

Received on 3/21/77

Attachment No. 17

MEMORANDUM

March 21, 1977

TO: New England Fish Company

FROM: H. Clayton Cook, Jr.  
Cadwalader, Wickersham & Taft

RE: Foreign Fishing Under the Fishery Conservation and Management Act of 1976 ("FCMA")

The purpose of this memorandum is to describe briefly (i) how the FCMA should be interpreted concerning the treatment of foreign fishing and (ii) the authority of the respective Regional Councils (A) to provide for levels of foreign fishing in their fishery management plans and (B) to comment upon the issuance of permits for foreign fishing pursuant to such plans.

Definitions

The FCMA defines "foreign fishing" as "fishing by a vessel other than a vessel of the United States" (Sec. 3(12)).

"Fishing" is defined as:

"(A) the catching, taking, or harvesting of fish;

(B) the attempted catching, taking, or harvesting of fish;

(C) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or

(D) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C)." (Sec. 3 (10)).

The term vessel is not defined in the FCMA, however, the term is defined in the general provision to the U.S. Code as follows:

"The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. 3.

The FCMA defines "vessel of the United States" as "any vessel documented under the laws of the United States or registered under the laws of any State." (Sec. 3(25)).

Foreign fishing under the FCMA; therefore, means the catching, taking, or harvesting of fish, activities attempting to or expected to result in the catching, taking or harvesting of fish; including operations at sea in support of or in preparation for such activities or attempts at such activities, performed by any description of watercraft or other artificial contrivance that can be used as a means of transportation on water if such activities are performed by other than by a vessel documented under the laws of the United States or registered under the laws of any State. In short, foreign fishing includes any fishing activity at sea performed by a vessel other than a vessel of the United States; that is, any operation at sea which would involve foreign fishing vessels would come within the definition of foreign fishing. For example, operations where vessels of the United States catch fish and then make such fish available to foreign fishing vessels within the 200-mile zone for processing or transporting would come within the definition of "foreign fishing" inasmuch as such functions are operations at sea in support of the catching of fish.

"Fishing vessel" is defined by the FCMA as:

"any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for -  
(A) fishing; or  
(B) aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including but not limited to, preparation, supply, storage, refrigeration, transportation, or processing." (Sec. 3(11)).

#### Limitations on Foreign Fishing Under the FCMA

Foreign fishing is authorized within the 200-mile zone only if (i) it is conducted pursuant to an existing international fishery agreement or a governing international fishery agreement; (ii) the foreign nation involved extends the same fishing privileges to vessels of the United States; and (iii) the fishing is conducted under and in accordance with a valid permit (Sec. 201 (a), (b), (c) and (f)). The first two criteria above are treated as technical matters and, for purposes of this memorandum, are assumed as not being obstacles to engaging in foreign fishing.

Foreign fishing is to be limited to that portion of the optimum yield of a fishery which will not be harvested by vessels of the United States (Sec. 201(d)). Foreign fishing includes many activities in addition to harvesting, yet in providing for the total allowable level of foreign fishing the FCMA sets out the harvesting by vessels of the United States as the basis for limiting the activities included in the definition of foreign fishing.

No foreign fishing vessel may engage in fishing within the 200-mile zone without a valid permit being issued to such vessel (Sec. 204(a)). Each application for a permit shall be published in the Federal Register and transmitted to the appropriate Regional Council (Sec. 204(b)(4)). The Regional Council may submit comments and recommendations with respect to the application and indicate conditions and recommendations with respect to any application it recommends for approval (Sec. 204(b)(5)).

The Secretary of Commerce, after taking into account the recommendation of the Council, may approve the application if he determines the fishing described in the application meets the requirements of the FCMA (Sec. 204(b)(6)). The Secretary may include in the permit conditions and restrictions related to fishing conservation and management which he prescribes as necessary and appropriate (Sec. 204(b)(7)(D)).

The amount of any fishery available to foreign fishing is determined by the respective Regional Councils in their fishery management plans. They must assess and specify the capacity and extent fishing vessels of the United States will attempt to harvest of a particular fishery on an annual basis so it can be determined what can be made available for foreign fishing (Sec. 303(a)(4)).

Here again the language of the FCMA uses the term harvesting by vessels of the United States to limit the activities included in foreign fishing. The operative effect of the FCMA is to limit the amount or extent of the various activities included in the definition of the term foreign fishing. Activities other than the harvesting of fish by foreign vessels are to be controlled or limited under FCMA. Strong support for this interpretation is found in the treatment of fishing vessels under the FCMA as it requires all foreign vessels, even those that are not engaged in harvesting of fish, to have permits (Sec. 204(a)). It can be asserted that vessels that prepare, supply, store, refrigerate, transport or process are required to apply for and have permits because it is the intent of the FCMA that only those foreign vessels that do not compete with U.S. interest that perform such activities are allowed to engage in

such activities. What is not set out in the FCMA is the basis by which the various activities that constitute foreign fishing are to be limited and how permits for vessels that engage in the various activities will be issued.

#### Allowable Level of Foreign Fishing -- Sub-Levels

The FCMA does not establish a method of how to specifically control the various activities included within the definition of the term foreign fishing. It is certain that it is possible to exclude foreign fishing in its entirety under the FCMA and it would follow that it would be possible to limit any specific activity included in the definition of foreign fishing (Sec. 201(d)). It can be asserted that a reasonable method which sets limits for the various activities within the definition of foreign fishing is required to be developed under the FCMA. It would be reasonable to establish allowable levels for each activity within the definition of foreign fishing. Then to the extent U.S. interest can or desire to engage in any such activities they would have priority to the exclusion of foreign fishing vessels. Thus any segment of the U.S. fishing industry could develop to the maximum extent possible without having to depend upon a corresponding development of capacity in other parts of the industry. For example, if U.S. catching vessels are available but U.S. transporting or processing is not, such U.S. vessels will be allowed priority even though the fish or fish product is transported or processed by foreign vessels and accordingly must be attributed in some manner to foreign fishing.

Foreign fishing should be allocated specific levels for each activity that cannot be performed by U.S. interest. Permits to foreign fishing vessels should accordingly be limited to those foreign vessels that are to perform those activities which U.S. interest do not have the capability or desire to engage in.

#### Authority of Regional Councils

The respective Regional Councils are required to specify what can be made available for foreign fishing (Sec. 303(4)(B)) and it would be consistent with (if not required by) the FCMA to specify in the fishery management plans what may be available for foreign fishing by the various activities that are included within the definition of that term. Each Regional Council has the duty to assess the capability of U.S. interest in its region to engage in fishing and limit foreign participation to the extent such U.S. interests desire and are capable of engaging in the various activities that constitute fishing.

Regional Councils also have authority to provide in their respective management plans various other controls or limits upon foreign fishing (Sec. 303(b)). It is permissible for a Regional Council (i) to designate zones where or periods when fishing is to be limited (Sec. 303(b)(2)); (ii) to limit types or qualities of fishing gear (Sec. 303(b)(4)); and describe other measures, requirements, or conditions or restrictions determined necessary or appropriate for the conservation and management of the fisheries (Sec. 303(b)(7)). Therefore, it would be appropriate for example, to allocate the annual quotas among the calendar quarters and take into account the spawning habits of various species or subspecies.

The Regional Council also can recommend disapproval of any permit to engage in foreign fishing (Sec. 204(b)(5)). This type of action should of course be consistent with its fishing management plans. That is, for example, an application to engage in transporting should be commented upon unfavorably if the Regional Council has found in its fishery management plan that vessels of the United States are fully capable of and desire to engage in such activity or the activity can be performed without engaging in foreign fishing.

Additionally, the Secretary of Commerce is required to include in any permit the requirements of any fishery management plan (Sec. 204(b)(7)). Therefore, any valid requirement promulgated in a fishery management plan will become applicable to any foreign fishing vessel that is issued a permit.

JAY S. HAMMOND  
GOVERNOR



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

*Agenda Item # 47*

March 15, 1977

Mr. Elmer Rasmuson  
Chairman  
International North Pacific  
Fisheries Convention  
and  
North Pacific Fishery  
Management Council  
P. O. Box 3136 DT  
Anchorage, Alaska 99510

Dear Chairman Rasmuson:

I have enclosed a copy of HOUSE JOINT RESOLUTION NO. 16  
(International Convention for the High Seas Fisheries  
of the North Pacific Ocean) recently adopted by the  
Alaska State Legislature.

Sincerely,

A large, stylized handwritten signature of Jay S. Hammond in black ink.

Jay S. Hammond  
Governor

MAR 28 1977

# STATE OF ALASKA

## THE LEGISLATURE

1977

Source

Legislative  
Resolve No.

HJR 16

19



Relating to the International Convention for the High Seas Fisheries of the North Pacific Ocean.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS the interception of Alaska salmon by the Japanese on the high seas has long been of concern to the United States and especially to Alaskans; and

WHEREAS this salmon interception resulted in the development in 1952 of the tripartite International North Pacific Fisheries Convention (INPFC), the primary purpose of which was to ensure the maximum sustained productivity of the fishery resources of the North Pacific Ocean, with special emphasis on protection of salmon of North American origin; and

WHEREAS INPFC, while helpful in some respects, has failed to eliminate the interception of salmon of Alaskan origin inasmuch as, on the average, four million salmon of Western Alaskan origin have been and are still being harvested west of the abstention line of 175 degrees West longitude; and

WHEREAS INPFC negotiations have protected salmon only partially and the Fishery Conservation and Management Act of 1976 (P.L. 94-265) states that the United States has exclusive management authority for all anadromous species originating in the United States throughout their migratory range; and

WHEREAS P.L. 94-265 clearly provides for the prompt re-negotiation of any fishery treaty in effect within the fishery conservation zone to bring that treaty into conformance with the provisions of P.L. 94-265; and

WHEREAS INPFC does not provide the fishery management mandated by our recently enacted extended jurisdiction law; and

WHEREAS the Alaska State Legislature considers it to be of the utmost importance that INPFC be promptly renegotiated in the interest of the conservation of Alaska salmon which presently are vulnerable to the Japanese high seas salmon net fishery both inside and outside the 200-mile fishery conservation zone;

BE IT RESOLVED that the Alaska State Legislature requests the U. S. Department of State to promptly initiate the renegotiation of the terms of the International Convention for the High Seas Fisheries of the North Pacific Ocean (INPFC); and be it

FURTHER RESOLVED that the U. S. Department of State involve to the maximum extent possible the North Pacific Fishery Management Council, the U. S. Section of INPFC, and the Alaska Board of Fisheries in the development of the United States position and goals regarding the future of INPFC.

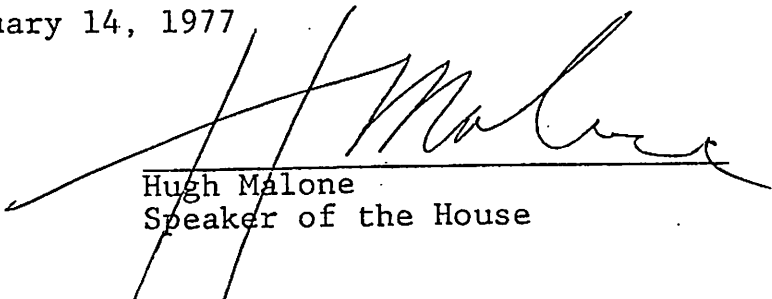
COPIES of this resolution shall be sent to the Honorable Cyrus Vance, Secretary of the U. S. Department of State, the Honorable Juanita Kreps, Secretary of the U. S. Department of Commerce; the Honorable Ted Stevens and the Honorable Mike Gravel, U. S. Senators, and the Honorable Don Young, U. S. Representative, members of the Alaska delegation in Congress; the Honorable Jay S. Hammond, Governor of Alaska; and to Mr. Elmer Rasmuson, Chairman of the International North Pacific Fisheries Convention and Chairman of the North Pacific Fishery Management Council.




# Authentication

The following officers of the Legislature certify that the attached enrolled resolution, House Joint Resolution No. 16, was passed in conformity with the requirements of the constitution and laws of the State of Alaska and the Uniform Rules of the Legislature.

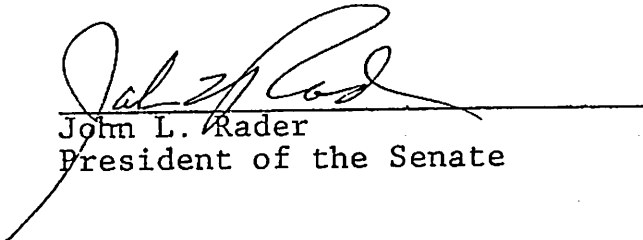
Passed by the House February 14, 1977

  
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Hugh Malone  
Speaker of the House

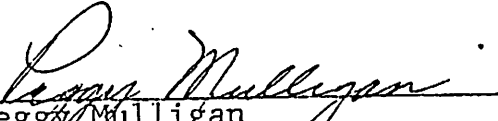
ATTEST:

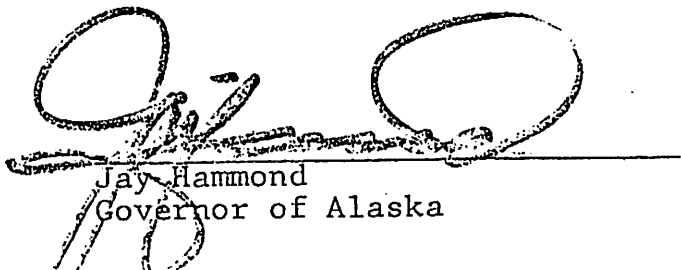
  
\_\_\_\_\_  
Irene Cashen  
Chief Clerk of the House

Passed by the Senate February 16, 1977

  
\_\_\_\_\_  
John L. Rader  
President of the Senate

ATTEST:

  
\_\_\_\_\_  
Peggy Mulligan  
Secretary of the Senate

  
\_\_\_\_\_  
Jay Hammond  
Governor of Alaska

(2)

DATE: March 8, 1977

TO: The Record

BY: Jim H. Branson, Executive Director

SUBJECT: Coordination with Pacific Council on Ocean Troll  
Salmon Management Plan

Harvey Hutchings called the afternoon of March 8 to bring the North Pacific Council up to date on the development of the Pacific Council's Ocean Troll Salmon Plan.

They held six public hearings between the 19th and 25th of February, over 1,000 people attended and they had received over 200 written comments to date. Their drafting team was working on the comments and revisions to the draft plan at the moment, hoped to have it completed by March 9, and in the hands of the Pacific Council by early next week.

The Scientific and Statistical Committee of the Pacific Council will meet March 16th and 17th. The first day at the NWAFC and the second with the Council at the Sea Tac Holiday Inn. The Council meets the 17th and 18th with the Advisory Panel at the Holiday Inn.

If the Council approves the Management Plan at that time it will be sent to the Secretary of Commerce for review and approval and, hopefully, following a 15 day cooling off period regulations should be in effect by the 14th or 15th of April. All on the assumption that there are no problems.

He said that there was a technical session with Canadian fishery scientists and managers planned at Vancouver for March 10th and 11th. It would include the drafting team for the Pacific Council's plan plus John McKean and Lorry Nakatsu. The Canadians in attendance were expected to be Todd, Dick Roberts, Mike Hunter and Rod Hourston. It was described as a technical session to coordinate the ocean salmon planning between the Pacific Coast and Canada. I asked if they had thought of inviting someone from the North Pacific Council and Hutchings allowed that it might be a good idea.

I called Don Johnson who said that a representative of the North Pacific Council would be welcome and I designated Gary Gunstrom, Chief of the North Pacific's Management Plan Development Team. The meeting will be held at the Canadian Department of Fisheries Office beginning at 1:30 p.m. Thursday, March 10th.

I was unable to reach Steve Pennoyer in Anchorage or Carl Rossier in Juneau so called Gunstrom direct to ask if he could attend. I told him that the Council would pay his travel expenses if the State was unable or unwilling to, as a part of the Management Plan Development expenses.

Gunstrom agreed to go and I did clear with Pennoyer later in the day. Steve agreed with the need for someone to be there and went forward with the planning for Gunstrom.

JHB:in