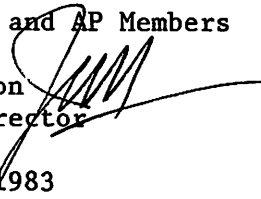


M E M O R A N D U M

TO: Council, SSC and AP Members

FROM: Jim H. Branson 
Executive Director

DATE: December 1, 1983

SUBJECT: Halibut Fishery Management

ACTION REQUIRED

- (a) Report from Halibut Workgroup.
- (b) Review draft management objectives for adoption.
- (c) Decide if a moratorium on new entry into the fishery is to be proposed before the 1984 season and whether long-term management actions are required of the Council.
- (d) Report from the IPHC on management alternatives for 1984.
- (e) Make recommendations to the IPHC for the 1984 season.

BACKGROUND

(a) Halibut Workgroup Report

Under the Council's direction, the Halibut Workgroup met at the Old Federal Building in Anchorage on November 17, 1983 to consider the public comments received on the draft halibut management objectives and to draft a moratorium for presentation at the December Council meeting.

Workgroup chairman Rick Lauber called the meeting to order at 9:00 a.m. and explained the Council's charge to the Workgroup. After discussion of the task before the Workgroup and management alternatives for the halibut fishery, consideration was given to the comments received on the draft management objectives. The Workgroup voted unanimously to amend and expand the draft objectives to read as follows:

1. Insure survival of the North Pacific halibut resource.
2. Distribute the halibut fishery in time and place to insure the harvest of the available surplus of all components of the halibut population over all areas of the North Pacific Ocean including the Bering Sea.
3. Continue to limit the harvesting of halibut to hook and line as the best means of utilizing and maintaining the resource at its highest sustained level of abundance.

4. Retain the International Pacific Halibut Commission as the primary management authority over the coast-wide range of the halibut population.
5. Provide high quality fresh, frozen or preserved halibut to the consumer throughout the year.
6. Strive to reduce incidental halibut mortality by gear that is not legal for a directed halibut fishery.

The original draft objectives are printed below:

1. Distribute the hook and line halibut fishery in time and space to insure conservation of all components of the stock.
2. Preserve halibut as a hook and line fishery.
3. Retain the International Pacific Halibut Commission as the primary management authority in cooperation with the North Pacific Fishery Management Council as established by the 1979 Protocol amending the Convention between the U.S. and Canada for the preservation of the halibut fishery in the North Pacific Ocean and Bering Sea, and the Northern Pacific Halibut Act of 1982.
4. Provide high quality fresh and frozen fish to the consumer throughout the year.
5. Develop the means for reducing the taking of incidentally-caught, non-targeted species by all gear types.

After action on the objectives, the Workgroup then discussed whether a moratorium and/or limited entry was needed in the halibut fishery and what purposes would be served by imposition of a moratorium for the 1984 season. Workgroup member Bob Alverson then moved that the 1983 moratorium proposal be amended and presented for Council action at the December meeting. The proposed amendments are as follows:

1. The term of the moratorium is to be for two fishing seasons, or 24 months, as opposed to 36 months;
2. An appeals procedure should be included in the moratorium;
3. Halibut vessels sold during the moratorium are to be transferred with any rights in any future limited entry system attached to the vessel;
4. The qualifying period for the moratorium should be expanded from 1978-1982 to 1978-1983;
5. The adoption of a moratorium constitutes a commitment by the Council to implement halibut limited entry at the end of the moratorium period.

The motion passed by a vote of 8 to 7 with 5 abstentions. A list of the Workgroup members and their votes on this issue is included with this report as Attachment 1. After the vote on the moratorium proposal, the Workgroup adjourned at approximately 5:00 p.m.

(b) Draft Halibut Management Objectives.

The Council must decide whether to adopt the halibut management objectives recommended by the halibut workgroup at its last meeting or to adopt other goals for the fishery. The objectives released for public comment after the September Council meeting and those recommended by the workgroup are contained in the workgroup report in item (a) above.

(c) Decision on a moratorium and long-term plans for halibut management.

At its September meeting, the Council directed the Halibut Workgroup to draft a moratorium for presentation at this Council meeting. As reported in item (a) above, the Workgroup recommended the 1983 moratorium proposal, with five amendments, be submitted for Council action. The text for the new proposal is included here as Attachment 2. The amended language is in italics.

In deciding whether to adopt a new moratorium, the Council must consider the objective of that proposal. Generally, the goal of a temporary restriction on entry to a fishery is to provide interim effort-control while a permanent management scheme is prepared; consequently, the primary purpose given for the 1983 moratorium was a three-year ban on new entry to allow the Council an opportunity to decide what permanent measures were needed. Because this reason was considered an insufficient basis for the regulation by NMFS/NOAA and OMB, the Council must advance a different goal for any new moratorium it may adopt.

Staff Recommendation

Even if the Council is of the opinion a halibut moratorium could provide a needed control on access, it is doubtful approval would be forthcoming from NMFS/NOAA and OMB. In letters from both agencies disapproving the 1983 proposal, the Council was advised to direct any future effort-limitation actions toward devising a permanent limited entry system.

Some may argue that a moratorium is a necessary first step in the limited entry process that would allow the Council to readily identify the class of potential applicants and to resolve any "data-lag" problems. While this would aid administrative efficiency, the negative aspects of devoting considerable effort to another unsuccessful attempt at imposing a moratorium weigh against its adoption by the Council. The time necessary to assemble the regulatory review documents and the political "capital" expended in moving the proposal through the agency network would be better devoted to work on a permanent system.

If the Council is serious about implementing some effort control, it should proceed directly in that regard by committing itself to implementing a limited entry program by a specified date. The Council would not need to select a particular form of limited entry at this meeting, but could make that decision in July or September after public hearings.

Some may believe the Council cannot decide whether limited entry is needed without additional study of the fishery; however, the Council through its own efforts and those of subcommittees and workgroups has been considering halibut management alternatives since 1977. The first official Council document was a report dated August 16, 1977 prepared by the Halibut Workgroup on management alternatives. Studies of halibut limited entry were commissioned in 1980 and 1982. The Council even adopted objectives for a halibut limited entry manage-

ment scheme in 1981. Information on various traditional management measures enacted by the IPHC and the fleet has been provided at past Council meetings.

In light of the substantial amount of information on the fishery presented to the Council in the past, little would be gained by deferring to some future date a decision on what course of action the Council intends to take. If the Council wishes to address the problem of the decreasing number of halibut fishing days, we recommend the Council develop and implement an access system. If the Council does not wish to take action in this regard, we recommend the Council withdraw from the field and allow the IPHC to continue halibut management to the extent of its ability and authority. Continued study and consideration of halibut management alternatives by the Council without a definitive action can only cause a further loss of confidence by the industry in the Council's ability to effectively address fishery management problems and provide a continuing impetus to enter the fishery by those speculating on implementation of limited entry. Sample motions for both decisions are provided below:

1. "I move the Council commit itself to implementing limited entry into the commercial halibut fishery in IPHC areas 2C, 3 and 4 before the beginning of the 1986 halibut season."
2. "I move the Council cease all consideration of management alternatives for the commercial halibut fishery and allow the IPHC to manage the fishery."

(d) IPHC Report on 1984 Management Alternatives

A report on the management alternatives under consideration for the 1984 season by the IPHC will be given by a Commission representative.

(e) Council Recommendations for the 1984 Season.

The Council has received two proposals for conducting the 1984 season. The first, included here as Attachment 3, was submitted by Vice-Chairman Harold Lokken. The Council may consider whether to recommend that IPHC implement this plan for the pending season.

The second is a petition from the Nelson and Pribilof Islanders to implement regulations for the 1984 season that would allow them to participate more fully in the commercial halibut fishery. The letter of request and proposal are included as Attachment 4.

At the last meeting, the Council was told that some questions existed regarding the Council's authority under the Halibut Act to accommodate the developmental halibut fishery north of 56°N latitude. Since that time staff member Ron Miller and NOAA General Counsel-Alaska Pat Travers have worked on an analysis of the Council's regulatory authority in this area. Pat Travers' opinion on this topic is included as Attachment 5. That opinion concludes, among other things, that the Council has the discretion to adopt exclusive area registration and vessel size limits in the halibut fishery within any IPHC areas under its jurisdiction.

11/17/83

Halibut Workgroup
 North Pacific Fishery Management Council

Vote on Moratorium Proposal 11-17-83

<u>Council</u>	<u>Yes</u>	<u>No</u>	<u>Abstained</u>
Jim Campbell (absent)	-	-	-
Don Collinsworth (Fred Gaffney)			x
Harold Lokken			x
Bob McVey (Jim Brooks)			x
Jeff Stephan			x
John Winther (absent)	-	-	-
<u>AP</u>			
Bob Alverson	x		
Barry Fisher		x	
Rick Lauber		x	
Tom Stewart	x		
<u>Industry</u>			
Charles Christensen/Petersburg Vessel Ownrs' Assn	x		
Mark Lundsten/Deep Sea Fishermen's Union	x		
Henry Mitchell/Bering Sea Fishermen's Assn	x		
Oliver Holm/Kodiak Fishermen's Assn		x	
Jack Knutsen/Fishing Vessel Ownrs' Assn	x		
Chuck Kekoni/Assn of AK Halibut Fishermen		x	
John Wolfe/North Pacific Fisheries Assn. (absent)	-	-	-
Perfenia Pletnikoff, Jr./Central Bering Sea Fishermen's Assn. (St. Paul)		x	
Paul Gronholdt/Peninsula Mktg Assn		x	
Gordon Williams/Angoon		x	
Dexter Kyle/AK Longline Fishermen's Assn	x		
<u>Agency Staff</u>			
Dick Myhre, IPHC	x		
Kurt Schelle, CFEC			x

PROPOSED HALIBUT PLAN

Submitted by Harold Lokken

AGENDA ITEM C-1
DECEMBER 1983

ATTACHMENT 3

1. All vessels, large and small, shall be registered to fish in a particular area or areas. This shall be done _____ days in advance of the opening of the initial fishing period of the area in which the vessels are to be used.
2. The vessels registered in a particular area shall be divided into two groups. One group shall be large vessels with names beginning with the letters A through M and small vessels under 5 net tons with odd registration numbers. The second group will be large vessels 5 net tons and over with names beginning with the letters N through Z and small vessels under 5 net tons with even numbers.
3. By lottery, one group will be chosen to fish first for the number of days in a month the Halibut Commission estimates that one-half of the allowable quota would be taken. The remaining group will then fish for the same number of ^{pounds or} days in another month. The months will be determined by the Halibut Commission. In the second year, the order will be reversed. Any overcatch during the first period shall not be deducted from the second period.
4. After the initial two year trial, the spread of years and vessels could be increased to a greater number.
5. If there is sufficient support, the number of years could be increased during the time of the initial trial.
6. The spread of months fished could be changed from time to time in an equitable manner if needed to make sure that all components of the halibut stock are adequately harvested.
7. Nothing in this plan should be construed as preventing any other management plan from being adopted in the future with or in place of this plan.
8. If desirable, not all sub-areas need be included in this division of fleet system.
9. Also if there is sufficient support for it, a moratorium on new entries could be added to the proposed plan.

Proposal:

Area 4C will be established as an exclusive registration area, open to small boat, day fishermen. Fishing within Area 4C will be open to all fishermen; however, fishermen who choose to fish in that area can fish only in Area 4C. Vessel size is limited to 5 net tons or less. Halibut caught in Area 4C must be landed on-shore before vessels leave the area. The fishing season for Area 4C will begin on June 1 and end on September 1 or when the quota is reached. Throughout the season, fishing will be open 4 days and closed for one day. If it is biologically healthy for the stock, the quota in Area 4C will be 800,000 pounds.

Section 301.15 Moratorium on entry into the Pacific halibut fishery

(a) Criteria for participation.

(1) From 12:01 A.M., _____ Standard Time, on _____, 1984, until 11:59 P.M., _____ Standard Time, on December 31, 1985, no person may harvest and sell halibut from the northern Pacific Ocean or the Bering Sea and Aleutian Islands area, except as provided in paragraph (b) of this section, unless

(A) that person had lawfully harvested and sold halibut from those waters, and reported such sale to the extent required by law, at any time between January 1, 1978, and December 31, 1983; and

(B) any vessel used by that person in that harvest of halibut is

(i) a vessel five net tons or over that was used at any time between January 1, 1978, and December 31, 1983, in the lawful harvest from those waters of halibut that was later lawfully sold;

(ii) a vessel five net tons or over the keel for which was laid on or before _____, 198_, and acquired on or before that date by a person who before December 31, 1983 and after January 1, 1978, had owned a vessel described in paragraph (a)(1)(B)(i) or (a)(1)(B)(iv) of this section or;

(iii) a vessel five net tons or over that replaces a vessel described in paragraph (a)(1)(B)(i) or (a)(1)(B)(ii) of this section, and has a net tonnage no more than ten percent greater than that of the vessel it replaces, provided that the vessel replaced has been sunk, destroyed, or otherwise rendered unusable; or

(iv) a vessel under five net tons.

(2) Except as provided in paragraph (b)(1) of this section, a person described in paragraph (a)(1)(A) of this section must be on board each vessel engaged in the commercial harvest of halibut in the waters described in paragraph (a)(1) of this section, and in the transportation of that halibut to its initial port of landing, and the sale of halibut so harvested must be recorded in the name of that person as required by law.

(3) For purposes of this section --

(A) A person shall be considered to have harvested halibut from the waters referred to in paragraph (a)(1) of this section if that person served as master or crew aboard a vessel at a time when that vessel harvested halibut from those waters.

(B) A person who is considered to have harvested halibut under paragraph (a)(3)(A) of this section shall be considered to have sold that halibut if sale of that halibut was reported to the extent required by law, and such sale was lawfully recorded in the name of that person on the document of sale required by law.

(C) A vessel shall be considered to have been used in the harvest of halibut if sale of that halibut was reported to the extent required by law, and that vessel is designated on the document of sale required by law as the vessel from which that halibut was harvested.

(b) Exceptions.

(1) If a person described in paragraph (a)(1)(A) of this section is unable to harvest halibut in the waters described in paragraph (a)(1) of this section due to death, injury, disease, or age, that person or the closest relative of that person may

designate in writing one substitute for that person for purposes of compliance with paragraph (a) of this section. The substitute so designated may be a person not described in paragraph (a)(1)(A) of this section. The writing shall state the period of time for which the designation is in effect, and shall be in the possession of the substitute at all times when that person harvests halibut in the waters described in paragraph (a)(1) of this section. No person may

(A) designate a substitute under this paragraph (b)(1) except for the reasons specified in this paragraph, and unless those reasons actually exist;

(B) harvest and sell halibut from the waters described in paragraph (a)(1) of this section if that person is a person described in paragraph (a)(1)(A) of this section for whom a substitute has been designated under this paragraph (b)(1) and that designation is in effect;

(C) designate more than one substitute under this paragraph (b)(1) for the same person described in paragraph (a)(1)(A) of this section for the same period of time;

(D) alter a writing designating a substitute under this paragraph (b)(1), or produce a document falsely purporting to be such a writing.

(2) Residents of rural coastal villages of Alaska to the west of 156 degrees west longitude may harvest halibut in areas of the Bering Sea to the north of 56 degrees north latitude and sell that halibut.

(3) This section shall not affect the taking of halibut on public lands and the use of that halibut for subsistence uses for purposes of Sections 803 and 804 of the Alaska National Interest Lands Conservation Act.

(c) Definitions. The terms used in this section have the following meanings:

(1) Bering Sea and Aleutian Islands area means waters under the jurisdiction of the United States within management areas 4A, 4B, 4C, and 4D, as defined in Section 301.1 of this Part, and the closed area defined in Section 301.5 of this Part.

(2) Halibut means Hippoglossus stenolepis.

(3) Northern Pacific Ocean means waters under the jurisdiction of the United States within management areas 2C, 3A, and 3B, as defined in Section 301.1 of this Part.

(4) Person means an individual natural person.

(5) Waters under the jurisdiction of the United States means the internal waters and territorial sea of the United States and the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act, 16 U.S.C. Sections 1801 et seq.

(d) Relationship to other requirements of law. The requirements of this section are in addition to all other requirements imposed by law for participation in the halibut fishery. The issuance to a person of a State or International Pacific Halibut Commission license or permit purporting to authorize fishing for or sale of halibut during the moratorium period shall neither excuse nor constitute evidence of that person's compliance with paragraph (a)(1) of this section. No provision of this section may be interpreted to allow fishing for halibut that is not authorized under other provisions of this Part.

(e) Future effect of participation during the moratorium. No provision in this section shall be interpreted as guaranteeing that participation during the first time period described in

paragraph (a)(1) will be the basis for an allocation of halibut fishing privileges under any halibut limited entry system that may be implemented after that time period.

(f) Determinations, appeals, and hearings.

(1) Any person may request the Director, Alaska Region, National Marine Fisheries Service (Regional Director), to determine any of the following matters:

(A) Whether that person meets the criteria for participation set forth in paragraph (a) of this section;

(B) Whether any vessel meets the criteria for participation set forth in paragraph (a) of this section;

(C) Whether that person comes within the exceptions set forth in paragraph (b) of this section.

Any request under this paragraph (f)(1) shall be in writing, shall include all relevant facts and documentation, and shall be addressed to the Director, Alaska Region, National Marine Fisheries Service, P.O. Box 1668, Juneau, Alaska 99802. A determination by the Regional Director under this paragraph shall be in writing, shall state the reasons therefor, and shall advise the person who requested the determination of the rights provided in this paragraph (f).

(2) No later than thirty days after receipt of a determination under paragraph (f)(1) of this section by the person who requested that determination, that person may appeal the determination to the Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration (Assistant Administrator). Appeals under this paragraph (f)(2) shall be in writing, shall set forth the reasons why the appellant believes the Regional Director's determination was in error, shall include any supporting facts or documentation, and shall be addressed to the Assistant Administrator, National Marine Fisheries Service, Room 400, Page 2 Building, 3300 Whitehaven Street, N.W., Washington, D.C. 20235. At the time the appeal is filed with the Assistant Administrator, the appellant may request a hearing with respect to any disputed issue of material fact. Failure to request a

hearing at this time shall constitute a waiver of the hearing. If a request for a hearing is filed, the Assistant Administrator shall order a hearing if he determines that a hearing is necessary to resolve material issues of adjudicative fact and shall so notify the appellant. A hearing may be denied where it is apparent that the appeal raises no genuine issue of material adjudicative fact. If the Assistant Administrator orders a hearing, he shall refer the appeal to the Office of Administrative Law Judges, U.S. Department of Commerce, for a hearing in accordance with 5 U.S.C. Sec. 554. Following the hearing, the Administrative Law Judge shall promptly furnish the Assistant Administrator with a recommended decision. As soon as practicable after considering the matters raised in the appeal, and the recommended decision of the Administrative Law Judge in the event a hearing is held under this paragraph, the Assistant Administrator shall issue a written final decision, including findings of fact and conclusions of law.

(g) Sale of halibut vessels during the moratorium. If the ownership of a vessel described in paragraphs (a)(1)(B)(i), (a)(1)(B)(ii), or (a)(1)(B)(iii) of this section is transferred during the time period described in paragraph (a)(1) of this section, any halibut fishing privileges that may attach to that vessel under any halibut limited entry system that may be implemented in the future transfers with the vessel's ownership.

(h) Replacement of the moratorium. After the expiration of the time period described in paragraph (a)(1) of this section, the moratorium shall be replaced by a permanent limited entry system.



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

AGENDA C-1
ATTACHMENT 5
SUPPLEMENTAL

December 4, 1983

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

FROM: GCAK - Patrick J. Travers

Pat

SUBJECT: Council Authority to Adopt Exclusive Registration Areas and Vessel Size Limits Under Section 5(c) of the Halibut Act in Order to Provide Special Protection to Developing Halibut Fisheries by Rural Alaskans.

INTRODUCTION

The question has arisen whether and under what limitations the North Pacific Fishery Management Council (Council) may develop regulations under §5(c) of the Northern Pacific Halibut Act of 1982, Pub. L. 97-176, 97 Stat. 78, 79-80, 16 U.S.C. §§773 et seq., 773c(c) (Halibut Act or Act), having as their primary purpose the economic protection of developing halibut fisheries carried out by rural coastal residents of Alaska, without at the same time developing a more general limited access scheme for the Alaska halibut fishery. The proposed protective measures would include, but not necessarily be limited to, exclusive registration areas and vessel size limitations that would, as a practical matter, exclude from certain parts of the fishery all persons except the rural residents of the immediately adjacent coastal areas.

I have concluded that the Council may develop such measures under the general regulation development authority conferred upon it by §5(c) of the Halibut Act. The protective effect of such measures would not necessarily have to be limited to rural coastal residents of areas along the Bering Sea north of 56° North latitude, but could be extended to rural coastal residents of any part of Alaska and, in fact, to any areas covered by the Act. The measures would not have to be incidental to a more general limited access system for the Alaska halibut fishery. The adverse effect of these measures would have to fall equally upon similarly situated Alaskan and non-Alaskan nonresidents of the specially protected areas. The measures would also have to be fair and equitable to all affected fishermen; be based upon rights and obligations in existing Federal law; be reasonably calculated to promote conservation; and be carried out in such manner that no person or other entity acquired an excessive share of halibut fishing privileges. To the extent that exclusive registration areas and vessel



size limits are limited access regulations, they would have to be consistent with the criteria set forth in Magnuson Act §303(b)(6). These requirements might be relaxed to some degree if the measures came within the final proviso of §5(c), discussed below. The measures adopted by the Council could not be implemented unless they were approved by NOAA. They could be stricter than similar regulations of the International Pacific Halibut Commission (Commission or IPHC), as long as they did not frustrate any purpose of the Commission as expressed in the IPHC regulations.

BACKGROUND

Section 5(c) of the Halibut Act, 16 U.S.C. §773c(c), provides as follows:

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.

This provision was enacted at a time when it was widely expected that development of a halibut limited entry system by the Council was imminent. The final proviso was added at the behest of persons residing in the Pribilof Islands and Nelson Island area of the central Bering Sea coast. These persons pointed out that they had recently undertaken small-scale commercial halibut fisheries that promised to relieve the pervasive economic distress in those areas, but which would be wiped out under the limited entry proposals then under consideration. In response to this, the

proviso specifically authorizes the Council and NOAA to make special provision for this region in any halibut limited entry system that they might adopt in order to prevent this result.

It appears from the legislative history of the Act that the members of Congress who were responsible for the proviso thought that it would require the Council and NOAA to exempt the northern Bering Sea region from any limited entry system for at least three years. Indeed, early versions of the proviso seem to have been so drafted. As enacted, however, the proviso clearly gives the Council and NOAA discretion to adopt a halibut limited entry system without including such an exemption. In light of the plain language of the proviso, any expression of legislative intent to the contrary would be so clearly mistaken as to have no legal effect.

This leads to the question whether the proviso adds anything to the authority that the Council and NOAA would have in its absence to adopt a halibut limited entry system with special provisions for the northern Bering Sea region. There is nothing in the other provisions of §5(c) of the Act that would prohibit such action by the Council and NOAA, as long as that action was consistent with the requirements prescribed by those provisions. Subject to those same requirements, similar exemptions would appear to be permissible for other regions of Alaska (or even of Washington, Oregon, and California, in the case of action developed by the Pacific Fishery Management Council). The proviso, however, is not qualified by the same requirements that apply to action under the other provisions of §5(c). Its sole effect, therefore, appears to be to allow the Council and NOAA to exempt the northern Bering Sea region for up to three years from any halibut limited entry system that they might adopt, even if such an exemption would not otherwise meet the requirements of the other provisions of §5(c).

In any event, the better view seems to be that the proviso comes into play only when the Council and NOAA are engaged in the development and implementation of a halibut limited access system. While this conclusion is disputable, it will be assumed for purposes of the following discussion.

In light of the OMB and NOAA rejection of the Council's proposed moratorium on entry into the Alaska commercial halibut fishery, and the expression of strong opposition to any limited access system for that fishery by certain segments of the affected public, such a system may not be implemented under §5(c) of the Halibut Act in the immediate future. At the same time, the residents of the Pribilofs and Nelson Island have now asked the Council and NOAA to take immediate action under §5(c), not linked to any general halibut limited access system, to reserve the halibut fishing grounds in their areas for their own developing halibut fisheries. Based on their experience during 1983, they fear

that, in the absence of such special protection, their fisheries will be preempted by large vessels based in other areas that can easily catch the relatively small halibut quota for the Pribilof/Nelson Island area within a few days. The latter area has been designated as IPHC regulatory area 4C. Discussion of ways in which the Council and NOAA might fulfill the Pribilof/Nelson Island request for protection has focused on two main alternatives. The first would be the designation of Area 4C as an exclusive registration area. Under this proposal, no vessel could fish for halibut in Area 4C unless it had previously been registered for that area with NOAA; and no vessel registered for Area 4C could fish for halibut in any other IPHC regulatory area. This alternative assumes that no owner of a large vessel based outside the coast of Area 4C would forego the opportunity to fish the large quotas of other IPHC areas in return for the chance to take the relatively small Area 4C quota. Since Area 4C is inaccessible to small vessels from other areas, the practical effect of its designation as an exclusive registration area would be to reserve it to halibut fishermen from the Pribilofs and Nelson Island.

The second major alternative response to the Pribilof/Nelson Island request for protection is the establishment of a vessel size limit for Area 4C. Under this proposal, no vessel above a specified size could fish for halibut in that area. The size limit would be so small as to exclude any vessels that could take the Area 4C quota in a short time, and most vessels that could travel safely to Area 4C from other areas. Once again, the practical effect of the measure would be to reserve halibut fishing in Area 4C to residents of the Pribilofs and Nelson Island.

Thus, the Pribilof/Nelson Island request raises the legal question stated in the Introduction: whether and to what extent the Council may develop and NOAA implement regulations under §5(c) of the Halibut Act, having the encouragement of economic opportunities for developing rural Alaskan halibut fisheries as their main purpose, without at the same time adopting a more general limited access system for the Alaska halibut fishery.

ANALYSIS

Protective regulations like those envisioned in the Pribilof/Nelson Island request plainly fall within the authority granted the Council and NOAA by §5(c), provided those measures comply with the requirements of that section. This is true whether or not the protective measures are themselves regarded as "limited access regulations", a matter that is open to dispute and will not be resolved here. Limited access regulations are mentioned in §5(c) as only one kind of the "regulations

governing the United States portion of Convention waters" that the Council and NOAA are authorized to adopt. Section 5(c) cannot reasonably be read to authorize only limited access regulations. The issue whether or not the protective measures proposed in the Pribilof/Nelson Island request are limited access regulations is material only to a determination of which requirements of §5(c) they must satisfy. If they are not limited access regulations, they arguably are not subject to the limited entry criteria of Magnuson Act §303(b)(6), which §5(c) of the Halibut Act incorporates by reference, or, as was noted above, to the final proviso of §5(c). They would, however, be subject to all other requirements of §5(c). If the proposed measures are limited access regulations, then they are subject to Magnuson Act §303(b)(6) and the other requirements of §5(c), but may be excused from most of those requirements to the extent they come within the final proviso of §5(c). The full panoply of §5(c)'s requirements would plainly apply to them if they were treated as limited access regulations but did not come within the terms of the proviso (to the extent, for example, that they were not limited to a period of three years, or affected areas south of 56° North latitude). For purposes of the following discussion, therefore, the "worst case" assumption will be made that the proposed protective measures are limited access regulations, and do not benefit from whatever exemption the proviso might offer from otherwise applicable requirements of §5(c).

Permissible measures designed to provide development opportunity for particular segments of the Alaska halibut fishery are not limited to those adopted in conjunction with a more general limited access system for that fishery. Section 5(c) sets forth a variety of relatively detailed requirements with which such measures must comply. Under established rules of statutory construction, the express enumeration of these requirements precludes the implication of other requirements having the same general nature. This construction of the text of §5(c) is too plain to be controverted by evidence of the specific circumstances that led to §5(c)'s enactment. If Congress had intended the contrary construction of this provision, it would have included express language to that effect in the text itself.

For the same reason, and as was stated above, §5(c) cannot reasonably be interpreted to authorize economic protective regulations only for the Bering Sea region north of 56° North latitude. As long as they met all the other requirements of §5(c), such measures could be adopted for any part of United States Convention waters, even those lying off states other than Alaska. Of course, such measures could not benefit from the proviso's probable relaxation of §5(c)'s other requirements to the extent those measures applied to areas other than the Bering Sea north of 56° North latitude.

The measures envisioned in the Pribilof/Nelson Island request must not be "in conflict with regulations adopted by the Commission." The fact that the measures were of the same kind as and stricter than IPHC regulations would not, in my opinion, automatically cause them to be "in conflict with" those regulations for purposes of this requirement. The Halibut Convention itself, at Article I(2), specifically provides for domestic regulations that are "more restrictive than", but necessarily consistent with, IPHC regulations. The experience of the Council and NOAA under the Magnuson Act is instructive in this respect. It is well established under that Act that a State regulation purporting to govern fishing in the FCZ will not be considered to conflict with Federal regulations solely because the State regulation is more restrictive than the Federal regulations. Instead, a case-by-case determination will be made as to whether, under all the relevant circumstances, implementation of the more restrictive State regulation would frustrate the purpose that the Council and NOAA intended to be served by the Federal regulations. There is nothing to suggest that a similar approach should not be used in determining whether a regulation under §5(c) conflicts with an IPHC regulation.

The proposed measures under §5(c) also may not "discriminate between residents of different States". The persons benefited by the measures proposed in Pribilof/Nelson Island request would, of necessity, all be residents of the State of Alaska. It might, therefore, be argued that the proposed measures would run afoul of this requirement because no residents of States other than Alaska would be benefited. In construing the identical requirement of Magnuson Act §301(a)(4), NOAA has consistently rejected this argument. For example, in evaluating king and Tanner crab FMPs that provide for exclusive registration areas benefiting the Alaskan communities adjacent to certain fishing areas, we have opined that such provisions do not "discriminate between residents of different States" as long as their adverse effect falls equally on similarly situated Alaskans and non-Alaskans. This is generally the case, because it is just as inconvenient for Alaska residents who own large vessels to register for the exclusive areas as it is for large vessel owners living in other States. Agency practice has thus established that it is the incidence of the burden, and not the benefit, of a fishery management measure that must be evaluated in determining whether it discriminates between residents of different States for purposes of the Magnuson Act. This interpretation would apply equally to the identical provision of the Halibut Act. Thus, the measures proposed in the Pribilof/Nelson Island request would not "discriminate between residents of different States" for purposes of §5(c) as long as their adverse effect fell equally upon similarly situated Alaskan and non-Alaskan nonresidents of the economically protected areas.

The proposed measures would plainly "allocate or assign halibut fishing privileges among various United States fishermen". They must therefore 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....

The proposed measures would not necessarily violate these requirements. They would, in particular, not seem to involve any necessary violation of "rights and obligations in existing Federal law," and they could in fact promote the purposes of such Federal statutes as the Alaska Native Claims Settlement Act and the Fur Seal Act Amendments of 1983. The requirement that the measures "promote conservation" has been interpreted by NOAA to refer to "conservation" in the sense of "wise use", and not to focus exclusively on the biological condition of fish stocks. 50 CFR §602.14(c)(3)(ii).

Assuming that the proposed measures are limited access regulations, they must be consistent with the limited entry criteria of Magnuson Act §303(b)(6), which provides that the Council and NOAA may

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....

Once again, there appears to be no necessary reason that measures like those proposed would run afoul of these criteria. It is particularly important to emphasize that factors (A) through (F) need only be "take[n] into account" by the Council and NOAA in the developing of limited access regulations. These factors are to be balanced, and no one of them is conclusive. As long as the regulations reflect a rational balancing of the factors, the fact that one of them, such as present participation in the fishery, was given a low priority will not render the regulations invalid.

In light of the dangers of overfishing that are posed by the large current halibut harvesting capacity, it would be difficult to refute the claim that any halibut limited access regulations were developed "in order to achieve optimum yield".

In addition to all the preceding requirements, the proposed measures would have to be approved by NOAA, and would therefore have to meet all the requirements of other Federal law for agency rulemaking.

Related to the preceding discussion is the question whether the Commission, if it so desired, could adopt regulations of its own implementing the measures proposed by the Pribilof/Nelson Island request. Such authority, if it existed, would derive from Article III(3)(a), (e), and (f) of the Halibut Convention, providing as follows:

For the purpose of developing the stocks of halibut of the Northern Pacific Ocean and Bering Sea to levels which will permit the optimum yield from that fishery, and of maintaining the stocks at those levels, the Commission, with the approval of the Parties and consistent with the Annex to this Convention, may...:

(a) divide the Convention waters into areas;

* * *

(e) fix the size and character of halibut fishing appliances to be used in any area;

(f) make such regulations for the licensing of vessels and for the collection of statistics on the catch of halibut as it shall find necessary to determine the condition and trend of the halibut fishery and to carry out the other provisions of this Convention....

A rather strong argument can be and has been made that the requirement that Commission action be for the purpose of developing and maintaining halibut stock levels so as to permit attainment of the optimum yield limits the Commission to measures based on the biological condition of halibut stocks, and forbids it to adopt measures having social or economic purposes. Such an argument would have been obviated if the provision quoted above had authorized the Commission to take action "for the purpose of attaining the optimum yield". This is because the commonly accepted concept of optimum yield from fishery incorporates social and economic, as well as biological, concerns. Article III(3), however, by limiting the Commission to development and maintenance of halibut stocks so as to permit the optimum yield, might well be interpreted to require the Commission to leave the social and economic management of the halibut fishery to others. I understand that Canadian government attorneys adhere quite

firmly to this interpretation. While the United States does not yet appear to have reached an official position on this matter, the limited interpretation of the Commission's authority is a reasonable one, and cannot be disregarded.

cc: Jim Brennan
Tim Keeney
Jay Johnson
Dave Fitch
Doug Ancona
Craig Hammond
IPHC Staff

SECTION 301.16 Vessel size limitation and registration.

(a) A vessel may be used for the commercial harvest of halibut in Area 4C only if it is:

- (1) a vessel less than 5 net tons; and,
- (2) a vessel which has been, on or before _____, 1984, registered with the Director, Alaska Region, National Marine Fisheries Service, by providing the Regional Director the State of Alaska Department of Fish and Game vessel registration number, the name of the vessel owner and the name of the vessel operator.

(b) a vessel described in paragraph (a) of this section may not be used for the commercial harvest of halibut in any area other than Area 4C, and may land halibut only at ports located along the coast of Area 4C.

RECEIVED DEC 11 1947

Litka, Alaska

Mr. Jim Branson, Executive Director
N. P. F. M. C.

g

Anchorage, Alaska

Dear Mr. Branson,

I am the captain/owner of the 70' Nalibut schooner "Arrow," home ported out of Litka. I have had the Arrow for the last five years, and prior to that, spent 10 years on deck of various kinds of boats fishing Alaskan waters.

I write this as a Nalibut fisherman who has seen a well-regulated fishery turn into a "catch as catch can" situation; a situation being exploited by those persons whose only interest is the pursuit of a limited entry permit, and what it would be worth to sell in the future. The influx of boats in the past five years to over 6000 this year I feel speaks for itself.

Unfortunately, many of these people already have a permit or permits for a fishery, i.e., salmon or herring which I can't fish without one. I do not blame anyone for doing what he can to stay alive in the fishing business, but not at the expense of the fishery itself.

Consequently, I favor an immediate moratorium and an eventual limited entry system which takes into account the years fished and the catch recorded. Should you desire any further informal please do not hesitate to ask.

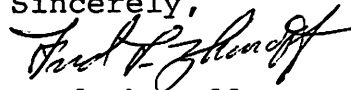
Thanking you,

Sincerely,

I strongly urge the Council to recognize that the moratorium is not acceptable to a majority of Alaskan fishermen. I request the Council to examine other alternatives and obtain new, accurate data on which to base their decisions.

I hope the Council will take these and other comments into consideration before making any final decision on this matter.

Sincerely,



Fred Zharoff
State Representative

United States Senate

COMMITTEE ON APPROPRIATIONS

WASHINGTON, D.C. 20510

December 2, 1983

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FRANCIS J. SULLIVAN MINORITY STAFF DIRECTOR

Mr. James Campbell
Chairman
North Pacific Fisheries
Management Council
P.O. Box 3136DT
Anchorage, Alaska 99510

Dear Jim:

As you know, the halibut issue will be before the Council again this month. I realize this is a very complex issue with many concerned interest groups. However, there seems to be some confusion regarding the authority for special halibut fishery development zones in the western Alaska area.

Concern by the Council that the development zones and the adoption of a moratorium/limited entry scheme were to be linked is unfounded. The intent of my amendment to the Halibut Act was to provide for fishery development in the western region irregardless of Council action on a moratorium or limited entry plan for the halibut fishery. We were aware of Council consideration of a limited entry proposal at the time the Halibut Act passed. The concern over development for western Alaska was, and remains, a separate problem.

You will remember that last season, a development zone was established in the Bering Sea. In spite of this effort, the people of western Alaska were not able to fully utilize their developmental fishery. Vessels from outside the region took much of the allocated catch.

It is my hope that the Council will move to assure the continued development of fisheries in the coastal areas of western Alaska. I will be happy to lend assistance where possible.

With best wishes,

Cordially,

TED STEVENS

Chairman Jim Campbell
North Pacific Management Council
P.O. Box 103136
Anchorage, Alaska 99510

Dear Mr. Campbell:

This letter was prepared for you to better help your decision in the North Pacific Halibut Moratorium Act.

As it stands now, halibut stocks are being successfully controlled with a longline fishery and a limited quota. I favor the moratorium for halibut fishing, not so much to limit competition, we can live with that, but most of all to stop the chance of the fishery ever becoming a trawl fishery.

If something is not done now to limit the boats coming into the game, the halibut will become victims of a trawl fishery that will lead to the destruction of a fishery that has existed longer than any other.

I would like to bring up a few points .

Until the mid 70's the majority of halibut taken was from conventional boats, meaning with the use of stock gear. Things were fine, then came the snap-on boats from small Alaskan towns that made a drastic increase in the amount of time the quota was being taken. That brought on the situation that we have now, too many boats in a small fishery with a relatively small poundage limit.

With poor crab stocks, many boats have converted last year and many more will come this year. Ninety percent of all boats are going to increase their catch by 30% this coming season by the use of the circle hook. Already we have reached a dangerous situation in keeping control of halibut stocks by the tremendous input of effort aided by an unconventional hook. Even with a moratorium on new boats into the fishery we are going to have some problems with the next few years. If we can't stop this onrush of effort, Kodiak and Seattle druggers are going to get in and there will be no control, because of their lack of interest when fishing for more than one species.

In a few years the halibut will begin on a decline. If dragging is allowed or even to many longliners with circle hooks during these declining years halibut will suffer from over harvesting even with the shortest seasons thinkable. I don't want to destroy something that the north Pacific and Bering Sea has yielded for over a hundred years. I am not prejudice against anyone, Alaskan or not, conventional or snap-on, but I firmly believe and support that the moratorium must pass or the North Pacific Halibut will become extinct and nobody will benefit.

I hope you will consider this issue with respecting thought toward the future of this fishery.

Now I would like to go into the sablefish or blackcod issues.

The general economy of the commercial fishery is forcing a lot of boats into blackcod. Presently, there are already 460 some odd foreign vessels over 200 feet fishing sablefish off and on with both longline and trawl gear. Most of them are Japanese. I am actively engaged in the sablefish industry with two vessels of over 70 feet and am concerned with the general outlook. Several problems that arise are, gear conflict, they use much heavier gear than we do and we can not get out up when entangled which happens often due to their inconsideration.

And then of course the trawlers sweep out gear away with no problem.

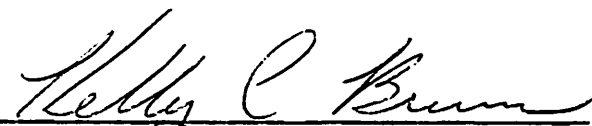
Next issue, social conflict. Lack of communication on their part results in our boats not being able to fish vast grounds for fear of losing their gear.

Another problem is the infiltration of these large vessels covering on small grounds in proportion to the size of the grounds. The Japanese fleet is already too big. As witnessed in Southeast Alaska several years ago. They were removed from the area up to 140 degrees west on the view that they were endangering the species by over harvesting. The problem now exists from 140 degrees west across the Gulf of Alaska to Unimak Pass.

If the Japanese are not removed from these waters to the west before the total influx of domestic boats come on line this year the sable fish fishery will collapse before anything can be done .

We have no more than two years for final elimination of foreign effort anyway and it would be helpful to our markets if the Japanese were removed.

I thank you for your considerations of these proposals.



Kelly Brennan
F/V ECLIPSE out of Homer

December 5, 1983

North Pacific Fishery Council
Anchorage, Alaska

Dear Sirs;

My name is Jack Knutsen. I am a longliner from Seattle, and I own and operate the halibut schooner "GRANT," which has fished in Alaskan waters since 1926. I started fishing for halibut in 1954 and have participated in every halibut season since. Fishing is the only occupation I have ever performed and I derive 100% of my income from it.

I realize it is probably a dead issue, but I would like to state some opinions and facts concerning limited entry for the halibut fishery. For years we participated in a fishery that was completely ignored by Central and Western Alaska fishermen. Other than a large, very professional fleet out of Petersburg and some smaller fleets from other towns in Southeast Alaska, halibut fishing was mainly comprised of boats from Seattle and British Columbia. I don't know how many times I was told by fishermen in Kodiak, Sand Point, and Dutch Harbor that there just wasn't enough money in halibut and that I should build a new, more efficient boat to get into the big money fisheries. That was fine, because we could make a living from halibut fishing, and it made one wonder who had the most efficient operation. Now, over the last four to five years, we have a situation where everyone wants to be a halibut fisherman. The crab have been wiped out, the shrimp are gone, one has to buy an expensive permit and replace somebody to get into the salmon fisheries, and the only successful bottomfish trawling seems to be in joint ventures. They call it pulse fishing; a more appropriate term would be rape and run. The new people have no knowledge, or appreciation, of the layup system that worked so well and was completely voluntary and non-governmental. They are not aware of the long, costly battle we fought over Greenland halibut to preserve the integrity of our markets. They don't care at all about the fine, long traditions of the halibut fishery such as putting in many years on deck learning the business right before you run a boat, providing jobs for the older fishermen and not putting them out to pasture when they are over thirty, preserving something for the next generation of fisherman, or to the contributions the Deep Sea Fishermen's Union has made to the fishery. It is ironic, but true, that we have the oldest fleet in Alaska in terms of age of the boats, but the best record as far as boat losses and sinkings go. By almost any standards, we have the most professional and experienced crews. Nobody ever got rich from halibut fishing, the big money was never there, but a lot of fishermen and families made a decent living for many years. The halibut fishery has made a big contribution to the Alaskan economy for a long time.

It seems to me the opposition to limited entry comes from three categories of people. First, we have the new small boat operators who have come into the

fishery in the last five years. They are chockful of counter-culture types and retired military people, and the one thing they have in common are large mouths and limited fishing ability. Second, there are the large boat operators who have cleaned up other fisheries. They built a lot of new boats, a lot through the encouragement of federal and state loan programs and guarantees, and made a lot of money for some time. The one thing they seem to have in common is that they over-capitalized their fisheries, are mortgaged to the hilt, and can not afford a bad season. Nobody should fish who can't afford a bad season. Third, there are the people who don't fish halibut at all. They wouldn't dream of interfering in other matters, but they seem quite comfortable in stating how the halibut fishery should be run. I pack herring every spring at Sitka; they won't even let me into the meetings where the decisions are made (permit holders only). I am not saying that is right or wrong, just an example of how other fisheries are run. A lot of the people who oppose limited entry hold salmon permits; none of them are turning their permits in and I don't hear any of them opposing the system. A large portion of the opposition supports area registration for the crab fisheries and before that supported same day opening times for different areas so boats would have to pick and choose. They strongly oppose lifting the 58 foot limit on salmon seiners. They are very vocal for "Alaska for Alaskans." These are all very effective forms of limited entry. They are also very fond of telling us to diversify. They should tell that to a professional fisherman from Petersburg who longlines halibut and black cod, seines and packs sac-roe and bait herring, seines and packs salmon, and pot fishes king and tanner crab. They are truly diversified and they are good at what they do, and they still support limited entry for halibut. The last five years I have been fishing black cod and packing herring besides fishing halibut. I keep my boat active 8 to 10 months a year, basically taking time off only for repairs and maintenance. I have diversified as much as I can.

I believe that limited entry is a fact of life and that it is here to stay. The only question I see, is that will it come in time to save the halibut fishery? The alternative is halibut becoming an incidental catch to other fisheries or becoming a part-time occupation for people who do other things such as school teachers, truck drivers, lawyers, ferry personnel, or military people. Either way, a fine fishery with a lot of tradition and history will be lost forever. We didn't build all the new boats and we didn't wipe out the other species. Why should we have to pay the price?

Thank you,

Jack G. Knutsen
F/V GRANT
800 N. W. Elford Drive
Seattle, WA 98177
(206) 362-2525

P.S. I am enclosing a list taken from my log book pertaining to my halibut fishing time since 1969.

F/V GRANT
Jack G. Knutsen

Halibut Fishing Days by Year

1969	92 days
1970	95 days
1971	123 days
1972	86 days
1973	98 days
1974	107 days
1975	100 days
1976	112 days
1977	94 days
1978	71 days
1979	82 days
1980	48 days
1981	30 days
1982	28 days
1983	26 days