AGENDA E-3
May 1981

MEMORANDUM

TO: Council, SSC, and AP members

FROM: Jim H. Branson
Executive Director

DATE: May 18, 1981

SUBJECT: King Crab Fishery Management Proposals

ACTION REQUIRED

1. *Final action on Joint Statement of Principles between North Pacific Fishery Management Council and Alaska Board of Fisheries.*

2. *Final action on Bering Sea/Aleutian Island King Crab Fishery Management Framework.*

3. *Review Board decisions regarding king crab management.*

4. *Determine whether management and conservation are sufficient under MFCMA.*

BACKGROUND

In March the Council accepted but did not formally approve the Joint Statement of Principles between the Council and Board of Fisheries for management of the domestic king crab fishery and Draft Alaska Board of Fisheries Bering Sea/ Aleutian Island King Crab Management Framework. These documents were referred to the Board and public for review. The Council urged the Board to formally adopt the documents and develop their regulations for the fishery. On April 1, 1981 the Board agreed to the "Joint Statement" and formally adopted the "Management Framework" as a State of Alaska fishery management plan.

The Council must decide whether to adopt the proposed co-management system with the Board or one of two alternatives:

1. Submit an FMP with implementing authority delegated by federal regulation to the state; or

2. Submit an FMP with federal implementation of regulations.

If the Council adopts the co-management approach, then it must review the Board decisions on management of the 1981 fishery and determine if further management and conservation are required under the MFCMA. A summary report on Alaska Board of Fisheries decisions is provided as item E-3(a). This document was mailed to you on April 20, 1981.

A package of materials including the Joint Statement of Principles, BS/AI King Crab Fishery Management Framework, Board of Fisheries Policy on King Crab Resource Management, and the proposed regulations for the 1981-82 fishery was sent out for a 45-day public review which ended at this meeting.

Two letters to the Secretary of Commerce regarding the proposed king crab management system are included for your information [items E-3(b) and (c)]. The letter from Congressman Young to the Secretary supports the management concept as outlined in the "Joint Statement" and "Management Framework". The second letter from the Point Judith Fishermen's Cooperative indicates their strong opposition to the proposal because it may set a dangerous precedent for all fisheries under the MFCMA.

A letter to the State/Federal Assistance Coordinator from the Mauneluk Association [item E-3(d)] supports the joint management concept, but states that the "Management Framework" fails to adequately stress the subsistence priority.

The Council has received a copy of a letter sent to Governor Hammond from Bob Alverson of the Alaska Marketing Association in Seattle [item E3(e)]. He is requesting that the Board of Fisheries reconsider the opening date of the Bristol Bay king crab season (September 10). During the 1980-81 season, which opened on the same date, the industry experienced a significant problem with light meat content in crab taken during the early part of the season. Along a similar line, the Alaska Crab Institute has requested a joint hearing before the State legislature resource committees regarding the season opening date [E-3(f)].

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ALASKA BOARD OF FISHERIES
DECISIONS REGARDING
MANAGEMENT OF DOMESTIC KING CRAB FISHERIES
IN THE
BERING SEA/ALEUTIAN ISLANDS AREA

March, 1981

During its March 1981 meeting, the Alaska Board of Fisheries adopted the Joint Statement of Principles on the Management of Domestic King Crab Fisheries and the Bering Sea/Aleutian Islands (BS/AI) King Crab Fishery Management Framework. These documents, which were prepared in cooperation with the North Pacific Fishery Management Council, clearly define the roles of both entities in the management of the domestic king crab fishery in the BS/AI area. In addition, the Board adopted a revised Policy Statement on King Crab Resource Management which applies to the king crab fisheries statewide.

In conformance with the above mentioned documents and recognizing its responsibility for the management of the domestic king crab fisheries in the BS/AI area, the Board received public testimony, ADF&G and NMFS staff recommendations, and considered and discussed at length issues related to regulations controlling fisheries during its March 1981 meeting. The decisions of the Board are presented in summary.

Norton Sound Fishery

Resource assessment surveys conducted in 1975 and 1976 for OCS environmental impact studies first identified a significant concentration of red king crab in the Norton Sound area. Since 1977 a regulated commercial fishery has been conducted each summer with annual harvests of 0.5 to 2.5 million pounds. During 1980, ADF&G conducted a tagging program in the Norton Sound fishery. The 1981 population is estimated to be 12 million pounds of legal males. Utilizing the procedure outlined in the Management Framework, the acceptable biological catch was determined to be 5 million pounds. The Board considered harvesting the legal population at a high exploitation rate as the ADF&G study indicates that the population is primarily composed of large, post recruit crab subject to high natural mortality losses. However, the Board decided to use a conservative exploitation rate due to the incomplete data base available for this new fishery and the need to protect a near-shore subsistence fishery. The guideline harvest level is set at 2 to 5 million pounds, reflecting these concerns. To further enhance subsistence fishing, the Board closed an area extending approximately 15 miles offshore in the northern and eastern portion of Norton Sound to commercial fishing from July 15 through September 3. The commercial fishery should be able to obtain the harvest while protecting the subsistence opportunities of local residents.

Adak Fishery

The Adak fishery began in 1961 with a harvest of 2.1 million pounds of red king crab. Increased effort quickly raised the production to a record high of 21.2 million pounds during the 1964-65 season. With the expansion of the Dutch Harbor

king crab fishery, production fell sharply to a low of 5.9 million pounds in 1966-67. The following six years saw stable production between 14 and 18 million pounds per season. Since the 1972-73 season, catches of crab declined and remained at low levels. Since 1975-76 the fishery has been conducted largely on an exploratory basis through fishing seasons which have occurred after the major king crab fisheries and prior to the Tanner crab fisheries.

ADF&G presented the Board with information gained from the 1981 Adak commercial fishery that the stocks appear to be increasing. Also, at the time of the March 27, 1981 closure fishermen began to encounter soft shell crabs. Industry expressed interest in a year round fishery for the area.

Since the fishery appears to be recovering from its former depressed levels and there is interest by the industry to resume normal commercial operations in the area, the Board decided to establish a commercial season of November 1 to February 15. This season, which is similiar to the season in place before the fishery crashed in the mid-1970's, should afford the industry the opportunity to harvest the 0.5 to 3.0 million pound harvest quideline while protecting the crab during biologically sensitive periods in their life cycle.

Dutch Harbor Fishery

In past years, the Dutch Harbor king crab fishery (Area O) experienced a sudden influx of large vessels to the fishery after the closure of the major southeastern Bering Sea king crab fishery. This situation proved to be a management problem for the Department since it was difficult to monitor effort in the several districts which comprise the Area O fishery. The Board addressed this problem through the establishment of fishing district registration requirements. After the designation of the Area T exclusive registration area this past season, managers noted that the Area O fishery was much slower paced and the number and size of vessels decreased. The Department recommended the elimination of district registration since it was no longer necessary to adequately monitor the fishery and assure that appropriate exploitation rates are achieved on various population segments. Given these circumstances, district registration requirements placed an unnecessary burden on both the fleet and the Department. The Board concurred by deleting the regulations requiring district registration.

Bering Sea Fishery

The Bering Sea fishery (Area Q) includes the blue king crab fisheries near the Pribilof, St. Matthew, and St. Lawrence Islands and the red king crab fishery in Norton Sound. All of these fisheries are relatively minor in comparison to the Bristol Bay (Area T) fishery. Designated as an non-exclusive registration area, vessels fishing Area Q can freely transfer in and out of the fishery.

ADF&G identified two problems associated with this fishery. During the 1979-80 season, regulations allowed fishing to begin for red crab (an incidental species) in the Pribilofs 5 days before the opening of the target blue crab fishery. This was the first year red king crab had been taken in the Pribilofs, presumably the result of high stock levels in the Bristol Bay area which moved crabs into the fringe areas. This different opening date caused much confusion during vessel registration and tank inspection since both species are fished on the same grounds. Also, the Pribilof fishing season began 5 days prior to the Bristol Bay fishery and an enforcement problem resulted. The Department recommended that the Pribilof

and Bristol Bay fisheries open simultaneously to alleviate these problems. The Board agreed and changed the season opening date for the Pribilof fishery to September 15.

The second problem identified by the Department was associated with taking incidental red king crab in the Pribilof fishery after the closure of the Bristol Bay fishery. When the red king crab season in Bristol Bay closed to fishing, the red king crab fishery in the Pribilofs also closed to prevent an enforcement problem. The blue king crab season in the Pribilofs remained open but the fishermen were required to throw back any incidental red crab. From commercial catch sampling the Department concluded that approximately 67% of the red king crab were greater than 7 1/2 inches. The Department recommended to the Board that during the second season the size limit be raised from 7 to 7 1/2 inches for the Pribilof red king crab fishery. Two purposes would be served: one, an increase harvest of post recruits which suffer from increased levels of natural mortality; and two, enforcement problems associated with possible illegal fishing in the Bristol Bay area. The Board concurred and raised the size limit from 7 to 7 1/2 inches.

Bristol Bay Fishery

The 1980 king crab harvest in Bristol Bay was at record levels. Effort which had been rapidly increasing since the mid-1970's stabilized during the 1979 and 1980 seasons at 236 vessels. This was due in part to the Board's action in designating the Bristol Bay fishery as an exclusive registration area. Three major topics were considered by the Board: 1) establishing the guideline harvest levels for the 1981 fishery; 2) a request for modifying the pot storage area; and 3) a request to classify the Bristol Bay registration area as a nonexclusive fishery.

The Bristol Bay fishery is currently experiencing high stock levels. The Board reviewed a report by Dr. Jerry Reeves (1981) entitled "The Projected 1981 Guideline Harvest Level for the Red King crabs in Bristol Bay." The report followed the procedures for determining the acceptable biological catch (ABC) specified in the BS/AI King Crab Fishery Management Framework. The Department endorsed the Reeves report which discussed the data base and its limitations when used to project the ABC of approximately 100 million pounds. Final verification of the projected guideline harvest levels will await results of the 1981 summer survey. The report suggests that, based upon past exploitation rates which have fluctuated from approximately 0.4 to 0.6 and given the uncertainty of the projection, a guideline harvest level range of 40-100 million pounds be established for the 1981 fishery. Public testimony supported the commercial harvest of the ABC. The Board accepted the report and discussed the limitations of the data base, particularly the spawner-recruitment relationship. The Board concluded that for the 1981 season the ABC was the Optimum Yield for the fishery. Therefore, the Board established a guideline harvest range of 40 to 100 million pounds for this season's fishery. The Board directed the Department to incorporate the 1981 survey results paying particular attention to the number of ovigerous females in the population. Further, the Board directed the Department to manage the fishery in so far as possible to achieve the ABC.

The Board considered a proposal to modify the existing pot storage area for the Bristol Bay fishery. This gear storage area has been in effect since 1978 and is designed to alleviate the problem of limited nearshore shallow water storage. The intent of the gear storage area is to provide a location near the fishing grounds which can be utilized as a staging area after the Tanner crab season closes and before the king crab season opens. This area is carefully delineated

so as to be outside the crab fishing grounds. The Department expressed concern that the proposed storage area was in an area which produced approximately half of the 1980 season harvest. Further, the Department pointed out the obvious enforcement problems with such an area. The Board received testimony expressing concern for possible biological harm by gear stored improperly in the major production areas. Also, concern was expressed that the proposed storage area would frustrate the public desire for a fair and equitable start of the fishery. The Board rejected the proposed storage area because 1) the area is in the major production grounds of the fishery and the enforcement costs of determining if pots are properly stored is too great; and, 2) the public desires a fair and equitable season start.

The Board considered a proposal to redesignate the Bristol Bay (Area T) fishery as a nonexclusive registration fishery. This area was classified as an exclusive registration area in 1980. This classification was opposed because it reduced the mobility of vessels and gear. The Board received testimony supporting the status quo. The Board evaluated these conflicting desires of the user groups and rejected the proposal to redesignate the area as nonexclusive. The Board based their decision on the desire to continue to provide a reasonable opportunity for all regments of the fleet to participate in the fisheries recognizing that some areas require large offshore vessels to harvest the resource while others may be harvested by smaller vessels fishing more inshore populations. Management can also be more precise providing fuller utilization of available surpluses when fishing effort is not so great that harvests are taken in a very abbreviated time. Two hundred thirty-six vessels with an average keel length of 105 feet fished the Bristol Bay area in 1980 harvesting 130,000,000 pounds of king crab compared to 18,900,000 pounds harvested in Area O by 121 smaller vessels (average keel length of 74 feet). Due to processing and unloading problems experienced when the Bristol Bay and Area O seasons were concurrent in 1979 and problems with crab quality, the Board delayed the reason opening in Area O to November 1 in 1980. Opening of Area O after the closure of Area T would promote an intense concentration of effort on Area O crab stocks if free transfer were allowed from Area T.

DON YOUNG
CONGRESSMAN FOR ALL ALASKA

COMMITTEES:
INTERIOR AND INSULAR AFFAIRS
MERCHANT MARINE AND FISHERIES

MAY 18 1981

AGENDA E-3(b)
May 1981

Congress of the United States
House of Representatives
Washington, D.C. 20515

DISTRICT OFFICES
FEDERAL BUILDING AND
U.S. COURT HOUSE
701 C STREET, BOX 3
ANCHORAGE, ALASKA 99513
TELEPHONE 907/271-5978

BOX 10, 101 12TH AVENUE
FAIRBANKS, ALASKA 99701
TELEPHONE 907/456-6949

May 10, 1981

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

Dear Secretary Bladrige:

It has come to my attention that you have been contacted by a number of concerned individuals regarding a proposal by the North Pacific Fishery Management Council (NPFMC), in cooperation with the Alaska Board of Fisheries (BOF), to establish a management framework for the king crab fishery in the Bering Sea/Aleutian Island area. I would appreciate your consideration of the following before any action is taken relative to that proposal.

As you know, the State of Alaska has managed this fishery pursuant to the direction of BOF for some years. During that time, the king crab resource has remained in good biological condition and harvest levels have generally remained high. The fishery itself is composed of boats from both Alaska and the Lower 48 States. Alaska has continued its authority over this fishery through its landing laws, which the courts have determined to be valid in a number of cases. In short, as long as conservation and management practices have continued, the resource has not suffered.

Recently, NPFMC and BOF have proposed to continue to allow State management of the fishery pursuant to a Joint Statement of Principles and Management Framework that were developed by NPFMC and BOF. This would essentially mean State management within the entire Fishery Conservation Zone (FCZ) subject to review by NPFMC. At its May meeting, NPFMC intends to review the proposed State regulations for the 1981 to insure that they are in compliance with the Magnuson Fishery Conservation and Management Act (MFCMA). If such compliance is found, and if future State regulations continue to comply with the Act, then no further action would be taken on a formal Fishery Management Plan for the king crab fishery. As I understand it, this decision will involve a "finding" by NPFMC that the king crab fishery does not need further conservation and managemnt. This "finding" will be forwarded to you for review.

I have always felt that fisheries management should not be handled by the Congress, but rather by the appropriate management authorities, be they State, federal or regional. In addition, I have always supported Regional Council decisions when those decisions are in compliance with the MFCMA. Obviously, if the management approach taken by NPFMC and BOF is contrary in some way to the provisions of the Act, then it will have to be modified or rejected in favor of some other approach. I know that NPFMC has in the past worked diligently to provide sound fisheries management in the FCZ off Alaska while following the letter of the law and I am sure that it will continue to do so.

In sum, I urge you to review carefully the proposed management regime in regard to the need for conservation and management of the resource and consistency with the MFCMA. If your review indicates that the proposed action is legal and beneficial to the fishery, I trust that you will uphold the NPFMC decision.

Sincerely,

DON YOUNG
Congressman for all Alaska

DY:rhm

AGENDA E-3(e)
May 1981

ALASKA MARKETING ASSOCIATION

Room 232, C-3 Building
Fishermen's Terminal
Seattle, Washington 98119
Phone: (206) 283-3341

April 30, 1981

Chairman Clem Tillion
North Pacific Fishery Management Council
Suite 32, 333 West 4th Avenue
Anchorage, Alaska 99510

Dear Chairman Tillion:

Please find a copy of our letter to Governor Hammond concerning the opening date for the king crab season in the Bristol Bay area T.

We would like the Board of Fisheries to reconvene and reconsider their action with respect to the opening date. Any assistance that the North Pacific Fishery Management Council can give to this effort would be appreciated.

Very Truly Yours,

ALASKA MARKETING ASSOCIATION

Robert D. Alverson, Manager

ALASKA MARKETING ASSOCIATION

Room 232, C-3 Building
Fishermen's Terminal
Seattle, Washington 98119
Phone: (206) 283-3341

April 30, 1981

Governor Jay Hammond
State of Alaska
Juneau, Alaska 99801

Dear Governor J. Hammond:

My name is Robert D. Alverson, I am manager of the ALASKA MARKETING ASSOCIATION. Our members fish King and Tanner Crab in the Bering Sea and Aleutian Islands. The Association negotiates prices for the boat owners for the different crab species in the Bering Sea.

During the 1980 Bristol Bay King Crab season several Processors complained about King Crab that was delivered light. That is, the meat quantity of the individual legs was less than 75% full. As the season progressed this problem seemed to correct itself in that the crab delivered were fuller. We recognize that this "light crab" can be caused from a number of circumstances such as feed, temperature and population density of the crab. The concern we have is that the major domestic distributors of King Crab in New York, Dallas, Los Angeles and the Japanese buyers are convinced that unless a later opening date is established they will get inferior crab.

These distributors of crab and the restaurant chain purchasers work closely with each other. Any negative perception in the restaurant trade whether based on valid concerns or not, with respect to Alaska crab quality could be devestating to the industry.

We therefore request that the Governors Office request the Board of Fisheries to reconvene and reconsider the September 15th opening date in the Bering Sea, Bristol Bay Area T.

We support an opening date which does not allow fishing until October 1st or later. The Alaska Marketing Association supports an October 15th opening.

It is important for the fleet to know at the earliest date if the opening date will be reconsidered by the Board of Fisheries. We hope you will be able to support our request.

Very Truly Yours,

ALASKA MARKETING ASS'N.

Robert D. Alverson, Manager

RDA/po

CC:

Nick Szabo
Clem Tillion
Keith Specking

AGENDA E-3(f)
May 1981

ALASKA CRAB INSTITUTE
500 ELLIOTT AVE WEST #370
(206) 284 6383
SEATTLE WA 98119

MAY 5 1981

AGENCY	ROUTE TO	INITIAL
	Exec. Dir.	
	Deputy Dir.	
	Admin. Off.	
	Fiscal Off.	
	Staff Assist.	
	Public Info. 2	
	Staff Assist. 3	SE
	Economist	
	Fishery Biologist	
	Secy./Typist	

April 30, 1981

Honorable Bettye Fahrenkamp
Honorable Terry Gardiner
Honorable Fred Zharoff
Pouch V, Mail Stop 3100
Juneau, Alaska 99811

Dear Senator Fahrenkamp:

The Alaska Crab Institute who represent packers of over 90% of Alaska's king and snow crab resource, hereby respectfully petition for a joint hearing before the Alaska State Senate and House of Representatives Resource Committees to seek relief from an Alaska Board of Fisheries decision to open the Bering Sea king crab season on September 10, 1981. This request is made to your committees because the Board of Fisheries chose to ignore factual testimony concerning the potential economic and biological damage to the industry and the king crab resource by opening the season before the crab are in prime condition.

The Board of Fisheries through its chairman, Nick Szabo, has denied the Institute's request to reconsider its decision. We therefore, believe there is no other choice available to the industry but to request assistance from your legislative committees.

Historically, the Bristol Bay (Area T) king crab season has opened in August and September but actual fishing has often been delayed by strikes. During the 1979 September fishery the crab were very weak and resulted in extremely high dead loss. The condition of the crab improved and water temperatures decreased so that by mid-October the dead loss and other quality problems were reduced to insignificant levels.

During the 1980 September king crab fishery the crab condition was extremely poor. This condition can best be described by the fact that the meat quantity of the individual legs was for the most part less than half full. Since the majority of Alaska king crab is now sold in the shell as either sections or split legs, it is extremely important that the meat quantity nearly fill the capacity of the shell in each leg. When this meat quantity is less than 75% full (as required by the Alaska King Crab Marketing and Control Board specifications) the consumer becomes very unhappy and complains he has been "ripped off". (During the 1980 Bering Sea season fishing was much slower. The boats were not delayed in unloading as they were in 1979 so the dead loss was not the significant problem it was in 1979.)

When this poor crab condition became apparent in September 1980, industry members met with both the vessel owners and Alaska Fish and Game officials in an attempt to stop all fishing. Some industry officials also wired Governor Hammond to request an emergency closure. Some packers also reduced the price paid to the fishermen in an attempt to compensate for the difference in good quality crab which was the basis of the price negotiation and settlement and the poor quality crab which was actually delivered. All these efforts proved in vain and poor quality crab at high prices were forced upon the king crab consumers.

All this is history and easily documented. In view of this recent miserable experience with a September king crab fishery in both 1979 and 1980, it is therefore not surprising that the industry petitioned the Alaska Board of Fisheries for a king crab opening which did not allow fishing until October 1 or later. The industry was fairly united in this request with only representatives from All Alaskan Seafood, Inc. and the North Pacific Vessel Owners offering testimony in favor of a September opening. All other testimony and written briefs were in favor of a later opening. (Since this meeting the North Pacific Vessel Owners have reversed their position and now support an October 15 opening, see enclosed letter) In view of the above it is incredible that the Board of Fisheries chose to ignore responsible and factual testimony and based their testimony on an emotional plea by an individual whose only rationale is the "weather is too tough to fish in October and November".

The industry is currently forecasting a Bering Sea king crab season of less than 20 days. This is based upon a harvest level of 100,000,000 lbs. and a daily processing capacity of about 6,000,000 lbs. To take these crab before they are in prime condition is economic foolishness and results in a significant loss of revenue for the fishermen, packers and the State of Alaska.

If we repeat the processing of poor quality crab similar to 1980, the damage to the industry may be irreversible. No one can predict when these crab will be at the peak of their condition, but there is general consensus that crab taken from Bristol Bay in mid October are more prime and heavier than those taken in September. Also, because the crab themselves are stronger and the water temperature lower, the dead loss in an October fishery is much less than the dead loss experienced in a September fishery.

This is a serious issue for our industry and we solicit your support and understanding. We assure you that if you will grant us a hearing we will come prepared to fully document and support our case. It is our hope that after you hear our case you will persuade the Alaska Board of Fisheries to move the opening date for the Bristol Bay king crab fishery to October 15, 1981.

Sincerely,

ALASKA CRAB INSTITUTE

R. E. RESOFF
President

RER:vt
cc: Governor Jay S. Hammond
Jalmar M. Kerttula, President of the Senate
Jim. H. Bransom, Executive Director North Pacific Regional Fishery Council
Nick Szabo, Chairman Alaska Board of Fisheries

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

SUBPORT BUILDING
JUNEAU, ALASKA 99801
PHONE:

May 22, 1981

Dr. Don Bevan
Fisheries Center, Room 204
University of Washington WH-10
Seattle, Washington 98195

Dear Don:

At your request, I've assembled the background information which led to the Board of Fisheries decision to close a 15 mile area around Nome to commercial king crab fishing. The Board's action was intended to improve subsistence king crab fishing opportunities in the immediate vicinity of Nome. Further, the Board concluded that this regulation would have minimal impact on the commercial fleet's ability to take the harvestable surplus. (Table 1).

A conflict between commerical and subsistence users erupted during the Board's March, 1981 meeting. Over 900 residents of Nome petitioned the Board to close the Norton Sound area to commercial king crab fishing. They cited the dramatic decline in subsistence king crab harvest since the commencement of commercial operations in 1977.

The Board is legally mandated to provide subsistence users a priority allocation of a limited resource. It is well documented that subsistence king crab catches near shore had declined in the face of a commercial fishery. However, the reasons for this decline are unknown. No scientific information has been collected on the near shore resource in an area which the subsistence fishery is conducted. Stock assessment surveys offshore from Nome have identified a significant biomass of king crab.

Sound conservation practices dictate that a harvestable surplus of king crab is available for exploitation. With the lack of scientific information on the relationship of the near shore and offshore distribution and migration patterns, the Board reasoned that an area closed to commercial fishing would have a reasonable opportunity of enhancing the subsistence fishery and at the same time provide an opportunity for the commercial users to achieve the optimum yield as outlined in the Management Framework.

You have expressed concern that the Board's action closing an area around Nome (most of which is in FCZ waters) may be inconsistent with certain National Standards of the Magnuson Act. I believe your concern for allocation among completing fishermen (National Standard #5) is unfounded in this particular case. Previously, the Council has been

unsucessful in situations where resource allocations were made between domestic commercial fishermen as in the proposed hand troll ban in FCZ waters and the 12 mile closure around Akutan. This issue is significantly different in that the user groups are not the same class. They fall into two distinct classes: subsistence and commercial.

There is ample precident for allocating between distinct user groups in FCZ waters. For example, the Council's High Season Salmon FMP restricts commercial trolling to east of Cape Suckling but no restriction is made for sports fishermen. Also, the Pacific Council's Salmon FMP provides for different fishing opportunities for sport and commercial salmon fishermen. Certainly, the Council could make a case to establish a subsistence priority in the king crab fishery.

Enclosed is a brief summary of the information which was available to the Board when it took action to adopt a Norton Sound king crab closed waters regulation for the commerical fishery.

If you require additional information, please let me know.

Sincerely,

Fred Gaffney
Fishery Biologist
Extended Jurisdiction Section
(907) 465-4215

Enclosure

cc: Nick Szabo
Greg Cook
Guy Thornburgh
Steve Pennoyer
Don Collinsworth
Dick Goldsmith
Jim Branson
Pat Travers

Table 1

Norton Sound commercial king crab harvests (summer season) inside and outside of the 15 mile closed waters regulation adopted by the Board of Fisheries April, 1981.

	HARVEST 1/		
Year	Inside closed Waters	Outside closed Waters	Season Total
1977	438 (85%)	80 (15%)	518
1978	641 (30%)	1,485 (70%)	2,126
1979	967 (33%)	1,965 (67%)	2,932
1980	188 (17%)	895 (83%)	1,083

1/ In thousands of pounds

Norton Sound King Crab

Introduction

The red king crab resource near Nome has long been utilized for subsistence purposes by local residents, only recently has a commercial fishery been initiated. Data collection programs for the subsistence and commercial fisheries are relatively new. Beginning in 1977, subsistence fisherman were required to obtain a permit prior to fishing. Resource assessment surveys were conducted in the Norton Sound area during 1975 and 1976 to gather environment information for proposed OCS oil lease sales. These studies, which identified a substantial abundance of king crab in Norton Sound, prompted considerable interest from commercial harvesters. In April 1977, the Board of Fisheries established regulations for an "experimental and exploratory" commercial fishery in Norton Sound.

The Subsistence Fishery

The subsistence fishery for red king crab in Norton Sound has traditionally occurred during the winter with the near shore ice pack serving as a convenient platform for gaining access to the fishing grounds and operating fishing gear. The vast majority of the fishing occur within two or three miles of shore. Access to the fishing grounds in this area, which may be within one mile of downtown Nome, is by foot or snowmachine. Both baited handlines and pots of various designs are used. Nome fisherman are represented by both natives and non-natives of varying incomes and lifestyles and the fishery serves both a subsistence as well as a recreational need.

Many of the Nome residents believe that large scale summer commercial king crab fishing has depleted the local crab population leaving nothing for the winter subsistence fishery. In response to this concern the Department's Division of Subsistence undertook a survey of subsistence crab fisherman. The draft report, "Norton Sound-Bering Strait Subsistence King Crab Fishery March 20, 1981" by Don Thomas, concluded that the subsistence harvest have experienced severe declines during the past three years. The catch per day per household declined from 15.9 crab in 1978 to 1.2 crab in 1980. The average king crab catch per household declined from 69.0 in 1978 to 18.9 in 1980. The average catch per day for the 1981 season has continued at a low level.

The Commercial Fishery

Commercial fishing activity in Norton Sound began in July 1977 with effort concentrating off the City of Nome on stocks which have traditionally provided winter subsistence catches for the local residents. Since this activity was contrary to the intention of an "experimental and exploratory" commercial fishery, a strip of Northern Norton Sound 15 to 20 miles wide between Cape Rodney and Topkok Head was closed July 16, 1977 by emergency order. The closure of the waters off Nome was postponed until July 23 by a temporary restraining order. The remaining area of the Northern district closed to king crab fishing August 16. The 1977 harvest was 543,000 pounds of king crab, including deadloss.

The first year of the Norton Sound fishery was plagued with excessive crab deadloss which resulted from holding crab in low salinity surface

water. Deadloss averaged 40 percent. In subsequent seasons the deadloss problem was overcome by moving the harvesting and processing operations further offshore.

The highly visible summer fishing and processing operations served to rekindle interest in the development of a local winter commercial fishery. The first year's harvest of crabs through the ice yielded 25,193 pounds. Numerous technological problems experienced in this fishing dissuaded further interest in subsequent winter seasons. The harvests for the 1979 and 1980 winter fisheries fell to 641 and 75 pounds, respectively.

During the 1980 summer season 10 vessels participated in the fishery. Three of the vessels were owned and operated by local residents. The three vessels were in the 32 foot and accounted for less than 0.1% of the total catch. The remaining seven vessels, all in the 100 foot class, harvested the bulk of the catch. All the large vessels delivered to a single procesor on the fishing grounds. The 1980 harvest was 1.2 million pounds.

Stock Status

Little is known regarding life history of Norton Sound king crab. Catch sampling indicates that these crabs are smaller then their southern counter parts. NOAA trawl surveys concluded the male to female ratio of Norton Sound king crab to be about 9:1. Molting periods appear to be variable, since recently molted crab have been taken as early as March and as late as September. Data obtained from commercial catch sampling and stock assement surveys indicate that the current population is

characterized by low recruitment and high levels of post recruits. These data suggests that the population may drastically decline as these larger size classes move out of the fishery.

Immediately prior to the 1980 summer fishery the Department conducted its first stock assessment survey in Norton Sound. This survey concentrated in 1,500 square mile area offshore of Nome, in the area primarily utilized by the Commercial fleet. Crabs were tagged and released to obtain data on migration, growth, and mortality.

A post season evaluation of tag recoveries estimated a standing stock of 14 million pounds of legal sized crabs prior to the summer fishery. Adjusting this biomass for the commercial harvest, natural mortality, growth, and recruitment, the 1981 biomass estimate is projected to be 10 million pounds of legal crab. This estimate will be re-evaluated if funding is available to repeat the Norton Sound survey in 1981.

No information is available on the abundance or distributional characteristics of king crab in the near shore area utilized by the subsistence fishermen. A limited tagging study will be conducted by the Department in early summer to determine migrational patterns of these near shore crab.

AGENDA E-3(g)
MAY 2 May 1981

FISHERMEN'S MARKETING ASSOCIATION, INC.
NO. 2 COMMERCIAL ST. WHARF
EUREKA, CALIFORNIA 95501
PHONE (707) 442-8789

ACTION	ROUTE TO	INITIAL
	Exec. Dir.	
	Dep. Dir.	
	Admin. Off.	
	Gen. Sec.	
		SD

May 19, 1981

Malcolm Baldrige
Secretary of Commerce
Washington, D.C. 20230

RE: Joint statement of principle between the North Pacific Fishery Management Council and the Alaska Board of Fisheries on the management of the King Crab fishery in Berring Sea and Aleutians.

Dear Secretary Baldrige:

The Fishermen's Marketing Association represents the commercial trawl fishermen from Ilwaco, Washington to Monterey, California. This association has been involved in fishery management issues since its conception in 1952. More recently, amoung other activities, we participated in the bilateral negotiation with the Soviet Union in the early 1970's, we were active in support of the 200 Mile Bill, we have had representatives placed on the Pacific Fishery Management Council's Advissory Panel, and had one member appointed to the Pacific Fishery Management Council.

I have recently reviewed and discussed with others in the industry the joint statement of principles between North Pacific Fisheries Management Council and the Alaska Board of Fisheries on the management of domestic King Crab fisheries in the Bering Sea and Aleutians.

I feel that any action along these lines would reduce the authority of the Management Council and is contrary to the original intent of Congress.

Management Councils, as established by the Magnuson Act, are a novel approach to Fishery Management. It was expected that problems would develop within system which would need to be fine tuned. However, I feel to turn the management responsibility of the King Crab fishery back over to the state of Alaska would set a harmful precedent that could ultimately lead to a challenge of the entire concept of Regional Council.

Re: Joint statement of principle between the North Pacific Fishery Management Council and the Alaska Board of Fisheries on the management of the King Crab fishery in Berring Sea and Aleutians.

This association supports Regional Management Councils and therefore is opposed to the transfer of management of the King Crab fishery to the state of Alaska.

I hope that you will agree with myself and others within the industry and oppose this transfer of management responsibility.

Sincerely,

Peter Leipzig
General Manager

PL/vc

cc: Clement Tillion
The entire Washington Congressional Delegation
The entire Oregon Congressional Delegation
The entire California Congressional Delegation
Richard Goldsmith
Lucy Sloan

AGENDA E-3(c)
May 1981

Point Judith Fishermen's Cooperative Ass'n., Inc.
Galilee Road
Narragansett, Rhode Island 02882

MAY 8 3 36 PM '81

May 6, 1981

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

Dear Mr. Secretary:

The proposed action by the North Pacific Fisheries Management Council and the Alaska Board of Fisheries as outlined in their Joint Statement of Principles for the Management of Domestic King Crab Fisheries in the Bering Sea and Aleutians gives us cause for grave concern. We are not involved in the king crab fishery, but we are all members of the New England Council or otherwise deeply involved with the council system. Since the enactment of the Magnuson Fisheries Conservation and Management Act we have worked to establish the principle that the primary function of the councils is to prepare, monitor and amend the fishery management plans which comprise the management authority in the fishery conservation zone in their respective areas of concern. We are confused and dismayed by the apparent willingness of the NPFMC to abdicate this responsibility by attempting to delegate their authority to the Alaska Board of Fisheries. We are furthur dismayed by the very first sentence of this document which uses the words "legal responsibility for recommending and reviewing to the Secretary of Commerce measures etc." which appears to be an attempt to shift the primary responsibility for the king crab management plan away from the council and to the secretary.

Should the procedure outlined for the management of this segment of the king crab fishery be followed, it would set a very dangerous precedent. The implications for the long term policy for commercial fisheries management and the future role of the council is of great signifigance.

Other problems that we see with this proposal are that although there are references to the role of the secretary, the secretarial reviews process is actually eliminated. Also the scheme would extend the authority of the state over non-residents beyond state waters and into the fishery conservation zone. Repeated references to the non-discriminatory nature of this proposal notwithstanding, the history of regulation by the State of Alaska has been one of repeatedly attempting to discriminate against non-residents. To pretend that this has not been and is not a matter of tremendous controversy is a less than credible approach. It is and will in the future be the most important socio-economic aspect of managing all of the species found in the U.S. fishery conservation zone off of Alaska.

We are not all lawyers, but we think that several aspects of this proposal are not legal. Beyond that we see the implications for future fisheries management policy in our area and the entire fishery conservation zone to be of tremendous importance. For these reasons we respectfully request that prior to the May meeting of the NPFMC you urge the NPFMC to reject the procedure proposed in the Joint Statement of Principles and proceed with a Fishery Management Plan for the Management of the king crab fishery in the Bering Sea and Aleutians as provided for in the Magnuson Fishery Conservation and Management Act.

Sincerely,

Jacob Dykstra Member, New England Council
Point Judith Fishermen's Cooperative Association

Dan Arnold Member, New England Council
Massachusetts Inshore Draggermen's Association

Robin Peters Member, New England Council
Commercial Fisheries News

Alan Guimond Member, New England Council
Atlantic Offshore Fish and Lobster Association

Jay Lanzillo Member, NEC Advisory sub-panel

cc: Senator Bob Packwood
Senator Mark Hatfield
Senator Slade Gorton
Senator Henry Jackson
Congressman Joel Pritchard
Congressman Gerry Studds
Congressman David Emery
Congressman John Breaux
Congressman Edwin Forsythe
Members of National Federation of Fishermen
Senator John Chafee
Senator Claiborne Pell
Senator William Cohen
Senator George Mitchell
Senator Edward Kennedy
Congresswoman Claudine Schneider
Congressman William Carney
Congressman Les AuCoin
Lucy Sloan National Federation of Fishermen

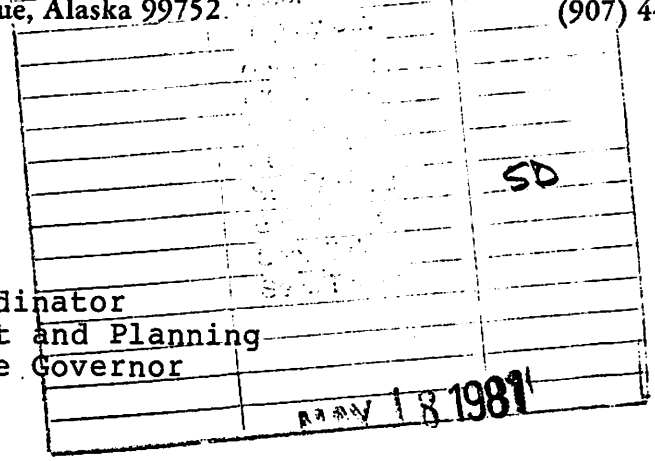
AGENDA E-3(d)
May 1981

MAUNELUK ASSOCIATION

P. O. Box 256
Kotzebue, Alaska 99752

Phone
(907) 442-3311
or
(907) 442-3313

May 13, 1981



Mr. Dave Haas
State/Federal Assistance Coordinator
Division of Policy Development and Planning
State of Alaska, Office of the Governor
Pouch AW
Juneau, AK 99811

RE: Western Alaska King Crab Fishery Management System
State I.D. No. PZN01-81042014

Dear Dave:

I have reviewed the above referenced project with respect to the concerns of Mauneluk Association for the subsistence economy in rural Alaska. In reviewing the Draft Joint Statement of Principles Between NPFMC and BOF...(3/26/81), the BOF Draft Bering Sea/Aleutian Island King Crab Fishery Management Framework (4/1/81), and BOF Decisions Regarding Management of Domestic King Crab Fisheries in the Bering Sea/Aleutian Islands Area (March 1981), I find there has been an inconsistent treatment of subsistence, the Alaska Subsistence Law, and the Nome subsistence crab fishery.

In the Draft Joint Statement of Principles Between NPFMC and BOF..., Part II, Subpart 1, the NPFMC and BOF have agreed that their joint activities, "...shall not discriminate between residents and non-residents of the State of Alaska."

This policy statement, however, is in contradiction with the Alaska Subsistence Law (SLA-151), which clearly states that in the event of a resource shortage, the Board of Fisheries must grant subsistence users a priority allocation, using the following criteria:

1. Local residency
2. Customary and traditional use
3. Availability of alternate resources

The Board of Fisheries operates under a legal mandate which would discriminate between residents and non-residents in the event of a resource shortage. Any agreement between BOF and NPFMC should reflect the content of SLA-151.

In the BOF Draft Bering Sea/Aleutian Islands King Crab Fishery Management Framework, Section 2.2, the statement on provision for subsistence uses of King Crab fails to adequately address the subsistence priority. The subsistence use of King Crab is the priority use of King Crab in State waters. If the commercial harvest impinges upon the subsistence harvest of King Crab, then the commercial harvest should be controlled. Basically, these are the same criteria BOF has used to manage commercial and subsistence salmon fisheries in the A-Y-K area.

The BOF Decisions Regarding Management of Domestic King Crab Fisheries in the Bering Sea/Aleutian Islands Area is evidence that BOF has failed to adequately address subsistence needs in the Nome area. Evidence given to BOF at its spring, 1981 meeting by Kawerak and other groups clearly showed that the subsistence harvest of King Crab in Norton Sound had been declining significantly since the beginning of the adjacent commercial crab fishery.

The BOF decision to create a 15 mile-wide zone closed to commercial crab fishing is inadequate protection for the subsistence fishery. The BOF harvest guideline, which could potentially double the king crab commerical harvest in Norton Sound, is hardly "conservative exploitation."

For these reasons, Mauneluk Association is opposed to the proposed Western Alaska King Crab Fishery Management System as it now stands. Mauneluk Association, however, supports the joint-management concept if adequate provision can be made for protection of the subsistence priority.

Sincerely,

MAUNELUK ASSOCIATION

Dennis J. Tiepelman, President

Greg Moore
Subsistence Coordinator

GM/mnp

cc: Matthew Iya, Kawerak
Jim Branson, NPFMC ✓
Greg Cook, Joint Boards of Fisheries and Game

NORTH PACIFIC FISHING VESSEL OWNERS ASSOCIATION
Building C-3, Room 218
Fishermen's Terminal
Seattle, Washington 98119
Phone: (206) 285-3383

May 18, 1981

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

Dear Mr. Branson:

On behalf of the North Pacific Fishing Vessel Owners' Association, I am responding to your letter of April 9, 1981 which requests comments on the Council's proposed management system for the Western Alaska king crab fishery. The Association has already submitted written comments to the Council on the "Western Alaska King Crab Draft Fishery Management Plan" and the "Joint Statement of Principles between North Pacific Fishery Management Council and Alaska Board of Fisheries on the Management of Domestic Fisheries." The analyses and observations contained in those letters (dated December 6, 1980 and March 23, 1981, respectively) are incorporated by reference in these comments.

The proposed scheme is illegal

The Association opposes the management scheme proposed by the Council. For reasons stated in its previous comments, the Association does not believe the Council has legal authority to enter into a pact with the State of Alaska for the management of the king crab fishery outside of state waters (i.e. more than three nautical miles offshore). An agreement between the Council and the State does not negate

the provision in the Magnuson Fishery Conservation and Management Act (MFCMA) that requires the United States to "exercise exclusive fishery management authority" over fish in the Fishery Conservation Zone, an area between three and 200 nautical miles offshore. (emphasis added) Nor is there any section of the MFCMA which allows the United States or the Council to delegate this authority to a state. Such a delegation would, in fact, undermine the regional management system which lies at the heart of the MFCMA.

U.S. Senators Bob Packwood, Slade Gorton, Mark Hatfield and Henry Jackson, and Representatives Gerry E. Studds, Joel Pritchard and David F. Emery sent letters to Malcolm Baldrige, the Secretary of Commerce, expressing these views and annunciating other concerns about the proposed management scheme. Copies of their letters are attached to these comments. (See Attachments I and II.)

Although the proposed management scheme is illegal and the Council would be abdicating its statutory responsibility to "prepare a fishery management plan with respect to each fishery within its geographical area of authority...." if such a scheme were adopted, the Association believes it has an obligation to reiterate and further expand upon the reasons for its opposition to the proposed action. (The Association will first make general observations and then offer specific statements and questions about the documents and procedures which constitute the proposed management scheme.)

GENERAL COMMENTS

The Proposed Scheme Undermines The Council System

The proposed management scheme for king crab threatens to undermine the entire Council system. If the proposed scheme were adopted, a dangerous precedent would be set for extending this type of arrangement to other North Pacific Council fisheries and fisheries throughout the nation.

In your April 9, 1981 letter, you state that the proposed management scheme "could serve as a model for other fisheries of mutual responsibility in the future." In his April 30, 1981 letter to Representative Gerry E. Studds, Ronald O. Skoog, Commissioner of the Alaska Department of Fish and Game (ADF&G), stated that the proposed scheme for king crab would be an exception; that it

> "would apply only to a few selected fisheries meeting the criteria of: a) no foreign involvement; b) no interstate stock distributions; c) a developed fishery, and d) demonstrated ability by the state to handle the requisite conservation and management responsibilities."

Already, personnel from ADF&G have publicly stated that they want the proposed scheme to be applied to the tanner crab fishery and, when foreign fishing is eliminated, to the Alaskan groundfish fishery.

The Alaskan groundfish fishery has the potential to dwarf all other Alaskan fisheries combined, both in terms of capital investments and economic returns. Due to the large amounts of money needed to develop this fishery, it is likely that the financial support and impetus to make this fishery grow will come from outside Alaska. This would parallel the development of other fisheries off Alaska, including the king crab fishery. Already, large non-resident vessels are exploring and beginning to successfully fish the Bering Sea for groundfish. For example, the Seattle-based AMERICAN NO. 1 caught over 6,000,000 pounds of pollock in just the month of March 1981. If the state were to manage this fishery under the same type of system proposed for king crab, out-of-state fishermen and investors are concerned that Alaskan small boat fishermen, whose vessels comprise the majority of the resident fleet, would exert pressures upon the Board of Fisheries to inhibit the growth of the domestic groundfish fishery. At the insistence of Senator Stevens of Alaska, Congress singled out the development of this fishery as an MFCMA priority. Congress also intended that the North Pacific Council be the prime mover behind this fishery's growth.

Four members of the New England Fishery Management Council already have written to the Secretary of Commerce expressing their concerns over the implications that the proposed scheme would have, if adopted, on Council management nationally. A copy of their letter is appended to these comments. (See

Attachment III.)

The Proposed Scheme Places The Council In A Subordinate Role

What the proposed management scheme does is remove the Council from its primary role in fisheries management and place it in a position subservient to the Board of Fisheries. By entering into the proposed pact, the Council does place itself in a role of "reviewing and recommending" conservation and management measures rather than preparing, monitoring and amending fishery management plans.

Perhaps the Council has forgotten that the MFCMA makes the Council the focal point of fisheries management. The Act stresses that

> "A national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources." (emphasis added)

Congress made the Councils paramount in this program by authorizing these regional bodies to prepare plans in accordance with the MFCMA's National Standards. Furthermore, it is the policy of Congress (as expressed in the MFCMA)

> "to assure that the national fishery conservation and management program... involves, and is responsive to the needs of interested and affective States and citizens...." (emphasis added)

By adopting the proposed managment scheme, the North Pacific Council is removing itself from its central role in fisheries management and thwarting congressional intent.

The Proposed Scheme Is Inconsistent With The MFCMA

As the Council is aware, fisheries management under the MFCMA is based on a regional concept. The Association has pointed out in its earlier comments that the MFCMA provides all fishermen with equal access to a management body that is composed of representatives from all states that are affected by the fisheries off Alaska. The MFCMA also establishes procedures to ensure that all interested persons can participate extensively in fisheries management. Regulations may be challenged in federal court.

The proposed system, which places the primary management functions in the hands of Alaska residents, is not consistent with the provisions, policies and objectives of the MFCMA. The Board of Fisheries, which is composed of Alaskans who owe allegiance to the State, must respond to the concerns and interests of Alaska's residents. By Alaskan law, the Board is required to make decisions which promote and protect Alaskans. The local advisory committees, composed of Alaskans, are part of Alaska's regulatory process and thus would be part of this proposed scheme. These committees, in addition to advising the Board, have the authority to close local fisheries. If the Board's regulations are contested, the state court is usually the forum.

Even though the Joint Statement purports to set out procedures to allow non-residents greater access to the Alaska regulatory system, these methods still do not bring the state system into line with the intent and provisions of the MFCMA.

The King Crab Fishery Needs MFCMA Management

The Joint Statement declares that the Council will make a determination whether or not the king crab fishery requires conservation and management under the MFCMA. The Association has stated in earlier letters that "need" is not a criterion in the development of a fishery management plan. However, "need" is demonstrated by Alaska's efforts to manage this fishery beyond its jurisdiction. And Alaska's lack of fishery management authority over non-resident vessels in the Fishery Conservation Zone should provide the impetus necessary for the Council to make a determination that the king crab fishery requires conservation and management under the Magnuson Act.

The Council Has Failed To Analyze Whether The Proposed Scheme Complies With The MFCMA

According to the Joint Statement, the Council desires comments on

> "whether the State of Alaska has provided and will provide effective conservation and management of the fishery consistent with the policies, purposes, and national standards of the Magnuson Act." (emphasis added.)

The Council thus places the onus of disproving the past and future effectiveness of Alaska's management system on those who do not want the proposed scheme. However, the burden of proof is misplaced. It is the Council which is attempting to cede its legally sanctioned responsibilities and embrace a scheme which is, at best, illegal. Therefore, the Council should substantiate the effectiveness of the system which it proposes to adopt.

In your letter of April 9 it is stated that

> "[t]he management objectives and measures in these documents [which comprise the proposed management scheme] are consistent with the national standards of the Magnuson Act, with the laws of the State of Alaska, and do not discriminate between residents and non-residents of the State of Alaska."

To the Association's knowledge the Council has not made detailed analyses of any of these documents to determine whether the above-quoted statement is true. What the Council has done is to adopt wholesale the State's regulations without questioning their conformity to the Magnuson Act's National Standards. As pointed out in its previous comments and in this letter, the Association strongly disagrees with any proclamation that the proposed scheme is consistent with the Magnuson Act. In fact, the Association in its letter of March 23, 1981 to the Council questioned whether the provisions of Alaskan laws and the Magnuson Act are even

compatible with each other.

Alaska's Management Practices Have Been And Will Be Ineffective And Inconsistent With The MFCMA

a. Exclusive registration areas

The Association's previously submitted comments are replete with instances of ineffective Alaska management practices which do not meet the National Standards of the MFCMA. Also see the Association's comments (below) on the documents forming the basis for the proposed management scheme. For example, exclusive registration areas, which were established to protect and promote local fleets, are discriminatory economic allocations. Exclusive areas have also led to the build-up of large and heavily capitalized fleets in these areas, resulting in economic inefficiencies. This practice is not effective management of the fishery and violates National Standards 4 and 5 of the MFCMA. (National Standard 4 requires that management measures be non-discriminatory, and that allocations (if necessary) be "fair and equitable" to all fishermen and "reasonably calculated to promote conservation." National Standard 5 requires that economic allocation not be the sole purpose of a management measure and that measures promote efficiency in the use of fishery resources.)

b. Minimum size limits and exploitation rates

The State's selection of minimum size limits and exploitation rates are other examples in which Alaska's conservation and management practices have fallen short of

being "effective" management that is consistent with the National Standards. A study prepared for the Association by Dr. Dayton L. Alverson, a noted fisheries scientist, and submitted to the Council last year indicates that reducing the current size limit and increasing the exploitation rate in the Bering Sea would (1) substantially increase the yield per exploitable biomass; (2) provide an adequate number of males to maintain a high reproductive potential; (3) increase average catch per unit of effort; (4) reduce sorting mortality; (5) decrease energy demands (fuel costs); and (6) minimize population fluctuation by including a broader spectrum of year classes in the fishery, thus increasing the stability of harvests from year-to-year. Judging from Dr. Alverson's study, Alaska's past and current size limits and exploitation rates would seem to violate National Standards 1 (conservation and management measures shall achieve, on a continuing basis, the optimum yield — the amount of fish which will provide the greatest overall benefit to the Nation — from each fishery) and 5 (conservation and management measures shall promote efficiency in the use of fishery resources.)

c. Second seasons on older crabs

The State also has persisted in holding second fishing periods to increase fishing mortality on larger, older crabs. According to Dr. Alverson's study, this strategy results in increased mortality on younger crabs (due to sorting) and is not fuel efficient. Again, this practice would appear to be

inconsistent with National Standard 5.

d. Fishing fees

Another overlooked problem with the Alaska regulatory system is that the interim use permit fees imposed by Alaska to fish for king crab are in excess of those permitted by the MFCMA. In addition, due to the discrepancy in fees charged to large and small, resident and non-resident vessels, there is a strong likelihood that these fees also violate the United States Constitution.

Limiting The Proposed Scheme To Western Alaska Is Unjustified, Discriminatory, And Violates The MFCMA

The Council has failed to adequately justify its decision to have the proposed management scheme only apply to the Bering Sea, Bristol Bay, Adak and Dutch Harbor registration areas. Why doesn't the proposed system apply to the entire king crab fishery off Alaska? A Council summary of its December 6, 1980 hearing in Kodiak on the Draft King Crab Fishery Management Plan states that "[t]he majority of persons testifying were against a federal FMP." (Eight people testified.) Just because people do not want a law to be applied to them is not a valid reason to exclude Kodiak from the proposed scheme.

Your letter of April 9, 1981, states that only Western Alaska is included in the system because "most of the resource [is] found outside state waters and [this area] has the greatest proportion of non-Alaskan participants of any of the king crab areas." (Ironically, this explanation supports the

need for a Council fishery management plan since the resource is outside state waters and therefore, not subject to the state's fishery management authority.) The Association finds your statement on behalf of the Council both troubling and puzzling. The Western Alaska area is singled out for the proposed scheme due to its large non-resident fishery. Yet, the Joint Statement of Principles states that the Framework "shall not discriminate between residents and non-residents of the State of Alaska." Limiting the proposed scheme to the area where there is the "greatest proportion of non-Alaskan participants" is, in itself, a form of discrimination.

In addition, limiting the proposed scheme to the Western Alaska area appears to violate MFCMA National Standards 4 (no discrimination between residents of different states) and 3 (to the extent practicable, an individual stock shall be managed as a unit throughout its range, and interrelated stocks shall be managed as a unit or in close coordination).

The Board Already Has Breached Its Agreement With The Council

In addition to the Board's failure to provide effective management in a manner that is consistent with the MFCMA, the Board has not abided by the Joint Statement and Framework in establishing regulations for the 1981 king crab fishery in Western Alaska. At the joint meeting in March, the Board agreed to conform to the procedures and guidelines laid out in these documents even though the proposed scheme had not received final approval from the Council. As pointed out in

the Association's comments (below) on these documents, the Board has breached this agreement.

Furthermore, the Board inserted an objective in the Framework which was not agreed upon by the Council at the joint March meeting--subsistence use. The Board then pointed to this objective as justification for its closure to commercial fisheries of an area in Norton Sound. This closure is an allocation which obviously does not comport with MFCMA National Standards 4 and 5. Yet the Board agreed that its regulations would meet all the National Standards.

The Council also has failed to comply with the terms of the Joint Statement. During the 45-day period set out in the Joint Statement for commenting on the effectiveness of Alaska management, the Council obligated itself to "hold public hearings on this issue at places and times that are likely to facilitate attendance by such persons and their representatives." There have been no such Council hearings.

The Secretary Determines Consistency With The MFCMA

Under the MFCMA, determinations of consistency with the Act are a two-tiered process: the Council develops a plan which one assumes is consistent with the MFCMA; the Secretary of Commerce then reviews the plan to ascertain whether it does meet the National Standards. The Joint Statement eliminates this process. In your May 1, 1981 letter to Congressman Studds and in ADF&G Commissioner Skoog's letters to Senator Hatfield

and Congressman Studds (dated May 7, 1981 and April 30, 1981, respectively), it is asserted that the king crab fishery management program would be forwarded to the Secretary for review and approval. The Association has found no provision in the Joint Statement that expressly mentions this secretarial review role.

Your letter of April 9, 1981 states

> "The proposed system will allow faster implementation of management measures, simplify paperwork and provide for co-management of the fishery by the Council and the Alaska Board of Fisheries."

Where are the analyses to verify this statement? Also, the term "co-management" implies equal status; as noted previously, the Association believes the proposed scheme relegates the Council to a lesser role than the Congress intended for it.

JOINT STATEMENT OF PRINCIPLES

Most of the Association's objections to this document already have been set forth in this letter or in its March 23, 1981 letter to the Council. Since the Joint Statement was revised subsequent to its March 23 letter, however, the Association offers the following additional comments.

Preamble

Paragraph 3

Where is the determination that the State has "exercised effective control" inside and outside of its territorial waters? (emphasis added). Effective in achieving what goals?

Although the State may have exercised control outside of its waters, the legality of its exercise of authority is in question.

Section I

What is the rationale for applying this scheme only to the Bering Sea, Bristol Bay, Adak and Dutch Harbor areas?

Section II

Paragraph 1

Who is to determine the consistency of the Framework with "the National Standards of the Magnuson Act and with the laws of the State of Alaska...."?

Paragraph 2

The Joint Statement promises that "other materials... evaluating management of the fishery by the State of Alaska" would be circulated with the Framework. (emphasis added) No evaluations of Alaska management were ever distributed by the Board or the Council.

Paragraph 3

Who is going to make the determination that the State's regulations are consistent with the Framework? Such a determination should be available for public review.

In its letter of March 23, 1981, the Association noted that in the Board of Fisheries procedures, proposal makers do not have to submit data to substantiate their proposals; opponents have the burden of gathering data to defeat a proposal. The provision in the Joint Statement which requires

the Board to provide "the reports and data received by BOF upon which the proposed regulation is based" does not make any changes to present state procedures. There is only an obligation for the Board to provide data if the Board receives data. Under the Council system, the Council must provide data to substantiate its proposals.

It would seem that if the Board must follow the Framework criteria for its decisions, then the Board must expound upon these criteria in the written statement justifying its regulations. This the Board has failed to do for this year's regulatory scheme. Also, the written statement should set forth detailed supporting data, not just general comments, in justifying the Board's decisions

The Board should be required to issue detailed statements, including substantiating data, for its emergency regulations. The issuance of emergency regulations should not excuse the Board from explaining its actions to the public.

Paragraph 4

When will the joint meeting be held? If there is truly concern over duplication of effort, then the annual meeting should be held concurrently with the Board of Fisheries' shellfish meeting.

It is assumed that the joint hearing in Seattle is to provide non-residents with access to the Board of Fisheries process. However, this hearing still does not enable non-residents to have the same type of voice in the State's management process that Alaskans have. Non-residents cannot

serve on the Board or local advisory committees. The Seattle hearing is no substitute for participation at local committee meetings or the Board meetings, where participants have the benefit of advice from ADF&G personnel. At Board and advisory committee meetings, there is also an opportunity to listen to the comments and question the data of other persons supporting or opposing a regulatory proposal. The MFCMA process invites extensive public participation enabling plans and amendments to undergo rigorous scrutiny and review before implementation. Unfortunately, the Joint Statement's procedures do not come up to the quality of those offered in the Magnuson Act.

Paragraph 5

The delegation of implementing authority to Alaska is not the Council's to give. The MFCMA clearly specifies that implementation of fishery management plans is a power which resides in the Secretary of Commerce; there is no provision in the Act which gives the Secretary authority to delegate this power to a state.

Why is ADF&G only encouraged to "consult actively" with fishery management agencies? Why isn't it required to consult?

Paragraph 6

What happens if conflicts cannot be resolved? Who prevails?

What is meant by "all appropriate means"?

THE FRAMEWORK

Areas And Fisheries

The Framework fails to justify why it applies only to the Bering Sea, Bristol Bay, Dutch Harbor and Adak registration areas. The limitation of the Framework to this area raises serious questions as to whether National Standard 3 (which requires the management of an individual stock as a unit throughout its range) has been violated.

Management Objectives

1. Achieve reproductive requirements for individual king crab stocks

What is meant by "optimization of the reproductive potential of individual king crab stocks"?

The Framework speaks of "low population levels," yet it fails to specify the present population levels for the affected fisheries and indicate whether these are of low, high or average abundance. Unless the present stock conditions and the conditions which the Framework's management measures hope to achieve are specified, how can one gauge whether this objective is being met?

For each area, what is "a sufficient number of males" that are needed to "maximize reproductive potential"?

2. Provide for subsistence uses of king crab

This objective was not in the Framework that was reviewed by the Council.

What is meant by "subsistence uses"?

Where are the areas that king crab is an "important food source." Where are the data to substantiate this claim?

What are "traditional and customary uses"?

Giving subsistence a priority is an allocation of crab. Where is the determination that this allocation meets the criteria of National Standards 4 and 5 of the MFCMA?

3. Optimize the net value of the fishery

The first sentence, "The optimal harvestable surplus for the Bering Sea/Aleutian Island king crab fishery is not necessarily the maximum physical yield," is unclear. What is meant by "optimal harvestable surplus"? What is meant by "maximum physical yield"? Does "maximum physical yield" refer to the maximum yield per recruit?

According to Dr. Alverson's study, maximizing the yield per recruit introduces more year classes into the fishery, not only ensuring greater year-to-year stability, but also increasing the yield. This approach, which is achieved by lowering current size limits and increasing exploitation rates, also would allow fishing to be more fuel efficient than is currently possible. Maximization of yield per recruit is a management strategy which is more likely to achieve this Framework objective and National Standards 1 and 5 than is Alaska's practice of maximization of year class biomass.

What are the "[s]ocial, economic or ecological factors [that] may change the yield"? The phrase "ecological factors" should be deleted from this sentence since these factors are

already considered when the acceptable biological catch is ascertained.

What are the "adverse socioeconomic consequences" associated with "boom and bust" fisheries?

What are the conservation and social objectives that must be achieved if additional burdens are to be imposed on industry?

Adverse weather conditions also threaten the safety of crews and vessels.

4. Minimize adverse socioeconomic impacts by protecting community and industrial investments

The Association is concerned that this objective is merely a guise to continue to treat non-residents in a manner different from Alaskan residents. Consequently, this objective would violate National Standards 4 & 5. Exclusive registration is pointed out as an example of a management measure which is used to achieve this objective. Yet, as set forth in the Association's December 6, 1980 letter to the Council, exclusive registration areas are designed to protect and promote the interests of local fleets and therefore, constitute discriminatory economic allocations.

Is this objective going to be used to protect and perpetuate inefficient fishing operations? If so, it may not be consistent with National Standard 5 of the MFCMA. Again, in its December 6, 1980 letter, the Association indicated that exclusive area registration promotes inefficiencies.

How do "fair starts" and setting seasons in relation to other fisheries protect community and industrial investments?

5. Optimize the cost effectiveness of management and enforcement

What are the "reasonable limits" for management and enforcement costs?

Does this objective consider the costs to fishermen in complying with management measures? If not, it should.

Management Measures

Determination of Optimum Yield

a. Bristol Bay

Who conducts the resource assessment surveys?

What are the high stock levels now present in Bristol Bay?

The Framework fails to specify what the excess reproductive potential is.

Although it is not clear from the Framework, the minimum size and exploitation rate are central to determining the acceptable biological catch (ABC). What criteria are used in setting minimum sizes and exploitation rates?

b. Adak, Bering Sea and Dutch Harbor

What data are needed for each area so that the minimum required spawning stock can be determined? Will attempts be made to gather the needed data?

Why was a .4 exploitation rate set? What other rates were considered? Why were they rejected?

What are the minimum sizes for these areas? How were these sizes selected, i.e. what were the criteria used in

establishing these sizes?

Fishing seasons

Poor weather conditions not only make fishing more difficult, but also pose a serious threat to the safety of crews and vessels. This consideration should be included in the Framework.

The real motive behind simultaneous openings is contained in the Framework:

> "This [simultaneous openings]... allows greater participation by local fleets."

Clearly, this discriminates against non-resident vessels and is a practice which is prohibited by the MFCMA's National Standard 4.

Since most of the major fisheries are conducted in exclusive registration areas, it is questionable whether simultaneous openings distribute fishing effort and help prevent gear saturation problems.

How does the Board intend to achieve "a balance of attitudes within the industry with respect to the several factors... [involved in setting seasons]"? Will some of the factors be of greater importance that others? If so, this should be stated.

Exclusive registration areas

This letter and the Association's previous letters are replete with reasons why exclusive registration areas violate National Standards 4 and 5.

The Framework unabashedly states that

"The socioeconomic impact upon local communities within an area has been a major consideration as to whether a registration area warrants exclusive or non-exclusive status." (emphasis added)

Again, Alaska has favored its citizens to the detriment of non-resident fishermen.

In its establishment of criteria for designating an area as "exclusive" or "non-exclusive," the Framework stacks the factors heavily towards Alaskan interests. One such factor is "the desire by the public to protect industrial and community investments." The Association already has shown that Alaskans have greater access to the state management process than non-residents; thus, the "public's desire" is more likely to be stated in terms favorable to Alaskans. Furthermore, because exclusive registration areas are designed to promote and protect local interests, "protection of industrial and community interests" becomes a pro-Alaskan issue; making an area exclusive hardly protects non-resident interests.

Another factor in the designation of areas which is biased towards Alaskans is "providing fleets a reasonable opportunity to participate in the fishery." Large vessels, primarily owned by non-residents, are physically capable of fishing anywhere. Thus, this factor is weighted to give the small vessels, the majority of which are owned

by residents, an opportunity to fish without having to worry about competing for quotas with large vessels.

"The ability to properly manage the fishery" is yet another consideration for designating an area. It is unclear how the designation of an area as "exclusive" or "non-exclusive" affects management ability; the Framework should explain.

In its earlier comments, the Association already noted that exclusive areas promote inefficiencies. It is doubtful that "promoting the most efficient utilization of vessels and gear" is going to be given serious consideration when an area is granted exclusive status. In fact, this factor would seem to be incompatible with another factor, "the desire by the public to protect industrial and community investments."

What are the similar management measures which limit overall fishing effort?

How are all these considerations to be weighed. Will one factor be looked at with greater interest than another?

Gear placement and storage

Requiring the removal of gear in poor weather threatens lives and property. The safety of crews and vessels should be another consideration in promulgating gear placement and storage regulations.

Are all the factors for determining storage and placement regulations of equal importance?

Vessel tank inspection

Do some factors have priority over others?

In-season adjustment of time and area

The factors listed give extremely wide latitude for making in-season adjustments. Unless some standards are provided for the exercise of this power, the person or agency making the in-season adjustments may be open to charges of acting in an arbitrary and capricious manner. For example, there should be specific catch per unit of effort levels at which time and area restrictions would be imposed.

What are "any other factors relevant to the conservation and management of king crab"?

Enforcement And Reporting Requirements

For any regulations that are issued to implement management measures, consideration should be given not only to the costs of enforcement, but also to whether the regulations are enforceable.

As mentioned earlier, Alaska's jurisdiction over vessels fishing outside of state waters extends only to resident vessels. Consequently, the reporting requirements cannot be imposed on non-resident vessels which are fishing for king crab in the Fishery Conservation Zone.

Other Comments On The Framework

Setting minimum size limits for crab has been entirely neglected as a management measure. Minimum size is obviously a very important consideration since the establishment of ABC

and Optimum Yield are contingent on both minimum size and exploitation rates. Furthermore, the Board has displayed a propensity for establishing second seasons on larger, post-recruit crabs--a practice with which the Association disagrees and has already commented on. Therefore, the management body should be required to establish criteria for selecting minimum sizes and to justify its decisions on this management tool.

Criteria also should be set out for the selection of exploitation rates.

THE WRITTEN STATEMENT OF THE BOARD OF FISHERIES' DECISIONS (DECISION DOCUMENT)

Norton Sound Fishery

1. The Board has failed to clearly indicate how the acceptable biological catch was determined. The Decision Document only states that the "procedure outlined in the Management Framework" was used. What data were used to arrive at the 1981 population of legal sized males? What is the legal minimum size of crab for this area and how was it determined? By adopting a conservative exploitation rate (presumably .4), how many pounds of large post-recruit crabs will be lost to the fishery due to natural mortality?

2. The Decision Document states that there is a need to protect a near-shore subsistence fishery. Where are the data on this subsistence fishery? Why is there a need to protect it? The Framework states that subsistence uses will be given a priority "if it is necessary to restrict the taking

of king crab to assure the maintenance of the sustained yield of the stock." The Board has failed to provide data showing that the sustained yield of the stock is threatened, thus demonstrating that subsistence use justifies a priority. Giving subsistence use a priority is an allocation. How is this allocation consistent with National Standards 4 and 5 of the MFCMA?

3. The Decision Document is inconsistent. It defends the use of a conservative exploitation rate to protect a near-shore subsistence fishery. The Board then closes a 15 mile offshore area to commercial fishing to "further enhance subsistence fishing...." (emphasis added) Again, this closure is an allocation, how is it consistent with the MFCMA's National Standards? Also, Alaska's legal fishery management authority, except for resident-owned vessels, does not extend beyond three miles. How can the State enforce this closure against non-resident vessels?

4. Why was a July 15 through September 3 closure selected?

Adak Fishery

1. What are the present stock levels and what were the "former depressed levels."

2. The Framework listed four factors (beyond biological considerations) to be considered in establishing fishing seasons. It appears from the Decision Document that the Board failed to look at these factors. Why?

Bering Sea Fishery

1. Unless one is familiar with the vessel tank inspection requirements, the explanation offered on why the Pribilof opening date was changed is rather confusing. Also the document should state what enforcement problem resulted from an earlier opening of the Pribilof fishery relative to the Bristol Bay fishery.

2. Enforceability of season openings is not listed as a Framework factor for changing seasons. Yet the season opening in the Pribilof fishery is based entirely on this consideration. This violates the Framework.

3. The document should relate what the enforcement problem was that required the closure of the Pribilof red crab fishery at the same time as the Bristol Bay fishery.

4. Dr. Alverson, in his study, concluded that split seasons and different size limits may increase sorting mortality and generate unnecessary fuel costs. Did the Board consider these factors in deciding to increase the Pribilof size to 7-1/2 inches ? In changing from 7 to 7-1/2 inches, how many pounds will fishermen be unable to harvest due to natural mortality?

5. How does raising the size to 7-1/2 inches alleviate "enforcement problems associated with possible illegal fishing in the Bristol Bay area"?

6. As the Association indicated in its comments on the Framework (above), there is a need to establish criteria for setting minimum sizes.

Bristol Bay Fishery

1. Where are the data which show that "stabilization" of the number of boats in the Bristol Bay fishery is due in part to the Board's designation of this area as "exclusive"? What are the other reasons (and where are the supporting data) for this leveling off of "effort." (According to the Decision Document, "Effort... stabilized during the 1979 and 1980 seasons at 236 vessels." However, if one defines "effort" as the number of pots hauled, there was an 80% increase in effort from the 1979 season (315,226 pots) to the 1980 season (567,292 pots). See page 153, "Westward Region Shellfish Report to the Alaska Board of Fisheries, March 1981.")

2. What are the current "high stock levels" for Bristol Bay?

3. In rejecting the proposal for a new gear storage area, the Board failed to make its decision on the Framework criteria for gear placement and storage. The document shows that the Board's decision was based primarily on the public's desire for a fair and equitable start. However "fair starts" are not a factor set forth in the Framework for establishing pot storage and gear placement regulations. What constitutes a "fair and equitable" start? Is it possible to achieve and if so, at what costs? Who is this "public" that desires a fair and equitable start?

Another factor in the Board's decision to reject the proposed storage area was the costs of determining if pots are properly stored. However the Decision Document does

not specify what these costs are. Why should these costs be any greater than the costs in checking pots in the present area? The Board also neglected to ascertain whether the costs of pot checking are outweighed by the benefits.

A final consideration in the Board's rejection of the proposed pot storage area appears to be that the area is in in a major production ground. However, there are no data in the document to show that storage there would have a biological effect on crab. The document does mention that the Board received testimony "expressing concern for biological harm by gear stored improperly in the major production areas." But what is this harm and where are the data offered to support these contentions? One might argue that the Decision Document notes that "the Department expressed concern that the proposed storage area was in an area which produced approximately half of the 1980 season harvest." But what was the basis of the Department's concern - biological impact on fishery resources, fair starts?

The Board failed to consider the costs to industry of gear storage in the present area. This is a factor which the Framework requires be analyzed before a decision on storage areas is made.

The Decision Document needs to articulate "the obvious enforcement problems" with the proposed storage area.

4. The Board failed to consider all the criteria outlined in the Framework for designating an area as "exclusive" or "non-exclusive." (The Association has also pointed out in

its comments on the Framework that the criteria heavily favor Alaskans.)

The Decision Document makes it clear that retention of the exclusive designation for Bristol Bay was an allocation decision: the Board decided that large vessels should fish Bristol Bay and small vessels should have the Dutch Harbor area available to them. (It is, of course, also interesting to note that of the vessels harvesting king crab in Western Alaska, non-residents generally own the large vessels while residents own the majority of small vessels.) Where is the determination by the Board that this allocation conforms to National Standards 4 and 5 by (a) being non-discriminatory; (b) being "fair and equitable;" (c) promoting conservation; (d) promoting efficiency in the use of fishery resources; and (e) having other purposes besides economic allocation?

The Decision Document did not accurately reflect the position of those who proposed the return of the Bristol Bay area to a non-exclusive status. The proposers stated that exclusive area registration was an unlawful exercise of the state's police powers because this practice is designed to protect local interests. They pointed out that area registration has led to the development of large fleets in exclusive areas and is not beneficial to the long-term health of the fishery. They also emphasized that no conservation purpose is served by area registration: the guideline harvest level, combined with size limits and gear restrictions, adequately protect the resource.

The document notes "[t]he Board received testimony supporting the status quo." However, the document does not set forth the reasons these people gave for keeping Bristol Bay exclusive.

What is meant by the statement "Management can also be more precise providing fuller utilization of available surpluses when fishing effort is not so great that harvests are taken in a very abbreviated time"?

BOARD OF FISHERIES POLICY ON KING CRAB RESOURCE MANAGEMENT

Most of the Association's concerns about Alaska's king crab resource management policy and its consistency with the MFCMA have already been expressed in this letter, its previously submitted comments, and Dr. Alverson's study. (In this letter, attention especially should be redirected to pages 9-11, 19, 25-26.)

The Council has yet to do an analysis to ascertain if this policy comports with the MFCMA's National Standards and policies.

Has there been a study done to determine if the Board has, in fact, been achieving the goals it has set for itself in this policy?

Fishery management must not only take into account the resource, but also the industry. What has been the Board's policy for fostering industry development?

THE STATE OF ALASKA'S KING CRAB REGULATIONS

It is interesting to note that the regulations cover not only state waters (within three miles of shore), but also "an

adjacent seaward biological zone, comprised of all the waters within the statistical area which are not part of the registration area [i.e. state waters]." (See 5AAC 34.005) This seaward biological zone extends into the Fishery Conservation Zone (FCZ).

As the Association has repeatedly pointed out, the State has no legal fishery management authority over non-resident vessels fishing in the FCZ. Yet, these regulations state that as a condition to the State granting interim-use permits and vessel licenses or registering a vessel or gear for a registration area, fishermen agree to abide by the State's regulations when fishing in the adjacent seaward biological influence zone. (See 5AAC 34.085) Clearly, the State is using all possible means in an attempt to extend its authority to an area where it has no legal jurisdiction over non-resident vessels.

The Association hopes these comments are helpful to the Council in its deliberations on management of the Alaska king crab fishery.

Sincerely,

Richard J. Goldsmith
Executive Director

Attachments

Attachment I

United States Senate

WASHINGTON, D.C. 20510

April 30, 1981

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

Dear Mr. Secretary:

A matter involving significant and potentially long-term policy implications for commercial fishery management is now before your Department. The issue is whether the North Pacific Fishery Management Council will manage the king crab fishery of the North Pacific as mandated by the Magnuson Fishery Conservation and Management Act (MFCMA). We believe there is no question, from either a policy or legal perspective, that the Council must prepare a king crab fishery management plan (FMP) to be submitted to you for approval.

The Council at its May meeting will be considering several possible courses of action, including (1) a "joint statement of principles" between the Council and the Alaska State Board of Fisheries, (2) a determination not to develop an FMP, and (3) development of a king crab FMP. Under both the first and second options, the State of Alaska would be the fishery manager.

It is not our intent to indict the State of Alaska's research, management or enforcement capabilities, which in many instances have been outstanding. It is our opinion, however, that sound policy and legal requirements mandate the Council's development and secretarial approval of king crab FMP.

As you know, the MFCMA gave the North Pacific Fishery Management Council exclusive management authority over the king crab resource beyond the three mile territorial sea. There is probably no other fishery in the northeast Pacific in which there is such a large degree of controversy among the various users. The non-Alaskan domestic fleet, which harvests most of the king crab resources, has long believed that the Alaska state management process is biased in favor of local residents and that certain regulations have not been adequately justified. In addition, there is a real question of whether a number of state regulations are consistent with the MFCMA. Failure by the Council and the Department to develop and implement a king crab management plan would be inconsistent with the Act and inconsistent in principle with previous Council actions, such as the development and implementation of tanner crab management plans.

We also believe that preparation of an FMP is legally necessary. It is the United States, and not the state of Alaska, that has "exclusive fishery management authority" over the fishery resources beyond the territorial sea. Although the state of Alaska has jurisdiction to regulate its own citizens outside the territorial sea, it is clear that the state has no jurisdiction over non-citizens engaged in the extraterritorial fishery if such persons do not land in the state.

And while we understand that it is being asserted that the state has the jurisdiction to manage non-Alaskans engaged exclusively in the extraterritorial king crab fishery if such vessels are "registered" or land in the state, we believe that the MFCMA requires the Council to be the high seas fishery manager. This asserted state jurisdiction is based primarily upon an Alaskan state court decision which was decided before Congress enacted the MFCMA and assumed exclusive federal management authority over the fishery resources within the 197 mile fishery conservation zone contiguous to the territorial sea. We seriously doubt that such an assertion of state jurisdiction would be found valid today.

The MFCMA provides that the federal government's exclusive management authority over the fishery resources within this nation's fishery conservation zone is to be administered by the Regional Fishery Management Councils or the Secretary of Commerce. This basic management authority cannot be delegated to the states, nor is there authority for the Council to bind itself or you to any sort of "joint statement of principles," such as the North Pacific Council has been considering.

We pledge to provide whatever Congressional assistance may be needed to improve the efficiency of the MFCMA's management plan development procedures; we feel, however, that it is necessary for you to inform the North Pacific Council that the development by the Council of a fishery management plan for 1982 is required, and that absent such Council action, you would be required under section 304(c) of the MFCMA to prepare such a plan. We believe that your attention to this matter is appropriate not only because of the importance of the king crab fishery, but also because of the precedent that will be created by any resolution of this issue.

We appreciate your consideration of this matter and look forward to your reply.

Cordially,

Bob Packwood
BOB PACKWOOD
United States Senator

SLADE GORTON
United States Senator

MARK HATFIELD
United States Senator

Henry M Jackson
HENRY JACKSON
United States Senator

Attachment II

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

April 15, 1981

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

Dear Mr. Secretary:

We are writing this letter to acquaint you with what we feel is a significant fisheries management issue over which your department has jurisdiction. This issue involves a recent decision by the North Pacific Fishery Management Council and the Alaska Board of Fisheries to develop a "Management Framework" in lieu of the submission of a Fishery Management Plan (FMP) for the Bering Sea/Aleutian Island King crab fishery. The implications of this approach reach far beyond the scope of the King crab fishery alone. In fact, the clear abandonment by the North Pacific Fishery Management Council of its exclusive management authority within the Fishery Conservation Zone by failing to submit an FMP could set an extremely adverse precedent and seriously undermine the Fishery Management Council structure.

First of all, the North Pacific Fishery Management Council has a legal responsibility for reviewing and recommending to the Secretary of Commerce measures for the conservation and management of the fisheries of the Arctic Ocean, Bering Sea, and the Pacific Ocean seaward of Alaska. The State of Alaska only has management authority within three miles, while the Council has authority from three to 200 miles. The only way to achieve conservation and management for a resource which clearly ranges beyond the State's jurisdiction is through the authority of the Fishery Management Council and the Secretary of Commerce. This is consistent with the legislative history of the Magnuson Fishery Conservation and Management Act (MFCMA), and it is essential that an FMP be developed to achieve such conservation and management for these stocks.

We might add that we have always been supportive of the State of Alaska's King crab research, but we are simply making

the point that the only lawful way to manage the King crab fishery is through the North Pacific Fishery Management Council which is the only body which has the clear management and enforcement authority through the Secretary of Commerce to manage the fishery throughout its range. Furthermore, it is our understanding that if the North Pacific Fishery Management Council neglects this duty, then section 304(c) of the MFCMA clearly provides that the Secretary of Commerce may develop an FMP for such species. The MFCMA did not provide for, nor did Congress intend that, the Secretary of Commerce should in any way acquiesce or delegate to any state the authority to manage fish stocks or enforce fisheries regulations beyond state waters.

What is most important about the development of an FMP under the MFCMA is that this plan must be consistent with certain national standards laid out in the Act. One of these standards prohibits either de-facto or de-jure discrimination between residents of different states engaged in a fishery. Because many non-Alaskans are engaged in the King crab fishery and because there has always been strong resentment of "outsiders" by the Alaska Board of Fisheries and their constituents, we think that the proposed "Management Framework" to be implemented primarily by the Alaska Board of Fisheries with very limited advice from non-residents is grossly inadequate and would most likely not adhere to the national standards of the MFCMA. This view is confirmed by the "Draft Regulations for the Bering Sea/Aleutian Island King Crab Fishery Management Framework" which was circulated by the Alaska Board of Fisheries on April 1, 1981.

Therefore, we strongly urge you to advise the North Pacific Fishery Management Council before its May meeting that a decision to not submit a formal King crab FMP for your approval is clearly inconsistent with the intent of the MFCMA, and that the Council should submit a formal FMP to you as soon as possible in order to prevent the application of section 304(c) of the Act. Five years have passed since the enactment of the MFCMA, and this is surely a long enough period for the development of a King crab FMP which meets the national standards. Your action on this matter has significant implications not only for the King crab fishery but as a precedent for the authority of Fishery Management Councils generally.

Thank you for your consideration of this matter.

With best regards,

Sincerely,

Gerry E. Studds
Chairman
Subcommittee on Coast Guard
and Navigation

Joel Pritchard
Ranking Minority Member
Subcommittee on Oceanography

David F. Emery
Member of Congress

Point Judith Fishermen's Cooperative Ass'n., Inc.

Galilee Road

Narragansett, Rhode Island 02882

May 6, 1981

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

Dear Mr. Secretary:

The proposed action by the North Pacific Fisheries Management Council and the Alaska Board of Fisheries as outlined in their Joint Statement of Principles for the Management of Domestic King Crab Fisheries in the Bering Sea and Aleutians gives us cause for grave concern. We are not involved in the king crab fishery, but we are all members of the New England Council or otherwise deeply involved with the council system. Since the enactment of the Magnuson Fisheries Conservation and Management Act we have worked to establish the principle that the primary function of the councils is to prepare, monitor and amend the fishery management plans which comprise the management authority in the fishery conservation zone in their respective areas of concern. We are confused and dismayed by the apparent willingness of the NPFMC to abdicate this responsibility by attempting to delegate their authority to the Alaska Board of Fisheries. We are furthur dismayed by the very first sentence of this document which uses the words "legal responsibility for recommending and reviewing to the Secretary of Commerce measures etc." which appears to be an attempt to shift the primary responsibility for the king crab management plan away from the council and to the secretary.

Should the procedure outlined for the management of this segment of the king crab fishery be followed, it would set a very dangerous precedent. The implications for the long term policy for commercial fisheries management and the future role of the council is of great signifigance.

Other problems that we see with this proposal are that although there are references to the role of the secretary, the secretarial reviews process is actually eliminated. Also the scheme would extend the authority of the state over non-residents beyond state waters and into the fishery conservation zone. Repeated references to the non-discriminatory nature of this proposal notwithstanding, the history of regulation by the State of Alaska has been one of repeatedly attempting to discriminate against non-residents. To pretend that this has not been and is not a matter of tremendous controversy is a less than credible approach. It is and will in the future be the most important socio-economic aspect of managing all of the species found in the U.S. fishery conservation zone off of Alaska.

We are not all lawyers, but we think that several aspects of this proposal are not legal. Beyond that we see the implications for future fisheries management policy in our area and the entire fishery conservation zone to be of tremendous importance. For these reasons we respectfully request that prior to the May meeting of the NPFMC you urge the NPFMC to reject the procedure proposed in the Joint Statement of Principles and proceed with a Fishery Management Plan for the Management of the king crab fishery in the Bering Sea and Aleutians as provided for in the Magnuson Fishery Conservation and Management Act.

Sincerely,

Jacob Dykstra Member, New England Council
Point Judith Fishermen's Cooperative Association

Dan Arnold Member, New England Council
Massachusetts Inshore Draggermen's Association

Robin Peters Member, New England Council
Commercial Fisheries News

Alan Guimond Member, New England Council
Atlantic Offshore Fish and Lobster Association

Jay Lanzillo Member, NEC Advisory sub-panel

cc: Senator Bob Packwood
Senator Mark Hatfield
Senator Slade Gorton
Senator Henry Jackson
Congressman Joel Pritchard
Congressman Gerry Studds
Congressman David Emery
Congressman John Breaux
Congressman Edwin Forsythe
Members of National Federation of Fishermen
Senator John Chafee
Senator Claiborne Pell
Senator William Cohen
Senator George Mitchell
Senator Edward Kennedy
Congresswoman Claudine Schneider
Congressman William Carney
Congressman Les AuCoin
Lucy Sloan National Federation of Fishermen

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Washington, D.C. 20235

F/CM6:CB

MAY 27 1981

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

Dear Jim:

Thank you for your informative letter of May 1, 1981, regarding the North Pacific Fishery Management Council's approach to management of the king crab fishery off Alaska.

I commend the Council and the State of Alaska for seeking ways to manage fisheries that save time and effort, and strongly support such approaches provided that they meet the requirements of law. Since the approach under consideration by the Council is innovative, and may have nationwide ramifications, decisions on the part of the Secretary will require careful consideration, especially in view of the change in Administration. In addition to other issues, we will need to examine whether all of the national standards are satisfied and whether the arrangement is consistent with the Council and Secretary of Commerce roles specified in the law.

I note that, if a recommendation against further management is made at your May meeting, the Council will forward that finding and supporting material to the Secretary and that the Council and the Alaskan Board of Fisheries are committed to complying with the national standards.

I hope these initial thoughts are useful.

Sincerely yours,

/s/ Terry

Terry L. Leitzell
Assistant Administrator
for Fisheries

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

May 26, 1981

Mr. Ronald O. Skoog
Commissioner
Department of Fish and Game
State of Alaska
Subport Building
Juneau, AK 99801

Dear Commissioner Skoog:

I would like to thank you for your rather extensive letter which states your views regarding king crab management. Your letter is very thorough in presenting an historical perspective on how the North Pacific Fishery Management Council (NPFMC) and the Alaska Board of Fisheries (ABOF) arrived at a proposed agreement to develop a "management framework" in lieu of a formal Fishery Management Plan (FMP). This is not to say, however, that I agree with your conclusion that the agreed-upon approach complies with the legislative intent and terms of the Magnuson Act. In fact, I strongly believe that what is being proposed by the NPFMC and the ABOF is clearly inconsistent with the procedural requirements of the Act.

I realize your concern about the need to be fiscally responsive and avoid duplication of effort. This is indeed a laudable objective and I have no problem with the State of Alaska continuing to perform certain activities once a formal king crab FMP has been approved by the Secretary of Commerce. However, fiscal restraint alone is no excuse for not submitting a formal FMP to the Secretary. I do understand the concern of the Council and the Board about procedural delays in the FMP process. Along with other Members of Congress, I also have concerns about the time requirements of FMP's, and I intend to do what I can to help streamline this process. However, the need to refine the time requirements of the FMP process is also no excuse for the NPFMC not complying with its duties and responsibilities under the Magnuson Act.

I would like to make two points which are quite straightforward. First, the submission of a finding to the Secretary by the NPFMC and the ABOF that adequate conservation and management is being achieved is not sufficient to achieve compliance

with the Act. The State of Alaska only has authority for management and enforcement out to three nautical miles. Beyond three miles, and it is clear that the king crab resource ranges beyond three miles, the responsibility and jurisdictional authority rests with the NPFMC and the Secretary of Commerce. And, if a fishery beyond the territorial sea requires conservation and management, then a formal FMP must be submitted to the Secretary in order to comply with the procedural requirements of the Act.

Second, once an FMP is submitted to the Secretary, it is up to the Secretary to determine whether the National Standards of the Magnuson Act are being complied with under the plan.

I should also reiterate from my earlier letter that I am concerned here about the precedential impact of the Council's actions on this matter, and I have observed for some time now, and will continue to observe, the Council's actions with regard to the king crab fishery.

Thank you for your views on this matter, and I do realize that several well-intended fisheries managers and others have expended considerable effort in attempting to fashion a workable approach for king crab management. However, I respectfully disagree with the one you have chosen.

Sincerely,

Joel Pritchard
Ranking Minority Member
Subcommittee on Oceanography

JP:cmm

5/28/81

DRAFT

JOINT STATEMENT

BETWEEN

NORTH PACIFIC FISHERY MANAGEMENT COUNCIL (NPFMC)
ANCHORAGE, ALASKA

AND

ALASKA BOARD OF FISHERIES (BOF)
JUNEAU, ALASKA

ON THE

MANAGEMENT OF DOMESTIC KING CRAB FISHERIES

******

Recognizing that the NPFMC has a legal responsibility to prepare and submit -- to the Secretary of Commerce measures for the conservation and management of the fisheries of the Arctic Ocean, Bering Sea and the Pacific Ocean seaward of Alaska, and

Recognizing that the Board of Fisheries of the State of Alaska has jurisdiction over fisheries within the State and that it has for more than two decades exercized control over domestic king crab fisheries both within and without its territorial waters; and

Recognizing that it is desirable for the two organizations to work together to coordinate the management of the crab resources within their respective jurisdictions:

It is therefore agreed, subject to the internal procedures of both parties that:

1. This joint statement applies to the domestic fishery for king crab through its range within the jurisdiction of the United States in the North Pacific Ocean.

2. The Board and Council shall hold joint hearings periodically to provide for public comment on management measures to be effective in the king crab fishery.

3. Following the hearings, each organization shall appoint a sub-committee of three voting members. It will be the duty of this committee of six members to develop joint recommendations on king crab management to be submitted to the two bodies.

4. On receipt of the joint committee's recommendations, the Board and the Council each shall approve or disapprove the proposed measures.

5. If both agree on the recommendations, each will implement the recommendations according to its own internal procedures.

6. In the event either body fails to approve the recommendations, each will be free to implement its own management measures within its own area of jurisdiction.

7. It is the intent of this arrangement, upon approval of the Secretary of Commerce and appropriate officials of the State of Alaska, to provide for implementation of the jointly agreed-upon management measures by the State.

8. It is also the intent of the Council to define its management plan so as to set limits of its recommendations within which the Regional Director of the National Marine Fisheries Service in Juneau would be empowered to make within season adjustments of regulations after consultations with the appropriate official of the State of Alaska.

5/28-21

NORTH PACIFIC FISHING VESSEL OWNERS ASSOCIATION

Building C-3, Room 218
Fishermen's Terminal
Seattle, Washington 98119
Phone: (206) 285-3383

May 28, 1981

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

Dear Mr. Branson:

After the North Pacific Fishing Vessel Owners' Association submitted a May 18, 1981 letter to you with its comments on the Council's proposed management scheme for the Western Alaska king crab fishery, the enclosed documents were received at the Association's office. Since these materials are pertinent to the Council's deliberations on the proposed scheme, I request they be incorporated into the Association's comments and made part of the administrative record.

LETTER DENYING PETITION TO CHANGE THE BERING SEA OPENING

The first document is a May 19, 1981 letter from Commissioner Ronald O. Skoog, Alaska Department of Fish and Game, to Robert Alverson, manager of the Alaska Marketing Association. At first glance, the letter merely sets forth reasons for denying a petition for a change in the season opening date of the Bering Sea (Bristol Bay) king crab fishery. Upon closer examination, however, the letter provides ample justification for the Association's position that management of the Alaska king crab fishery should encompass all waters off Alaska, not just the area which the Council has demarcated for its proposed management scheme.

In the letter it is stated that

> "The season opening date for Bering Sea king crab is, in essence, the keystone decision in Alaska king crab management. Many other decisions made by the Board of Fisheries are contingent on the outcome of this threshold issue." (emphasis added)

Commissioner Skoog also pointed out that

> "Any decision to change the season opening date in the Bering Sea for king crab will have

[illegible letterhead]

May 28, 1981

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

Dear Mr. Branson:

I feel the North Pacific Fishing Vessel Owners' Association [illegible] May 18, 1981 letter to you with its comments on the Council's proposed management regime for the [illegible] fishery, the [illegible] were [illegible]. Since these materials [illegible] to the Council's deliberations on the [illegible], I request they be incorporated into the Association's [illegible] and made part of the administrative record.

[illegible]

The first document is a May 11, 1981 letter from Commissioner [illegible], Alaska Department of Fish and Game, to [illegible], president of the Alaska [illegible] Association. [illegible] the letter [illegible] season opening date [illegible] king crab fishery. [illegible] the letter provides ample justification for the Association's position that management of the Alaska king crab fishery should encompass all waters off Alaska, not just the area which the Council has designated for the proposed management regime.

In the letter it is stated that:

The season opening date for [illegible] king crab [illegible] in Alaska [illegible]. [illegible] other [illegible] are contingent on the outcome of this [illegible] issue." (emphasis added)

Commissioner [illegible] also pointed out that

Any decision to change the season opening date for the [illegible] king crab will have

> repercussions far beyond the Dutch Harbor area. (Dutch Harbor is the principal area in which the petitioners reside or process crab.) For example, if the Bering Sea opening is delayed until October and other Westward crab seasons retain the existing uniform September opening date, processing disruptions can be anticipated. These processing disruptions would derive from floating processors for the Bering Sea who would have the opportunity to first work other areas, e.g., Kodiak, Sand Point, Chignik, and Port Moller, thereby disrupting deliveries that would otherwise be made to shore-based processing facilities in these locations."

Commissioner Skoog's declarations show that strong interrelationships exist between activities in the Western Alaska area (the Bristol Bay, Bering Sea, Dutch Harbor and Adak registration areas) and the other king crab registration areas of the state. If the Western Alaska fishery affects the other king crab fisheries as Commissioner Skoog indicates, then these fisheries also should be subject to any management system adopted by the Council. However, should the Council continue to limit its proposed scheme to only the Western Alaska area, then considerations for fisheries outside this region should not be able to influence management decisions for the fishery under the proposed joint management system. That is, the Western Alaska region should be managed as a completely autonomous unit.

The letter from Commissioner Skoog notes that it has been the policy of the Board of Fisheries to have a uniform opening date for the entire Westward region (an area which not only takes in the Western Alaska area, but also encompasses the Alaska Peninsula and Kodiak registration areas). This policy, he states, "is to promote equality of bargaining position among fishermen." Why is the state concerning itself with price negotiations? Even more important, why wasn't this policy spelled out in the "Alaska Board of Fisheries Policy on King Crab Resource Management" that was sent out for public review? If the state's response to this question is that the document sent out for public review only addresses the biological considerations of king crab management, then the Council has been remiss in not requesting the Board's policies for management of the industry. These policies should also be subject to public scrutiny since they are central to any conservation and management decisions for the Western Alaska king crab fishery.

Statements in Commissioner Skoog's letter indicate that state management not only favors small vessels (which are owned primarily by Alaskans), but also shore-based processors. How do these biases comport with claims that the proposed management scheme will be even-handed and consistent with the National Standards of the Magnuson Fishery Conservation and Management Act?

It appears from Commissioner Skoog's letter that the Framework criteria were not the primary reasons for establishing the season opening for the Bering Sea. This violates the Framework and the Joint Statement of Principles. Furthermore, when one of the Framework criteria for season openings was set down as being "the timing of season openings for individual areas relative to one another," the Association assumed that the criterion meant the timing of an area opening relative only to other areas within the Western Alaska region. As evidenced by Commissioner Skoog's letter which stresses the importance of the Bering Sea (Bristol Bay) opening upon areas outside Western Alaska, this assumption was erroneous. The Framework should be amended to clarify this criterion. Again, if it is proposed that the Western Alaska area be managed differently from other king crab areas of the state, why are the effects on fisheries in other areas considered when making management decisions for the Western Alaska king crab fishery?

FEDERAL COURT DECISION REQUIRING SUFFICIENT DATA IN A FISHERY MANAGEMENT PLAN

The second document accompanying this letter is a recent decision by the U.S. Court of Appeals, Ninth Circuit, concerning data that is required to be contained in a fishery management plan. On May 18, 1981, this court ruled in Washington Trollers Association v. Kreps (No. 79-4240) that to carry out the purposes and policies of the Magnuson Act for meaningful public comment, a fishery management plan's summary of data used in specifying a fishery's present and future condition, maximum sustainable yield and Optimum Yield "must...provide information sufficient to enable an interested or affected party to comment intelligently on those specifications." The court cited Portland Cement Association v. Ruckelshaus when it stated

> "'It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that [to a] critical degree, is known only to the agency.'" 486 F.2d 375,393 (D.C.Cir.1973), cert. denied, 417 U.S. 921 (1974).

The Association believes that the court's holding is applicable to the Council's proposed management scheme for the Western Alaska king crab fishery. As the Association indicated in its

May 18, 1981 comments on the proposed scheme, the document which contains the justifications for regulations governing the Western Alaska king crab fishery failed to provide data on which the Board based its decisions. Those comments also pointed out that the Joint Statement's procedures are inadequate for allowing meaningful public comment.

SENATOR GORTON'S LETTER TO COMMISSIONER SKOOG

A May 20, 1981 letter from U.S. Senator Slade Gorton to Commissioner Skoog is the third document which is offered to the Council. This letter reemphasizes that neither the proposed management scheme"nor Alaskan state management is consistent with the requirements of the MFCMA."

LETTER FROM THE FISHERMEN'S MARKETING ASSOCIATION OF EUREKA, CALIFORNIA TO THE SECRETARY OF COMMERCE

The final document is a May 19, 1981 letter from Peter Leipzig, general manager of the Fishermen's Marketing Association, Inc. of Eureka, California to Malcolm Baldrige, the Secretary of Commerce. Mr. Leipzig urges that the Secretary oppose the course of action that the Council is taking with regard to the proposed management scheme for the king crab fishery off Alaska.

The Association hopes that these additional documents and comments will assist the Council in making its decisions on management of the Alaska king crab fishery.

Sincerely,

Richard J. Goldsmith
Executive Director

Enclosures

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

SUBPORT BUILDING
JUNEAU, ALASKA 99801
PHONE: 465-4100

May 19, 1981

Robert Alverson, Manager
Alaska Marketing Association
Room 232, C-3 Building
Fishermens Terminal
Seattle, Washington 98119

Dear Mr. Alverson:

Your petition for change in the season opening date for king crab fishing in the Bering Sea has been received. Your petition has been acted upon in accordance with AS 44.62.230 and Delegation of Authority #80-81-FB. After consultation with the Board of Fisheries, I have determined that your petition should be and hereby is formally denied.

Your petition for regulatory change was based on the premise that meat recovery for king crab legs and sections is higher later in the season. You presented evidence documenting this. Also, you presented support from a number of other crab processors and Dutch Harbor fishermen who concur in this opinion. Therefore, I would like to present to you some of the reasons for my decision to deny your petition, after consultation with the Board of Fisheries.

1. Any decision to change the season opening date in the Bering Sea for king crab will have repercussions far beyond the Dutch Harbor area. (Dutch Harbor is the principal area in which the petitioners reside or process crab.) For example, if the Bering Sea opening is delayed until October and other Westward crab seasons retain the existing uniform September opening date, processing disruptions can be anticipated. These processing disruptions would derive from floating processors for the Bering Sea who would have the opportunity to first work other areas, e.g., Kodiak, Sand Point, Chignik, and Port Moller, thereby disrupting deliveries that would otherwise be made to shore-based processing facilities in these locations.

2. King crab tend to move out of the shallower bays later in the fall. Shallow bays are the favored fishing grounds for the small boat fleet (less than 100 feet) in areas such as Kodiak. If a uniform season opening date is retained for the entire Westward region as has been Board policy, and the opening is changed to October, small boat fishermen would be disproportionately disadvantaged.

3. A later season creates higher operating costs for fishermen. Generally speaking, October and November produce more inclement weather than September. This can delay fishing and force vessels to waste fuel on the grounds waiting for clement fishing weather. It is impossible to hypothesize the marginal economic advantage to be gained from increased meat recovery on king crab as compared to the marginal economic loss from increased operating costs. This aspect of a later season opening date, like that described in (2) above, inures to the detriment of the small boat fleet to a greater extent than the large boat fleet.

4. Price negotiations would be affected throughout the Westward region. Board policy in the past has been to favor a uniform season opening date for the entire Westward region king crab fishing season to promote equality of bargaining position among fishermen.

5. Processors who do not feel that meat recovery is of high enough quality early in the season may refrain from purchasing any product they judge inferior. This is aways a prerogative of the buyer and is not affected by season opening dates.

6. At the April, 1981, meeting of the Alaska Board of Fisheries, there was broad support for retaining the September opening date for Bering Sea king crab. Mr. Richard Goldsmith of the North Pacific Fishing Vessel Owners' Association testified to the Board in favor of retaining this date. His testimony alluded to the diminished safety for fishermen involved in later fishing seasons.

7. The season opening date for Bering Sea king crab is, in essence, the keystone decision in Alaska king crab management. Many other decisions made by the Board of Fisheries are contingent on the outcome of this threshold issue. To change the decision on that threshold issue at this point would be manifestly unfair to the public in attendance at the regularly scheduled Board meeting. Fishing plans for the Bering Sea must be laid well in advance, and the public places justifiable reliance on the integrity of the Board decisions of this magnitude.

In closing, let me thank you for your interest in the king crab resource and the industry dependent upon that resource. I urge you to appear before the Board at their regularly scheduled public meeting for shellfish regulatory matters in March, 1982, to present your case again. Data should be presented to the Board showing economic benefits of delayed season openings compared to data showing marginal economic losses associated

with a later season. No such data have yet been presented to the Board. I would counsel you to work closely with the fishermen's organizations, since welfare of the fishermen is of high importance to the Board of Fisheries.

Sincerely,

Ronald O. Skoog
Commissioner

cc: Alaska Board of Fisheries
Dutch Harbor Advisory Committee
Kodiak Advisory Committee
Sand Point Advisory Committee
Chignik Advisory Committee
Homer Advisory Committee
Jeff Stephen, United Fishermens Marketing Association
Robert Resoff, Alaska Crab Institute
✓Richard Goldsmith, NPFVOA,
Rep. Zharoff
Rep. Sutcliffe
Sen. Mulcahy

WASHINGTON TROLLERS ASSOCIATION et al., Plaintiffs-Appellants,

v.

Juanita KREPS, Secretary of Commerce, Defendant-Appellee.

No. 79-4240.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 8, 1981.

Decided May 18, 1981.

Action was brought seeking declaration that fishery management plan for commercial and recreational salmon fisheries off the coasts of Washington, Oregon and California did not conform to the provisions of the Fishery Conservation and Management Act of 1976. The United States District Court for the Western District of Washington, William W Schwarzer, J., 466 F.Supp. 309, entered summary judgment for defendant Secretary of Commerce, and plaintiffs appealed. The Court of Appeals, Pregerson, Circuit Judge, held that: (1) summary of information utilized in a fishery management plan's specifications must provide information sufficient to enable an interested or affected party to comment intelligently on those specifications, and although the "summary" that the plan is required to include may incorporate by reference documents containing the necessary information, those documents must be reasonably available to the interested public, and (2) factual issues, precluding summary judgment, existed as to availability of documents describing computer methodology and whether plan set out the data that was fed into the computer to obtain plan's specifications.

Reversed and remanded.

Poole, Circuit Judge, filed a dissenting opinion.

1. Fish ⇨12

Under the Fishery Conservation and Management Act of 1976, summary of information utilized in fishery management plan's specifications must provide information sufficient to enable an interested or affected party to comment intelligently on those specifications, and though the "summary" that the plan is required to include may incorporate by reference documents containing the necessary information, those documents must be reasonably available to the interested public. Fishery Conservation and Management Act of 1976, §§ 2-406, 2(b)(5)(A), (c)(3), 303(a)(3), 305(a), 16 U.S.C.A. §§ 1801-1882, 1801(b)(5)(A), (c)(3), 1853(a)(3), 1855(a).

2. Federal Civil Procedure ⇨2481

In action seeking declaration that fishery management plan for commercial and recreational salmon fisheries off the coasts of Washington, Oregon and California did not conform to the provisions of the Fishery Conservation and Management Act of 1976, issues of fact, precluding summary judgment, existed as to availability of documents describing the computer methodology used and whether plan set out the data that was fed into the computer to obtain the plan's specifications. Fishery Conservation and Management Act of 1976, §§ 2-406, 16 U.S.C.A. §§ 1801-1882; Fed.Rules Civ.Proc. Rule 56(c), 28 U.S.C.A.

Appeal from the United States District Court for the Western District of Washington.

Before PREGERSON and POOLE, Circuit Judges, and KARLTON,* District Judge.

PREGERSON, Circuit Judge:

Appellants--several associations representing commercial troll fishermen, and named individual troll fishermen--appeal from a summary judgment against them in this suit challenging the 1978 Fishery Management Plan for commercial and recreational salmon fisheries off the coasts of Washington, Oregon, and California ("the Plan"). Appellants seek a declaration that the Plan does not conform to the provisions of the Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-82 ["the FCMA"], and the guidelines established pursuant to that act, 50 C.F.R. 602.2, 602.3, and hence could not serve as a proper basis for fishery management regulations promulgated by the appellee Secretary of Commerce. Because we find that material issues of fact remain unresolved, we reverse the district court's grant of summary judgment.

Section 303(a)(3) of the FCMA, 16 U.S.C. § 1853(a)(3), which provides that fishery management plans are to specify the fishery's present and likely future condition, maximum sustainable yield, and optimum yield, requires that plans "include a summary of the information utilized in making such specification." Appellants contend that the Plan violates this requirement because it relies on computerized analysis systems without describing either the computer methodology or the data used to arrive at the Plan's projections and recommendations. Appellees reply that the Plan cites documents that describe the computer methodology in sufficient detail to serve as the basis for informed criticism and that as long as such documents were publicly available, it was unnecessary to include them in the Plan itself.

The kind of "summary" section 303(a)(3) requires can be understood only in light of the purposes and policies of the FCMA. Congress clearly intended to give those members of the public interested in or affected by fishery management plans and regulations a meaningful voice in shaping those plans and regulations. Section 2(b)(5)(A) of the FCMA, 16 U.S.C. § 1801(b)(5)(A), states that one purpose of the Act is to "enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such [fishery] plans." And section 2(c)(3) of the FCMA, 16 U.S.C. § 1801(c)(3), enunciates a policy of "assur[ing] that the national fishery conservation and management program ... involves, and is responsive to the needs of, interested and affected States and citizens." To realize these goals, Congress stipulated that when the Secretary of Commerce approves a fishery management plan and publishes it with proposed implementing regulations, "[i]nterested persons shall be afforded a period of not less than 45 days after such publication within which to submit in writing data, views, or comments on the plan ..., and on the proposed regulations." FCMA section 305(a), 16 U.S.C. § 1855(a).

[1] This provision for public comment can effectuate Congress's goals only if the public is able to make intelligent,

* Honorable Lawrence K. Karlton, United States District Judge for the Eastern District of California, sitting by designation.

informed, meaningful comments. The "summary of the information utilized" in the Plan's specifications required by section 303(a)(3) must therefore provide information sufficient to enable an interested or affected party to comment intelligently on those specifications.[1] "To suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether." *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2d Cir. 1977). Accordingly, although the "summary" that the Plan is required to include may incorporate by reference documents containing the necessary information, those documents must be reasonably available to the interested public.[2] "It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that [to a] critical degree, is known only to the agency." *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 393 (D.C.Cir.1973), *cert. denied*, 417 U.S. 921, 94 S.Ct. 2628, 41 L.Ed.2d 226 (1974).[3]

[2] Here, appellants and appellees disagree sharply as to how readily available the documents describing the computer methodology actually were. They disagree on whether the Plan sets out the data that was fed into the computer to obtain the Plan's specifications. They even disagree on whether only one computer model was used to obtain all of the descriptions, projections, and analyses in the Plan. All of these are issues of fact, all are highly material, and all are unresolved. Summary judgment, however, is proper *only* when "there is no genuine issue as to any material fact." Fed.R. Civ.P. 56(e); *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 668 n.3 (9th Cir. 1980). Therefore, we must reverse the entry of summary judgment; further proceedings will be necessary to resolve the factual disputes in this lawsuit.

The judgment of the district court is reversed, and the case is remanded for further proceedings.

POOLE, Circuit Judge, dissenting.

Today the majority mandates that henceforth, before promulgating fishing

1. The dissent argues that this interpretation of "summary" strains the common meaning of the term, which it characterizes as " 'a comprehensive and usually brief abstract, recapitulation, or compendium of previously stated facts or statements.' " *Dissent* slip op. at 2142, at ———. Yet in reality it is the sketchy information contained in the Plan which does violence to the common meaning of "summary." Repeatedly, the Plan explains how data used in its calculations was obtained, but gives no clue as to what that data actually was nor where to find it. For example, the Plan states that its yield computations are based partly on ocean migration patterns derived "primarily [from] an analysis of adult fish tagging experiments in the ocean." Plan at 91, 43 Fed.Reg. 15685. But nothing is said as to what these patterns actually were, where they are to be found, what the experiments were, or where *they* are recorded. Such sketchy information is not an abstract, recapitulation, or compendium of previously stated facts, but rather an allusion to completely unstated facts.

2. The dissent is mistaken in describing this requirement as mandating that "all of the raw data and any other information" used in formulating fishery yield specifications must be made available. The issue is whether the very information *central* to the decision, and which the government in fact relied upon, must in some form be accessible to the interested public.

3. *Cf. Western Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) ("When substantive judgments are committed to the very broad discretion of an administrative agency, procedural safeguards that assure public access to the decisionmaker should be vigorously enforced.")

regulations pursuant to the Fishery Conservation and Management Act (Act), 16 U.S.C. § 1801 *et seq.*, the Secretary of Commerce must make available to every interested party, every computer model, methodology, statistical study, all of the raw data and any other information which played a role in formulating fishery yield specifications pursuant to § 1853(a)(3). Thus, the public now has a right of access to all that is used to formulate such specifications and may obtain the information in the form that it came to the Secretary. I cannot agree that the statute or the public's interest in commenting on proposed regulations requires imposition of such a sweeping access requirement. Nor can I agree that summary judgment was improperly granted in this case. I respectfully dissent.

I.

The key statutory provision construed is 16 U.S.C. § 1853(a)(3), which provides that in promulgating a fishery management plan, that plan must:

> assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery, *including a summary of the information utilized in making such specification.*

(emphasis supplied). Reading this language in conjunction with provisions of the Act requiring public opportunity for comment on fishery management plans and regulations,[1] the majority concludes that the term "summary" must be defined to require complete access to all the information and methodologies used in formulating the specifications of a fishery management plan. As the majority makes clear in the fourth paragraph of its opinion, all of the basic data used must be available if meaningful public comment is to be possible. Moreover, in light of the conclusion that material issues of unresolved fact are whether the raw data fed into the computer was disclosed in the plan,[2] or whether the computer model was available, the majority must necessarily conclude that disclosure of such materials is essential. Absolute access is the necessary import of today's decision.

A.

It is a familiar principle of statutory construction that the particular words used by Congress provide the best indication of a statute's meaning. *See, e. g., Ernst and Ernst v. Hochfelder*, 425 U.S. 185, 201, 96 S.Ct. 1375, 1384, 47 L.Ed.2d 668 (1976). In this case, Congress used the term "summary" and the Act requires a plan to summarize the information used to develop the plan specifications. 16 U.S.C. § 1853(a)(3). I cannot conceive of any definition of the term "summary" which would require access to the underlying raw data. A summary is "an abridgment; brief; compendium; digest; * * *";[3] or "a comprehensive and

1. *See* 16 U.S.C. § 1855(a).

2. The majority opinion is contradictory when it concludes that a material issue of unresolved fact is "whether the Plan sets out the data that was fed into the computer to obtain the Plan's specifications." Maj. Op., slip op. at 2142, 2143, at ——. Earlier on the same page the opinion indicates that detailed information which the Secretary must disclose may simply be made reasonably available to the public rather than actually appended to the plan. I assume the material issue of fact captured in the majority's understanding is whether the data fed into the computer was "reasonably available," not whether it was actually disclosed in the plan.

3. Black's Law Dictionary (5th ed. 1979).

usually brief abstract, recapitulation, or compendium of previously stated facts or statements."[4] Access to all is the antithesis of a summary.

B.

As a matter of language and common understanding, the majority does not attempt to characterize "complete access" as an accepted—or even plausible—definition of the term "summary."[5] Rather, the justification for the extraordinary access mandated today is said to lie in the public's need for all the Secretary's information so that meaningful comment will be possible. We are told that although this information need not be appended to the plan or regulations themselves, it must be reasonably available to the interested public if intelligent public comment is to be expected, and that access to that body of knowledge, wherever it be located, is an absolute condition to the legality of any plan or regulation.

I have no difficulty agreeing that, when the Secretary is required to disclose highly detailed information, it is adequate if, instead of appending that information to the plan or regulations, the public is provided a means of reasonable access. The flaw in the majority opinion is its conclusion that the word summary is to be given something foreign to its common meaning and that the Act's provisions for public comment are to be enlarged into an onerous responsibility nowhere contemplated by Congress or supported in any authority on administrative procedure. It simply serves no legitimate end to hold that complete access to everything used to formulate plan specifications is the *sine qua non* of intelligent public comment.[6]

C.

Of course it is true that meaningful public comment flows from information. But the quantum of the information that must be disclosed to bring forth intelligent comment is a fluid consideration. Obviously, the most informed commentator would be one with all of the agency's information, extensive experience with the administrative process, expertise in the field of which the regulation is a part and a participative role in the decisionmaking. Yet no one has suggested that to be helpful or meaningful, comments must be the product of such ideal, laboratory conditions.

There is no limit on an analysis which defines disclosure solely with reference to what is necessary for intelligent public comment. It is always possible for ingenious litigants and resourceful judges to envision additional bits of information which, if publically available, would im-

4. The Random House College Dictionary (rev. ed. 1980).

5. The legislative history does not offer guidance as to why the term "summary" was included in § 1853(a)(3).

6. Cases such as *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 251 (2d Cir. 1977), do not particularly aid analysis in this case. *Nova Scotia* did not deal with a situation, such as in this case, where Congress placed some limits on what the regulating agency was required to make publically available. Moreover, the problem the court faced in *Nova Scotia* was the complete absence of information from the Food and Drug Administration about the scientific basis for regulations significantly burdening the food industry. *Id.* Ours is not a case in which the Secretary has proposed regulatory action, yet failed to apprise the public of the basis for it. The Secretary has never disputed her obligation to make available a meaningful summary of the basis for her plan specifications, including both the scientific data and computer models employed, pursuant to § 1853(a)(3).

prove the administrative process by permitting broader public comment. But when as here, Congress has drawn the line of required access, it is not for us to redraw it to increase comment, and especially upon as tenuous a basis as that put together by the majority here.

The right of public comment under this statutory scheme is a right defined by Congress. It is not, under the Act, a public invitation to reconduct and reformulate the entire regulatory process using all of the materials used by the Secretary. Rather, it is a right to comment based on access to a meaningful summary of the information used in formulating the plan. Thus, Congress provided for the fullest and most thoughtful comment that a comprehensive, brief recapitulation of the Secretary's data and methodologies used in preparing the plan specifications would evoke.

Not only does congressional use of the term "summary" compel this conclusion but other provisions of the Act vindicate such a construction. The Act expects that much of the information necessary to evolve fishery plans will be supplied by those in the fishing industry. *See* 16 U.S.C. § 1853(a)(5). All of this information, which is by the terms of the Act essential to formulation of a plan and regulations [16 U.S.C. § 1853(a)(2)], is *not* to be made publically available:

> Any statistics submitted to the Secretary by any person in compliance with any requirement under subsection (a)(5) of this section shall be confidential and shall not be disclosed except when required under court order. . . . except that such statistics [may be disclosed] *in any aggregate or summary form* which does not disclose directly or indirectly the identity or business of any person who submits such statistics.

16 U.S.C. § 1853(d) (emphasis supplied).[7]

Subsection 1853(d) is relevant in two respects. First, it undercuts the majority's analysis that all raw data must be available to vindicate the public comment provisions contained in the Act. Congress concluded that the public comment provisions could survive, and comments be meaningful, even without all of the raw data used pursuant to § 1853(a)(2).

The language of the subsection also makes clear that Congress used "summary" just as it is commonly defined. The language of the subsection leaves no doubt that "aggregate or summary form" was not to be defined as "raw, unedited data."

D.

The Act cannot be construed to require anything more than a summary—that is, a brief, compendium or digest of the information used to formulate the plan specifications pursuant to § 1853(a)(3). When Congress has defined the required level of administrative disclosure to the public, the right of public comment can only be understood with reference to the congressionally defined level; it is not for the judiciary to substitute its judgment, however preferable that may temporarily seem, as to what public access is appro-

7. The Senate Conference Report on the Act makes this point unmistakeably. Commenting on § 303 of the Act, 16 U.S.C. § 1853, it warns:

> This section also requires that statistics submitted by the Secretary pursuant to a management plan must not be released to the public in the form of individual records unless pursuant to court order.

S.Conf.Rep.No.94-711, 94th Cong., 2d Sess. 53, *reprinted in*, [1976] U.S.Code Cong. & Ad. News, 593, 660, 676.

priate in the interest of a "more perfect" administrative system.[8]

II.

The disposition of this case cannot be fairly characterized as a failure of the district court to identify material, unresolved issues of fact. Disputed facts as to appellants' access to all the raw information used in devising the plan specifications become material only if one accepts the majority's theory that a "summary" within the meaning of the Act requires complete access. That interpretation should be rejected, and the appropriate inquiry should be whether the Secretary made available congressionally mandated summaries of the information used in devising the plan which must be disclosed pursuant to § 1853(a)(3).

A.

The only issue of availability in this case, once one puts aside the vagrant theory of a need to disclose raw data and unedited models, is whether a summary of the computer model was available. The Secretary concedes that information about the model was not actually disclosed with the plan or regulations but argues it was reasonably available. Appellants contend they were unsuccessful in obtaining a summary of the model and point to efforts they made to obtain the model summary from the Chairman of the Committee that prepared the plan and from a state library. The Secretary does not dispute that a summary of the model is relevant information about the formulation of the plan and must be publically available as part of the "summary" required in § 1853(a)(3).

Although the district court did not expressly indicate whether summary information about the model was available, it was unnecessary to resolve the issue as appellants cannot complain about their inability to obtain the summary; they failed to pursue a reasonable means provided by the Secretary to get additional information.

In the Federal Register notice of the plan and regulations, Mr. Donald Johnson of the Commerce Department in Washington was specified as the person to contact for more information. 43 Fed. Reg. 15630. Appellants did not contact Mr. Johnson. The Act recognizes that publication in the Federal Register is the most appropriate means for the Secretary to convey to the public information relevant to promulgation of either a plan or regulations. *See* 16 U.S.C. § 1855(a). Failure to pursue this reasonable avenue to obtain more information forecloses the opportunity for complaint in this court.[9]

8. In evaluating the disclosure requirements of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, an analogous problem, this court recently declined to require that the public be granted access to all the working papers or detailed supporting documents employed in preparing an environmental impact statement even though such materials would provide "additional insight" to members of the public wishing to comment. *Columbia Basin Protection Ass'n v. Schlesinger*, 643 F.2d 585 at 595 (9th Cir. 1981). I believe that this view of public disclosure requirements in *Columbia Basin* is consistent with the views I express here.

9. Appellant argues that a Federal Register notice specifying Johnson as the source of more information came too late for it to obtain a summary of the computer model for use in commenting to the Pacific Regional Council, the body which prepared the proposed plan. Without tarrying over whether a summary of the model could reasonably be obtained before the notice was published in the Federal Register specifying Johnson as the source of additional information, appellant's argument simply misses the point. A plan may not be effective until approved by the Secretary. 16 U.S.C. § 1854(a). Before they may be made binding,

B.

The remaining issue is whether the summary provided by the Secretary pursuant to § 1853(a)(3) was sufficient for purposes of the statute. The district judge found that the plan contained information about the maximum and optimum yield calculations as required by § 1853(a)(3). 466 F.Supp. at 314. Reviewing the 157 page plan in its entirety, the court concluded that a reasonable effort had been made to disclose substantial amounts of information covering every issue relevant in promulgating the plan and regulations, found that no subject had been ignored, and noted that the appellants had failed to point to any information withheld or which was essential to their right to comment. *Id.* The district court's conclusions are sustained by the record.

The primary purposes served by statutory requirements of public disclosure are those of apprising the public of the action the Secretary plans to take and affording an opportunity for public participation by means of the comment process. This court has said that in reviewing disclosures required by a statute to permit public comment, regulations will not be set aside for inadequate disclosure unless the disclosures were so grossly deficient as to frustrate the public right. *See, e. g., National Wildlife Federation v. Adams*, 629 F.2d 587, 593 (9th Cir. 1980). Nowhere in the record here does it appear that the disclosure of information was so grossly deficient as to erode the public right to comment or to withhold from the public information on regulatory action proposed by the Secretary. I would affirm the judgment.

the plan and proposed regulations must be published in the Federal Register so that the public will have 45 days to comment on the plan, any amendments to it or any regulations proposed. *See* 16 U.S.C. § 1855(a)(2). The Secretary is required to consider all comments received. 16 U.S.C. § 1855(c)(1)(A). It was at this stage, when complete comment on the entire range of regulation proposed by the Secretary was possible, that Johnson was designated as the source of additional information. I am not prepared to invalidate regulatory action for want of adequate public disclosure when, at a stage complete comment is possible, parties fail to seek out information they may need to comment from a person specified as the source for additional information.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION
WASHINGTON, D.C. 20510

May 20, 1981

The Honorable Ronald O. Skoog
Commissioner, Department of Fish and Game
State of Alaska
Subport Building
Juneau, Alaska 99801

Dear Commissioner Skoog:

Thank you for your letter of May 7th commenting on the letter I, along with Senators Packwood, Hatfield and Jackson, sent to Secretary Baldrige regarding king crab management. I appreciate your providing me with your views, and I accept your invitation to comment on your letter.

First, you indicate that the "Draft Statement of Principles" for managing the king crab fishery is sound because the State of Alaska has determined that this statement "incorporates the National Standards" (of the MFCMA), implements a regional approach to management problems, and "is consistent with the intent" of the MFCMA. It appears to me that the point you are missing is that it is the legal responsibility of the North Pacific Fishery Management Council and the Secretary of Commerce to make such management decisions. Furthermore, a king crab management plan must be not only consistent with the intent of the Act, but the terms of the Act.

Second, your letter states: "You interpret the Magnuson Act to require a FMP for each fishery in the Fishery Conservation Zone." This is not correct, nor does the letter state that. It is my belief, however, that when an extraterritorial fishery does require conservation and management, the MFCMA requires that an FMP be prepared in accordance with the terms of the Act.

Third, your letter states that: "You claim the current management program is biased in favor of local residents." I made no such claim in the letter to Secretary Baldrige. That letter states that "the non-Alaskan domestic fleet, which harvests most of the king crab resources, has long believed that the Alaskan state management process is biased in favor of local residents." This can hardly be denied. It is this kind of disagreement amongst various state users and managers of our extraterritorial fishery resources which led Congress to establish the regional council system for managing these resources. Your statement that the non-Alaskans concerns over "local bias" will be remedied by the State Board of Fisheries and the Council meeting "jointly to review the consistency of the management program with the Act and its National Standards" again misses the point. The law requires the Secretary of Commerce to make such a consistency determination of an FMP, drawn up and submitted by the Council.

I am still fully supportive of the letter that Senators Packwood, Hatfield, Jackson and I sent Secretary Baldrige. I have no objection to your suggestion that the Secretary defer any final decision until after the Council's meeting in late May. It is essential for the State of Alaska and the Council to realize, however, that neither the "draft statement of principles" management framework nor Alaskan state management is consistent with the requirements of the MFCMA. Failure to acknowledge this can only result in further controversy and further Congressional concern over king crab management.

Sincerely,

SLADE GORTON
United States Senator

SG:ckj

CC Secretary Malcolm Baldrige

FISHERMEN'S MARKETING
ASSOCIATION, INC.
NO. 2 COMMERCIAL ST. WHARF
EUREKA, CALIFORNIA 95501
PHONE (707) 442-3789

May 19, 1981

Malcolm Baldrige
Secretary of Commerce
Washington, D.C. 20230

RE: Joint statement of principle between the North Pacific Fishery Management Council and the Alaska Board of Fisheries on the management of the King Crab fishery in Berring Sea and Aleutians.

Dear Secretary Baldrige:

The Fishermen's Marketing Association represents the commercial trawl fishermen from Ilwaco, Washington to Monterey, California. This association has been involved in fishery management issues since its conception in 1952. More recently, amoung other activities, we participated in the bilateral negotiation with the Soviet Union in the early 1970's, we were active in support of the 200 Mile Bill, we have had representatives placed on the Pacific Fishery Management Council's Advissory Panel, and had one member appointed to the Pacific Fishery Management Council.

I have recently reviewed and discussed with others in the industry the joint statement of principles between North Pacific Fisheries Management Council and the Alaska Board of Fisheries on the management of domestic King Crab fisheries in the Bering Sea and Aleutians.

I feel that any action along these lines would reduce the authority of the Management Council and is contrary to the original intent of Congress.

Management Councils, as established by the Magnuson Act, are a novel approach to Fishery Management. It was expected that problems would develop within system which would need to be fine tuned. However, I feel to turn the management responsibility of the King Crab fishery back over to the state of Alaska would set a harmful precedent that could ultimately lead to a challenge of the entire concept of Regional Council.

Re: Joint statement of principle between the North Pacific Fishery Management Council and the Alaska Board of Fisheries on the management of the King Crab fishery in Berring Sea and Aleutians.

This association supports Regional Management Councils and therefore is opposed to the transfer of management of the King Crab fishery to the state of Alaska.

I hope that you will agree with myself and others within the industry and oppose this transfer of management responsibility.

Sincerely,

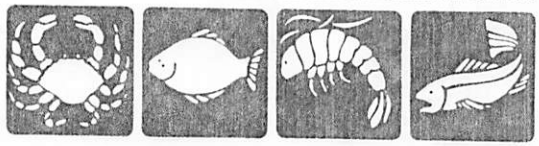
Peter Leipzig
General Manager

PL/vc

cc: Clement Tillion
The entire Washington Congressional Delegation
The entire Oregon Congressional Delegation
The entire California Congressional Delegation
Richard Goldsmith
Lucy Sloan

Alaska
Seafood
Marketing
Institute

526 Main Street Juneau, Alaska 99801 (907) 586-2902



"Promoting Alaska's Finest Resource"

MEMORANDUM

To: J. Richard Pace, Chairman
From: Eric Eckholm
5/21/81
Regarding: Trip report, National Restaurant Show

I just returned from the National Restaurant Show in Chicago, where 100,000 restaurant owners, operators and others associated with the restaurant industry passed by our booth. It was a very productive show.

One factor relating to King Crab was mentioned by quite a few of the restaurant operators. They wanted to know what was the matter with their king crab this year, why it didn't have much meat in the legs.

People stated that they were unhappy with the situation, and several said they were considering taking king crab off their menus. This factor could be important in future efforts of ASMI in promoting seafood, and I thought it would be of interest to you.

CC: Rick Lauber

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

DATE: December 8, 1980

TO : North Pacific Fishery Management Council Members
NPFMC - Jim Branson
GCF - Jay Johnson
FROM: GCAK - Patrick J. Travers Pat

SUBJ: Alternatives to Conventional King Crab FMP and Implementing Regulations

INTRODUCTION

The purpose of this memorandum is to discuss the availability to the North Pacific Fishery Management Council (Council), the Assistant Administrator for Fisheries, NOAA (Assistant Administrator), and the State of Alaska, of management procedures for the western Alaska king crab fishery (fishery) other than the preparation and approval of a fishery management plan (FMP) and the implementation of that FMP through the promulgation of detailed regulations by the Assistant Administrator.

Since Alaska attained statehood in 1959, its government has asserted and effectively exerted a high degree of management authority over the fishery both within and without the three-mile limit, and with respect to both fishermen residing in Alaska and those residing in other states, particularly the State of Washington. In exercising this authority, Alaska has taken advantage of the fact that the fishery takes place in extremely remote areas, and that it has until recent years almost exclusively required the delivery of live crab to shore-based processors. Because the landing of live crab caught in the fishery in a state other than Alaska is unfeasible due to the fishery's remoteness, both Alaskan and non-Alaskan participants in the fishery have of necessity landed their catches in Alaska, thereby subjecting themselves to a comprehensive system of landing laws and regulations governing many features of the fishery. These regulations are promulgated by the Alaska Board of Fisheries (Board) and implemented by the Alaska Department of Fish and Game (ADF&G), both of which are agencies of the Alaska state government. Alaska's authority to use these regulations to manage participation in the fishery beyond the three-mile limit by non-Alaskans was endorsed by the Alaska Supreme Court in State v Bundrant,

546 P.2d 530 (1976), even though enforcement of previously promulgated regulations had been preliminarily enjoined by a three judge Federal district court in Hjelle v Brooks, 377 F Supp. 430 (D. Alaska 1974). Each of these cases involved Seattle-based fishermen who participated in the fishery beyond the three-mile limit.

The insertion of the second sentence of section 306(a) into the FCMA is generally believed to have been an attempt engineered by the Washington congressional delegation to overrule Bundrant. This sentence provides:

> "No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel beyond its boundaries, unless such vessel is registered under the laws of such State."

As you know, this sentence has turned out to be ambiguous, because it is the Federal government, and not the states, that registers (in the usual sense of "documents") vessels the size of those participating in the fishery. Taking advantage of this abiguity, Alaska has required all vessels landing king crab on its shores or otherwise coming into its territory incidentally to participation in the fishery, to "register" in Alaska. This "registration" is actually a conventional permitting system, rather than a system of vessel documentation. By requiring such registration, Alaska believes that it has effectively asserted its management authority over the activities of such vessels in the fishery conservation zone (FCZ) beyond its three-mile limit in a manner consistent with FCMA section 306(a). This belief is vigorously contested by Seattle fishermen like those involved in the Hjelle and Bundrant cases, but has generally enjoyed the support of the NMFS Alaska Region and the Council. The Alaska Supreme Court endorsed this position in its recent American Eagle decision.

There is a small, but growing, number of catcher/processor vessels that participate in the fishery. Because these vessels can process their catch at sea, they do not have to land it live in Alaska ports, or otherwise come within Alaska territory. As a result, they are able to avoid "registering" under Alaska law without fear of suffering sanctions that might be imposed by Alaska upon those landing king crab within its territory. Because the Alaska management system for the fishery does not apply to these catcher/processors, and because there is not yet a Federal management system to fill the vacuum, the fishery operations of these catcher/processors are, as a practical matter, unregulated.

The Seattle fishermen have argued strongly for the prompt adoption by the Council of an FMP for the fishery, and for the implementation of that FMP through regulations of the Assistant Administrator that would displace Alaska's regulations to the extent they apply to the fishery in the FCZ. A number of Council members, however, believe that continued

direct participation of the Board and ADF&G in management of the fishery in the FCZ would be desirable. They and the Council staff have asked that alternatives to the conventional approval and implementation of an FMP for the fishery that would allow such participation by Alaska in its management be analyzed.

The main alternatives that are under consideration are as follows:

(1) Approval of a "framework" FMP without adoption by the Assistant Administrator of any implementing regulations, with implementation of the FMP left to Alaska through its registration and landing regulations.

(2) Approval of a "framework" FMP with adoption by the Assistant Administrator of a regulation delegating authority for implementation of the FMP to the Board and ADF&G.

(3) Joint adoption by the Council and the Board of a set of management standards and policies other than an FMP, with implementation of those standards and policies resting with the Board and ADF&G.

The feasibility under the FCMA of each of these alternatives for management of the king crab fishery will now be considered.

(1) Framework FMP Approved But Federal Implementing Regulations Not Adopted

It has been suggested that NOAA and the Council might ensure a continuing role for Alaska in the management of the fishery by developing and approving a "framework" FMP, but declining to promulgate regulations to implement that FMP under FCMA section 305. A "framework" FMP for this purpose is an FMP that does not prescribe specific fishery management measures in detail, but rather sets forth more general management goals and standards to be implemented through measures adopted by ordinary rule-making. Such a format would eliminate the need to amend the FMP every time it was desired to change a management measure. Under this proposal, ADF&G and the Board would continue to regulate participation in the fishery by vessels registered under the laws of Alaska subject to the management objectives and standards set forth in the FMP. There would be no Federal regime for management of the fishery other than Council and NMFS oversight of Alaska's regulatory activities to ensure that they complied with the FMP, and periodic review of the FMP itself to determine whether it was in need of amendment. The Assistant Administrator would retain authority to adopt Federal regulations overruling Alaska regulations that were found to be inconsistent with the FMP or with any amendment thereto.

The primary advantage perceived in this proposal is that it would forego the establishment of a new Federal king crab management regime which many believe would simply duplicate a management capability

currently possessed by Alaska, at least with respect to vessels registered in Alaska. Proponents of this alternative suggest the unlikelihood, due largely to budgetary constraints, that any Federal king crab management system could in the foreseeable future acquire the research, monitoring, and data-gathering capacity currently available to ADF&G and the Board in their management of the fishery. It is thus suggested that a Federal king crab management regime would largely be a bureaucratic overlay of Alaska's management system that would add little of substantive significance to the quality of management while imposing significant additional administrative burdens. Those making this suggestion find support for it in the current regulatory situations of the Tanner crab and Alaska salmon troll fisheries, and in the confusion that has surrounded development of a Bering Sea herring FMP.

A disadvantage of this alternative would be that it would leave unmanaged participation in the fishery by the catcher/processors based in Washington State that are not even arguably "registered" in Alaska due to their nondependence on Alaska shore-based facilities. This disadvantage could be ameliorated if Washington, in cooperation with NMFS, the Council, and Alaska, were to adopt its own king crab management regime to implement the FMP, covering vessels "registered" in Washington.

The viability of this proposal would, of course, depend upon continued adherence by NOAA to its liberal interpretation of the second sentence of FCMA section 306(a), under which each State is considered to have great latitude in determining which vessels are to be considered "registered" under its laws, provided that it has substantial relationships with those vessels.

The primary legal obstacle to adoption of this alternative for king crab management is presented by FCMA section 305(c) which provides, in part:

> "The Secretary shall promulgate regulations to implement any fishery management plan or any amendment to any such plan . . . if he finds that the plan or amendment is consistent with the national standards, the other provisions of the Act, and any other applicable law."

[Emphasis added.]

The use of the mandatory "shall" in this provision would seem on its face to require the Assistant Administrator to adopt implementing regulations for any approved FMP. In contrast with FCMA section 302(h)(1) discussed below, which contains similar mandatory language concerning Council preparation of FMP's, there is no other provision of the FCMA

that might qualify the language of section 305(c). Thus, the better view is probably that the Assistant Administrator must adopt regulations of some sort to implement an FMP which he has approved although, as will be discussed in connection with the next alternative, he probably has substantial leeway as to the exact content and nature of those regulations.

It could be that the "shall" of FCMA section 305(c) could be read in a nonmandatory way, despite its usual mandatory significance. Such a reading could be supported by the general disinclination of Congress, particularly over the past few years, to espouse unnecessary Federal regulation. A party challenging the nonadoption by the Assistant Administrator of a regulation he had specifically found to be unnecessary would at the very least be in a somewhat awkward position, although that party's chances of success would not be negligible. Therefore, the Council and NOAA may not at this time want to dismiss the pursuit of this first alternative, recognizing that it does entail a legal risk that does not accompany the two alternatives discussed below.

(2) Framework FMP Approved and Implementing Authority Delegated by Federal Regulation to State Agencies

The second alternative for management of the fishery would involve the adoption and approval by the Council and NOAA of a framework FMP, and the promulgation by the Assistant Administrator of an implementing regulation that would simply delegate authority for implementation of the FMP to ADF&G and the Board. This would have substantially the same practical advantages and disadvantages as the first alternative. As would be the case with that alternative, the regulation of catcher/processors not registered in Alaska could be accomplished through a similar delegation to Washington State management agencies.

The primary legal issue raised by this alternative is the extent to which the Assistant Administrator may subdelegate his authority under FCMA section 305 to implement an FMP to State agencies such as ADF&G and the Board. This authority was delegated to the Secretary of Commerce by Congress in enacting the FCMA, and was subdelegated by the Secretary to the NOAA Administrator, who further subdelegated it to the Assistant Administrator.

The law of subdelegation of regulatory authority appears to be quite confused, and the cases focus almost exclusively upon subdelegation by an agency head to subordinates within the agency. See, generally, 1 K. Davis, Administrative Law Treatise (2d ed.) 216-23 (1978). Yet, the current approach of courts and agencies to subdelegation appears to be quite permissive. Id. at 218-20. The leading case on the subject appears

to be Fleming v Mohawk Wrecking and Lumber Company, 331 U.S. 111 (1947). There, the Court cited a provision of the Emergency Price Control Act which stated that the Price Administrator

> "may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

The Court then stated:

> "Such a rule-making power may itself be an adequate source of authority to delegate a particular function, unless by express provision of the Act or by implication it has been withheld."

331 U.S. at 111.

In Mohawk, the Court departed sharply from the much more restrictiv approach to subdelegation that it had adopted earlier in Cudahy Packing Company v Holland, 315 U.S. 357 (1942), in which it held that the Wage and Hour Administrator of the Department of Labor could not subdelegate his statutory authority to sign subpoena duces tecum. While the Court in Mohawk made a somewhat strained attempt to distinguish Cudahy, 331 U.S. at 120-21, it in fact appears to have adopted a generous approach to subdelegation similar to that espoused by Justice Douglas in his Cudahy dissent, 315 U.S. at 367-73, and Cudahy is no longer treated as viable precedent, Davis, supra, at 218. The Court reaffirmed this approach in Jay v Boyd, 351 U.S. 345 (1956). Concerning the provision of the Immigration and Nationality Act of 1952 which provided that the Attorney General "may, in his discretion" suspend the deportation of certain aliens, the Court stated:

> "Petitioner does not suggest, nor can we conclude that Congress expected the Attorney General to exercise his discretion in suspension cases personally. There is no doubt but that the discretion was conferred upon him as an administrator in his capacity as such, and that under his rulemaking authority, as a matter of administrative convenience, he could delegate his authority to special inquiry officers with review by the Board of Immigration Appeals."

Id. at 351 n. 8.

In NLRB v Duval Jewelry Company of Miami, 357 U.S. 1 (1958), the Court drew a distinction between cases of the kind just discussed, which involve complete subdelegations of regulatory authority, and situations in which the delegor retains the right to make the final decision by way

of an appeal procedure, even though the initial decision is made by a delegate. Id. at 6-8. The Court seemed to indicate that subdelegations of the latter, partial type would be even more readily allowed than complete delegations. Id. at 8.

In United States v Giordano, 416 U.S. 505 (1974), the Court reiterated the liberal approach to subdelegation established in Mohawk, but held that the statute under consideration in the instant case specifically forbade the delegation of the function in question. Id. at 513-14.

In reviewing subdelegations of certain administrative functions by the Equal Employment Opportunity Commission under its authority to make procedural rules, two circuits have applied the liberal approach to subdelegation prescribed by the Supreme Court. EEOC v Raymond Metal Products Company, 530 F2d 590 (4th Cir. 1976); EEOC v Laclede Gas Company, 530 F.2d 281 (8th Cir. 1976). In Raymond Metal, the Court placed some emphasis upon the fact that judicial review of the subdelegated administrative actions was available even though there was no express provision for administrative review of those actions. 530 F.2d at 594.

An apparent aberration in the generous approach taken by the Federal courts to subdelegation is presented by certain dicta in Relco, Incorporated v Consumer Product Safety Commission, 391 F. Supp. 841 (S.D. Texas 1975). In that case, a manufacturer challenged the issuance of preliminary adverse publicity concerning one of its products by the CPSC's Bureau of Compliance under a provision of the Consumer Product Safety Act. This function had been subdelegated by the Commission to the Bureau under a provision of the Act specifically authorizing the Commission to delegate any function or power other than the power to issue subpoenas. In considering the Plaintiff's claim that authority to issue the adverse publicity had been improperly subdelegated by the Commission to the Bureau, the Court stated:

> ". . . [S]ome functions are so primary and so basic to the implementation of the statute as to be nondelegable. Functions constituting final agency action, such as administrative adjudications and rule making, must be made or ratified by the Commissioners and may not be delegated to subordinates under broad grants of authority . . . While intra-agency delegation is a necessity in carrying out some of its functions, such delegation cannot be excessive . . . "

391 F. Supp. at 845-46.

The Court cited absolutely no case authority for this statement, referring only to a passage in an earlier version of the Davis treatise which has since been replaced by the new sections cited above. If accepted, the court's statement would probably invalidate the delegation of FCMA authority from the Secretary of Commerce to NOAA, and it appears to be totally unsupported by any viable judicial precedent. Fortunately, the statement was plainly mere dictum: the court dismissed the complaint for lack of exhaustion of administrative remedies and the CPSC, having won the case, had no occasion to challenge the statement before a higher court. Relco has not been cited once in any other judicial decision since its release almost six years ago.

The cases discussed above deal with subdelegations within the Federal government. The subdelegation of king crab management authority that is under consideration would be from a Federal agency to a State agency. This raises the question whether subdelegations to entities outside the Federal government must be analyzed under principles substantially differing from those discussed above.

A decision of the District of Columbia circuit indicates that this is not so. In Tabor v Joint Board for Enrollment of Actuaries, 566 F.2d 705 (D.C. Cir. 1977), certain actuaries challenged regulations of a Federal agency established for their certification under which membership in a private actuarial association could substitute for the passing of a professional examination. The plaintiffs challenged this provision as an unlawful subdelegation of the Board's authority to a private party. The Court responded as follows:

> "As a factual matter, the Board has not substantially delegated its responsibility to set and administer enrollment standards. Permitting association members to short-cut the regular certification process does not mean that the Board has delegated its control over that process. Each applicant can obtain certification through a process superintended by the Board in every respect. And there is no claim that the Board has set the pass rate for its exam at such a high level that, in practice, the private associations actually set the enrollment standards.
>
> "In any event, appellants are incorrect in asserting that express statutory authority is necessarily required for delegation by an agency. [The court cited Mohawk, distinguishing it from Cudahy and Giordano on the ground that those

> cases involved prohibitions by Congress on subdelegation.] Congress has evidenced no such intent here. In fact, Congress granted the Joint Board discretion to establish reasonable standards and qualifications. . . ' for certification of competence."

566 F.2d at 708 n. 5.

Thus, the court appears to have held that, even assuming that the Board had subdelegated its authority to the Association, such subdelegation was permissible under the cases discussed above.

United States v Matherson, 367 F. Supp. 779 (E.D.N.Y. 1973), involved the challenge of certain National Park Service regulations providing that a permit for use of a motor vehicle in the Fire Island National Seashore would be granted only if an adjacent municipality had already issued a permit. The court rejected the argument that this was an unlawful subdelegation of NPS authority.

> "Both parties agree that the purpose of the [local ordinance and the challenged Federal regulation] is to prevent erosion on Fire Island. The local municipalities and the Superintendent of the National Seashore have endeavored to cooperate with each other to maintain the natural beauty of Fire Island. [Footnote omitted.] It was in furtherance of this spirit of cooperation that the Superintendent promulgated [the challenged regulation]. This section is in no way an abdication of the Superintendent's power to administer the National Seashore. Rather, the instant section merely exemplifies an effort by the Superintendent to facilitate the orderly prevention of erosion on the island. The Superintendent still makes the ultimate determination of whether to grant a vehicular permit to travel on National Seashore land . . . Moreover, the practicalities of the situation dictate that such a regulation be in existence. The local municipalities and the National Seashore are contiguous."

367 F. Supp. at 782.

It must, on the other hand, be noted that the court observed that the municipality "has absolutely no power to grant a vehicular permit for the National Seashore." It did not, however, indicate that its decision would have been different if such power had been subdelegated. In fact, the court cited approvingly Gauley Mountain Coal Company v Director, U.S. Bureau of Mines, 224 F.2d 887 (4th Cir. 1955), and Clark Distilling Company v Western Maryland Railroad Company, 242 U.S. 311 (1917), both involving congressional delegations to the States, and stated that these delegations were

> "far more extensive than the local municipalities' delegated authority under the instant regulation. In those two cases, the state's classification was final and all that remained was to apply the federal regulation. In contrast, under [the Federal regulation challenged in Matherson] the Superintendent retains the ultimate decision-making power."

367 F. Supp. at 783.

The Matherson court's citation of Gauley and Clark Distilling is significant, because it indicates both that the court believed the same standards to apply to congressional and administrative delegations of Federal authority to non-Federal entities; and that the court would have tolerated an even greater degree of delegation to the municipalities in Matherson.

In Gauley, a Federal statute imposed limitations on the use of electrical equipment in any mine found to be "a gassy or gaseous mine pursuant to and in accordance with the law of the State in which it is located," the State determination as to gaseousness being nonreviewable by the responsible Federal agency. 224 F.2d at 888-89. The statute was challenged as an impermissible delegation of Federal authority to the State. The court responded as follows:

> "There is no delegation by Congress of its own power to a state agency, but merely the acceptance by Congress of state action as the condition upon which its exercise of power is to become effective. Congress has done this in a number of other fields of the law. [Here, among other statutes, is cited the Assimilative Crimes Act, which extends the criminal law of each State and Territory to areas under Federal jurisdiction located there.] . . .
>
> . . . .
>
> "In the case at bar, the regulations prescribed by Congress with respect to gaseous mines became effective upon a determination by a state agency under state law. That determination is not made under the authority of Congress. Congress merely applies its regulation in aid of state regulation after the state has classified the mine as subject to regulation as a gaseous mine. In the light of the authorities cited, this is clearly not delegation of Congressional power to the states . . ."

Id. at 890-91.

Gauley is thus notable both for the conclusive effect of the State determination upon the operation of the Federal management regime and for the court's obvious discomfort with the idea that this was a "delegation" of Federal authority, despite the fact that it obviously was, as was recognized in Matherson. 367 F. Supp. at 783.

Clark Distilling, supra, cited in both Matherson and Gauley, involved a challenge to the Webb-Kenyon Act. This pre-Prohibition statute made unlawful the transportation into a State of liquor in violation of laws of that State which, it was conceded, would otherwise have been unconstitutional under the Commerce Clause. The Supreme Court stated:

> "The argument as to delegation to the states rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply."

242 U.S. at 326.

Based upon these authorities, the better view would seem to be that there is no necessary legal impediment to the delegation by the Assistant Administrator to State agencies of authority to implement a PMP for the fishery, pursuant to his general rulemaking authority under FCMA section 305. This would be particularly true if express provision is made for timely review of the State management measures by the Council and NMFS. The review procedure, which it would be advisable to prescribe in the delegation, could include joint meetings of the Council and the Board before the Board's adoption of new regulations; a recommendation by the Council to NMFS (either the Assistant Administrator or the Regional Director) as to the compliance of the new regulations with the FMP; and a decision of the Assistant Administrator or Regional Director, based on the Council's decision, whether to adopt Federal regulations to supplement or supersede those of the State. Assuming that the "framework" format of the FMP worked as planned, amendments to the FMP would be rare, and actions of the Board and of NMFS would be almost entirely through normal notice-and-comment rulemaking.

(3) Joint Council/Board Policy Statement Adopted and State Management Continues Without an FMP

The third alternative to the conventional FCMA enforcement mechanism that is being considered for the fishery would be the adoption by the Council and the Board of a joint statement of management policies and

standards for the fishery that would not, however, constitute an FMP. The Board and ADF&G would agree to be bound by this statement in their own management of the fishery, but otherwise the current State management system would not be disturbed and no Federal management regime would be established.

It has been argued that adoption of this alternative is impermissible under the FCMA. This argument is based upon FCMA section 302(h)(1), which provides:

> "Each Council shall, in accordance with the provisions of this Act -
> (1) prepare and submit to the Secretary a fishery management plan with respect to each fishery within its geographical area of authority . . . "

Read in isolation, this provision appears on its face to require the Council to prepare an FMP for every fishery off Alaska, including that for king crab, regardless of its views as to the necessity of an FMP. This interpretation is vigorously endorsed by the Seattle fishermen, and would undoubtedly form the basis for a legal challenge if the Council declined to adopt an FMP for the fishery.

Another provision of the FCMA, however, seems to indicate that the Council's obligation to prepare an FMP for the fishery is somewhat less stringent than an isolated reading of section 302(h)(1) would suggest. FCMA section 304(c)(1)(A) provides:

> "The Secretary may prepare a fishery management plan with respect to any fishery, or any amendment to any such plan, in accordance with the national standards, the other provisions of this Act, and any other applicable law, if -
> (A) the appropriate Council fails to develop and submit to the Secretary, after a reasonable period of time, a fishery managementplan for such fishery, or any necessary amendment to such a plan, if such fishery requires conservation and management. . . "

[Emphasis added.]

Under this remedial provision, the Assistant Administrator is not even authorized, much less required, to develop an FMP in default of Council action unless the fishery "requires conservation and management." Since

section 304(c)(1)(A) prescribes the administrative remedy for violation by the Council of section 302(h)(1), and since no such remedy was authorized by Congress when the fishery is not one that "requires conservation and management," it would be reasonable to interpret the Council's underlying obligation so as not to require the preparation of an FMP for a fishery not requiring "conservation and management." Such an interpretation is bolstered by common sense and by the current offensive against unnecessary Federal regulation.

Assuming that this latter interpretation is adopted, the question arises whether the fishery for king crab is one that "requires conservation and management" within the meaning of the FCMA. If this phrase is interpreted in the absolute sense, with no consideration of the existing management regime, then the fishery would generally be conceded to require "conservation and management," since the capacity of the various participants far exceeds the amount of king crab that can be taken without reducing the reproductive capacity of the resource. If, however, assessment of the need for Federal "conservation and management" under sections 302(h)(1) and 304(c)(1)(A) can take into account the efficacy of existing non-Federal management regimes, then the fishery for king crab may well be one that the Council and the Assistant Administrator could reasonably find not to require such "conservation and management." Either interpretation of this phrase would seem to be reasonable, given the apparent absence of legislative history on the subject, and the Council and the Assistant Administrator could therefore, in the exercise of their administrative discretion, select the interpretation they desired. Courts would be required to defer to this interpretation by the Council and NMFS of the statute they are charged to administer. Udall v Tallman, 380 U.S. 1, 16 (1965). As you are aware, some Federal courts tend to honor this principle in the breach, and there is no guarantee that they would be inclined to follow it in this instance. Despite the presence of some legal risk, however, I am persuaded that the Council could, in accordance with the FCMA, find that the current king crab management regime of the State of Alaska effectively protects the king crab resource, and that the fishery is not, therefore, one that "requires conservation and management."

If it adopted this position, the Council would be well advised to compile a record, including comments and hearing summaries on the draft FMP and DEIS and background information on the provisions of its joint statement with the Board. Following compilation and review of this record, and finalization of the Council/Board statement, the Council would adopt a formal finding based on the record that the fishery is not one that "requires conservation and management," as long as the Board adheres to the statement in its own management of the fishery. It might

be advisable to include in the finding a discussion of the impact of catcher/processors that are beyond Alaska's jurisdiction. The Assistant Administrator would then review the Council's finding in light of the record, perhaps accepting public comments on it, and, if he concurred in the finding, issue a formal notice to that effect. The Council would periodically review the Board's management of the fishery and either renew its finding or, if it found that the joint statement was not being complied with or needed an amendment that the Board would not agree to, either undertake the preparation of an FMP for the fishery or request the Assistant Administrator to do so.

CONCLUSION

Thus, there do not appear to be serious legal impediments to adoption of at least the latter two alternatives discussed above by the Council and NMFS.

I will be happy to respond to any questions or comments on this conclusion, either at the meeting or afterward, and will keep the Council staff informed on GCF's response to it.

cc: GC - Jim Brennan
F/AKR12 - Jim Brooks
ADF&G - Guy Thornburgh
ADF&G - [illegible]

TED STEVENS
ALASKA

United States Senate

OFFICE OF
THE ASSISTANT MINORITY LEADER
WASHINGTON, D.C. 20510

May 21, 1981

The Honorable Malcolm H. Baldridge
Secretary
Department of Commerce
Washington, D.C. 20230

Dear Mr. Secretary:

I'm writing to bring to your attention the recent efforts of the North Pacific Fishery Council (NPFC) to devise a Fishery Management Plan (FMP) for Alaskan king crab.

Included in the FMP is the joint statement of principals between the regional council and the State of Alaska. I am informed of concern in certain quarters over the approach that has been proposed by the North Pacific Fisheries Council.

I prefer to give the maximum flexibility possible to the regional councils. In this case the actions of other members of Congress require that I speak out in favor of the Council's decision. The innovative approach taken by the NPFC is well-reasoned and most importantly, workable.

The proposed FMP for king crab does fall within the MFCMA standards. This plan will simply endorse at the federal level the management scheme that has been highly successful for the last twenty years.

There is no need for a costly duplication of management efforts at the federal level. The State of Alaska is strongly committed to providing the best fishery management and enforcement effort in the nation and it spends $68 million annually to that end. This compares to approximately $15 million expended by the federal government in the North Pacific region. The current fiscal crisis requires a more creative approach to state and federal government interactions.

Above all, the past management plan has worked. I've always worked on the premise that "if it ain't broke, don't try to fix it". The North Pacific Regional Council plan offers a long list of procedural safeguards to out-of-state fishermen. On-record hearings and comment periods are extended to include a hearing in Seattle. All of the national standards that are outlined in the MFCMA will be rigidly enforced by the NPFC in its oversight capacity.

The Council does not, as has been suggested, delegate its management authority to the state. The State's efforts will be critically reviewed by the Council for complete consistancy. The Council retains full discretion to abbrogate the agreement at all times. This approach is necessary because the fishery is located solely off of Alaska's coast, there are no foreign vessels involved, and the Council has additional management responsibilities that are still incomplete five years after passage of the MFMCA.

The Council system is strengthened by creative approaches like the King Crab FMP that meet desired ends while effecting considerable savings in manpower and expense.

Please help us by preventing the growth of Federal involvement at the Washington level when it is not needed and would be counterproductive.

With best wishes,

Cordially,

TED STEVENS
Assistant Majority Leader

5/28/81

DRAFT

JOINT STATEMENT

BETWEEN

NORTH PACIFIC FISHERY MANAGEMENT COUNCIL (NPFMC)
ANCHORAGE, ALASKA

AND

ALASKA BOARD OF FISHERIES (BOF)
JUNEAU, ALASKA

ON THE

MANAGEMENT OF DOMESTIC KING CRAB FISHERIES

******

Recognizing that the NPFMC has a legal responsibility to prepare and submit — to the Secretary of Commerce measures for the conservation and management of the fisheries of the Arctic Ocean, Bering Sea and the Pacific Ocean seaward of Alaska, and

Recognizing that the Board of Fisheries of the State of Alaska has jurisdiction over fisheries within the State and that it has for more than two decades exercized control over domestic king crab fisheries both within and without its territorial waters, and

Recognizing that it is desirable for the two organizations to work together to coordinate the management of the crab resources within their respective jurisdictions:

It is therefore agreed, subject to the internal procedures of both parties that:

1. This joint statement applies to the domestic fishery for king crab through its range within the jurisdiction of the United States in the North Pacific Ocean.

2. The Board and Council shall hold joint hearings periodically to provide for public comment on management measures to be effective in the king crab fishery.

3. Following the hearings, each organization shall appoint a sub-committee of three voting members. It will be the duty of this committee of six members to develop joint recommendations on king crab management to be submitted to the two bodies.

4. On receipt of the joint committee's recommendations, the Board and the Council each shall approve or disapprove the proposed measures.

5. If both agree on the recommendations, each will implement the recommendations according to its own internal procedures.

6. In the event either body fails to approve the recommendations, each will be free to implement its own management measures within its own area of jurisdiction.

7. It is the intent of this arrangement, upon approval of the Secretary of Commerce and appropriate officials of the State of Alaska, to provide for implementation of the jointly agreed-upon management measures by the State.

8. It is also the intent of the Council to define its management plan so as to set limits of its recommendations within which the Regional Director of the National Marine Fisheries Service in Juneau would be empowered to make within season adjustments of regulations after consultations with the appropriate official of the State of Alaska.

Attachment I

KING CRAB MOTION #1

I move:

(1) that the Council adopt the Joint Statement of Principles on the Management of Domestic King Crab Fisheries from the Bering Sea and Aleutians by the Alaska Board of Fisheries as revised March 26, 1981;

(2) that the Council approve the Alaska Board of Fisheries Bering Sea/ Aleutian Island King Crab Fishery Management Framework, dated April 1, 1981;

(3) that the Council find, on the basis of the commitment of the Alaska Board of Fisheries to adhere to the Statement of Principles and Framework mentioned above, that the 1981 king crab fishery in the Bering Sea and Aleutian Islands area does not require conservation and management other than that provided by the State of Alaska.

During this period of time the State will continue management and enforcement of the king crab fishery.

30A/Q

KING CRAB OPTION 2 Bew

I move:

That the Council direct the staff to prepare for consideration at the July meeting, a fishery management plan for the management of the king crab fishery ~~(off Alaska)~~ of the Bering Sea and Aleutians to go into effect by the beginning of the 1982 fishery. This plan shall be a framework plan that shall maximize the authority of the managers of the fishery to change management measures without amendment of the plan itself, subject to basic policies and management standards incorporated in the plan. The plan shall be based upon the Alaska Board of Fisheries, Bering Sea/Aleutian Island King Crab Fishery Management Framework, dated April 1, 1981. It is the intent of the Council that this plan be implemented by a delegation of Federal implementation authority to the State of Alaska, and a draft regulation having this effect shall accompany the plan through all stages of administrative review.

30A/N

5/28/81

DRAFT

JOINT STATEMENT

BETWEEN

NORTH PACIFIC FISHERY MANAGEMENT COUNCIL (NPFMC)
ANCHORAGE, ALASKA

AND

ALASKA BOARD OF FISHERIES (BOF)
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4. On receipt of the joint committee's recommendations, the Board and the Council each shall approve or disapprove the proposed measures.

5. If both agree on the recommendations, each will implement the recommendations according to its own internal procedures.

6. In the event either body fails to approve the recommendations, each will be free to implement its own management measures within its own area of jurisdiction.

7. It is the intent of this arrangement, upon approval of the Secretary of Commerce and appropriate officials of the State of Alaska, to provide for implementation of the jointly agreed-upon management measures by the State.

8. It is also the intent of the Council to define its management plan so as to set limits of its recommendations within which the Regional Director of the National Marine Fisheries Service in Juneau would be empowered to make within season adjustments of regulations after consultations with the appropriate official of the State of Alaska.