


MEMORANDUM

TO: Council, SSC and AP Members

FROM: Clarence G. Pautzke   
Executive Director

DATE: September 17, 1992

SUBJECT: Crab Management

**ACTION REQUIRED**

- (a) Receive staff report on the annual Bering Sea crab survey
- (b) Optimum yield analysis for the Bering Sea *C. opilio* fishery
- (c) Receive report from ADF&G on placing observers on crab catcher vessels
- (d) Receive summary report from the Crab Interim Action Committee on pot limits

**BACKGROUND**

Bering Sea Crab Survey

Though the "Report to Industry on the 1992 Eastern Bering Sea Crab Survey" will not be available until sometime in October 1992, Dr. Bob Otto will be with us to present the results of this year's Bering Sea crab survey.

Optimum Yield (OY) for *C. opilio* Analysis

At the June meeting, the Council requested the Crab Plan Team begin an analysis to reevaluate the optimum yield (OY) for *C. opilio* and present a draft EA/RIR document to the Council at the September meeting.

The analysis will not be completed in time for Council review at this time. However, because *C. opilio* abundance information from the EBS crab survey indicates that the State of Alaska will probably set a Guideline Harvest Level below the 333 million pound OY, there will be little impact of delaying its review of this amendment. This delay will also allow for additional information to be utilized in the analysis.

Crab Catcher Vessel Observer Coverage

At its April and June meetings, the Council requested ADF&G to investigate the possibility of increasing the crab observer program to include catcher vessels in order to obtain better information for management of the Bering Sea crab fisheries. In addressing the Council's concern, ADF&G staff will present a report at this meeting outlining this issue. The report will include information on the following: 1) an overview of the current crab observer program, including a summary of current regulations and requirements; 2) current level of coverage; 3) percentage of the harvest from both

observed and non-observed vessels; 4) estimation procedures of the current crab observer program; 5) potential effects of the Council's Research Plan; 6) the mechanism for establishing catcher vessel observer coverage; and, 7) data on bycatch of crab and finfish in directed crab fisheries.

#### Crab Interim Action Committee Meeting on Pot Limits

On March 5, 1992 the Alaska Board of Fisheries (Board) voted to implement a pot limit for the BS king and Tanner crab fisheries. The Board recommended a 250 pot limit for Area T, the Bristol Bay red king crab fishery, and Area J, the Bering Sea Tanner crab fishery (both *C. opilio* and *C. bairdi*). It also recommended a 100 pot limit for the smaller BS crab fisheries in Area Q (Norton Sound, St. Matthew and the Pribilof fisheries).

On June 30, 1992, the NMFS AKR received an appeal from a group of BS crab fishermen regarding the Board's decision to limit the number of pots in the BS crab fisheries. The crab FMP authorizes this appeal and requires that the Crab Interim Action Committee (CIAC) convene to consider this appeal and forward its recommendations to the Secretary of Commerce.

The CIAC met in Juneau on August 26, 1992 to address the pot limit appeal. No consensus was reached by this committee. However, a committee report, including reports from the members representing the State of Alaska and the State of Washington, will be available at the Council meeting.

# North Pacific Fishery Management Council

Richard B. Lauber, Chairman  
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## CRAB INTERIM ACTION COMMITTEE North Pacific Fishery Management Council Report of the August 26, 1992, Meeting Juneau, Alaska

The Crab Interim Action Committee (CIAC) of the North Pacific Fishery Management Council (Council) met August 26, 1992 in Juneau, Alaska. The CIAC is authorized by the Fishery Management Plan for the King and Tanner Crab Fisheries of the Bering Sea and Aleutian Islands Area (FMP). The FMP was developed by the Council and approved by the Secretary of Commerce (Secretary). It is a framework FMP that has delegated management, with Council oversight, of the crab resources in the Bering Sea and Aleutian Islands Area to the State of Alaska.

Under the FMP, the CIAC is established by the Council to provide oversight and Council review of State of Alaska regulatory actions, which are promulgated by the State's Board of Fisheries.

The CIAC has no authority to grant or reject an appeal. A function of the CIAC is to comment in writing on preseason appeals to assist the Secretary with her review of new State crab regulations to determine if they are consistent with the FMP, the Magnuson Act, and other Federal law. CIAC members included Carl Rosier, Commissioner, Alaska Department of Fish and Game (ADF&G); Judith Merchant, Deputy director, Washington State Department of Fisheries (WDF); and Steven Pennoyer, Director, Alaska Region, National Marine Fisheries Service (NMFS).

The purpose of the August 26, 1992, meeting was to review an appeal presented by the Coalition of Bering Sea Crab Fishermen (Coalition). The Coalition's appeal was directed at the Alaska Board of Fisheries' (Board) decision to adopt regulations limiting the number of pots that may be carried aboard crab vessels in certain Bering Sea and Aleutian Islands king and Tanner crab fisheries. Specifically, the Board established the following uniform pots limits:

- 250 pots per vessel for the Bristol Bay red king crab, Bering Sea Tanner crab (*bairdi*), and Bering Sea snow crab (*opilio*) fisheries; and
- 100 pots per vessel for the Norton Sound red king crab, Pribilof blue king crab, and Saint Matthew blue king crab fisheries.

Pot limits are authorized in section 8.2.7 of the FMP. The FMP states that "Pot limits must be designed in a nondiscriminatory manner. For example, pot limits that are a function of vessel size can be developed which affect large and small vessels equally." The Coalition appealed the pot limits on the basis that they are inconsistent with the FMP, alleging that they were designed in a discriminatory manner.

During its meeting, the CIAC reviewed the purposes and function of the FMP. It received a briefing on the appeals process from NOAA General Counsel, a summary of the Board of Fisheries action and findings presented by ADF&G staff, a synopsis of the content of the appeal by NOAA General Counsel, and public testimony from seven individuals representing the large vessel sector of the industry which filed the appeal. The State commented on the appeal.

The CIAC was unable to reach a consensus on written comments to the Secretary to assist her in making determinations about the pot limits. CIAC members agreed, therefore, to submit their individual concerns in writing about the efficacy of the pot limits. CIAC members agreed that their written concerns should be appended to the CIAC report. Their submissions are attached. Brief summaries of their concerns follow:

State of Washington -- The fixed pot limits implemented by the Board are inconsistent with the FMP, the Magnuson Act, and other applicable law. Specifically, fixed pot limits are inconsistent with the text of the FMP at Section 8.2.7, which states that "pot limits must be designed in a nondiscriminatory manner. For example, pot limits that are a function of vessel size can be developed, which affect large and small vessels equally. Historic data on pot registration and keel length could be used for developing pot limit regulations." Further, an economic report prepared for the Alaska Board of Fisheries points out the discriminatory nature of the fixed pot limits. Washington does not oppose the use of pot limits as a management tool to address management and conservation concerns. For example, proportionate pot limits are an available tool to the Alaska Board and would avoid the discrimination against a vessel class resulting from fixed pot limits.

Fixed pot limits also fail the intent of the Council in that the wording of the FMP at Section 8.2.7 reflects a negotiated agreement by the Alaska and Washington Council members that was critical to final acceptance of the FMP.

State of Alaska - Following an extensive public involvement that included oral testimony from 30 individuals and a working group that was composed of 10 fishermen and

processors, most of whom were not Alaskan residents, the Board of Fisheries implemented pot limits in response to conservation and management concerns resulting from excessive use of pots. The average number of pots used per vessel has increased 33 percent since 1985, while the total number of pots has increased by about 30,000 pots to over 100,000 pots during the same time period. The Board specifically attempted to stabilize or increase the season length in the red king crab fishery; place controls on fishing effort to allow prosecution of king crab fisheries with small guideline harvest levels, e.g. the St. Matthews, Norton Sound, and the Pribilof Islands fisheries; and reduce pot loss. This loss may be caused by gear conflicts with other crab gear in the Bristol Bay red king crab fishery, entanglement of crowded pots in Tanner crab fisheries, conflicts with other gear types, fast moving ice floes, and poor gear tending.

Absent pot limits during the 1992-1993 season to control effort, ADF&G could not have been able to open the St. Matthew blue king crab fishery, and might not be able to open the red king crab fishery in Bristol Bay where the harvestable biomass estimate is only half as large as that estimated in 1991 when the fishery only lasted seven days.

A pot limit in the Chionoecetes opilio Tanner fishery is essential to address the problem of lost pots and provide a positive control over retention of undersized C. bairdi Tanner crab. Lacking a pot limit this season, guideline harvest reductions in the opilio and bairdi fisheries would be required to account for fishing induced mortality and ensure that overfishing does not occur.

Although the Board of Fisheries understood that its action would have a disproportionate impact on some vessels in each size category, it attempted to resolve this issue in a non-discriminatory manner. After extensive public process, the Board determined that treating the crab fleet as a whole would be less discriminatory. It sought to provide equal access to the fishery and to the harvest for all vessels equally.

Regional Director - The specified pot limits of 250 and 100 pots, which are imposed on all vessels regardless of their size, appear to be inconsistent with the strict language of the FMP. The FMP says "Pot limits must be designed in a nondiscriminatory manner. For example, pot limits that are a function of vessel size can be developed which affect large and small vessels equally." Background documents supporting the development of this FMP language further narrow the interpretation of the non-discriminatory clause by stating, "A properly frameworked pot limit need not pit

large vessels against smaller vessels. Historic data on pot registration and keel length could be used for developing pot limit regulations. A relationship between these two variables could be used as a basis for restricting all vessel types equally."

While the issue for the CIAC centered around the non-discriminatory language, the CIAC spent some time trying to understand the need for pot limits. In this regard, some members felt that one of the problems in evaluating the adequacy of the Boards uniform pot limits is the vastly different circumstances of the individual crab fisheries. Whereas the Bristol Bay red king crab fishery (opening November 1) may have a much reduced guideline harvest level (GHL) from the 18 million pounds last year, the Tanner and snow crab fisheries with GHLs of 33 and 333 million pounds in 1991 offer greatly different conservation concerns. I have some sympathy, however, for the managers' dilemma on Bristol Bay red king crab faced with no pot limits, high industry interest in the fishery and maybe 120,000 or more pots. Also, we did not have the benefit of all the information that had been presented to the Board of Fisheries.


Although the CIAC did not reach a consensus about what recommendation should go forth to the Secretary, resolution of the Coalition's appeal is necessary. The CIAC understands that the Regional Director will provide an independent recommendation to the Assistant Administrator for Fisheries.

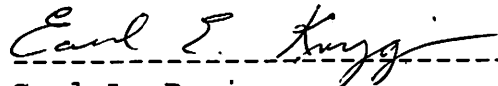
Under these provisions of the FMP, if the Secretary makes a preliminary determination that the State regulations are inconsistent with the FMP, the Secretary will publish a proposed rule that is consistent with the FMP, the Magnuson Act, and other applicable Federal law, together with the reasons for the rule, and will request comments for 30 days.

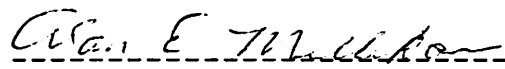
The Secretary also must provide actual notice of the proposed rule to the Council and the Commissioner of ADF&G. The FMP allows the State 20 days to request an informal hearing. The Secretary may withdraw the proposed rule if she decides that the State regulations in question are consistent with the FMP, the Magnuson Act, and other applicable law. If she determines that the regulations are inconsistent, she may publish a final rule that would supersede the State regulations in the exclusive economic zone.

The FMP allows for an expedited review when necessary to make the final Federal rule effective in a timely fashion. The Secretary must notify the Council and the Commissioner of ADF&G when she plans to use an expedited review. In an expedited

review, the Secretary will provide for comment by the Council (or a committee of the Council) and the Commissioner of ADF&G, if at all possible. However, if necessary, the Secretary could immediately publish in the Federal Register an interim final rule that supersedes any State regulation in the EEZ that the Secretary finds is inconsistent. The Secretary would then request comments on the interim final rule.

  
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Steven Pennoyer  
Regional Director,  
Alaska Region, NMFS

  
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*for* Carl L. Rosier  
Commissioner,  
Alaska Department of Fish and  
Game

  
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*for* Judith M. Merchant  
Deputy Director,  
Washington Department of Fisheries

Attachments

# STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

## DEPARTMENT OF FISH AND GAME

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### OFFICE OF THE COMMISSIONER

September 11, 1992

Mr. Steve Pennoyer  
CIAC Chairman  
Regional Director  
NOAA/NMFS  
P.O. Box 21668  
Juneau, AK 99802

Dear Steve:

The following are the State of Alaska's comments regarding the Crab Interim Action Committee (CIAC) meeting held in Juneau on August 26 to address an appeal to rescind the crab pot limitation.

The Alaska Board of Fisheries (BOF) implemented pot limitations in the Bering Sea Aleutian Islands (BSAI) king and Tanner crab fishery in response to conservation and management concerns resulting from use of excessive pots; average pot per vessel usage has increased by 33 percent since 1985, and total pots from nearly 30,000 to over 100,000 during the same time period. The BOF specifically attempted, under the Federal Management Plan, to restore order to these fisheries. It sought to stabilize or increase the season length in the red king crab fishery; place controls on fishing effort so that king crab fisheries with small guideline harvests levels (GHL) (i.e., St. Matthews, Norton Sound and the Pribilof's) can be prosecuted; reduce pot loss in the Bristol Bay red king crab fishery due to gear conflicts from within fishery crowding; reduce pot loss in Tanner crab fisheries due to entanglement of crowded pots, conflicts between gear types, and by fast moving ice floes; and reduce pot loss by improved gear tending.

Additionally, the Alaska Department of Fish and Game (ADF&G), believes that a pot limit in the *C. opilio* Tanner crab fishery will solve a constant conservation concern; pot limitation will slow that fishery to a pace that will allow fishermen to properly sort and release the more valuable undersized *C. bairdi* Tanner crab and other nontargeted species.

Without a pot limit in the 1992-93 season, many of these important objectives will not be reached. In particular, considering the amount of effort experienced in the St. Matthew blue king crab fishery (174 vessels), without pot limits ADF&G could not have opened this valuable fishery in 1992.



Mr. Steve Pennoyer

-2-

September 11, 1992

NMFS has now completed their crab survey. Their biomass estimate for the Bristol Bay red king crab stocks is nearly half of that observed last year; a fishery that lasted only seven days in 1991. With a harvestable biomass only half as large, this fishery could only be expected to last three days if effort were to remain as it did in 1991. Fishing effort has steadily increased each year in this fishery, and can reasonably be expected to continue to increase. Lacking a pot limit to control effort, ADF&G (as the inseason managers) would be faced with the prospect of not opening this fishery at all in 1992.

The ADF&G believes that a pot limit in the *C. opilio* Tanner crab fishery is essential to address the problem of lost pots and provide a positive control over retention of undersized *C. bairdi* Tanner crab. Lacking a pot limit in place this season, guideline harvest reductions in the *C. bairdi* and *C. opilio* fisheries would be required to account for fishing induced mortalities and ensure that overfishing does not occur. Additionally, it is not economically advantageous to fish excessive pots in this fishery according to Dr. Greenberg (paragraphs 3 and 4, page 11 of Executive Summary).

The state is concerned that the CIAC may not have appreciated the costs to industry if pot limits are rejected by the Secretary. First, without pot limits there is the concern with ADF&G's ability to manage the red king crab fisheries. This would result in very conservative management approach to protect stocks, or in the worst case scenario, not opening the fishery. Such action would be costly to the fishing fleets. Second, many fishermen and fishing companies have geared up for a constrained fishery; their plans for the year have been constructed around the pot limit premise. A change at this time will have a negative impact on some fishermen or their companies.

The following are specific comments on the Coalition's Appeal and the issues discussed at the CIAC meeting.

1. Appellants allege that the pot limit regulation is inconsistent with the FMP because (1) it does not meet the "nondiscriminatory" standard, and (2) it does not meet the requirements listed in the FMP (8.2.7) which allows pot limits. This is not the case:
  - a. Section 8.2.7 (Pot Limits) of the BSAI king and Tanner crab fishery management plan (FMP) authorizes the state to implement pot limits to attain the biological conservation objective and the economic and social objective of the FMP. Because this management procedure is authorized, logically it can be implemented, even though none of the committee could define a situation

Mr. Steve Pennoyer

-3-

September 11, 1992

which did not have disproportionate impacts on some segment of the industry. Thus, a "nondiscriminatory manner" must allow some level of disproportionate impacts, or it would not have been authorized.

- b. The allegation that fixed pot limits are discriminatory (i.e., they have a significantly greater impact on larger vessels), was not, prior to and while the FMP was being written, a vessel size issue, but rather one of resident versus nonresident. Based on the crab FMP history, at the time it was drafted, big versus small described perceived and actual discriminatory preference against nonresidents. This, in fact, was the issue that drove the need for having an FMP. The BOF was familiar with this very important concern of nonresidents, and the need to treat individuals and groups of individuals in a fair and equitable manner. This may be why, in summarizing the feelings of the BOF, one member stated that it was less discriminatory to treat the crab fleet as a whole and to provide equal access to the fishery and to the harvest for all vessels equally (i.e., that after all of the testimony and analysis was considered, the BOF felt that equal opportunity for all fishermen regardless of residency or vessel size, was less discriminatory than a graduated pot allocation).
- c. The FMP language which states that pot limits must be designed in a nondiscriminatory manner originated from the state's attempt to address concerns of nonresidents. Note that the first sentence in paragraph 4, p. 8-24, is a statement that ends with a period. Then, an example is given. The modifiers in this example offer wide opportunities. It states: "For example, pot limits that are a function of vessel size can be developed which affect large and small vessels (which can be interpreted as all participants) equally." [Emphasis added] It then states that historic data on pot registration and keel length could be used for this.. This language indicates that this is only a single example and that other options or examples exist,

Contrary to the appellants' statement, the FMP does not identify proportional limits as nondiscriminatory. It simply states that it is possible to develop nondiscriminatory limits based on vessel size which affect all participants equally. Considering this, it may also be possible to construct a fixed pot limit which is not discriminatory. That is what the BOF attempted to do. Though fixed pot limits may have some disproportionate impacts, when all relevant factors were

Mr. Steve Pennoyer

-4-

September 11, 1992

taken into consideration, the BOF believed they were being nondiscriminatory by treating all vessels equally. As noted in paragraph "a." above, any pot limit will have a disproportionate impact on someone. That, in and of itself, does not mean it is necessarily discriminatory. Pot limits do not necessarily redistribute effort, they alter the disparity in effort from largest to smallest vessels. Pot limits actually benefit the most experienced fisherman, regardless of vessel size.

- d. If indeed pot limits cannot be implemented in a non-discriminatory manner, as indicated under the FMP, then this provision needs to be examined and possibly amended. In the interim, however, the BOF is charged with ensuring the conservation of BSAI crab stocks and providing for orderly management of those fisheries frameworked in the FMP. The BOF found it critical to address this issue now because of overcapitalized and unmanageable fisheries.
  - e. Economic conditions was not the only factor considered by the BOF in making their regulations nondiscriminatory. Others included enforcement, what to do with new entrants (vessels without a catch history), the fact that some large vessels fished few pots and some small vessels fished many pots, and the other concerns listed in the findings. Though it is critical to consider economic implications of management actions, elevating the wishes of an overcapitalized industry above the concerns for wise management is believed by many to be the cause of the collapse of many East Coast fish stocks.
  - f. This section further states that only special types of situations warrant the use of pot limits: "There are at least two such cases", i.e., there are more. However, both of these cases are cited by the BOF as justification for their action. Thus, the appellants' arguments are unclear.
2. Appellants mistakenly claim the BOF's reasons for rejecting .. proportional limits are invalid and unpersuasive.
    - a. The BOF said up front that a pot limit was the only tool available to them (at its spring 1992 meeting) to address the conservation and management concerns presented by excessive gear. Though the North Pacific Fishery Management Council (NPFMC), under FMP category 1, is developing a moratorium and may follow with some form of limited entry, the BOF was concerned with excessive amounts of gear presently being fished by individual

Mr. Steve Pennoyer

-5-

September 11, 1992

vessels. In fast-moving ice conditions, the main problem is that many vessels fish more pots than they can control on a daily basis, and in all fisheries, too much gear results in pot loss from between and within gear group conflicts. The BOF has prescheduled public review of their actions at their March 1993 meeting. The BOF will consider further modifications or adjustments after industry input.

- b. Proportional limits encourage overcapitalisation. First, existing crab vessels will be encouraged to increase size to maximize harvest shares. Second, large groundfish vessels "out of work" much of the year, and allowed to "cross over" under the NPFMC moratorium, will tend to enter the fishery. This is because, with a pot limit preference based on vessel size, large groundfish vessels will benefit most by gaining a catch history for future IFQs.
- c. As to the complaint that pot limits do not prevent vessels that fished fewer pots than the quota from now fishing more, the response is: There were numerous large, medium and small vessels which, prior to the pot limit, fished fewer pots than the new limit allows. These vessels are prevented not by a numerical limit, but by their physical size, deck space, or vessel stability from fishing more pots. These variables do not change with a pot limit regulation.
- d. The principal objective of the BOF was to significantly reduce total effort. Their action will reduce the number of pots on the grounds. An estimate made during the BOF meeting suggests that over 120,000 pots were fished in the 1990-91 season. The current limit should reduce this amount well below 75,000 pots.
- e. The analysis which suggests a benefit of only a 1.2 day increase to the season length was based upon a model which used the 1991 "reported" figure of 89,000 pots. If 120,000 pots were in fact used, as is believed, the gain in season length should be significant. Even the addition of 1.2 days is useful and does more than just stabilize the fishery
- f. The appellants claim that harm is "imposed on one class." This is not so; many large vessels fished less than 250 pots and some medium and small vessels fished more than 250 pots. Also, the Greenberg analysis (paragraph 2, page 8, Executive Summary) considered cost on a qualitative basis and noted that pot limits could promote

Mr. Steve Pennoyer

-6-

September 11, 1992

efficiencies for the industry, assuming the number of vessels in the fishery do not increase.

3. Appellants claim pot limits are inconsistent under National standards 5 and 7 because they are unenforceable; citing a 1983 ruling; the lay-up of the state enforcement vessel Vigilant; and a letter by Commissioner Burton. These claims are without merit.
  - a. National Standard 5 requires the state to "promote efficiency." But it is impossible to promote efficiency while allowing overcapitalization in the fleet (i.e., excessive numbers of pots per vessel is part of the race for fish under an open access system). The economic study did not analyze efficiency, only effectiveness. As noted, the only tool under the FMP available to the BOF to place some controls on overcapitalization and directly address the conservation and management concerns and meet the Management Objectives listed in chapter 7 of the crab FMP was pot limitation. Though the NPFMC is concurrently considering a moratorium and some form of limited entry, they may never get there. Even with a moratorium, ADF&G believes that a pot limit is necessary to stop the continued escalation of fishing effort. If the BOF did not act, it would be shirking its responsibilities and jeopardizing the crab fisheries.
  - b. Appellants' reliance on the rejected 1983 pot limit is misplaced. The 1983 pot limit was developed from an FMP which the Secretary later found to be inconsistent with federal law. The 1983 pot limit and Tanner crab FMP were not "frameworked," and did not utilize buoy bag stickers. Without frameworking, federal regulations were required to mirror the BOF action in order for the regulations to be in effect in federal waters. This did not occur. Therefore, the pot limit was unenforceable due to inconsistent state and federal regulations, not because pot limits themselves were unenforceable. Additionally, in 1983 the lack of buoy bag stickers made keeping track of pot limits impossible. This inconsistency does not exist under the current frameworked FMP or in the current BOF pot limit regulations.
  - c. The regulations are enforceable, the Vigilant is not just drydocked, it is being surplused. But Fish and Wildlife Protection (FWP) is leasing a medium sized crab vessel to replace the Vigilant, and plans to have two vessels on the grounds during the red king crab and *C. bairdi* fisheries, and a portion of the *opilio* fishery. Also, the mandatory observer program places observers on all

Mr. Steve Pennoyer

-7-

September 11, 1992

catcher processors whose secondary role includes validating regulatory infractions.

- d. The appellants cite Commissioner Burton's letter to the BOF concerning the enforceability of pot limits. FWP's preferred alternative was for pot stickers without replacement of lost stickers. The BOF did compromise with industry on this issue because industry insisted they had to have replacement of pots. During the BOF meeting FWP agreed that the requirement for an affidavit of lost pots, which the skipper and three crew members are required to sign, allows for an enforceable regulation. This type of affidavit has more force of law, because it allows for prosecution of falsified statements. (See letter from Commissioner Burton dated September 10, 1992, attached.)
- e. Lastly, this is a different pot limit, one which largely has industry support, something that was lacking on the 1983 limit.

4. Section (2)(e) of Executive Order 12291 states:

Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by the regulation, the condition of the national economy, and other regulatory actions contemplated for the future.

As evidenced in the BOF written reports, transcripts and findings, the BOF met this requirement.

5. The appellants wrongly claim the BOF action is inconsistent with Public Law 96-354 (1981), The Regulatory Flexibility Act, which is a statement of general policy. However, the BOF was specifically empowered under the FMP to resolve problems of resource conservation and management. The FMP mandates that the BOF protect and conserve the resource and meet the seven objectives of the FMP. Where, as here, there is conflict between a specific substantive law and a general policy, the substantive law should prevail to effect the purpose of the specific law and protect the resources. Furthermore, P.L. 96-354 is for the purpose of protecting small businesses, not large. The appellant represents large business.
6. As to "equal protection," the BOF treated all vessels equally and determined that what disproportionate impact there was did

Mr. Steve Pennoyer

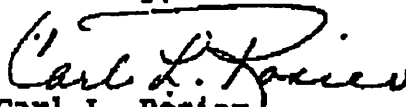
-8-

September 11, 1992

not constitute discrimination against larger vessels. The BOP's primary concern was protecting an already overcapitalized fishery by controlling excessive effort.

Please add these comments to the CIAC report to the Secretary. Thank you.

Sincerely,

  
Carl L. Rosier  
Commissioner

Attachment: Commissioner Burton's letter

Robert Turner  
Acting Director



STATE OF WASHINGTON  
DEPARTMENT OF FISHERIES

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September 2, 1992

Steve Pennoyer  
Alaska Region  
National Marine Fisheries Service  
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Dear Steve:

You have asked me, as the Washington Department of Fisheries representative on the Crab Interim Action Committee (CIAC), to summarize my perspective and recommendation to the Secretary of Commerce regarding the appeal of the Coalition of Bering Sea Crab Fisherman. I have carefully reviewed the written material provided by your staff both before and during the Committee's deliberations on August 26, the testimony given by the industry at that meeting, and my notes on the ensuing discussion among you, Carl Rosier, and me.

I have made special note that the FMP states in 9.3 that "the Secretary can consider only challenges to regulations alleging that the new regulations ARE INCONSISTENT WITH THE FMP, THE MAGNUSON ACT, OR OTHER APPLICABLE FEDERAL LAW." I believe the issues of the appeal are consistent with this requirement. More to the point, I agree with the appeal's basic assertion that the pot limit regulations adopted by the Alaska Board of Fisheries are not consistent with the FMP, the Magnuson Act, or other applicable federal law.

The most obvious deficiency of the regulation is its inconsistency with the FMP. It fails on two levels:

1. It fails on the face value of the language in 8.2.7 which states that "pot limits must be designated in a nondiscriminatory manner. For example, pot limits that are a function of vessel size can be developed which affect large and small vessels equally. Historic data on pot registration and keel length could be used for developing pot limit regulations." The "Report to the Alaska Board of Fisheries, Economic Impacts of Alternative Pot Limits to Bristol Bay Red King Crab and Bering Sea *C. opillio* Fishermen" repeatedly and graphically spells out the discriminatory nature of the fixed pot regulation. For example on pages 5 and 6, the report references fixed



and proportional pot limit regimes in the Bristol Bay Red King Crab Fisheries:

p. 5 "The two pot limit regimes have significantly different distributional impacts on vessel harvest and vessel revenues."

p. 6 "The beneficiary of the fixed pot limit was clearly the small vessel size class."

Page 11 refers to the Bering Sea c. opillio Fishery and states:

"It is evident that, under any scenario (200, 250 or 300 fixed pot limits), large vessels are going to incur a disproportionate reduction in their net operating revenue under the fixed limits."

2. The second level on which the regulation fails is in the review of the intent of those who approved the FMP, i.e., the Council members. Clarence Pautzke, Executive Director of the Council, discussed with us his belief (based on personally hearing the discussion and on transcripts of the Council proceedings) that the wording in the FMP in 8.2.7 which uses vessel size as an example was very deliberate and reflected a negotiated agreement by the Alaska and Washington Council members that was critical to the final acceptance of the FMP. I believe it is essential that the Secretary be fully apprised of the transcript of the Council deliberations, and of the views expressed by the Council Executive Director before the CIAC.

Representatives of the Coalition of the Bering Sea Crab Fishermen testified to their despair over the potential collapse of their life long personal and economic investments due to fixed pot limits. They argued that the potential loss of \$12,749 per large vessel in the Red King Crab Fishery to save one extra day in the season did not meet the test of the Magnuson Act national standard to promote efficiency nor the requirement in Executive Order 12291 that "regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society." This is particularly true, argues their appeal, if the costs are imposed on one class of vessels. Since the fishery is managed to a quota and is not exceeding the harvest limitations, what is the societal gain resulting from the discrimination?

I found the comments regarding the Bering Sea C. opillio fishery, especially compelling in view of the above arguments. In a quota fishery of 325.2 million pounds in 1992, the Alaska Board justified the redistribution of harvest among vessel classes by implementing

Steve Penoyer  
September 2, 1992  
Page 3

fixed pot limits on the basis that it would "cause greater vigilance in gear placements and would decrease the number of pots being lost" due to fast moving ice conditions.

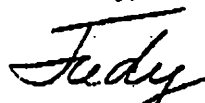
Industrial representatives objected to the logic of the management remedy, and again, pointed to the inconsistency with the standards for nondiscrimination, efficiency, and societal benefits.

In closing, I wish to emphasize that I am not judging the Alaska Board's conclusion that pot limits are an appropriate management measure when faced with conservation and management concerns. I am, however, compelled by the argument that fixed limits (rather than proportional limits) do not meet the FMP standards that regulations be consistent with the FMP, the Magnuson Act, and other applicable Federal Law. I am advised by you that time constraints do not allow for the required public review should the Secretary conclude that proportional limits or some other regulatory approach might be more appropriate. Under these circumstances, I can only recommend that the Secretary rule that the fixed pot regulations do not meet the standards of the FMP and should be invalidated. I would urge the Board to consider alternative measures, including proportional pot limits, to address the management and conservation issues facing them.

One final comment. At the very end of the meeting, an Alaska manager announced that unofficial and preliminary data indicated a reduction in available harvest from 17.1 million pounds in 1991 to around 10 million pounds in 1992. He concluded that without pot limits there would likely be no Bristol Bay king crab fishery at all in 1992. I cannot evaluate the management needs of a reduced fishery. I do question the appropriateness of these comments at the conclusion of our lengthy discussion. I would anticipate that a reduced harvest would drive up the value of the catch, exacerbating the discriminatory results of fixed pot limits identified in the economic study. Again, a proportional pot limit would be a likely candidate for regulations that would address management needs and FMP standards.

There was CIAC concensus on one issue, Steve, and that is the CIAC is, at best, a clumsy mechanism to address an appeal of this nature. I recommend that this process be an agenda item at the September Council meeting.

Sincerely,



Judith M. Merchant  
Deputy Director

OVERVIEW OF THE STATE OF ALASKA  
MANDATORY SHELLFISH OBSERVER PROGRAM



The Alaska Board of Fisheries adopted regulations in the spring of 1988 requiring 100% observer coverage on vessels which processed king crab and *C. bairdi* Tanner crab in waters of Alaska. This action was prompted by consistently higher production rates of catcher processors compared to catcher only vessels, which suggested illegal processing of undersize and female crab by at-sea processors.

Primary goals of the program were to determine the legality, size and age composition and condition of the landed catch and to collect bycatch data from the pots being fished. Shellfish Observers were first deployed in the September 1988 Bristol Bay red king crab fishery.

In spring of 1990 the Alaska Board of Fisheries revisited the shellfish observer program and adopted regulations which broadened mandatory observer coverage to include vessels processing *C. opilio*, due to reports of undersized *C. bairdi* being processed as *C. opilio*. At that time observer qualification requirements and conflict of interest standards were more narrowly defined.

Observer Program guidelines were originally defined and remain in regulation. The cost of observers is borne by industry, with vessels hiring observers through third party contractors. Contractors are required to hire, train and provide all observer logistical support. ADF&G is responsible for establishing observer qualification and conflict of interest standards and sampling procedures as well as observer testing, certification (and decertification), briefing, debriefing, analysis of observer data and program progress reports. Observer qualifications include a minimum of a BS in the Natural Sciences or prior experience as an National Marine Fisheries Service observer.

Although Observer Program regulations apply statewide, activity has focused on crab fisheries in the Bering Sea and Aleutian Islands. The majority of observer activity has been handled by ADF&G Observer Program staff in Dutch Harbor.

In 1991 106 observers made 270 trips and logged over 325 observer months at sea. Observer Program staff conducted over 600 brief/debreif encounters. At this time there are 10 certified contractors, six of which currently supply observers to the program.

Currently 34 catcher processors and 19 floating processors participate in king and Tanner crab fisheries in the Bering Sea Aleutian Islands area. Approximately 280 catcher only vessels also participate in one or more of these fisheries.

Refer to tables 1-4 for vessels, landings and coverage by fishery.

Table 1. Summary of season length, number of pounds landed, number and type of vessel and percent landings, observer/ADF&G sampler coverage and bycatch coverage for the St. Matthew blue king crab fishery, 1988-1992.

YEAR	SEASON		NUMBER				TOTAL LANDINGS <sup>2</sup>	PERCENT LANDINGS		PERCENT COVERAGE			% FLEET COVERED FOR BYCATCH
	LENGTH DAYS	LBS LANDED (MILLIONS)	CP <sup>1</sup>	CATCHER	FP	SHORE PLANTS		CP+FP	SHORE	CP+FP	SHORE (ADF&G)	TOTAL	
1988 <sup>3</sup>	4	1.3	9	37	3	0	46	100	0	50 <sup>4</sup>	0	50	0
1989	2.5	1.2	15	54	6	0	69	100	0	100	0	100	22
1990	6	1.7	7	24	3	0	38	100	0	100	0	100	22
1991	4	3.4	9	59	2	4	69	81	19	100	0	81	13
1992 <sup>5</sup>	2.5	2.5	8	166	7	4	179	79	21	100	67	93	4

<sup>1</sup> Catcher processors (CP) sometimes act as floating processors (FP).

<sup>2</sup> Only catcher processors and catcher vessels generate landings.

<sup>3</sup> Observer coverage starts after St. Matthew fishery.

<sup>4</sup> 50% coverage by ADF&G.

<sup>5</sup> Preliminary information.

Table 2. Summary of season length, number of pounds landed, number and type of vessel and percent landings, observer/ADF&G sampler coverage and bycatch coverage for the Bristol Bay red king crab fishery, 1988-1991.

YEAR	SEASON		NUMBER		TOTAL		PERCENT LANDINGS		PERCENT COVERAGE		% FLEET COVERED FOR BYCATCH		
	LENGTH DAYS	LBS LANDED (MILLIONS)	CP <sup>1</sup> CATCHER	FP SHORE PLANTS	LANDINGS <sup>2</sup>	SHORE	CP+FP	SHORE	CP+FP	SHORE (ADF&G)		TOTAL	
1988 <sup>3</sup>	8	7.4	20	180	11	15	201	45	55	100	58	77	10
1989	12	10.3	18	193	12	14	287	62	38	100	100	100	9
1990	12	20.4	20	219	16	15	331	63	37	100	71	89	8
1991	7	17.2	25	278	14	18	324	42	58	100	47	69	8

<sup>1</sup> Catcher processors (CP) sometimes act as floating processors (FP).

<sup>2</sup> Only catcher processors and catcher vessels generate landings.

<sup>3</sup> Observer Program starts for king crab and C.bairdi.

Table 3. Summary of season length, number of pounds landed, number and type of vessel and percent landings, observer/ADF&G sampler coverage and bycatch coverage for the Bering Sea bairdi tanner crab fishery, 1988-1992.

YEAR	SEASON		NUMBER			TOTAL LANDINGS <sup>2</sup>	PERCENT LANDINGS		PERCENT COVERAGE		% FLEET COVERED FOR BYCATCH		
	LENGTH DAYS	LBS LANDED (MILLIONS)	CP <sup>1</sup> CATCHER	FP SHORE PLANTS	SHORE LANDINGS		CP+FP	SHORE	CP+FP	SHORE (ADF&G)		TOTAL	
1988 <sup>3</sup>	93	2.2	1	97	11	9	248	64	36	100	20	71	1
1989	110	7.0	4	105	16	14	359	51	49	100	34	68	4
1990 <sup>4</sup>	89	24.5	8	171	17	14	1032	65	35	100	73	91	4
1990/91	126	40.1	19	236	18	14	1756	66	34	100	62	87	7
1991/92	137	31.8	26	259	13	12	2339	52	48	100 <sup>5</sup>	14	59	9

<sup>1</sup> Catcher processors (CP) act as floating processors (FP).  
<sup>2</sup> Only catcher processors and catcher vessels generate landings.  
<sup>3</sup> Observer Program starts.  
<sup>4</sup> Winter fishery.  
<sup>5</sup> Most deliveries incidental to C. opilio fishery.

Table 4. Summary of season length, number of pounds landed, number and type of vessel and percent landings, observer/ADF&G sampler coverage and bycatch coverage for the Bering Sea opilio Tanner crab fishery, 1988-1992.

YEAR	SEASON		NUMBER		TOTAL		PERCENT LANDINGS		PERCENT COVERAGE		% FLEET COVERED FOR BYCATCH		
	LENGTH DAYS	LBS LANDED (MILLIONS)	CP <sup>1</sup>	FP	LANDINGS <sup>2</sup>	SHORE PLANTS	CP+FP	SHORE	CP+FP	SHORE (ADF&G)		TOTAL	
1988	120	134.1	16	155	11	14	1258	43	57	0	60	26	0
1989	112	149.4	18	150	16	16	1341	31	69	0	94	29	0
1990	148	161.8	14	175	17	15	1565	26	74	0	100	26	0
1991 <sup>3</sup>	158	328.9	26	202	18	14	2788	27	73	100	88	96	11
1992	97	315.3	31	219	18	12	2763	32	68	100 <sup>4</sup>	43	82	12

<sup>1</sup> Catcher processors (CP) sometimes act as floating processors (FP).

<sup>2</sup> Only catcher processors and catcher vessels generate landings.

<sup>3</sup> Observer Program starts.

<sup>4</sup> Only partial coverage by ADF&G.

Figure 1: Catch per unit effort (CPUE) for the St. Matthew blue king crab fishery in 1991.

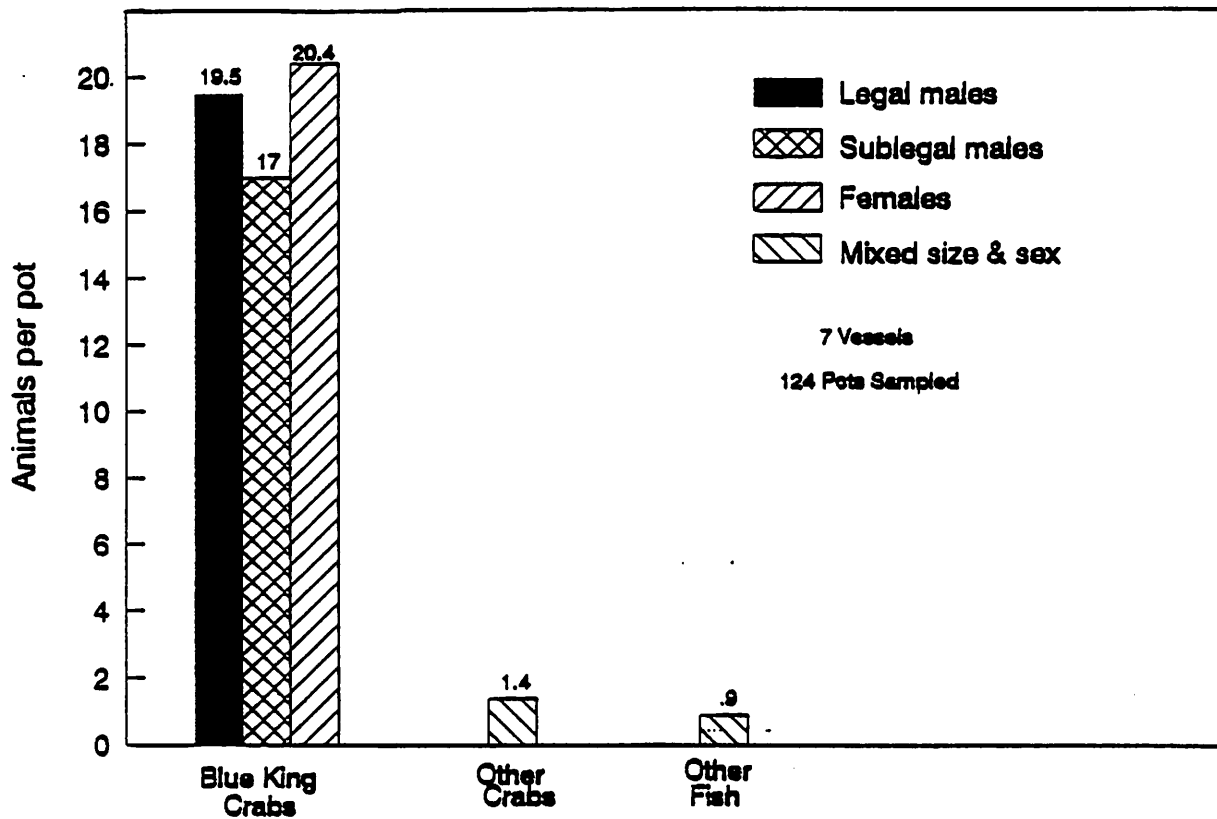


Table 1. Summary of pot sampling during the St Matthew blue king crab fishery in 1991 (7 vessels, 124 pots sampled).

Species	Number of Animals
Blue king	
legal size males	2,416
sub-legal males	2,106
females	2,525
Snow crabs	22
Lyre crabs	157
Snailfish	1
Yellowfin sole	34
Pacific cod	62
Sculpins	12



Figure 3. Catch per unit effort (CPUE) for the Bristol Bay red king crab fishery in 1991.

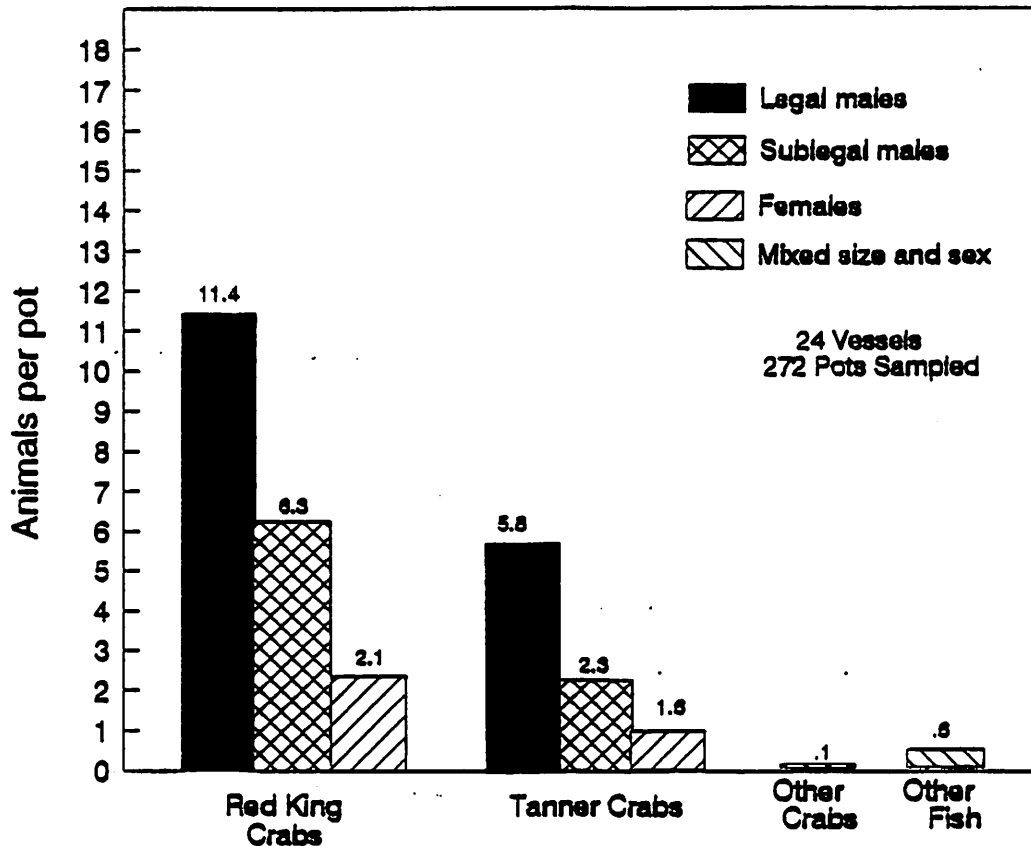


Table 2. Summary of pot sampling during the Bristol Bay red king crab fishery in 1991 (24 vessels, 272 pots sampled).

Species	Number of Animals
Red king	
legal size males	3,098
sub-legal males	1,710
females	582
Tanner	
legal size males	1,565
sub-legal males	613
females	271
Snow crabs	16
Hybrid Tanner crabs	11
Rockfish	2
Halibut	10
Yellowfin sole	62
Pacific cod	62
Sculpins	11

Figure 5. Catch per unit effort (CPUE) for the Bering Sea Tanner crab fishery in 1990-91.

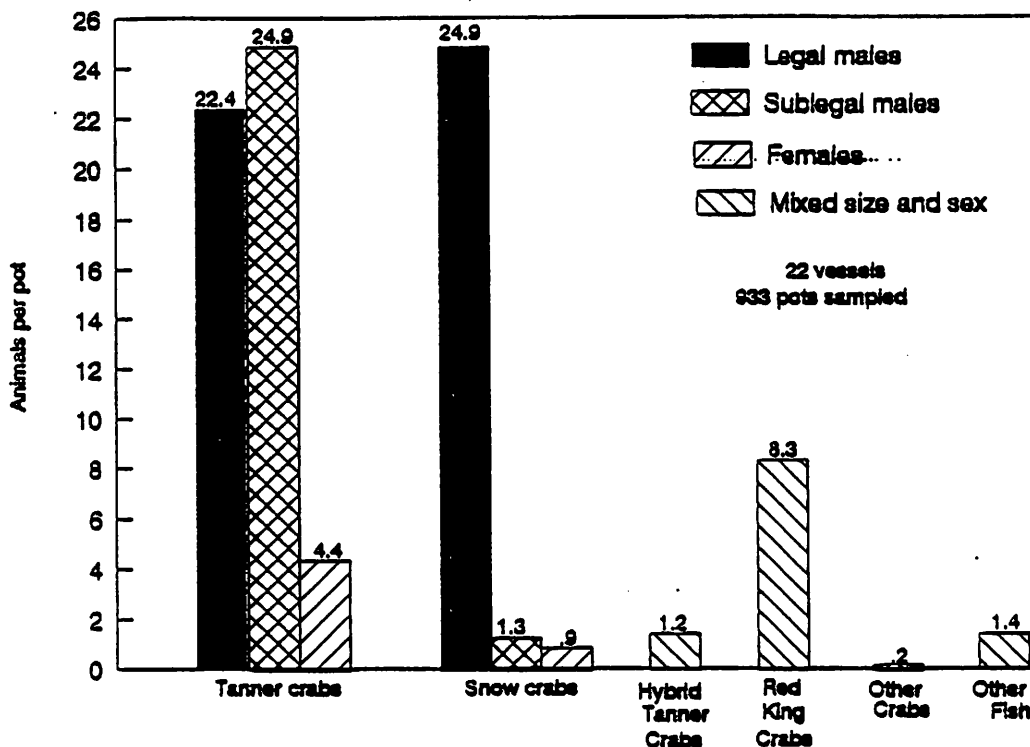


Table 4. Summary of pot sampling during the Bering Sea Tanner crab fishery in 1991 (22 vessels, 933 pots sampled).

Crab Species	Number of Animals	Other Species	Number of Animals
<b>Tanner</b>		<b>Hallbut</b>	24
legal size males	20,938	<b>Yellowfin sole</b>	415
sub-legal males	23,233	<b>Pacific cod</b>	675
females	4,068	<b>Sculpins</b>	115
<b>Snow</b>		<b>Rock sole</b>	10
legal size males	23,182	<b>Alaska plaice</b>	1
sub-legal males	1,178	<b>Pollock</b>	43
females	806	<b>Arrowtooth flounder</b>	1
<b>Hybrid Tanner</b>		<b>Flathead</b>	2
legal size males	68	<b>Prowfish</b>	1
sub-legal males	1033	<b>Rockfish</b>	1
females	22	<b>Octopus</b>	16
<b>Red king crabs</b>	7,732		
<b>Blue king crabs</b>	1		
<b>Korean hair crabs</b>	13		
<b>Lyre crabs</b>	168		
<b>Hermit crabs</b>	12		

Figure 8. Catch per unit effort (CPUE) for the Bering Sea snow crab fishery in 1991.

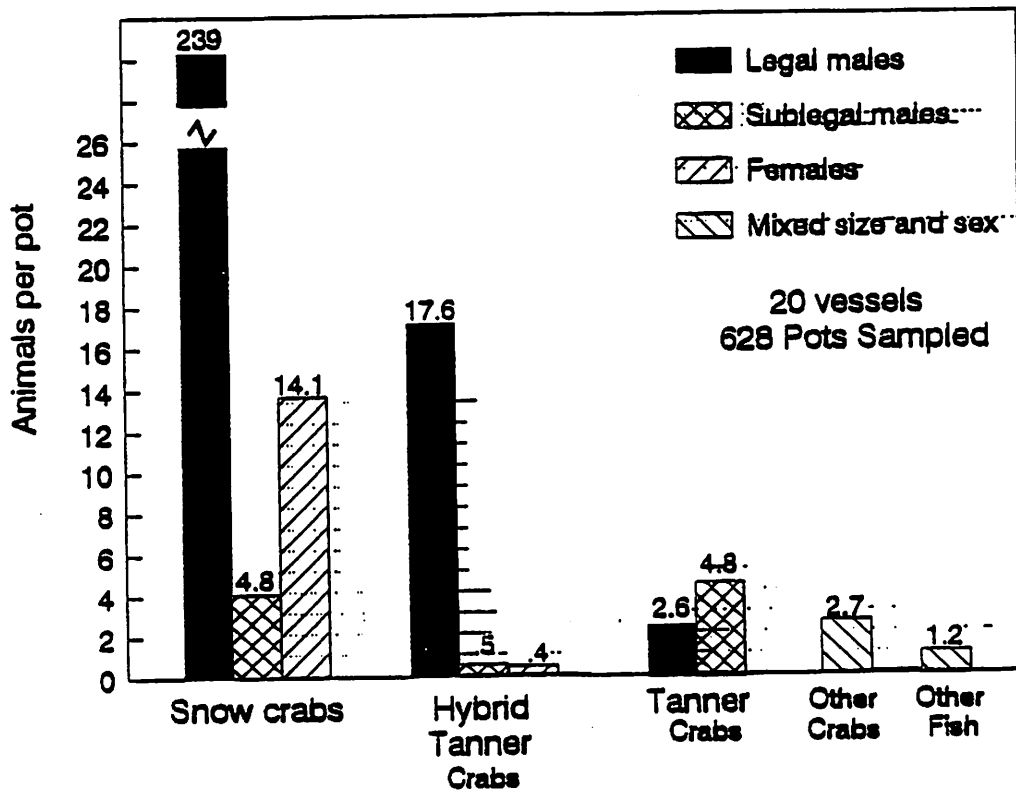


Table 7. Summary of pot sampling during the Bering Sea snow crab fishery in 1991 (20 vessels, 628 pots sampled).

Crab Species	Number of Animals	Other Species	Number of Animals
Snow		Halibut	5
legal size males	150,060	Yellowfin sole	3
sub-legal males	2,617	Pacific cod	554
females	8,862	Sculpins	123
Tanner		Snailfish	24
legal size males	1,630	Sablefish	2
sub-legal males	2,987	Pollock	24
females	95	Arrowtooth flounder	1
Hybrid Tanner		Skates	5
legal size males	11,035	Octopus	12
sub-legal males	340		
females	250		
Blue king crabs	59		
Red king crabs	74		
Golden king crabs	1		
Lyre crabs	27		
Hermit crabs	6		

# RESULTS OF THE 1991 NMFS BERING SEA CRAB SURVEY

## EXECUTIVE SUMMARY

The following is a summary of conclusions presented in the NMFS Processed report titled "Report to Industry on the 1992 Eastern Bering Sea Crab Survey". All estimates of abundance were compared to those of the previous year by Kolmogorov-Smirnov two-sample test; significant differences from previous year estimate are indicated as (Sig) for  $p < 0.05$ , or as (NS) if not significant. Note that for some groups of crabs, especially blue king crabs, the variance of the data, as indicated by the confidence interval, is so great that large changes from last year may not be deemed statistically significant. Such changes are considered to be below the ability of the survey to detect. GHL = Guideline Harvest Level, as determined by the Alaska Dept. of Fish and Game. For questions about these data, contact Dr. Bradley G. Stevens or Dr. Robert Otto, NMFS, P.O. Box 1638, Kodiak, AK 99615. Phone (907) 487-4961.

### Red king crab (*Paralithodes camtschatica*) All districts combined.

Legal males: 5.8 million crabs; decrease of 52.1% (NS).  
Pre-recruits: Decrease of 14.0% (Sig).  
Large Females: 6.3% increase (NS).  
Outlook: Population is low and declining. No significant recruitment of juveniles in recent years.  
GHL: 10.3 million lbs.

### Pribilof Islands blue king crab (*P. platypus*) Pribilof District.

Legal males: 1.0 million; No significant change.  
Pre-recruits: 13.5% increase (NS).  
Large Females: 26.8% decrease (NS).  
Outlook: Population low stable. Trends not detectable.  
GHL: Fishery closed for 1992.

### St. Matthew blue king crab (*P. platypus*) Northern District.

Legal males: 2.3 million; 6.1% increase (NS).  
Pre-recruits: 3.6% decrease (NS).  
Large Females: 92% increase (NS).  
Outlook: Population at average levels and stable.  
GHL: 3.1 million lbs (2.5 million lbs landed).

### Tanner crab (*Chionoecetes bairdi*) Eastern District.

Legal males: 41.8 million; Significant increase of 16.0%.  
Pre-recruits: 3.3% decrease (NS).  
Large Females: 45.3% decrease (NS).  
Outlook: Population moderately high and stable. Expect future downturn as strong year class expires.  
GHL: 39.2 million lbs.

Snow crab (C. opilio) All districts combined.

Large males: 256.4 million; 47% decrease (NS).

Pre-recruits: 52% decrease (Sig).

Large Females: 47% decrease (NS).

Outlook: Population high but declining due to passage of strong year class. Expect future near-term declines followed by another increase in 3-5 years as another strong year class matures.

GHL: 207 million lbs.

Hair crab (Erimacrus isenbeckii)

Large males: 300,000 crabs; 54% decrease (NS).

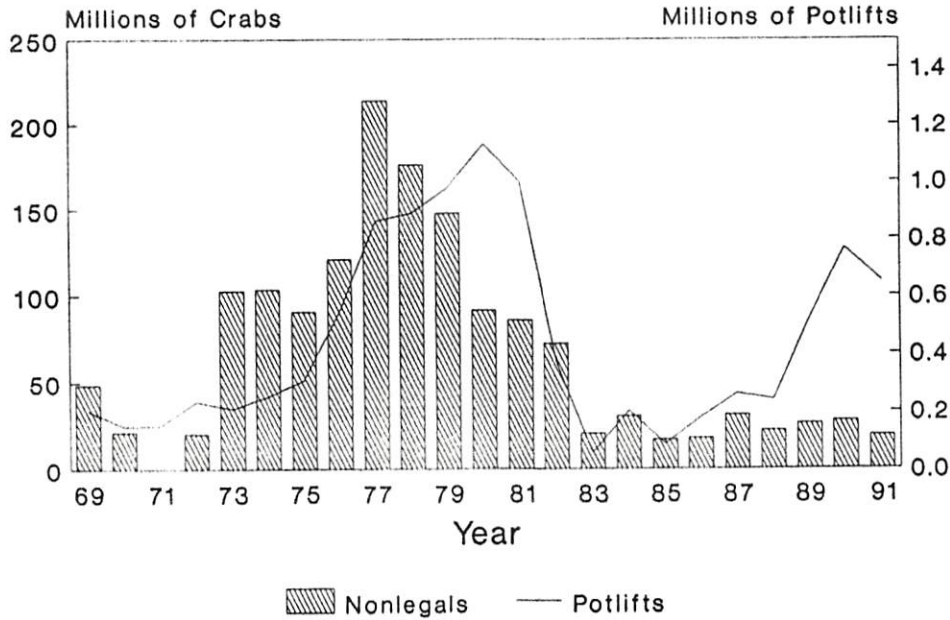
Large Females: 58% decrease (NS).

Outlook: Population low and declining suddenly due to unknown causes. Strong recent landings may have contributed to decline.

GHL: None Projected.

Submitted by Kris Poulsen  
DURING PUBLIC TESTIMONY  
SEPT 1992 Council MTG

A. Nonlegal Abundance vs Fishing Effort



B. Composition of Fishing Effort

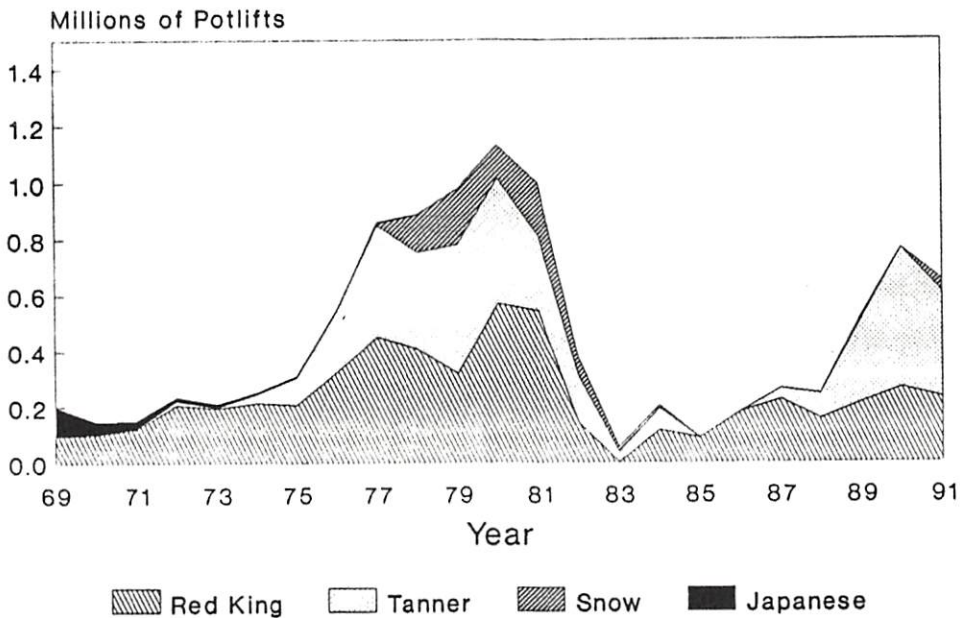


Fig. 5. Red king crab abundance compared to total pot fishery effort in Bristol Bay (from a report under preparation by J. E. Reeves, AFSC, Seattle).