

MEMORANDUM

TO: Council and Board Members

FROM: Jane DiCosimo
Fishery Biologist

DATE: February 2, 2000

SUBJECT: Halibut Management Issues

- a. Council management alternatives for subsistence category.
- b. Council management alternatives for charter boat guideline harvest level.
- c. Update on Board local area management plan development.
- d. State regulatory authority over the Pacific halibut fisheries.

Subsistence

In December 1999, the Council modified a list of alternatives for defining halibut subsistence in Alaska from an analysis prepared in 1997. Management alternatives were originally developed to address a conflict between the IFQ/CDQ regulations and customary and traditional practices of Alaska Natives in International Pacific Halibut Commission regulatory Area 4E (Western Alaska), whereby halibut CDQ fishermen were retaining undersized halibut for subsistence. In June 1997, the Council approved and the IPHC adopted a change to its regulations to allow Area 4E CDQ fishermen to retain undersized halibut while commercial fishing. That measure took effect June 4, 1998 and will sunset on December 31, 2001 unless reapproved by the IPHC.

The Council is scheduled to review the remaining issues of defining eligibility, legal gear, customary and traditional trade, bag limits, and cooperative management. The Council revised its list of alternatives (Attachment 1) and set initial review of the revised analysis in April and final action in June 2000.

Charter boat guideline harvest level

Also in December, the Council released the staff analysis to the public that would implement a guideline harvest level (GHL) and management measures to keep charter halibut harvests in Gulf of Alaska Areas 2C and 3A under the GHL. It adopted the restructured alternatives as proposed by the staff to simplify the decision-making process and added to the analysis: (1) possession limits as a possible management tool; (2) a 3-year rolling average for determining whether an area GHL is exceeded; (3) an option to apply the GHL as a percentage to the constant exploitation yield (CEY) by area after non-guided sport and personal use deductions are made, but prior to deductions for commercial bycatch and wastage; (4) additional discussion of economic characterizations of the commercial and charter fisheries (particularly for Area 2C); and (5) additional discussion of implementation and trigger mechanisms during periods of low halibut abundance (Attachment 2). It deleted an option that would have closed the halibut charter fishery in-season if the GHL was exceeded. For final action in February, staff will report on: (1) the revised IPHC stock assessment and quotas and the potential impacts on the analytical conclusions in the EA/RIR/IRFA; (2) estimated implementation costs; and (3) other possible management solutions.

Local area management plans

Ed Dersham will provide an update on the Board's progress with developing LAMPs. Attachment 3 contains a list of community proposals received by the Board to-date.

Regulatory Authority

The joint Council/Board Committee has requested the Council and Board discuss the legal ability to delegate halibut management to the State. Attachment 4 is a 1995 memo from NOAA General Counsel on this subject.

Halibut Subsistence Alternatives for initial review in April 2000

ALTERNATIVE 1. Status quo.

ALTERNATIVE 2. Allow the harvest of halibut for subsistence.

OPTION 1. Define subsistence.

Halibut subsistence regulations are needed to allow the continued practice of long-term customary and traditional practices of fishing halibut for food for families in a non-commercial manner for non-economic consumption. Subsistence is defined as 'long-term, customary and traditional use of halibut.'

OPTION 2. Define eligibility for halibut subsistence:

Suboption A. Members of Alaska Native Federally-recognized Tribes with customary and traditional use of halibut and other permanent rural residents in such Native villages.

Suboption B. Alaska rural residents as defined in ANILCA and identified in the table entitled 'Alaska Rural Places and Native Groups with Subsistence Halibut Uses,' and will also include other communities for which customary and traditional findings are developed in the future.

Suboption C. Tribal members and other permanent residents of Native villages who have legitimate subsistence needs.

OPTION 3. Define legal gear.

Suboption A. rod-and-reel gear.

Suboption B. hook-and-line gear (including set and hand-held gear) with a range of:

1. 2 hooks;
2. 10 hooks;
3. 30 hooks;
4. 60 hooks.

Suboption C. Allow Tribal governments to contract with NMFS to register designated fishermen to fish for the community using:

1. 1 - 3 skates of gear, up to 60 hooks each;
2. any gear type

Suboption D. Allow retention of subsistence halibut using commercial gear while IFQ/CDQ fishing.

OPTION 4. Allow the customary and traditional trade of subsistence halibut.

Suboption 1. Customary and traditional trade through monetary exchange shall be limited to an annual maximum of:

1. \$0;
2. \$200;
3. \$400;
4. \$600.

Suboption 2. Customary and traditional trade through non-monetary exchange is allowed with:

1. other Alaska Tribes;
2. any Alaska rural resident;
3. any Alaska resident;
4. anyone.

OPTION 5. Define a daily bag limit of between 2-20 halibut.

Suboption. No bag limits for subsistence halibut.

OPTION 6. Develop cooperative agreements with Tribal, State, and Federal governments to collect, monitor, and enforce subsistence harvests and develop local area halibut subsistence use plans in coastal communities.

Alternative 1: Status quo. Do not develop implementing regulations.

Alternative 2: Approve management measures to implement the halibut charter guideline harvest level

ISSUE 1: Apply GHLS to Areas 2C and/or 3A to trigger management measures as:

Option 1: Fixed percentage annually expressed in pounds.

Based on 1995: GHL equal to 12.76% in 2C, 15.61% in 3A.

Based on 1998: GHL equal to 18.01% in 2C, 13.85% in 3A.

Option 2: Fixed range in numbers of fish.

Based on 1995: GHL range equals 50 - 62 thousand fish in 2C; 138 - 172 thousand fish in 3A

Based on 1998: GHL range equals 61 - 76 thousand fish in 2C; 155 - 193 thousand fish in 3A

Option 3: Manage GHL as a 3-year rolling average

Option 4: Apply the GHL as a percentage to the CEY by area after non-guided sport and personal use deductions are made, but prior to deductions for commercial bycatch and wastage.

ISSUE 2: Implement management measures. None to all of the following management measures would be implemented up to 2 years after attainment of the GHL (1 year if data is available), but prior to January 1 for industry stability. Restrictions would be tightened or liberalized as appropriate to achieve a charter harvest below the GHL if a fixed percentage or within the GHL range if a range.

- | | |
|-----------------------|----------------------------------|
| • line limits | • super-exclusive registration |
| • boat limits | • sport catcher vessel only area |
| • annual angler limit | • sportfish reserve |
| • vessel trip limit | • rod permit |
| • bag limits | • possession limits |
| | • prohibit crew-caught fish |

ISSUE 3: Under varying halibut abundance.

Option 1: Status quo. The GHL fixed percentage varies on an annual basis with area halibut abundance.

Option 2: Reduce area-specific GHL ranges during years of significant stock decline. The following suboptions may be instituted in a stepwise fashion, and/or used in combination.

Suboption 1: Reduce to 75-100% of base year amount when the charter allocation is predicted to exceed a specified percentage (options: 15, 20, or 25%) of the combined commercial and charter TAC.

Suboption 2: Reduce area-specific GHL by a set percentage (options: 10, 15 or 20%). The trigger for implementing the reduction would be based on total harvests and would be IPHC area-specific:

<u>Area 2C Options</u>	<u>Area 3A Options</u>
4 million lb	10 million lb
6 million lb	15 million lb
8 million lb	20 million lb

or an amount proportionate to the reduction in abundance (indicated by the CEY)

ISSUE 4: GHL or allocation

- Option 1: Under a GHL and the current IPHC setline quota formula, halibut not harvested by the charter fleet in one year are rolled into the commercial setline quota the following year.
- Option 2: Unharvested halibut would remain unharvested under a direct allocation to the charter sector.
Suboption: unharvested halibut banked in a sportfish reserve

ISSUE 5: Establish a moratorium for the halibut charter industry.

- Option 1: Establish an area-wide moratorium
- Option 2: Establish a local moratorium
Suboption: Prohibit new charter licenses upon attainment of the GHL.

LAMP proposals that have been submitted to the Board to date

- Implement a moratorium on new entries to the halibut charter industry in Upper and Lower Cook Inlet for three years. Submitted by the Deep Creek Charterboat Association.
- Allow only 12 halibut per 24-hour day for six-pack charters who launch and load from Ninilchik to Anchor River. Submitted by Doug Blossom Jr.
- Provide that recreational halibut anglers shall not anchor their vessels in times or areas open to the salmon drift fishery when drift vessels are present and engaged in fishing. Submitted by the United Cook Inlet Drift Association.
- Implement a moratorium on new entry into the halibut charter or guide service business in the waters of Cook Inlet and Kachemak Bay for a period of three years. Submitted by the Homer Charter Association.
- Define a separate halibut management area for Kodiak similar to the Kodiak Salmon Management Area. Submitted by the Kodiak Advisory Committee.
- Direct the development of six sub-area plans within the larger Kodiak Management Area. Submitted by the Kodiak Native Tourism Association.
- Establish sport fishing only areas in Prince William Sound for halibut effective May 15 to September 15. Submitted by the Valdez Advisory Committee.
- Establish sport fishing only areas in Prince William Sound for halibut effective May 15 to September 15. Submitted by David Pinquoch.
- Allow IFQ halibut fishing in Prince William Sound only from March 15 through May 15 and from September 15 through November 15. Submitted by the Valdez and Seward Charterboat Associations.
- Establish Prince William Sound as a super-exclusive registration area for commercial and charter halibut fishers. Submitted by the Valdez Advisory Committee.
- Establish a Seward Area as a super-exclusive registration area for the halibut charter fishery. Submitted by the Valdez and Seward Charterboat Associations.
- Establish sport fishing only areas for halibut off Cape Cleare and Cape Puget effective May 15 to September 15. Submitted by the Valdez and Seward Charterboat Associations.
- Prohibit commercial fishing for halibut within three miles of land. Submitted by the Alaska Sportfishing Association.
- Establish a halibut management plan for the Yakutat area. Submitted by the Yakutat Advisory Committee.



UNITED STATES DEPARTMENT OF COMMERCE
 National Oceanic and Atmospheric Administration
 Office of General Counsel
 P.O. Box - 21109
 Juneau, Alaska 99802-1109

December 4, 1995

MEMORANDUM FOR: North Pacific Fishery Management Council

THROUGH: Lisa Lindeman
 Alaska Regional Attorney *Lisa Lindeman*

FROM: Jonathan Pollard *Jonathan Pollard*
 Attorney-Advisor

SUBJECT: State regulatory authority over the Pacific
 halibut fisheries

QUESTION PRESENTED:

Is State authority to regulate fishing for Pacific halibut in Convention waters preempted by the Convention Between the United States and Canada for the Preservation of the Pacific Halibut Fishery of the Northern Pacific Ocean and the Bering Sea ("Convention") and the Northern Pacific Halibut Act, 16 U.S.C. §§ 773-773k?

BRIEF ANSWER:

Yes. State authority to regulate fishing for Pacific halibut in Convention waters is preempted by federal law. The Convention and the Northern Pacific Halibut Act amount to comprehensive and pervasive federal regulation of, and a dominant federal interest in, direct and uniform regulation of the Pacific halibut fishery in Convention waters.

SHORT DISCUSSION:

A preemption question requires examination of Congressional intent. First, Congress explicitly may define the extent to which its enactments preempt State laws. Second, preemption may be inferred through Congress' occupation of a given field to the exclusion of State law. Such an inference may be drawn when --



the pervasiveness of federal regulation precludes supplementation by the States, or

the federal interest in the field is sufficiently dominant, or

the object of the federal law and the character of the obligations imposed by it reveal the same purpose.

See Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190, 204 (1982). The Supreme Court repeatedly has held that where Congress has exercised exclusive jurisdiction over a general and inclusive area of activity, the very delegation of regulatory power to an administrative agency will supersede any State action over that area. See Ray v. ARCO, 435 U.S. 151, 157 (1978); Bethlehem Steel v. New York Labor Relations Board, 330 U.S. 767 (1947). Such a comprehensive arrogation of governmental powers nullifies looser or stricter direct State regulation of the subject matter. See Ray v. ARCO, 435 U.S. 151 (1978); Huron Portland Cement v. Detroit, 362 U.S. 440 (1960).

Finally, even where Congress has not entirely displaced State law in a particular field, State law is preempted to the extent that it actually conflicts with federal law. Such a conflict will be found when --

it is impossible to comply with both State and federal law, or

the State law stands as a obstacle to the accomplishment of the purposes and objectives of Congress.

See Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190, 204 (1982).

Although the Convention and the Halibut Act do not expressly preempt State laws directly regulating the Pacific halibut fishery in Convention waters, the Convention and the Act amount to a pervasive scheme of federal regulation occupying the field to the exclusion of all State laws that are not identical to the federal regulations. Article I of the Convention states that all

fishing for Pacific halibut in Convention waters (including State waters) is prohibited except as expressly provided in the Convention. Further, persons may fish for Pacific halibut only in accordance with the Convention and the approved regulations of the International Pacific Halibut Commission. The Commission has broad authority to adopt regulations to develop and maintain the stocks of Pacific halibut pursuant to Article III of the convention. Article I, paragraph 2, states that each "Party" (the United States and Canada) may establish additional regulations governing the taking of Pacific halibut that are more restrictive than those adopted by the Commission.

The Halibut Act implements the Convention, and provides that the Secretary of Commerce has general responsibility to carry out the Convention and the Halibut Act, and that the regional fishery management councils may develop Pacific halibut fishery regulations that are in addition to, and not in conflict with, Commission regulations. Council regulations can be implemented only with the approval of the Secretary of Commerce.

Taken together, the Convention and the Halibut Act and implementing Commission and federal regulations constitute a comprehensive and pervasive regulatory scheme that completely occupies the field of Pacific halibut fishery regulation, including research, open and closed areas, gear limitations, quotas, allocation and more. Furthermore, this conclusion is also supported by the possibility of collision between Pacific halibut fishery regulations adopted by Alaska, Washington, Oregon and California and those adopted by the Commission and the federal government. When State regulations could affect the ability of the federal government to regulate comprehensively and uniformly or presents the prospect of interference with the federal regulatory power, then State law will be preempted even though collision between State and federal law may not be an inevitable consequence. Scheidewind v. ANR Pipeline Co., 485 U.S. 293, 310 (1988); Northern Natural Gas Co. v. State Corporation Commission of Kansas, 372 U.S. 84, 91-92 (1963).

In conclusion, States have no authority to directly regulate aspects of the Pacific halibut fishery in Convention waters that have been preserved by the Convention and the Halibut Act to the exclusive regulatory jurisdiction of the Commission, the regional

fishery management councils and the Secretary of Commerce¹ - such matters as research, designation of open and closed areas, gear limitations, quotas, and allocation of fishing privileges. Consequently, States have no regulatory authority in this area to which the regional fishery management councils and the Secretary of Commerce may defer.

Of course, every State law that has some indirect effect on the regulation of the Pacific halibut fishery within Convention waters is not preempted. Cf. Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 753-756 (1985). However, State regulations that directly regulate matters that Congress intended the Commission, the regional fishery management councils and the Secretary of Commerce to regulate are preempted within Convention waters.

cc: Jay Johnson
Steve Pennoyer
Eileen Cooney

¹ Compare section 306(a)(3) of the Magnuson Act, 16 U.S.C. § 1856(a)(3), which provides that a State may not directly or indirectly regulate any fishing vessel outside its boundaries, including waters of the EEZ, unless the vessel is registered under the laws of that State. Here Congress actually preserved a regulatory role for the States in the comprehensive federal fishery regulatory scheme implemented by the Magnuson Act. See also the Pacific Salmon Treaty Act, 16 U.S.C. §§ 3631 - 3644, and the Interjurisdictional Fisheries Act, 16 U.S.C. §§ 4101 - 4107, which both provide a regulatory role for the States. Neither the Convention nor the Halibut Act preserve any regulatory role whatever for the States, even within State waters.

HANDED OUT AT
REQ of DR WHITE

January 23, 2000

**North Pacific Fishery Management Council
605 West Fourth Avenue, # 306
Anchorage, Alaska 99501**

Subject: The North Pacific Fishery Management Council's proposals to limit charter boats participation and to reduce their clients bag limits to one halibut per day.

No reasons have been presented to indicate that these proposed actions are fundamentally necessary for the protection of the sustained yield conservation of these common property public trust fishery resources. In fact, we find that the councils admitted purpose is to limit common personal consumptive users allocation, and to provide that for a prescribed exclusionary class of commercial harvester. (ie IFQ)

As common consumptive users of the public trust fish, wildlife and waters; we submit the following cited legal opinions as information to the North Pacific Fishery Management Council, in support of our position:

1. **Alaska vs. Ostrosky**
Cited as 667 p2d 1184 (Alaska 1983)

Justice Robinowitz dissenting opinion, which has since been effectively adopted, by the Alaska Supreme Court, in several related cases:

- (a) "Free transferability (ie limited entry permits now likewise IFQ) impairs rights guaranteed by three separate clauses of the Alaska Constitution."

Article VIII

Section 3 "Wherever occurring in their natural state fish, wildlife and waters are reserved to the people for common use."

Section 15 "No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the state."

Article I

Section 1 "All persons are equal and entitled to equal rights, opportunities and protection under the law."

"The common use clause necessarily contemplates that resources remain in the public domain and will not be ceded to private ownership."

"Since the right of common use is guaranteed expressly by the constitution it must be viewed as a highly important interest running to each person within the state." "In my view, Article VIII Section 3 still mandates that limited entry be achieved through the least possible "privatization" (ie IFQ) of the common resource."

The no exclusive right or special privilege of fishing clause was adopted, into the Alaska Constitution, from a federal statute (ie The White Act) that congress passed before statehood; and reflects the continued recognition of the public trust doctrine responsibility in the management of the common use of our replenishable resources for and by the people as a whole.

II. **Owisichek vs. Alaska**
Cited as 763 p2d 488 (Alaska 1988)

This case also cites the dissenting opinion of Justice Robinowitz, in the Ostrosky case. It explicitly references the "Public Trust", "Public Trust Doctrine" and the common use clauseⁿ over 40 times.

Page 493 "The expression for common use implies that these resources are not to be subject to exclusive grants or special privileges (ie IFQ) as was so frequently the case in royal tradition."

Page 494 "The development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised like all other powers of government as a trust for the benefit of the people, and not as the prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished for the public good."

Page 497 "Admittedly there is a difference between **(footnote 15)** commercial fishermen and professional guides." "A commercial fisherman takes his catch himself before selling it to others for consumption, while a hunting guide does not actually take the game, a privilege reserved for the client." "We view this as an insignificant distinction that does not remove the professional hunting guide from protection under the commons use clause." "The work of a guide is so closely tied to hunting and taking wildlife that there is no meaningful basis for

distinguishing between the right of a guide and the rights of a hunter under the commons use clause."

Contrary to the public propaganda, that some expound, charter operators are not commercial fishermen. They in fact furnish commercial transportation and expertise needed to their clients, who are the personal consumptive USERS of the common property public trust fishery resources.

Another false propaganda concept is that those non-resident clients are a bunch of free loaders. The state of Alaska recently lost a federal court case because we were charging non-resident commercial fisherman three times as much as residents. The court found that since residents pay no taxes in support of fishery management costs, the state could not charge non-residents any more.

But in the case of sport fishing, the state of Alaska is now charging non-residents up to eight times as much as residents. No other state charges such differences.

The courts have consistently found that the public trust fishery resources belong to all citizens as a whole. Discrimination based on either interstate or intrastate residency has been judged to violate the United States Constitution's privilege and immunities doctrine, as well as the due process and equal protection clauses of the 14th amendment.

III. McDowell vs. State
Cite as 785 p2d 1 (Alaska 1989)

This case cites both the Ostrosky and Owisichek cases is reference to the open access clauses of the constitution and the exclusionary fisheries such as limited entry.

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& 10

"Since the common use clause of section 3 and the no exclusive right of fishery clause of section 15 remain in the constitution, the premise of the argument is that whatever system of limited entry is imposed must one.... which entails the least possible impingement on the common use reservation and on the no exclusive right of fishery clause." "The argument concludes that free transferability does not entail that least possible impingement on the anti-exclusionary values which these provisions reflect." "The premise of this argument is logical."

"The optimum number provision of limited entry act is the mechanism by which limited entry is meant to be restricted to its constitutional purpose." "Without this mechanism limited entry has the potential to be a system which has the effect of creating an exclusive fishery to ensure the wealth of permit holder and permit values, while exceeding the constitutional purposes of limited entry." "Because of this risk of unconstitutionality exists, the commercial fisheries entry commission should not delay in embarking on the optimum number process."

When comparing the system IFQ's with that of limited entry, we find that it has the same potential of creating an exclusionary class to ensure the wealth of IFQ holders and IFQ permit values; while impinging on constitutional rights of the common personal consumptive USERS. Because of this risk of unconstitutionality and violation of the Public Trust, the council's responsibility is to not delay in maintaining an optimum number process for IFQ's within this commercial halibut fishery.

III. **Payton vs. Alaska**
Cite as 938 p2d 1036 (Alaska 1997)

This case specifically addresses the important constitutional differences between USE and USERS.

Page 1042 "Accordingly we consistently have interpreted customary and traditional to refer to "USES" rather than "USERS"

The Alaska Constitution addresses these differences in explicit sections of Article VIII.

Section 4: Fish, forests, wildlife, grasslands and all
(sustained yield) other replenishable resources belonging to the state, shall be utilized, developed and maintained on the sustained yield principle, subject to preferences among beneficial USES.

The open access clauses of section 3 common use, section 15 no exclusive right or special privilege of fishery and section 17 uniform application all mandate that there be no preferences among USERS.

v. **Totemoff vs. State**
Cite as 905 p2d 954 (Alaska 1995)

We take the position that the fish, wildlife and waters are common property public trust resources. The legislators as trustees management, are responsible to the people as a whole, who are the beneficiaries (USERS).

The Alaska's constitution's Article VIII "Natural Resources" is the finest of any in the nation and is a valid foundation guide line for the management of these replenishable common property fish, wildlife and water resource.

The Alaska Supreme Court has a history of valid judicial findings that are based on recognition of the Public Trust Doctrine and Equal Protection under the law doctrines of both the United States and Alaska Constitutions. Within this history, we are prepared to defend the personal consumptive common use right of the people as a whole.

In the Totemoff case the Alaska Supreme Court has established their first line of authority in these matters.

Page 955 "Alaska Supreme Court is not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law."

With this edict in mind, the people as a whole will welcome a final decision on their equal constitutional right as common consumptive USERS of these halibut fishery resources.

Submitted on behalf of concerned public interests.

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cc: Concerned Alaskans
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