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U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

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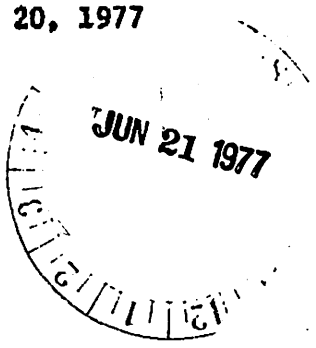

Mr. Jim H. Branson, Executive Director
North Pacific Fishery Management Council
P.O. Box 3136DT
Anchorage, Alaska 99510

Dear Jim:

During the discussion of the KMIDC Joint Venture proposal at the last council meeting, the following question was raised: If the Secretary issues permits to the KMIDC processing and transport vessels authorizing them to receive fish from U.S. vessels, does the Secretary have the power to restrict processing and transporting by such vessels later in the season, as an emergency measure, in order to prevent the total U.S. and foreign catch from exceeding the TAC contained in the PMP?

In response to this question, Jim Brooks suggested that the emergency regulation provision of the Act (section 305(g)) could be invoked by the Secretary to amend the PMP regulations applicable to that fishery. Don McKernan, on the other hand, questioned whether the emergency regulation provision could be invoked in regard to a PMP. I responded that the emergency regulation provision of the Act could be invoked to implement a PMP as well as a FMP.

Upon further review of this question, I must advise the council that there is serious question whether section 305(g) could be relied upon as a method for regulating a fishery when a PMP is in place. However, it is the position of the NOAA Office of General Counsel that a more effective mechanism exists which enables the Secretary to stop foreign activity when there is the prospect of exceeding OY. Rather than requiring an affirmative emergency action by the Secretary later in the season, as would be the case in section 305(g), permits issued to the KMIDC vessels could simply include a restriction which allows them to receive and process fish from U.S. vessels until the optimum yield in the fishery is attained by the combined U.S. and foreign harvest, and that upon notice by the Secretary that the optimum yield has been achieved, the vessels must cease receiving fish from U.S. vessels for processing.

I am of the opinion that such a restriction could be attached to the permit when issued, and that it would provide assurance that the TAC for the fishery would not be exceeded. Since this procedure would

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not involve amending the permit subsequent to issuance, termination of the foreign activity when the OY is achieved would not require notice or opportunity for a hearing, which would be required in cases where a permit or regulation is amended to accomplish such purpose.

I hope this letter helps to eliminate some of the confusion surrounding this issue at the last meeting.

Sincerely,

James K. White
Alaska Regional Counsel

JKW/mo
cc: Jim Drewry, GCF
Harry Rietze, NMFS
Jim Ellis, CGLO

Federal Maritime Statutes Affecting Joint Ventures in Fisheries

In general terms, for an existing fishing vessel to enjoy treatment as a U.S. vessel it must (1) have been built in the United States, and (2) if owned by an individual or a partnership, all owners must be U.S. citizens, or, if owned by a corporation, that corporation must be incorporated under the laws of the United States or any State thereof, the president or other chief executive officer and the chairman of the board of directors must be citizens of the United States, and no more of its directors than a minority of the number necessary to constitute a quorum can be noncitizens.

If the amount of foreign ownership of a corporation is more than a controlling interest (usually 50%), the acquisition of existing fishing vessels by the corporation would require approval of the Maritime Administration under the Shipping Act of 1916. Under present regulations, however, if acquisition is of a new fishing vessel (not previously documented), no Maritime Administration approval is required even if foreigners own 100% of a domestic corporation making such an acquisition.

The Shipping Act of 1916 (46 U.S.C. 801-840)

Section 2 (46 U.S.C. 802) defines "citizens of the United States" for purposes of the Act. Of particular importance is that for fishing vessels, the controlling interest in a corporation must be owned by U.S. citizens. (However, under present foreign transfer regulations, in the case of domestic corporations acquiring new, previously undocumented fishing vessels, foreign control may be up to 100%. See 46 C.F.R. S221.4(c), published at 40 Federal Register 2435, January 13, 1975). For regulations describing the corporate citizenship requirements for vessels entitled to documentation see 46 C.F.R. S67.03-5.

Section 9 (46 U.S.C. 808) provides that it is a crime to transfer to foreign control or ownership any U.S. documented vessels without approval of the Maritime Administration. (Again, this does not apply to new, previously undocumented fishing vessels.)

Section 37 (46 U.S.C. 835) provides that it is a crime to transfer any vessel, whether documented or not, any shipyard, or any controlling interest in a corporation owning vessels to foreign ownership or control without permission of the Maritime Administration during a war or a state of national emergency. A state of national emergency has existed since 1950. Basically this statute would prohibit joint venture ownership of fishing vessels without Maritime Administration approval. However, as stated earlier, under present regulations, new, previously undocumented fishing vessels may be acquired by domestic corporations without Maritime Administration approval even though such corporations are 100% foreign owned. (46 C.R.F. S221.4(c)).

46 U.S.C. 11

This is the basic statute setting forth the requirements for documenting vessels under U.S. law. The tests of ownership are similar to the tests under S2 of the Shipping Act of 1916 except that there is no requirement for the Coast Guard to investigate the percentage ownership of stock. This statute, when read with 46 U.S.C. 251, requires that fishing vessels must have been built in the United States in order to be documented under U.S. law. Therefore, under the documentation law it is possible for vessels built in the United States to be documented under U.S. law in the name of domestic corporations wholly owned by foreign nationals.

46 U.S.C. 251-252

This statute provides that only vessels of the United States, with certain enumerated exceptions, may land their catch in a port of the United States. A foreign-flag vessel may not land in a port of the U.S. its own catch of fish or the fish products processed therefrom, nor the catch or processed fish products taken on board such vessel on the high seas from any other vessel. Foreign-caught or processed fish or fish products must be landed in another country before it may be shipped to the U.S.

The above statutes are the principal ones that would apply to joint ventures. However, there would also be a need to satisfy requirements of other agencies such as the Customs Service, the Labor Department, Environmental Protection Agency, and the Coast Guard. In addition, such joint ventures would be bound to comply with various State and local laws.

James K. White
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NOAA