Lori Havel*
 GCAK - James K. White

SUBJ: Review of the Legal Research Proposal submitted by John T. O'Shea and Curt N. Eperson

Pursuant to your request I offer the following comments on the subject proposal, which are aimed at helping to narrow the scope of the project in order to reduce the cost.

Objectives 2 and 3 of the Proposal represent what I perceive to be the essential objectives of this project. Analysis of these two objectives would be limited to consideration of Federal law and the development of a Federal lease program for the FCZ by the NPFMC. Objectives 1 and 4 would expand the analysis considerably to include consideration of State law, and attempt to resolve potential State/Federal conflicts which may occur. While this would be a useful analysis, it appears to expand the scope and cost of the project considerably. Elimination of objective 4 and the State constitutional and statutory aspects of objective 1 would narrow the focus of the study to an analysis of Federal constitutional and statutory requirements and alternative types of lease programs which might be utilized. Comparing the results of that analysis to State requirements could be addressed once this report is completed, and presumably with assistance from the State Attorney General's Office.

As to section 3 of the proposal, I have the following comments regarding the legal issues which are identified:

1. The first issue presented, that being the FCMA's limitation on permit fees to "administrative costs" for domestic fishermen, is essential to the study. However, lengthy analysis of this issue already exists in published articles (for example, Bill Burke's Washington Law Review article on recovering economic rent), and it may not be a justified expense to conduct new analysis of this issue. Perhaps a summary of the results reached in existing literature, without any original research would substantially accomplish the purpose.
2. The second issue focuses entirely on the State/Federal jurisdictional problems, and, as suggested above, should be deleted if the analysis is to focus only on the Federal aspects of the program.



3. This paragraph cites seven Federal, and three State statutes which the proposal would consider in analyzing the issues. As suggested above, analysis of the State statutes could properly be excluded from this analysis. As to the seven Federal statutes cited, I would suggest that five be eliminated now:

(1) the Marine Mammal Protection Act, while being a statute of major significance to the Bering Sea clam plan overall, is not a significant factor in analysis of a lease program itself; (2) the Coastal Zone Management Act is of limited relevance if this study is limited to consideration of a lease program for the FCZ only, since the CZMA does not apply beyond three miles; (3) the Federal Water Pollution Control Act Amendments are simply not directly related to the central legal issue involved in establishing a leasing program, since these amendments would relate more to the methods of harvest utilized in the fishery; (4) the Endangered Species Act is not relevant for the same reasons that the Marine Mammal Protection Act does not apply to this issue; (5) the Marine Protection Research and Sanctuaries Act should be excluded since there are currently no marine sanctuaries off of Alaska and non are specifically proposed for the near future - it would be very speculative to attempt to analyze the relationship between the provisions of a hypothetical marine sanctuary and possible harvesting techniques to be utilized in the clam fishery.

4. The fourth issue is one that has already been stated in the objectives section, that being to analyze the Federal constitutional and statutory requirements that would be applicable to such a program.

I hope that this review is helpful in scaling down the scope of the contract.

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

SUPPORT BUILDING
JUNEAU, ALASKA 99801

July 12, 1979

FILE	ACT	INFO	ROUTE TO
			Exec. Dir. <i>B</i>
			A. Exe. Dir. <i>MMH</i>
			Admin. Off.
			Exec. Sec.
			Writer/1
			Writer/2
			Sec. Recep.
			Sec. Typist
JUL 18 1979			

Curtis V. McVee, Director
Bureau of Land Management
Department of the Interior
701 C Street, Box 13
Anchorage, Alaska 99513

Dear Mr. McVee:

The Alaska Department of Fish and Game is jointly developing with the National Marine Fisheries Service a fishery management plan for clams in the southeastern Bering Sea adjacent to the Alaska Peninsula. Among the options considered is the establishment of a seabed leasing system for the extraction of clams. The function of a leasing system would be to foster a series of management goals including, allocation of resources among users, promotion of sustained yield management, and limitation of entry into the fishery. However, before this option can be explored further, we must understand the mechanism by which such a leasing system could be established and how it would operate.

- What permits are needed from the Bureau of Land Management to harvest bottom-in-dwelling clams from submerged lands? The clams would be harvested by a towed dredge which removes the clams from the top 6-12 inches of the substrate.
- Is there an existing procedure for leasing submerged lands that would be applicable to clam harvesting?
- What procedures must be followed in order to establish a leasing system for submerged lands?
- How long would it take to implement a system once the decision is made to adopt it?
- Who must initiate the process -- Bureau of Land Management, Alaska Department of Fish and Game, the fishermen?
- Does the Bureau of Land Management foresee any obstacles to the establishment of a State leasing system for submerged lands or a joint State-Federal leasing system.

State Division of Land

July 12, 1979

The management area involved includes submerged lands within Alaska's territorial sea and the Federal outer continental shelf. A cooperative agreement between the Alaska Department of Fish and Game, Alaska Department of Natural Resources, National Marine Fisheries Service and the Bureau of Land Management would probably be necessary at some time in the future if a comprehensive leasing program is developed. The Alaska Division of Lands is being requested for information on the State aspects of a submerged lands leasing system.

The Bering Sea clam fishery is presently only a potential fishery. Actual development of the fishery will be closely related to the status of the East Coast clam fisheries which are now quite depressed. Several of the major clam processors from the East Coast formed a consortium to fund exploratory work in the area during 1977 and 1978. These studies have shown that the fishery could produce 19-25 million pounds of clam meats per year. The fishery could start as early as 1980 provided that an economical monitoring system for paralytic shellfish poisoning can be established. The absence of a leasing system will not inhibit the development of the fishery.

The fishery management plan for Bering Sea clams is just beginning its initial review. If we could have a response from the Bureau of Land Management by September we could incorporate your information into the plan, however, if this is not reasonable for your staff we will await a response at your convenience.

If there is any additional information that we can provide on this subject, I can be contacted at 465-4215 in Juneau.

Sincerely,

George Utermohle

George Utermohle
Extended Jurisdiction Section

cc: Jim Branson - NPFMC ✓
Rod Kaiser - ADF&G, Kodiak

Agenda Item IX-4
August, 1979

Bering Sea Clam Leasing Study Proposal

The Committee felt that some combination of a renegotiation of the University of Washington proposal and the ADF&G/NMFS study should be pursued regarding a study of the legal ramifications of sea bed leasing.

PROPOSAL:

A Legal Analysis of Leasing as a Management
Approach in the Eastern Bering Sea Surf Clam Fishery

JOHN T. O'SHEA
Attorney at Law

CURT N. EPPERSON
Attorney at Law

May 1979

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I. Introduction

In 1977-1978 the Northwest and Alaska Fisheries Center of the National Marine Fisheries Service coordinated a study of the surf clam (*Spisula polynyma*) resource in the southeast Bering Sea. The estimate of total biomass is 277,000-381,000 metric tons, with an estimated yield of 19-25 million pounds of meat per year. Such a harvest would significantly offset the decline in the Atlantic surf clam fishery.

Pursuant to its statutory duty, the North Pacific Fishery Management Council [NPFMC] is formulating a management plan for the fishery, and a "leasing approach" is under consideration as a management technique.

The purpose of this proposal is to analyze the legal ramifications of such an approach. The study will determine which federal and state laws may affect a lease program. Research will include a compilation and analysis of all agency and department regulations which may have an impact on the plan. Where problems or conflicts are present, the study will identify possible solutions and alternatives. Existing marine leasing programs will be considered, as well as other management approaches for fisheries similar to the eastern Bering Sea surf clam fishery.

II. Summary of Objectives

The primary objective will be to identify and discuss the principal legal issues involved in a lease program. Among the salient questions to be answered, are the following:

1. What are the federal and state constitutional and statutory requirements which must be satisfied in developing a lease program for the surf clam fishery?

2. Does the NPFMC have authority to employ limited access management through a lease program?

3. What alternative types of lease programs might be utilized? Which of these are likely to withstand judicial review? Why?

4. Are there potential conflicts between state and federal authority over the surf clam resource? Which state and federal agencies are involved? How might such conflicts affect various lease programs?

III. Nature of the Problem

The utilization of a lease program as a management principle for the surf clam fishery offers some unique advantages, but poses a multiplicity of legal questions. As a system of limiting access to the fishery, leasing may represent an efficient mechanism for achieving optimum yield. It appears to be particularly appropriate for an undeveloped fishery such as this. Implementation of the leasing plan would not cause short-run unemployment or dislocation or capital investment.

Among the legal issues to which this project will be addressed are:

1. The NPFMC is authorized by Section 303(6)(1) of the FCMA to require permits and payment of fees by U.S. vessels for fishing in the Fishery Conservation Zone [FCZ]. According to Section 304(d) those fees may not exceed administrative costs. Under Section 303(b)(6), the Council may establish a limited access system, in compliance with criteria set forth. What effect does the "administrative costs" provision have on a leasing program?

2. If the fishery is to be conducted within the territorial sea and the FCZ, what are the jurisdictional conflicts? The Fishery Conservation and Management Act [FCMA] only asserts federal authority over fisheries within the FCZ (except in the case of anadromous species). Due to the location of the surf clam resource, a comprehensive leasing program requires a resolution of authority among the federal and state agencies, many of which have overlapping jurisdiction.

3. Preliminary investigation reveals several federal statutes which may impact a lease plan. A study must consider:

(a) Submerged Lands Act, 43 U.S.C.A., sec. 1301 et seq. (Supp. 1979).

(b) Outer Continental Shelf Lands Act, as amended, 43 U.S.C.A., sec. 1331 et seq. (Supp. 1979).

(c) Federal Water Pollution Control Act Amendments (Clean Water Act), 33 U.S.C.A., sec. 1251 et seq. (1978).

(d) Coastal Zone Management Act, as amended, 16 U.S.C.A. sec. 1451 et seq. (Supp. 1979).

(e) Marine Mammal Protection Act, as amended, 16 U.S.C.A., sec. 1361 et seq. (1978).

(f) Endangered Species Act, as amended, 16 U.S.C.A., sec. 1531 et seq. (1978)-

(g) Marine Protection, Research and Sanctuaries Act, as amended, 33 U.S.C.A., sec. 1401 et seq. (1978).

In addition, applicable state laws must be analyzed, particularly:

- (a) Alaska State Constitution, Article 8.
- (b) Alaska Land Act, Title 38, Alaska Statutes.
- (c) Alaska Fish and Game Code, Title 16, Alaska Statutes.

4. A leasing program must be constructed in compliance with constitutional and statutory standards. What are they and how can they be met?

IV. Legal Approaches to the Problem

The proposed study will closely examine the provisions of the Fishery Conservation and Management Act [FCMA] (16 U.S.C.A., sec. 1801 et seq., Supp. 1979), and its legislative history. The purpose of the analysis will be to determine whether Congress intended to grant authority to the regional councils to conduct lease programs and how such programs can be structured within the legal confines of the F.C.M.A. Existing management strategies for comparable fisheries (such as the Atlantic surf clam and the Hawaiian precious coral), will be discussed. The report will present the views of leading commentators and it will review relevant case law.

In order to comprehensively evaluate the potential effectiveness of a surf clam lease program, other marine leasing schemes will be identified and compared. For example, in the State of Washington tidelands and submerged areas are leased for the production and

harvest of oysters and geoducks. In Alaska, such areas are leased for the use of set nets. At the federal level marine leasing programs are conducted by the Bureau of Land Management of the Department of the Interior. Non-marine programs are conducted by the National Park Service and other agencies within the Department of the Interior. This study will investigate and analyze the field of leasing programs, and conclude which ones are appropriate models for the surf clam fishery.

This project is designed to provide an accurate, in depth assessment of the legal feasibility of a lease program for the surf clam fishery in the eastern Bering Sea. Leasing blocks for the harvest of surf clams may be a very effective management technique. However, to meet potential legal challenges, the leasing plan must be founded upon an objective legal analysis which anticipates potential issues, investigates the alternatives, and presents solutions based on professional research and opinion.

V. Program Schedule

The research and analysis will require two months. Assuming a contract date of June 15, 1979, the final written report will be submitted to the North Pacific Fishery Management Council on or about August 15, 1979. The report will consist of a concise summary of the results, accompanied by the legal analysis (presented in common terms), and the rationale for recommendations offered. The attorneys will be available for in-person discussions with the Council. A mid-term progress report will be submitted on or about July 15, 1979.

VI. Personnel Qualifications

The proposal will be carried out by co-principal attorneys: John T. O'Shea, B.A. 1969, J.D. 1972; Master of Environmental Law and Marine Affairs 1979; and Curtis N. Epperson, B.A. 1975, J.D. 1978, Master of Environmental Law and Marine Affairs 1979.

Mr. O'Shea has been an attorney at law since 1972; Mr. Epperson since 1978. Both attorneys have completed a specialized program of post-graduate study at the University of Washington School of Law, in conjunction with the Institute for Marine Studies. The course of study concentrated on International Law of the Sea, Environmental Law, Economics of Fisheries, Law of the Coastal Zone, and U.S. Fisheries Law, particularly the Fishery Conservation and Management Act, Marine Mammal Protection Act, Endangered Species Act and Coastal Zone Management Act.

Mr. O'Shea has recently completed a major study on oil pollution liability, prepared under a Sea Grant project coordinated by Professor Ralph W. Johnson of the University of Washington School of Law. The publication, entitled A Compendium of Oil Pollution Liability: Where have we been? Where are we going? is being distributed to Sea Grant personnel and to interested parties. A copy is available at the University of Washington School of Law Library.

Mr. Epperson has worked since September 1978 doing research and analysis under a grant from the University of Washington Sea Grant Office. That work has revolved around varying questions, with particular emphasis upon legal issues arising from the Fishery Conservation Management Act, the Marine Mammal Protection Act and the

Endangered Species Act. Work under that grant was coordinated by Professor William T. Burke, University of Washington School of Law, and the NOAA Northwest Regional Counsel.

Legal research will be assisted by third-year law students at the University of Washington School of Law, using the library's substantial facilities. All work will be done under the direct supervision of the principal attorneys.

VII. Cost of Proposal

Legal fees are based on \$50 per hour of productive time. Amounts include salaries of secretarial personnel, and all overhead expenses including office equipment, insurance coverage, fringe benefits, social security and withholding taxes.

One(1) attorney		
Eight (8) weeks at 75%		\$10,500
One (1) attorney		
Eight (8) weeks at 50%		7,000
Two (2) Legal Research Assistants		
Six (6) weeks at 100%		<u>2,240</u>
Total for professional services		\$19,740
Reproduction of documents	100.00	
Long distance toll calls	<u>50.00</u>	<u>150.</u>
Total cost of proposal		<u><u>\$19,890.00</u></u>

This proposal is submitted pursuant to an RFP, dated May 3, 1979, addressed to John O'Shea. The undersigned co-principal attorneys, making the offer, hereby agree to perform the research and tender a report, in accordance with the proposal, at the cost and under the terms contained herein.


JOHN T. O'SHEA


CURT N. EPPERSON

May 22, 1979