M E M O R A N D U M

TO: Council, SSC and AP Members

FROM: Jim H. Branson
Executive Director

DATE: November 22, 1985

SUBJECT: Offer by NMFS to Establish a September 26, 1985 Cut-off Date for Participation Credit for Entry into the Gulf of Alaska Hook and Line Sablefish Fishery

ACTION REQUIRED

Decide whether to accept offer.

BACKGROUND

In his September 26, 1985 letter of approval for Amendment 14 to the Gulf of Alaska Groundfish Fishery Management Plan, NMFS Regional Director Robert McVey stated the following:

> Because the current hook-and-line fleet is considered sufficient to fully harvest the increased OY, the National Marine Fisheries Service recommends that the Council begin immediately to address the problem by developing additional effort control measures. To assist the Council in this effort, the National Marine Fisheries Service offers to publish a notice in the FEDERAL REGISTER, announcing that anyone entering the sablefish fishery after September 26, 1985, will not be assured of future participation should the Council develop, and the Secretary implement, an effort control regime that limits the number of participants in the fishery. This announcement would in no way preclude the Council from setting any other date for eligibility. The National Marine Fisheries Service believes that such an announcement would aid in discouraging speculative entry into the fishery while an effort management regime is under development.

The Council should consider this offer and decide whether NMFS is to proceed with publication of the notice. In making its decision, the Council should be mindful that affirmative action in this area can only be interpreted as a commitment to (pursue) access limitation for the Gulf of Alaska hook and line sablefish fishery. consider / study suggested by John H

The Council should also be aware that such a notice would be advisory in nature and could not serve as a categorical refusal to consider participation in the fishery after September 26, 1985 in connection with any future access limitation system. Section 303(b)(6) of the Magnuson Fishery Conservation and

Management Act sets out the following criteria that must be taken into account when a Council establishes access limitation:

(A) present participation in the fishery,

(B) historical fishing practices in, and dependence on, the fishery,

(C) the economics of the fishery,

(D) the capability of fishing vessels used in the fishery to engage in other fisheries,

(E) the cultural and social framework relevant to the fishery, and

(F) any other relevant considerations. . .

An access limitation system that did not consider participation in the fishery between September 26, 1985 and the date of implementation would violate the requirement that present participation and historical fishing practices in and dependence on the fishery be taken into account. Such a requirement does not mean, however, that those criteria must be accommodated in an access limitation system if there is a reasoned basis for their exclusion. Legal guidance in this case may be found in a March 28, 1983 memorandum to the Council (Attachment A) from NOAA General Counsel for Alaska Pat Travers which in part states:

> It should first be emphasized that [Section 303(b)(6)] requires only that the factors listed be "taken into account" in the development of a limited access system. It is not required that they be accommodated by that system if the Council and NOAA reasonably find that other factors should be given greater weight. This conclusion is reinforced by the probability that, in many instances, accommodation of some of the five specifically enumerated factors would require that others of those factors not be accommodated. . . Congress itself seems to have recognized the limited roles of these factors by giving equal status to "any other relevant consideration." By doing this, it gave the Council and NOAA great discretion to allow the five named factors to be overridden by other factors they consider relevant, subject to the arbitrary and capricious standard of judicial review that applies to most Federal rulemaking under the Administrative Procedure Act, 5 U.S.C. Chapters 5 and 7 (APA).

Attachment B is a table showing participation patterns in the Gulf of Alaska hook and line sablefish fishery for the years 1976-85.

Options

The Council's options are:

1. take no action;
2. accept the September 26, 1985 date; or
3. establish another date.

If the Council adopts Option 2 or 3 it would be advised to indicate to the industry what the follow-up action will be: whether a special workgroup of Council members will be formed, whether the staff will be directed to begin work in this area, or whether no action will be taken other than adopting a cut-off date. If the Council does decide on follow-up action, a schedule could be discussed at the January meeting.

ATTACHMENT A

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
P.O. Box 1668
Juneau, Alaska 99802
Telephone (907) 586-7414

March 28, 1983

TO: F/AKR - Robert W. McVey
NPFMC Members and Staff

FROM: GCAK - Patrick J. Travers Pat Travers

SUBJECT: Legal Analysis of the Halibut Limited Entry System Proposed in Northwest Resources Analysis' Draft Report, "Limited Entry in the Pacific Halibut Fishery: The Individual Quota Option"

INTRODUCTION

The purpose of this memorandum is to provide an initial legal analysis of the system of limited entry recommended for the Pacific halibut fishery off Alaska in a Report to the North Pacific Fishery Management Council (Council) by Northwest Resources Analysis of Seattle, Washington, entitled "Limited Entry in the Pacific Halibut Fishery: The Individual Quota Option" (Report). The Report was prepared by Dr. Robert L. Stokes of the University of Washington under a contract with the Council. It discusses the feasibility of a limited entry system for the fishery under which "shares" or "quotas" representing rights to harvest specified portions of the annual permissible halibut catch would be assigned to individual fishermen, who could either exercise those rights or transfer them to other fishermen. This type of proposed system has come to be commonly called the "share system," and it will be so referred to in this memorandum. The Report includes a number of recommendations for specific features of any share system that the Council might adopt for the Alaska halibut fishery, and attempts to assess the economic costs and benefits of a share system having these features.

The following analysis first examines the authority of the Council to adopt, and NOAA to approve, a share system as recommended by the Report under the Northern Pacific Halibut Act of 1982, Pub. L. 97-176, 97 Stat. 78, 16 U.S.C. 773 et seq. (May 17, 1982) (Act), and evaluates the consistency of that system with the standards that the Act prescribes. It then discusses means by which a share system could be implemented in accordance with constitutional and statutory procedural requirements while avoiding reliance on a large number of trial-type hearings. The analysis then describes the issues that must be resolved in order to determine the extent to which implementation of the share system could be delegated to the State of Alaska or another entity

outside of NOAA; and the authority of the Council and NOAA to impose on shareholders penalties and sanctions other than those specifically provided for in the Act. The analysis concludes with a discussion of the various senses in which the rights conferred on fishermen under a share system would and would not constitute "property" for legal purposes.

AUTHORITY FOR ADOPTION AND APPROVAL OF THE SHARE SYSTEM UNDER THE ACT, AND CONSISTENCY OF THE SHARE SYSTEM WITH THE ACT'S STANDARDS

General authority of the Council to adopt, and NOAA to approve, the share system as recommended by the Report

The statutory provision under which the Council would adopt, and NOAA approve, a share system for the Alaska halibut fishery is contained in §5(c) of the Act:

> The Regional Fishery Management Council having authority for the geographic area concerned may develop regulations governing the United States portion of Convention waters, including limited access regulations, applicable to nationals or vessels of the United States, or both, which are in addition to, and not in conflict with regulations adopted by the Commission. Such regulations shall only be implemented with the approval of the Secretary, shall not discriminate between residents of different States, and shall be consistent with the limited entry criteria set forth in section 303(b)(6) of the Magnuson Fishery Conservation and Management Act. If it becomes necessary to allocate or assign halibut fishing privileges among various United States fishermen, such allocation shall be fair and equitable to all such fishermen, based upon the rights and obligations in existing Federal law, reasonably calculated to promote conservation, and carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges: Provided, That the Regional Council may provide for the rural coastal villages of Alaska the opportunity to establish a commercial halibut fishery in areas in the Bering Sea to the north of 56 degrees north latitude during a 3 year development period.

There appears to be no serious room for doubt that this provision gives the Council general legal authority to adopt, and NOAA such authority to approve, a share system for the Alaska halibut fishery having the general characteristics described in the Report. Regulations implementing the share system as recommended in the Report would plainly be "limited access regulations" within the meaning of §5(c) of the Act, quoted above. The members of Congress primarily responsible for drafting §5(c) are widely known to have been aware at that time of the proposals for a share system for the Alaska halibut fishery, and of the fact that §5(c) was likely to be relied upon as authority for establishment of such a system. The "geographic area concerned" is Alaska, over which the Council has marine fishery management authority under Magnuson Act §302(a)(7).

Section 5(c) allows limited access regulations to apply in "Convention waters," which are defined in §2(d) of the Act and Articles I(1) and II(3) of the Convention Between the United States of America and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea (Convention) to include the fishery conservation zone (FCZ), the territorial sea, and internal waters. Thus, the authority of the Council and NOAA under the Act is not limited to the FCZ, in sharp contrast with their authority under the Magnuson Act. Because only nationals and vessels of the United States may participate in the Alaska halibut fishery in Convention waters, the application of the share system is of necessity limited to such nationals and vessels.

No feature of the share system as described in the Report would appear to conflict with any existing or, for that matter, foreseeable regulation of the International Pacific Halibut Commission (Commission) established by the Convention. Commission staff members have, in fact, been supportive of share system proposals and cooperated in the preparation of the Report. The Secretary of Commerce has delegated his authority to approve regulations developed by the Council under §5(c) to the NOAA Administrator.

Consistency of the share system as recommended by the Report with the standards of the Act

Before examining the consistency of the share system as it is recommended in the Report with the standards prescribed by §5(c) of the Act, it is important to note that the Report refrained from endorsing specific principles for allocation of halibut fishing rights among fishermen. This necessarily limits the scope of this memorandum, because it will be the allocation priniciples ultimately adopted by the Council that will, in all likelihood, raise the most significant questions

about the consistency of a share system with the Act's standards. Nevertheless, the share system as recommended by the Report has been sufficiently elaborated to permit evaluation of many of its features in light of the standards of §5(c).

(1) Nondiscrimination among residents of different States

The share system as recommended in the Report does not appear to contain any feature that can reasonably be considered to discriminate in favor of or against any person on the ground of that person's State residency.

(2) Consistency with the criteria of Magnuson Act §303(b)(6)

Section 5(c) of the Act requires that regulations adopted under its authority be consistent with the limited entry criteria of Magnuson Act §303(b)(6), which provides as follows:

> [An FMP may--]
> * * *
> (6) establish a system for limiting access to the fishery in order to achieve optimum yield, if, in developing such system, the Council and the Secretary take into account--
> (A) present participation in the fishery,
> (B) historical fishing practices in, and dependence on, the fishery,
> (C) the economics of the fishery,
> (D) the capability of fishing vessels used in the fishery to engage in other fisheries,
> (E) the cultural and social framework relevant to the fishery, and
> (F) any other relevant considerations....

It should first be emphasized that this provision requires only that the factors listed be "taken into account" in the development of a limited access system. It is not required that they be accommodated by that system if the Council and NOAA reasonably find that other factors should be given greater weight. This conclusion is reinforced by the probability that, in many instances, accommodation of some of the five specifically enumerated factors would require that others of those factors not be accommodated. For example, if the economic viability of a fishery required the use of large-scale, new technology by a relatively small number of gear units, it could be permissible for that fishery's limited access system not to reflect historical fishing practices in and dependence on the fishery. Congress itself seems to have recognized the limited role of these factors by giving equal status to "any other relevant considerations."

By doing this, it gave the Council and NOAA great discretion to allow the five named factors to be overridden by other factors they consider relevant, subject to the "arbitrary and capricious" standard of judicial review that applies to most Federal rulemaking under the Administrative Procedure Act, 5 U.S.C. Chapters 5 and 7 (APA). Thus, it need only be determined whether the share system as recommended in the Report would reflect a "taking into account" of the factors set forth in Magnuson Act §303(b)(6), and not whether it would accommodate those factors. Once again, the scope of this determination at this time is limited by the fact that the Report does not endorse specific principles for allocation of fishing rights among halibut fishermen.

As has been advised in previous discussions with the Council, the requirement that the first two factors be taken into account would probably be violated by a limited access system that categorically ignored halibut fishing activities during the year immediately preceding that system's implementation, without evidence in the record that the effects of that categorical exclusion had been assessed during the system's development. If, however, the Council and NOAA had determined the effects of the exclusion in light of the first two factors, and had reasonably determined that they were outweighed by "other relevant considerations," then such an exclusion could be permissible. This is relevant to the determination whether a share system or other permanent limited access system to replace the moratorium would have to reflect participation in the fishery during the moratorium, or whether it could reflect participation only before the moratorium went into effect. Before adopting and approving a system that did not reflect participation during the years since implementation of the moratorium, the Council and NOAA would have to determine the effects of the exclusion of such participation in light of their obligation to take into account present participation in the fishery and historical fishing practices in, and dependence on, the fishery. If, after doing this, they were to determine reasonably that these effects were outweighed by other relevant considerations, they could then adopt and approve a limited access system that did not reflect participation since the implementation of the moratorium.

It should be noted here that, if the Council and NOAA had had the time and resources to determine the effects of excluding 1982 from the moratorium base period, and to weigh those effects against other relevant considerations, it might have been possible to exclude 1982 from the base period even though it was the year immediately preceding proposed implementation of the moratorium.

The Report itself is the primary evidence that the share system it recommends reflects a taking into account of "the economics of the fishery," even though opinions differ sharply about the economic conclusions that it draws. Because halibut fishing does not ordinarily involve the use of vessels and gear that cannot be used in fishing for other species, the share system proposed in the Report would appear, in the absence of conflicting information, to reflect a taking into account of this factor. There does not, at this point, appear to be significant evidence that the share system as recommended in the Report is so inconsistent with "the cultural and social framework relevant to the fishery" as not to reflect adequate consideration of that factor. A separate report is apparently being prepared on this matter. Until further public and agency comment is received, it would be premature to speculate whether there are "any other relevant considerations" that should be taken into account in evaluating the share system as recommended in the Report.

Magnuson Act §303(b)(6), as incorporated by reference in §5(c) of the Act, also requires that one purpose of a limited access system be "to achieve optimum yield." The share system as recommended in the Report appears to meet this requirement. It has as a purpose the promotion of a yield from the fishery that is "optimum" not only in its total amount, but also in its distribution through time and space.

(3) General allocation criteria

To the limited extent the share system recommended in the Report includes proposals for the allocation of halibut fishing rights, that system would not necessarily appear to be inconsistent with the §5(c) requirements that such allocation be fair and equitable to all fishermen, based upon the rights and obligations in existing Federal law, and reasonably calculated to promote conservation. The Report contains fairly specific proposals to ensure that the share system would be carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges.

(4) Special provisions for rural coastal villages of Alaska

The final proviso of §5(c) of the Act authorizes the Council to provide in any limited access system the opportunity for the rural coastal villages of Alaska to establish a commercial halibut fishery in areas of the Bering Sea north of 56 degrees north latitude during a three-year development period. It should be emphasized initially that the Council is permitted, not required, to provide such an opportunity:

the language of the proviso is permissive ("may"), rather than mandatory ("shall"). Because the language of the Act is plain in this respect, legislative history to the contrary is without legal effect. Perhaps the main consequence of the proviso is to exempt any provisions that may be made under its terms from the standards that otherwise apply to limited access systems under the other provisions of §5(c).

The share system as proposed in the Report contains provisions that would offer the rural coastal villages of Alaska the opportunity described in the proviso.

IMPLEMENTATION OF THE SHARE SYSTEM WITHOUT A LARGE NUMBER OF TRIAL-TYPE HEARINGS

Background

Perhaps the greatest potential obstacle to the actual implementation by the Council and NOAA of a share system or other limited access system for halibut would be the need for a large number of trial-type administrative hearings of the kind that the State of Alaska has had to conduct in the implementation of its own limited entry system. Because of budgetary and personnel restrictions, it would be impossible for NOAA to establish a hearing mechanism on anything like the scale of that established by the Alaska Commercial Fisheries Entry Commission. It is important, therefore, to explore means by which a share system could be implemented in a manner consistent with the procedural requirements of law while, at the same time, avoiding reliance on a large number of trial-type hearings.

The law concerning the circumstances under which an agency must offer an opportunity for a trial-type hearing before taking administrative action, which has developed under the Fifth Amendment to the United States Constitution and the APA, is not only complex but, to some extent, internally inconsistent. Any attempt to summarize it comprehensively in the abstract would be of little value. Some principles that are particularly relevant to the limited access context can, however, be suggested to guide the Council and NOAA in their effort to avoid reliance on trial-type hearings. Collectively, these principles suggest that the Council and NOAA should make regulations implementing a share system as specific as possible, relying to the maximum on "legislative" facts concerning the fishery as a whole, rather than "adjudicative" facts concerning specific individuals. The regulations should provide for determination of halibut fishing rights through mathematical calculations based on written evidence, and

should specifically provide for summary disposition of cases in which there is no significant question of fact.

Each of these principles will now be discussed more specifically.

Principles for minimizing the need for trial-type hearings

(1) Fishing rights under a share system should be assigned as specifically as possible in regulations that are based on general "legislative" facts

It is well established that, through rulemaking based upon "legislative" facts concerning the general political, social, and economic situation, an agency may extinguish or modify rights of persons without a trial-type hearing. This is true even when the Due Process clause of the Fifth Amendment, the APA, or some other law would have required such a hearing if the agency had acted on a more individualized basis. See 2 K. Davis, Administrative Law Treatise, 2d Ed. §14:5 (1979).

For example, it has been held that the Federal Communications Commission could deny an application for a television license without a hearing, despite the express statutory requirement for a "full hearing" before such a denial, where the FCC had previously adopted a rule limiting the number of licenses a person could hold, and the applicant already had that number. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956). Similarly, although a statute required "opportunity to be heard" before an airline pilot's certificate could be modified on an individual basis, it was held that the agency could, through the usual notice and comment procedure, adopt a rule terminating all such certificates whenever the holders reached their sixtieth birthdays without giving those holders any additional hearing. Air Line Pilots Association v. Quesada, 276 F.2d 892 (2d Cir. 1960).

This principle, as illustrated by these and other cases, provides the Council and NOAA with a potent means for avoiding the plethora of individual trial-type hearings that has so plagued the Alaska limited entry program. In order to take advantage of it, they should implement any share system through regulations that specify the assignment of halibut fishing rights in as much detail as possible, foreclosing to the extent practicable issues that might otherwise be left to adjudication through individual hearings. These regulations should be based, as regulations usually are, on "legislative" facts, which are facts concerning the general political, economic, or social situation that the agency is trying to affect. Legislative facts stand in contrast

with "adjudicative" facts, which are facts about individual persons subject to agency action.

(2) Regulations implementing a share system should express the assignment of halibut fishing rights through formulas that are so exact that the rights of any individual can readily be determined through mathematical calculation using information derived from written records.

Even in a case that might ordinarily involve a question of adjudicative fact requiring a trial-type hearing under the Due Process clause, the APA, or other statutes, such a hearing may not be required "where the decision is based upon mechanical application of mathematics." B. Schwartz, Administrative Law 195-96 (1976). In Pullman Co. v. Knott, 235 U.S. 23 (1914), for example, it was held that a sleeping car company could be required to pay a state tax on gross receipts within the State without a prior trial-type hearing on the amount of tax due. The company was required by the tax law to submit a report listing its gross receipts from business done between points within the State, and the tax was a straight percentage of the amount so reported. Justice Holmes, speaking for the U.S. Supreme Court, stated, "If the companies do as required there is nothing to be heard about. They fix the amount and the statute establishes the proportion to be paid over." 235 U.S. at 26, quoted in Schwartz, supra.

A prior trial-type hearing is normally required before welfare benefits may be reduced or terminated. It has been held, however, that no such hearing was needed where a statute required such a reduction in a person's State benefits in the amount that Federal benefits to that person had been increased under a recent amendment to the Social Security Act. The court held that a trial-type hearing would be meaningless where the only question was whether a mathematical formula had been applied correctly to a specified amount. Velazco v. Minter, 481 F.2d 573 (1st Cir. 1973), discussed in Schwartz, supra.

In light of the principle illustrated by these cases, it would be highly advantageous for the Council and NOAA to implement any share system through regulations that describe the assignment of halibut fishing rights to individual fishermen through mathematical formulas, to the extent that this is practicable. These formulas should be so specific that the halibut fishing rights of any person under the share system can readily and precisely be determined simply by applying the formulas to the relevant facts about that person's relationship to the Alaska halibut fishery. The sources of these facts should, as far as possible, be limited to written records, such as fish tickets. The courts in the

two cases just discussed seem to have been influenced at least partly by the fact that the information to which the mathematical formulas would be applied was readily available in reliable written records. Other cases, the facts of which seem to reinforce this view are Mathews v. Eldridge, 424 U.S. 319 (1976), the leading case on rights to trial-type hearings before administrative action is taken; and Califano v. Yamasaki, 442 U.S. 682 (1979). These cases are discussed in 2 K. Davis, Administrative Law Treatise, 2d. Ed. §13:9 (1979); and id., 1982 Supp. §13:9-1. Thus, the regulations implementing the share system should not only define halibut fishing rights in terms of mathematical formulas, but should also, to the extent reasonable, limit the facts about individual fishermen to which these formulas would be applied to information derived from such written records as fish tickets. (Electronically retrievable records, such as computer data, would do just as well.) By so casting the regulations, the Council and NOAA should greatly reduce the need to rely on trial-type hearings in the share system's implementation.

(3) Regulations implementing a share system should specifically provide for summary disposition of cases concerning the assignment of halibut fishing rights when such cases do not present significant questions of fact.

Even in situations where trial-type hearings would not have been required under principles like those just discussed, agency decisionmakers have sometimes held such hearings needlessly because they lacked specific guidance on the criteria and procedures for refusing a hearing. See 3 Davis, Administrative Law Treatise, 2d Ed. §14:7 (1980). It is therefore important that regulations implementing a share system include provisions for summary disposition without trial-type hearings of cases that do not raise significant questions of adjudicative fact. These provisions would be based on the same principles long used by courts in issuing summary judgments, and would help ensure that full advantage was taken of provisions designed to minimize reliance on trial-type hearings. The Administrative Conference of the United States and the regulations of other agencies provide examples of summary disposition procedures upon which the Council and NOAA can draw. Id.

DELEGATION OF THE SHARE SYSTEM'S IMPLEMENTATION TO THE STATE OF ALASKA OR ANOTHER ENTITY OUTSIDE OF NOAA

The budgetary and personnel limitations to which NOAA is currently subject have caused concern that these limitations might prevent the agency from effectively implementing even a share system that did not rely heavily on trial-type hearings.

Interest has, therefore, been expressed in the possibility of delegating some of the duties that NOAA would ordinarily perform in implementing a share system to another entity, such as the Alaska Commercial Fisheries Entry Commission or the International Pacific Halibut Commission.

As has been discovered in connection with the Bering Sea/Aleutians King Crab Fishery Management Plan, there is no general principle of law forbidding NOAA to delegate its rulemaking authority to the State of Alaska, provided that NOAA exercises sufficient oversight of the State's activities under the delegation. In the case of a share system, the authority to be delegated would most likely be the authority to adjudicate individual cases, rather than to make general rules. It will be important, therefore, to determine whether the legal principles governing delegation of adjudicatory authority by a Federal agency to a non-Federal entity differ significantly from those governing such delegation of rulemaking authority. A very preliminary survey of some relevant authorities did not reveal any such major difference, but more research and analysis will be necessary to confirm this. It may be that, if the underlying regulations are very specific and afford relatively little room for discretion in their implementation, as was recommended above, the case for delegation of their implementation to an entity outside NOAA could be more easily made.

If the principles governing delegation of rulemaking and adjudication authority are similar, it will be necessary for NOAA to review actions of the State or other entity under the delegation, so that the share system would still necessitate some increase in or reallocation of NOAA's financial resources and personnel.

IMPOSITION OF SANCTIONS ON SHARE SYSTEM PARTICIPANTS OTHER THAN THE PENALTIES SPECIFICALLY PROVIDED FOR IN THE ACT

The report recommends that, when a fisherman holding halibut fishing rights under the share system it describes catches an amount in one year that exceeds or falls short of his authorized harvest by more than 10 percent, "penalties" in the form of deductions from that person's future harvest rights should be imposed. The suggested penalties would be 25 percent of an excessive shortfall and 200 percent of an excessive overage. There are serious questions whether the Act authorizes the imposition of penalties of this sort.

Section 7(a)(1) and (5) of the Act provide as follows:

> It is unlawful--
> (a) for any person subject to the jurisdiction of the United States--
> (1) to violate any provision of the Convention, this Act or any regulation adopted under this Act;
> * * *
> (5) to ship, transport, offer for sale, sell, purchase, import, export or have custody, control or possession of, any fish taken or retained in violation of the Convention, this Act, or any regulation adopted under this Act....

Regulations implementing a share system would be regulations "adopted under this Act" for purposes of these provisions. The Act specifically prescribes two kinds of sanctions for the violation of these provisions. Section 8 of the Act authorizes NOAA to impose a civil penalty of up to $25,000 for each such violation. Section 10 of the Act authorizes the judicial forfeiture to the United States of vessels and gear used in such violations as well as any resulting catch. Both sections contain detailed provisions concerning the procedures that must be followed before the sanctions they prescribe can be imposed. A person against whom a civil penalty has been assessed has a right to a trial-type administrative hearing. A forfeiture can be ordered only through an action brought in the appropriate United States district court by the Department of Justice. The criminal penalties provided for by §9 of the Act are not available for violations of §7(a)(1) and (5).

5 U.S.C. §558(b), a provision of the APA, provides as follows:

> A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

Because the Act specifically prescribes the sanctions and procedures that would be available for violations of regulations implementing a share system, it is highly likely that the "penalties" proposed in the Report would violate the APA provision just quoted. This conclusion is supported by the principle of statutory construction that the mention of one or more things in a law ordinarily implies exclusion of other things that might have been, but were not, mentioned. Thus, the authorization of monetary civil penalties and judicial forfeitures in the Act, together with specific procedures for their imposition, appears to exclude the use by NOAA of other sanctions and procedures.

Under the Magnuson Act, NOAA has imposed permit sanctions on United States vessels even though the Magnuson Act specifically authorizes such sanctions only for foreign vessels. The

Magnuson Act, however, also specifically authorizes the Council and NOAA to require that United States vessels obtain permits before fishing in the FCZ. The authority to require such permits has been read to include the authority to modify and revoke them in response to violations. It therefore overcomes the principle of statutory construction just mentioned. The Act under which a share system for the Alaska halibut fishery would be implemented does not specifically authorize the Council and NOAA to require shares to be obtained for participation in that fishery. It is much more difficult, therefore, to make the case that they may modify and revoke shares for penal purposes than would be the case for permits under the Magnuson Act.

Modification and revocation of fishing rights under a share system that did not have penal purposes would be permissible. For example, there would be nothing to prevent NOAA from reducing a shareholder's fishing rights for a year by the amount his harvest had exceeded his rights for the preceding year. This would seem to have the conservation purpose of keeping the total halibut harvest over time within the authorized amounts. It is the Report's proposal to deprive the shareholder of more than the amount of his overage that raises problems. In that case, the deprivation appears to have the purpose of punishing the shareholder and deterring others from similar action, rather than simply protecting the resource. Since the Act has prescribed specific methods and procedures for punishment and deterrence, NOAA could not use its authority to modify fishing rights under a share system for such a purpose. It would have either to assess a civil monetary penalty against the shareholder or, for a serious violation, ask the Justice Department to sue for forfeiture of the shareholder's vessel, gear, and catch.

The Report also proposes "penalties" for nonuse of harvest rights under a share system. This problem could probably be dealt with through regulations not having a penal purpose or effect. These might provide that a shareholder who consistently harvested significantly less than he was entitled to would be required to sell a number of shares corresponding to the shortfall.

Because of the limited variety of penalties specifically authorized by the Act, research and analysis will continue on the extent to which authority for other kinds of sanctions can be implied from the Act's provisions. For the reasons given above, however, it is unlikely that this effort will be particularly fruitful. If this should present major obstacles to the implementation of a share system or other limited access system for halibut, the Council and NOAA may wish to consider recommending that the Act be amended to increase the range of available sanctions.

FISHING RIGHTS UNDER A SHARE SYSTEM AS "PROPERTY"

Background

There has been some discussion about the extent to which rights to harvest halibut under a share system would constitute a new form of "property." Far-reaching claims appear to have been made that a share system would transform halibut from a "common property" resource to one that is owned by individuals, in the same way that the medieval common lands of England were divided into individually owned tracts during the eighteenth century. These assertions reflect confusion of the several legal senses in which the term "property" is often used; and also overlook the special ownership principles that apply under Anglo-American law to free roaming, wild animals like halibut before their capture.

The following discussion examines three senses in which rights to fish halibut under a share system would or would not constitute "property" recognized by the law.

"Property" in its common law sense

When people in everyday life speak of "property" or of "owning" land or some other thing, they are generally using those terms in a sense that we in the United States have inherited from the English "common law," the ancient court-made law that still forms the basis for most private legal rights in both England and the United States. Common law concepts of property were developed during the Middle Ages, and were accepted or "received" by each of the American colonies and, later, States, as they were founded. In contrast with some other areas of the common law, its basic property concepts have been largely unaffected by State and Federal statute.

It is well established in the common law as it currently applies throughout the United States that a free roaming wild animal, such as a moose, migratory bird, or marine finfish like halibut, cannot be the property of anyone until it has been captured and "reduced to possession." This principle was stated forcefully by the United States Supreme Court in Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977):

> [I]t is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture.

Id., at 284.

In light of the Supreme Court's pronouncement, only an express Federal statute could modify the common law principle that it states. Thus, whether or not a share system is implemented for the Alaska halibut fishery, the uncaught halibut resource upon which that fishery depends can be the "property" of or "owned" by no one, in the common law sense. As a result, implementation of a share system cannot parallel the eighteenth century process by which English commonly-owned lands were transformed into individually owned tracts. The common law recognizes both "common" and individual ownership of land, while it recognizes neither "common" nor individual ownership of uncaught fish such as halibut.

The last statement may cause some confusion, since fishery resources are almost universally referred to as "common property" or "commonly owned" resources. In the case just discussed, the Supreme Court dismissed this "common property" concept as

> no more than a 19th-century legal fiction expressing "the importance to its people that a State have power to preserve and regulate the exploitation of a common resource." [Citation omitted.]

Id.

Thus, for purposes of the common law, the uncaught halibut resource is not "common property": it is not property at all, and this is true with or without a share system. As will be discussed further below, the uncaught halibut resource will remain "common property" in the fictional sense recognized by the Supreme Court even after a share system is implemented.

While a share system could not confer ownership rights in the common law sense in the uncaught halibut resource itself, the fishing rights conferred under such a system could be recognized under the common law as "intangible" property--that is, property that is not associated with any particular material object. Stocks, bonds, and other debts are the most familiar examples of intangible property. The extent to which halibut fishing rights under a share system might consitute such intangible property would depend on the specific terms of the implementing regulations.

"Property" in the constitutional sense

The Fifth and Fourteenth amendments to the United States Consitution forbid the Federal and State governments, respectively, to deprive any person of "life, liberty, or property" without "due process of law." It can be stated categorically that both the current right of any person to participate in the halibut fishery and any such rights that may be assigned

to a limited number of people under a share system are "liberty" or "property" or both for purposes of these constitutional provisions. It is well established that the "property" protected by the due process clauses is a much broader concept than common law property, and it has not been sharply distinguished from the even more general concept of "liberty." Thus, participation rights in the Alaska halibut fishery will be protected under the due process clause as "liberty, or property" both under the current management system and under any share system.

Further research and analysis is necessary on the extent to which these participation rights would constitute the "private property" which may not, under the Fifth and Fourteenth amendments, be taken by the Federal and State governments without "just compensation." A preliminary review indicates that this concept of "private property" is more closely related to the common law concept of property than is the "property" to which general due process protection applies.

"Common property" as a legal fiction

As was noted above, the term "common property" has been applied to uncaught fishery resources as a legal "fiction" or "shorthand" expressing the authority of a State or the United States to regulate such resources when its people have sufficient interests in them. As was also discussed, this fictional concept does not reflect "ownership" of such resources in any normal sense, either by the Government or by the people at large.

The authority of the United States, in accordance with the Convention, to regulate the halibut resource off Alaska will continue whether or not a share system is implemented for the Alaska halibut fishery. Thus, the uncaught halibut resource off Alaska will remain a "common property" resource in the proper "fictional" sense of that term even after any share system is implemented.

cc: Bob McManus
Jim Brennan
Tim Keeney
Jay Johnson
Marilyn Luipold
Phil Chitwood
Ron Berg
Sue Salveson
Lew Queirolo

TABLE 1. GULF OF ALASKA SABLEFISH LONGLINE FISHERY 1976-1985
NUMBER OF PARTICIPANTS AND POUNDS

YEAR	NUMBER OF PARTICIPANTS	TOTAL POUNDS
1976	56	413,454
1977	87	1,135,020
1978	63	1,567,029
1979	154	3,060,291
1980	102	2,380,350
1981	65	1,818,323
1982	111	3,129,595
1983	120	4,660,781
1984	176	13,232,393
1985	248	11,562,170

Source: C.F.E.C.

Figure 1

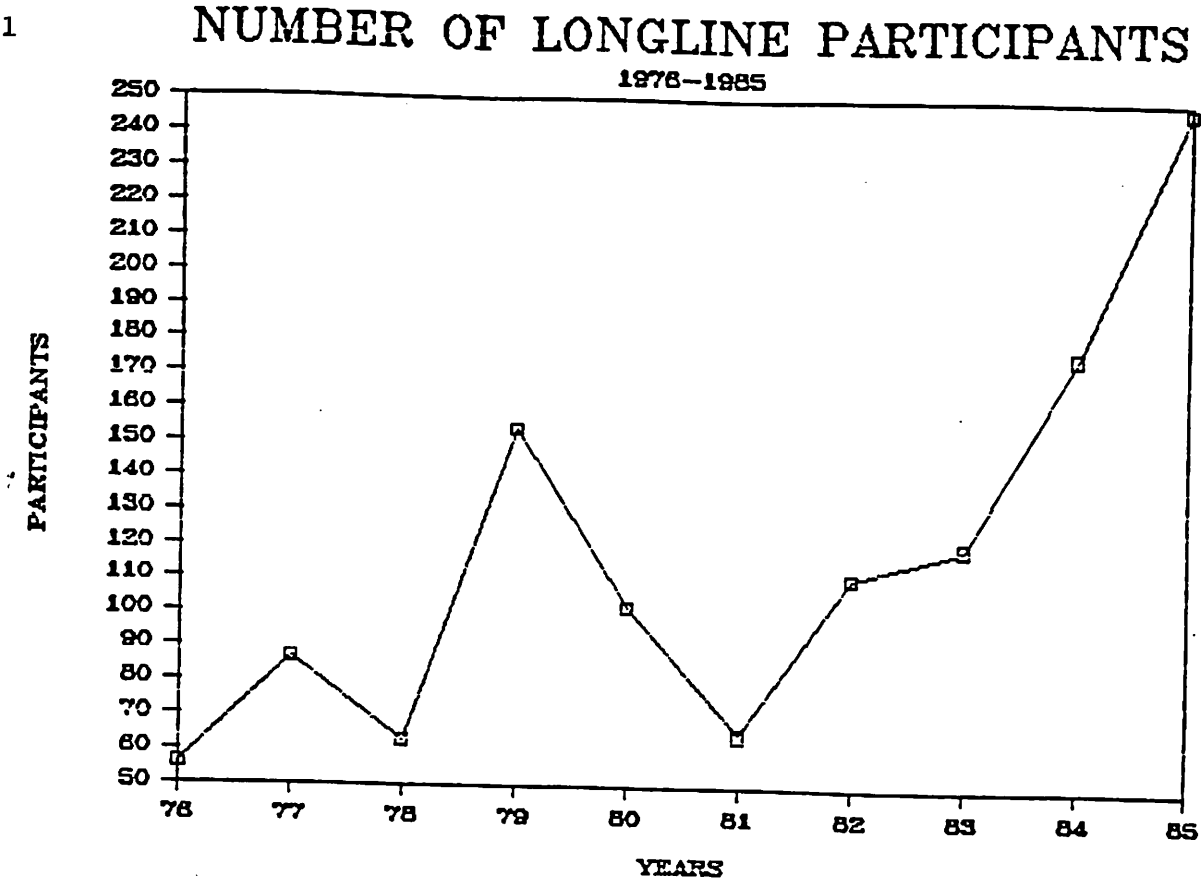
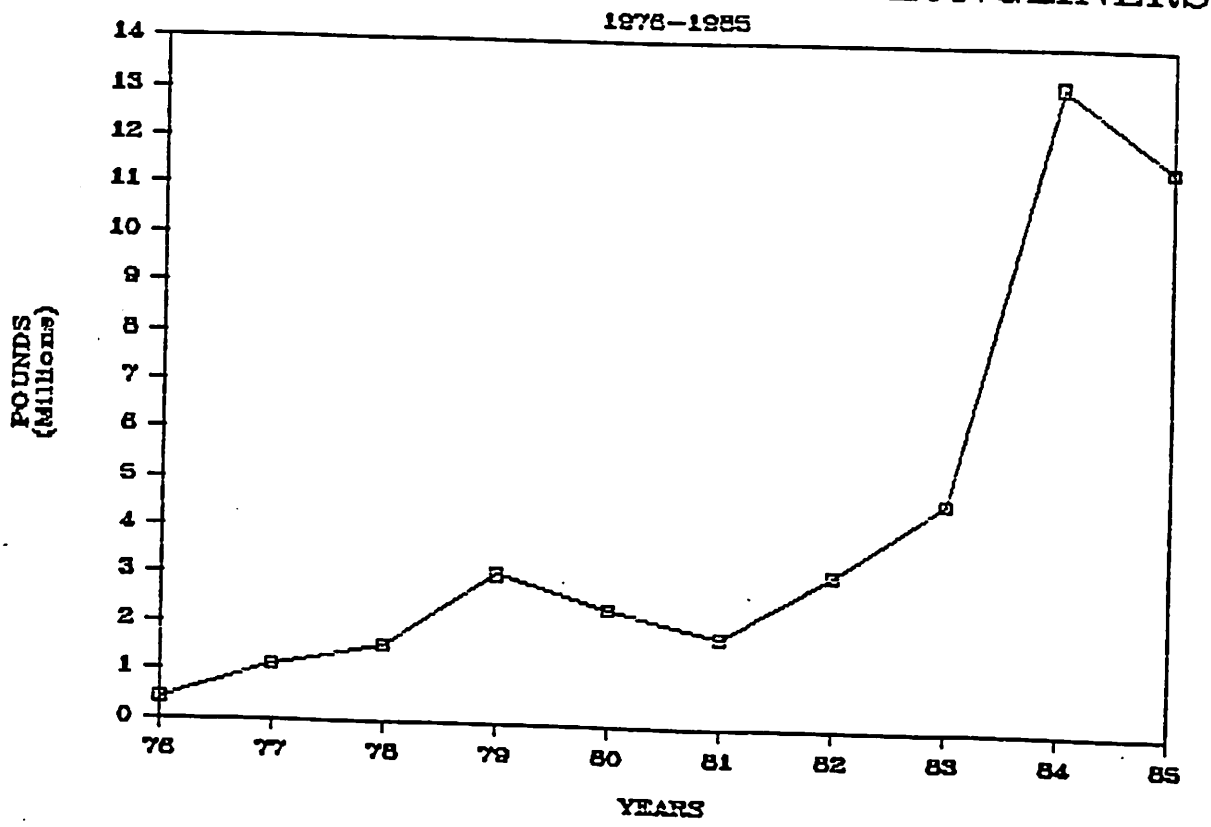


Figure 2



Source:CFEC

AGENDA ITEM C-4

U.S. House of Representatives
Committee on
Merchant Marine and Fisheries
Room 1334, Longworth House Office Building
Washington, DC 20515

November 12, 1985

Mr. Robert L. Bartley
Editor, Wall Street Journal
222 Courtland Street
New York, New York 10007

11/27/85

Dear Mr. Bartley:

I am writing in reply to an article that appeared in the October 10, 1985, issue of the Journal entitled "Free-For-All Fishing Depletes Stock". The author, Mr. S. Fred Singer, makes the claim that our current system of fisheries management is inviting "over-fishing and long-term shortages". Not only do I believe that Mr. Singer is incorrect, but I also think that his proposed solution -- "privatizing" U.S. fisheries -- makes no sense.

Management of the fisheries in the Exclusive Economic Zone (EEZ) adopted by the United States is conducted pursuant to the provisions of the Magnuson Fishery Conservation and Management Act (MFCMA). Eight Regional Fishery Management Councils establish -- subject to the approval of the Secretary of Commerce -- catch limits and regulatory measures designed to conserve and manage the resources in the EEZ. The councils include the directors of the state fish and game agencies of those states represented on the councils, employees of the National Marine Fisheries Service, and private citizens who are knowledgeable or experienced in regard to the fisheries under the councils' jurisdiction.

In 1978, the first full year that the MFCMA was in effect, the optimum yield (the maximum amount that can be harvested from any fishery and which is based on the maximum sustainable yield from the fishery as modified by any relevant economic, social, or ecological factors) for all fisheries in the EEZ equaled 2.65 million metric tons. In 1984, that figure increased to 3.25 million metric tons. Although some of the increase might be accounted for by better research, there is no doubt that conservation and management measures have led to healthier fish stocks in a number of areas. Further, the optimum yield does not include fisheries managed by individual states, such as the salmon fishery in Alaska which has seen record returns in the last five years largely due to management measures imposed under the MFCMA. It also does not include halibut, which is managed under an international treaty. Due to regulatory measures put in place under authority found in the MFCMA, halibut stocks have increased to the point where some fishermen have found them to be a nuisance. In sum, our fisheries

resources as a whole are not declining. If anything, stocks are increasing because of the strict biological controls supported by U.S. fishermen which are imposed on our fisheries.

As for the waste of capital that Mr. Singer alleged, I think he ignores the fact that -- in the eight-year period since implementation of the MFCMA -- the U.S. fishing industry has gone from a primarily local operation to a large-scale modern industry. Further, this has been accomplished without the use of government subsidies. While further improvements can certainly be made, we have witnessed the development of an economic sector using free-market principles in spite of competition with subsidized foreign interests and political road-blocks enacted by those who would trade away our fishing interests to accomplish other goals.

Further, efforts in the U.S. to establish private rights to fish have always been used to accomplish political goals rather than economic efficiency. The limited entry system for salmon in Alaska was originally designed to prevent participation by non-residents of that State. Only after the original proposal was rejected by the courts was a system of transferable rights developed that was not based primarily on residency (even though residency and past participation in the fishery are two criteria used in awarding limited entry permits). The salmon limited entry system has not resulted in the use of the most efficient vessels because state laws still require that certain types and amounts of gear be used, and that vessels be limited in length. Thus, along with the cumbersome bureaucratic regulatory process involved in maintaining a limited entry system, additional regulations prevent maximum economic efficiency. I am shocked that Mr. Singer, as an appointee of this Administration, advocates increasing costly regulations on a U.S. industry.

Harvesting and processing fish is an expensive proposition. In addition, all species are not available at all times. Thus, the prices paid by consumers will continue to be high. Further, Americans do not eat as much fish as they do meat. If a greater demand existed for some of the high-volume, low-cost species available in our waters, I think that the average price would go down. Until this happens, no amount of "privatization" will lower costs to consumers.

In sum, I think that Mr. Singer should stick to his economic theorizing and leave development of the fishing industry to those who have been doing it successfully. The fishing industry is doing fine on its own, Mr. Singer. It doesn't need the regulatory nightmare that you are proposing.

Sincerely,

Don Young
Ranking Minority Member
Subcommittee on Fisheries
and Wildlife Conservation
and the Environment

DY:rmd

U.S. House of Representatives
Committee on
Merchant Marine and Fisheries
Room 1334, Longworth House Office Building
Washington, DC 20515

October 1, 1985

The Honorable Malcolm Baldrige
Secretary of Commerce
U.S. Department of Commerce
Washington, D.C. 20230

Dear Mr. Secretary:

I want to congratulate you on your decision to approve Amendment 14 to the Gulf of Alaska Groundfish Fishery Management Plan. This proposal, which was supported by a vast majority of the affected fishermen in Alaska, will go a long way toward solving some of the difficult fishery management issues we face as we continue to develop the resources in our Exclusive Economic Zone. Without Amendment 14, I fear that there would be further controversy on the fishing grounds off Alaska -- something which is not needed in the face of continuing competition from foreign fleets.

At the same time, I must express grave concern over certain statements made in the letter of transmittal to the North Pacific Fishery Management Council. While I recognize that the letter was prepared in the Alaska region, I understand that it was reviewed by the Assistant Administrator for Fisheries in Washington, D.C. I therefore believe it appropriate to address my concerns directly to you.

As you are aware, the issue of access limitations in our nation's fisheries is a controversial one. I have made no secret of my opposition to such limitations although I believe that the ultimate decision on implementing such restrictions must be made by those in the fishing industry who are directly affected. A similar sentiment was expressed by the House Committee on Merchant Marine and Fisheries when it approved changes to the Magnuson Fishery Conservation and Management Act in May of this year. In its amendments to Section 303 of the Act, the Committee stipulated that no limited access plan could be put into effect unless it was approved by at least two-thirds of the fishermen presently participating in the fishery.

I was therefore quite concerned when the letter of transmittal contained a recommendation from the National Marine Fisheries Service that the North Pacific Fishery Management Council begin immediately to consider effort control measures in

the Gulf of Alaska sablefish fishery. This not only prejudges the issue of limited entry but also departs radically from the spirit of the Committee's amendments mentioned above. Further, to my knowledge, this particular proposal has never been discussed in public session with the North Pacific Fishery Management Council. Obviously, the statement made in the letter had nothing to do with the decision-making process on Amendment 14 and remains an entirely separate issue. Therefore, it is evident that the National Marine Fisheries Service has acted on its own in proposing a highly controversial and -- in my view -- potentially costly management measure that could have significant effects on those involved in the sablefish fishery.

Again, I compliment you on your decision to approve the measure put before you. However, I ask that you also take whatever steps are necessary to ensure that employees of the Department of Commerce do not take matters into their own hands in advocating management regimes that could harm those same American citizens we are pledged to serve.

Sincerely,

Don Young

Don Young
Ranking Minority Member
Subcommittee on Fisheries
and Wildlife Conservation
and the Environment

DY:rmm