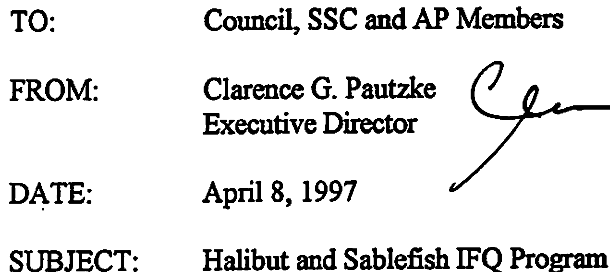
AGENDA C-3
APRIL 1997

MEMORANDUM



TO: Council, SSC and AP Members

FROM: Clarence G. Pautzke
Executive Director

DATE: April 8, 1997

SUBJECT: Halibut and Sablefish IFQ Program

ESTIMATED TIME
3 HOURS

ACTION REQUIRED

(a) Initial Review of IFQ amendments.
(b) Status Report on the IFQ and CDQ fee and loan programs.
(c) Status Report on the central title registry program.
(d) Status Report on the national IFQ panel.
(e) Status Report on the proposed IFQ weighmaster program.

BACKGROUND

(a) Initial Review of IFQ Amendments

In December 1996, the Council approved development of analyses of two changes to the halibut and sablefish IFQ programs as recommended by the IFQ Industry Implementation Team. The Team unanimously supported a proposal to allow QS transfers to immediate family members, under the 3-year emergency provision. This proposal would change 'surviving spouse' to 'heir.' A revised draft analysis is attached as Item C-3(a)(1).

The Team also recommended defining ownership of a vessel for hiring skippers, since current requirements result in widespread defacto leasing and are in conflict with the Council's goals of an owner-operated fleet under the IFQ program. A loophole exists in the IFQ regulations that allows leasing in perpetuity by initial recipients due to inexact language related to ownership of vessels on which QS is fished. An individual may take part ownership in a vessel temporarily (say, for as little as $1) in order to hire a vessel and skipper to fish his QS. In April 1995, the Team recommended that the Council implement a "controlling interest" (e.g., 51%) or other requirement to prevent "paper" ownership that circumvents Council intent for an owner/operator IFQ fleet. In May 1995, the Council forwarded to NMFS the Team's recommendation for a 51% ownership requirement as evidenced by U.S. Coast Guard Abstract of Title, Vessel Registration, etc. In November 1995 and October 1996, the Team reiterated their support of a 51% controlling interest. A revised draft analysis is included here as ItemC-3(a)(2).

(b) IFQ/CDQ Fee Programs and North Pacific Loan Program

The NMFS Task Group, along with representatives from the Council and the State of Alaska, has met since the February Council meeting to further develop the IFQ/CDQ fee program. As you may recall from our earlier Magnuson-Stevens Act discussions, the fee program for IFQ and CDQs will levy a fee of up to 3% on exvessel value, and is required to be developed and implemented by the agency (Secretary of Commerce). The North Pacific Loan Program is an offshoot of the overall fee program, but is to be developed and submitted by the North

Pacific Council by October of 1997. A report on fee program development, including an initial outline for analyses, will be presented by task leader Jay Ginter.

Based on our work group discussions, some key points can be raised before we go into the specifics of the report. Because the language in the Act specifies that fees be collected either at or after the time of landings, we cannot collect fees in advance. The previous report to the Council indicated that it would very likely be 1999 before this fee program was up and running. However, it is possible that we could collect fees on 1998 landings, though it would be at the end of 1998, depending upon when the regulations are actually promulgated. We will continue to research this possibility with agency and NOAA-GC representatives. The fee plan would probably have to be fully developed by this September for that to happen.

The previous report to the Council also discussed the Loan Program, which takes 25% of the fees, and indicated that the Loan Program, being dependent upon the fee program, could not actually be implemented until fee collection begins. In reviewing the actual language of the Act, it appears that the Loan Program may not be directly dependent upon the fee program after all. Although the Act specifies that 25% of the fees will be directed to the Loan Program, it calls for that portion of the fees "to be deposited in the Treasury (as opposed to the LASFA fund) and made available, *subject to annual appropriations*, to cover the costs of new direct loan obligations and new loan guarantee commitments..."

This language implies that actual funding of the Loan Program: (1) is subject to annual appropriations by Congress; (2) that such appropriations could be more or less than the actual amount of fees collected; and, (3) that the Loan Program could be 'jump started' beginning in late 1997 by appropriation, without fees having been actually assessed and collected. We have requested assistance from NMFS in developing the Loan Program in order to satisfy our October 1997 deadline, and will keep you apprised of progress on this issue, which is somewhat separate from the overall fee program.

(c) Central Title Registry

Section 305(h) of the Magnuson-Stevens Fishery Conservation and Management Act requires the Secretary to establish:

> *...an exclusive central registry system...for limited access system permits established under section 303(b)(6) or other federal law, including individual fishing quotas, which shall provide for the registration of title to, and interests in, such permits, as well as for procedures for changes in the registration of title to such permits upon the occurrence of involuntary transfers, judicial or nonjudicial foreclosure of interest, enforcement of judgments thereon, and related matters deemed appropriate by the Secretary...*

Although the Act requires that the registry system be "central," it may be administered on a regional basis. It also provided that operation of the registry could be contracted to a private sector firm. Over 90% of all transferable limited access system permits in the country are administered through the Alaska Region of NMFS (RAM Division).

To seek public input on the wide variety of legal and administrative issues involved with implementing the registry system, NMFS published an Advanced Notice of Proposed Rulemaking (ANPR) on March 7. The ANPR posed some 28 questions, ranging from whether NMFS should operate the registry (as opposed to contracting for its operation) to necessary procedures for nonjudicial foreclosure. Comments on the ANPR were due April 7, 1997. The ANPR, in worksheet form, was mailed to the Council on March 11, 1997.

At a workshop in Kodiak on March 20 (sponsored by the Alaska Draggers Association, Kodiak Vessel Owners, and Access Unlimited, Inc.) a group of industry representatives discussed the legal requirements of the Act, the questions posed by the ANPR, and the needs of industry. The unanimous recommendation of those assembled was to request a 6-month extension on the comment period (through October 7, 1997) to allow for greater industry involvement in devising the regulations that would govern the registry's operations (Item C-3(c)(1).

(d) National Academy of Science IFQ/CDQ Studies

The Council nominated Chairman Lauber and Ms. Behnken for the IFQ Review Group to the National Research Council for its IFQ study, based on a March 24 deadline (the deadline for nominations was since extended to April 14). Item C-3(d)(1) contains the *Federal Register* Notice soliciting nominations. NMFS staff may be able to provide additional information on this, and on the formation of the CDQ Review Group.

(e) Status Report on the Proposed IFQ Weighmaster Program

In October 1996, the IFQ Implementation Team unanimously approved requiring weighmasters at the point of landing, noting that there is an existing pool of community members in selected ports currently employed by IPHC to interview skippers and collect otoliths. In December, the Council requested that a discussion paper be prepared to discuss the enforcement need and costs of such a program. NMFS has reported to the Council that it lacks the staff resources to begin the requested assessment at this time (Item C-3(e)(1)).

Comments received on these agenda topics are attached as Item C-3 Supplemental.

AGENDA C-3(a)(1)
APRIL 1997

REVISED

DRAFT

ENVIRONMENTAL ASSESSMENT/REGULATORY IMPACT REVIEW/ INITIAL REGULATORY FLEXIBILITY ANALYSIS FOR A REGULATORY AMENDMENT TO EXTEND TRANSFER PRIVILEGES TO SURVIVING HEIRS OF DECEASED QUOTA SHARE (QS) AND INDIVIDUAL FISHING QUOTA (IFQ) HOLDERS IN THE IFQ PROGRAM

Prepared by

National Marine Fisheries Service

April 4, 1997

Executive Summary 1

1.0 Introduction 1

1.1 Purpose and Need for Action 2

1.2 Management Action Alternatives 3

1.3 Management Background 3

2.0 NEPA Requirements: Environmental Impacts of the Alternatives 4

2.1 Impacts on Endangered, Threatened or Candidate Species 5

2.2 FONSI statement 5

3.0 Regulatory Impact Review:
Economic and Socioeconomic Impacts of the Alternatives 6

3.1 Identification of the Individuals or Groups
that May Be Affected by the Proposed Action 7

3.2 Economic and Social Impacts of the Alternatives 7

3.3 Administrative, Enforcement, and Information Costs 7

4.0 Initial Regulatory Flexibility Analysis 7

4.1 Economic Impacts on Small Entities 8

5.0 Summary and Conclusions 8

6.0 Preparer 9

Executive Summary

The Individual Fishing Quota (IFQ) Program restricts the transfer of quota shares (QS) and resulting IFQ to prevent excessive consolidation of QS and ensure that QS continue to be held by professional fishermen, rather than being acquired by investment speculators. In 1996, a regulatory amendment was implemented to allow for the transfer of QS to surviving spouses of deceased QS holders. Under this provision, upon the death of an individual who holds QS or IFQ, a surviving spouse receives all QS and IFQ held by the decedent by right of survivorship, unless a contrary intent was expressed in a will that is probated. This provision was consistent with the intent of the Council for the IFQ Program, as evidenced by § 14.4.7.1.4(5) of the FMP for the BSAI and § 4.4.1.1.4(5) of the FMP for the GOA, which state:

> The Secretary may, by regulation, designate exceptions to [the transfer provisions] to be employed in cases of personal injury or extreme personal emergency which allows the transfer of [IFQ resulting from QS assigned to vessel categories B, C, or D] for limited periods of time.

At its meeting in October, 1996, the IFQ Industry Implementation Team recommended a proposal to extend transfer privileges to surviving heirs as well, so that other members of a deceased QS holder's immediate family may benefit for a certain period of time from the deceased's commercial fishing interests with regard to the IFQ Program. On the basis of this recommendation, in December, 1996, the North Pacific Fishery Management Council (Council) requested an analysis of an action amending the regulations to include "surviving heirs" of a QS holder's immediate family in the survivorship transfer provisions.

Management Action Alternatives

Alternative 1: Status Quo. Provide transfer privileges for a period of three years to a deceased QS holder's surviving spouse only.

Alternative 2: Revise regulations to extend transfer privileges of QS and IFQ to surviving members of a deceased QS holder's immediate family. This alternative would provide for cases in which a deceased QS holder has no surviving spouse but has other surviving members of his or her immediate family who might be in need of temporary financial support from the deceased QS holder's fishing interests. As with the provisions for transfer to a surviving spouse, this alternative would allow a surviving heir, first, to transfer any current year's IFQ for the duration of the allocation year and, second, to transfer annual allocations of IFQ resulting from the total QS transferred by right of survivorship for three calendar years from the date of the deceased QS holder's death. "Immediate family" is defined as a spouse and children of a holder of QS or IFQ.

1.0 INTRODUCTION

The groundfish fisheries in the Exclusive Economic Zone (EEZ) (3 to 200 miles offshore) in the Gulf of Alaska (GOA) and in the Bering Sea and Aleutian Islands (BSAI) are managed respectively under the Fishery Management Plan (FMP) for Groundfish of the Gulf of Alaska and the FMP for the Groundfish Fisheries of the Bering Sea and Aleutian Islands Area. The FMPs were developed by the North Pacific Fishery Management Council (Council) under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The GOA and BSAI FMPs were approved by the Secretary of Commerce and became effective in 1978 and 1982, respectively.

Actions taken to amend FMPs or implement other regulations governing the groundfish fisheries must meet the requirements of Federal laws and regulations. In addition to the Magnuson-Stevens Act, the most important of these are the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), Executive Order (E.O.) 12866, and the Regulatory Flexibility Act (RFA).

NEPA, E.O. 12866, and the RFA require a description of the purpose of and need for the proposed action as well as a description of alternative actions which may address the problem. This information and impacts on endangered species and marine mammals are included in Section 2. Section 3 contains the Regulatory Impact Review (RIR) which addresses the requirements of both E.O. 12866 and the RFA that economic impacts of the alternatives for the proposed actions be considered. Section 4 contains the Initial Regulatory Flexibility Analysis (IRFA) required by the RFA which specifically addresses the impacts of the proposed action on small businesses. Section 5 contains the summary and conclusions of the analysis and Section 8 lists the preparer of the analysis.

1.1 Purpose and Need for the Action

The IFQ Program restricts transfer of QS and IFQ to assure that catcher vessel QS would continue to be held by professional fishermen after the initial allocation process instead of being acquired by investment speculators. As evidenced by § 14.4.7.1.4(5) of the FMP for the BSAI and § 4.4.1.1.4(5) of the FMP for the GOA, however, the Council intended to allow for transfer in cases of extreme personal hardship:

> The Secretary may, by regulation, designate exceptions to [the transfer provisions] to be employed in cases of personal injury or extreme personal emergency which allows the transfer of [IFQ resulting from QS assigned to vessel categories B, C, or D] for limited periods of time.

In response to requests to NMFS from the industry, regulations governing transfer of QS and IFQ were amended in 1996 to extend transfer privileges of QS and IFQ to a surviving spouse of a

deceased holder of QS and IFQ. Under this provision, upon the death of an individual who holds QS or IFQ, a surviving spouse receives all QS and IFQ held by the decedent by right of survivorship, unless a contrary intent was expressed in an will that is probated. The provision allows a surviving spouse, first, to transfer any current year's IFQ for the duration of the allocation year and, second, to transfer annual allocations of IFQ resulting from the total QS transferred by right of survivorship for three calendar years from the date of the death of the deceased holder of QS or IFQ.

In October, 1996, the IFQ Industry Implementation Team recommended that the transfer provisions for surviving spouses be extended generally to surviving heirs of a QS holder's immediate family, in the event that a QS holder is survived only by dependent children. This action would create survivorship rights for other immediate family members, in addition to a spouse, to gain some pecuniary benefit from the deceased's commercial fishing interests with regard to the IFQ Program for a certain period of time.

1.2 Management Action Alternatives

Alternative 1: Status Quo. Provide transfer privileges to a deceased QS holder's surviving spouse only for a period of three years.

Alternative 2: Revise regulations to extend survivorship transfer privileges to surviving members of a deceased QS holder's immediate family. As with the provisions for transfer to a surviving spouse, this alternative would allow a surviving heir, first, to transfer any current year's IFQ for the duration of the allocation year and, second, to transfer annual allocations of IFQ resulting from the total QS transferred by right of survivorship for three calendar years from the date of the deceased holder's death.

1.3 Management Background

The Northern Pacific Halibut Act of 1982 (NPHA), P.L. 97-176, 16 U.S.C. 773 c (c) authorizes the regional fishery management councils having authority for the geographic area concerned to develop regulations governing the Pacific halibut catch in U.S. waters, which are in addition to but not in conflict with regulations of the International Pacific Halibut Commission. The halibut IFQ program is implemented by federal regulations under 50 CFR part 679, Limited Access Management of Fisheries off Alaska under authority of the Magnuson Fishery Conservation and Management Act of 1975, P. L. 94-265, 16 U.S.C. 1801.

The halibut and sablefish IFQ program was implemented under Amendments 15/20 to the groundfish FMPs of Alaska (NPFMC 1992). A history of the Council's actions with respect to Alaska's halibut and sablefish IFQ fisheries is summarized in Amendments 31/35 (Modified

Block Amendment) (NPFMC 1994a). Recent amendments to the IFQ program have allowed a block exemption and one-time transfer of CDQ compensation QS (Amendments 32/36) (NPFMC 1995), prohibited the use of halibut catcher vessel QS on freezer/longline vessels and allowed the freezing of non-IFQ species along with sablefish catcher vessel QS on freezer/longline vessels (Amendments 33/37) (NPFMC 1996a), allowed the use of larger catcher vessel QS on smaller vessels (Amendments 42/42) (NPFMC 1996c), and increased the halibut and sablefish sweep-up levels (Amendments 43/43) (NPFMC 1996d).

This section contains the draft Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) for a regulatory amendment to allow for transfer of QS and IFQ to surviving members of a deceased QS holder's immediate family. As with the provisions for transfer to a surviving spouse, this alternative would allow a surviving heir, first, to transfer any current year's IFQ for the duration of the allocation year and, second, to transfer annual allocations of IFQ resulting from the total QS transferred by right of survivorship for three calendar years from the date of the death of the deceased holder of QS or IFQ.

2.0. NEPA REQUIREMENTS: ENVIRONMENTAL IMPACTS OF THE ALTERNATIVES

An environmental assessment (EA) is required by the National Environmental Policy Act of 1969 (NEPA) to determine whether the action considered will result in significant impact on the human environment. If the action is determined not to be significant based on an analysis of relevant considerations, the EA and resulting finding of no significant impact (FONSI) would be the final environmental documents required by NEPA. An environmental impact statement (EIS) must be prepared for major Federal actions significantly affecting the human environment.

An EA must include a brief discussion of the need for the proposal, the alternatives considered, the environmental impacts of the proposed action and the alternatives, and a list of document preparers. The purpose and alternatives are discussed in Sections 2.1, 2.2, 3.1 and 3.2. Sections 2.4 and 3.4 contain a discussion of the environmental impacts of the alternatives. Section 5 contains the summary and conclusions of the analysis. The list of preparers is in Section 8.

The environmental impacts generally associated with fishery management actions are effects resulting from (1) harvest of fish stocks which may result in changes in food availability to predators and scavengers, changes in the population structure of target fish stocks, and changes in the marine ecosystem community structure; (2) changes in the physical and biological structure of the marine environment as a result of fishing practices, e.g., effects of gear use and fish processing discards; and (3) entanglement/entrapment of non-target organisms in active or inactive fishing gear.

None of the proposed alternatives would have such impacts on the environment. The

contemplated action would not change the amount or type of fishing gear use or the time or location of its use. A change in transfer provisions to allow transfer to the surviving heirs of a deceased holder of QS or IFQ would affect only the financial affairs of QS holders. Therefore, this action would have no significant impact on the environment.

2.1 Impacts on Endangered, Threatened or Candidate Species

Endangered and threatened species under the ESA that may be present in the Gulf of Alaska and the Bering Sea and Aleutians Islands include:

Endangered

Northern right whale	*Balaena glacialis*
Sei whale	*Balaenoptera borealis*
Blue whale	*Balaenoptera musculus*
Fin whale	*Baleanoptera physalus*
Humpback whale	*Megaptera novaeangliae*
Sperm whale	*Physeter macrocephalus*
Snake River sockeye salmon	*Oncorhynchus nerka*
Short-tailed albatross	*Diomedea albatrus*

Threatened

Steller sea lion	*Eumetopias jubatus*
Snake River spring and summer chinook salmon	*Oncorhynchus tshawytscha*
Snake River fall chinook salmon	*Oncorhynchus tshawytscha*
Spectacled eider	*Somateria fischeri*

None of the alternatives for either management action is expected to have an effect on endangered, threatened, or candidate species, for the same reasons cited above.

2.2 FINDING OF NO SIGNIFICANT IMPACT

None of the alternatives is likely to significantly affect the quality of the human environment; preparation of an environmental impact statement for selection of any of the alternatives as the proposed action would not be required by Section 102(2)(C) of the National Environmental Policy Act or its implementing regulations.

signed:

3.0 REGULATORY IMPACT REVIEW: ECONOMIC AND SOCIOECONOMIC IMPACTS OF THE ALTERNATIVES

This section provides information about the economic and socioeconomic impacts of the alternatives including identification of the individuals or groups that may be affected by the action, the nature of these impacts, quantification of the economic impacts if possible, and discussion of the trade offs between qualitative and quantitative benefits and costs.

The requirements for all regulatory actions specified in E.O. 12866 are summarized in the following statement from the order:

> In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environment, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

This section also addresses the requirements of both E.O. 12866 and the Regulatory Flexibility Act to provide adequate information to determine whether an action is "significant" under E.O. 12866 or will result in "significant" impacts on small entities under the RFA.

E. O. 12866 requires that the Office of Management and Budget review proposed regulatory programs that are considered to be "significant." A "significant regulatory action" is one that is likely to:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

A regulatory program is "economically significant" if it is likely to result in the effects described above. The RIR is designed to provide information to determine whether the proposed regulation is likely to be "economically significant."

3.1 Identification of Individuals Affected by this Proposed Action

The action proposed under Alternative 2 would affect all individuals who hold QS or IFQ and the members of their immediate families as survivors of a deceased QS holder. By species and area, as of April 4, 1997, a total of 7,971 persons held QS. Halibut QS are held by 5,978 persons, and sablefish QS by 1,993

3.2 Economic and Social Implications

Alternative 2 would provide some temporary financial relief for immediate families of deceased holders of QS or IFQ. This action would provide a net benefit to the nation by making the IFQ Program more responsive to the familial financial obligations of its participants who hold QS or IFQ. As the transfers allowed by this action would be temporary, emergency measures as provided for by the FMPs, alternative 2 would not compromise the intent of the IFQ Program to ensure that fishing privileges remain in the hands of professional fishermen instead of being acquired by investment speculators.

3.3. Administrative, Enforcement, and Information Costs

No additional enforcement costs are expected from the proposed alternative to the status quo. Nor will Administrative and information costs be affected by this action: administrative processes currently in effect to extend transfer privileges of QS or IFQ to surviving spouses would provide also for transfer to surviving heirs.

4.0 INITIAL REGULATORY FLEXIBILITY ANALYSIS

The objective of the Regulatory Flexibility Act is to require consideration of the capacity of those affected by regulations to bear the direct and indirect costs of regulation. If an action will have a significant impact on a substantial number of small entities, an Initial Regulatory Flexibility Analysis (IRFA) must be prepared to identify the need for the action, alternatives, potential costs and benefits of the action, the distribution of these impacts, and a determination of net benefits.

NMFS has defined all fish-harvesting or hatchery businesses that are independently owned and operated, not dominant in their field of operation, with annual receipts not in excess of $2,000,000 as small businesses. In addition, seafood processors with 500 employees or fewer, wholesale industry members with 100 employees or fewer, not-for-profit enterprises, and

government jurisdictions with a population of 50,000 or less are considered small entities. A "substantial number" of small entities would generally be 20% of the total universe of small entities affected by the regulation. A regulation would have a "significant impact" on these small entities if it reduced annual gross revenues by more than 5 percent, increased total costs of production by more than 5 percent, or resulted in compliance costs for small entities that are at least 10 percent higher than compliance costs as a percent of sales for large entities.

If an action is determined to affect a substantial number of small entities, the analysis must include:

(1) a description and estimate of the number of small entities and total number of entities in a particular affected sector, and total number of small entities affected; and

(2) analysis of economic impact on small entities, including direct and indirect compliance costs, burden of completing paperwork or recordkeeping requirements, effect on the competitive position of small entities, effect on the small entity's cashflow and liquidity, and ability of small entities to remain in the market.

4.1 Economic Impact on Small Entities

The "total universe" of small entities affected by this action would comprise all holders of QS and IFQ. As of April 4, 1997, a total of 7,971 persons held QS. By species and area, that total comprises the following allocations:

halibut

2C	1,869
3A	2,480
3B	805
4A	431
4B	143
4C	79
4D	67
4E	104
	5,978

sablefish

SE	599
WY	382
CG	539
WG	210
AI	129
BS	134
	1,993

This action would relieve a restriction on transfer of QS and IFQ to provide for emergency situations in which the death of a holder of QS or IFQ leaves his or her immediate family in need of temporary financial support.

As a temporary, emergency provision not affecting the general allocation and use of QS and IFQ, this action would not have any significant economic impact on the small entities participating in the IFQ Program. Nor would it impose any additional compliance costs or information requirements beyond those already approved for the IFQ Program.

5.0 Summary and Conclusions

The proposed action would provide for the temporary financial relief of the surviving heirs of a deceased holder of QS or IFQ by extending the emergency transfer provisions for surviving spouses to other surviving members of a deceased QS holder's immediate family.

Two alternatives were evaluated. Alternative 1, the "no action" or status quo alternative required by NEPA and E.O. 12866, would allow transfer of a deceased QS holder's QS or IFQ to a surviving spouse, only. Alternative 2, the proposed alternative submitted by industry representatives, would extend the emergency transfer privileges of a surviving spouse to surviving heirs as well. This alternative would provide for cases in which a deceased QS holder has no surviving spouse but has other surviving members of his or her immediate family who might be in need of temporary financial support from the deceased QS holder's fishing interests.

A review of the economic and social impacts of the alternatives indicates that alternative 2 would provide a net benefit to the nation by improving the responsiveness of the IFQ Program to the personal, familial obligations of its chief participants: the professional fishermen who hold and fish QS and IFQ.

None of the alternatives is expected to have a significant impact on endangered, threatened, or candidate species. Nor are the alternatives expected to have any significant impact on a substantial number of small entities.

6.0 Preparer

James Hale
National Marine Fisheries Service

REVISED

DRAFT

ENVIRONMENTAL ASSESSMENT/REGULATORY IMPACT REVIEW/

INITIAL REGULATORY FLEXIBILITY ANALYSIS

FOR

A REGULATORY AMENDMENT TO AMEND

VESSEL OWNERSHIP REQUIREMENTS FOR THE

INDIVIDUAL FISHING QUOTA PROGRAM

Prepared by

National Marine Fisheries Service

April 4, 1997

Executive Summary

The Individual Fishing Quota (IFQ) Program requires (with some exceptions) holders of QS to be aboard the vessel harvesting IFQ species during all fishing operations. The Council intended this requirement to assure that catcher vessel QS would continue to be held by professional fishermen after the initial allocation process instead of being acquired by investment speculators. While sole proprietor commercial fishing businesses were unlikely to have difficulty complying with this restriction, the Council recognized that many fishing firms may use hired masters to operate their vessels. The Council did not wish to constrain this option for small businesses and therefore created an exception to this requirement (codified at sections 679.42 (i) and (j)of the IFQ regulations) for individuals who received initial allocations of catcher vessel QS, provided that such an individual (a) owns the vessel on which the IFQ halibut or sablefish are harvested and (b) is represented on the vessel by a master in his employment.

The same exception is extended to corporations and partnerships who hold QS and could not be aboard the vessel harvesting IFQ halibut or sablefish as an "individual," provided that the corporation received QS as an initial allocation, the harvesting vessel is owned by the corporation, and the QS holder is represented on the vessel by a master employed by the corporation.

At its meetings in 1995, the IFQ Industry Implementation Team expressed concern that inexact language in the current regulations inadvertently provides a loophole that allows for nominal ownership of vessels expressly for the purpose of hiring a skipper to fish a QS holder's IFQ. Because the current regulations do not stipulate a specific percentage of interest that an "owner" must have in a vessel, an individual may take part ownership in a vessel temporarily (say, for as little as $1) in order to hire a vessel and skipper to fish his QS. In April 1995, the Team recommended that the Council implement a “controlling interest” (e.g., greater than 50%) or other requirement to prevent “paper” ownership that circumvents Council intent for an owner/operator IFQ fleet. In May 1995, the Council relayed to NMFS the Implementation Team’s recommendation for a controlling interest ownership requirement as evidenced by U.S. Coast Guard Abstract of Title, Vessel Registration, etc., that included a more responsible level of interest in and liability for a vessel than do “paper” transfers. In November 1995 and in October 1996, the Team reiterated its support of a 51% controlling interest, and in December, 1996, the Council took action to initiate an analysis of alternative minimum ownership requirements of 1%, 20%, and 51% interests.

Management Action Alternatives

Alternative 1: Status Quo. Ownership requirements for hiring a skipper to fish a QS holder's IFQ remain unspecified, allowing for minimal interest in vessels. This analysis assumes the 1% alternative to represent the status quo.

Alternative 2: Revise regulations to require a specific percentage of interest in vessels for QS

holders wishing to hire skippers.

Option A: Require a 20% minimum interest in vessel.

Option B: Require a 51% minimum interest in vessel.

1.0 INTRODUCTION

The groundfish fisheries in the Exclusive Economic Zone (EEZ) (3 to 200 miles offshore) in the Gulf of Alaska (GOA) and in the Bering Sea and Aleutian Islands (BSAI) are managed respectively under the Fishery Management Plan (FMP) for Groundfish of the Gulf of Alaska and the FMP for the Groundfish Fisheries of the Bering Sea and Aleutian Islands Area. The FMPs were developed by the North Pacific Fishery Management Council (Council) under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The GOA and BSAI FMPs were approved by the Secretary of Commerce and became effective in 1978 and 1982, respectively.

Actions taken to amend FMPs or implement other regulations governing the groundfish fisheries must meet the requirements of Federal laws and regulations. In addition to the Magnuson-Stevens Act, the most important of these are the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), Executive Order (E.O.) 12866, and the Regulatory Flexibility Act (RFA).

NEPA, E.O. 12866, and the RFA require a description of the purpose of and need for the proposed action as well as a description of alternative actions which may address the problem. This information and impacts on endangered species and marine mammals are included in Section 2. Section 3 contains the Regulatory Impact Review (RIR) which addresses the requirements of both E.O. 12866 and the RFA that economic impacts of the alternatives for the proposed actions be considered. Section 4 contains the Initial Regulatory Flexibility Analysis (IRFA) required by the RFA which specifically addresses the impacts of the proposed action on small businesses. Section 5 contains the summary and conclusions of the analysis and Section 6 lists the preparer of the analysis.

1.1 Purpose and Need for the Action

A key element of The IFQ Program is the requirement for catcher vessel QS holders to be on board the vessel during harvest and offloading of IFQ species. The Council intended this requirement to assure that catcher vessel QS would continue to be held by professional fishermen after the initial allocation process instead of being acquired by investment speculators. While sole proprietor commercial fishing businesses were unlikely to have difficulty complying with

this restriction, the Council recognized that many fishing firms may use hired masters to operate their vessels. The Council did not wish to constrain this option for small businesses and therefore created an exception (codified at 50 CFR 679.42(i) and (j)) for individuals who received initial allocations of catcher vessel QS, provided that such an individual (a) owns the vessel on which the IFQ halibut or sablefish are harvested and (b) is represented on the vessel by a master in his employment.

The same exception is extended to corporations and partnerships who hold QS and could not be aboard the vessel harvesting IFQ halibut or sablefish as an "individual," provided that the corporation received QS as an initial allocation, the harvesting vessel is owned by the corporation, and the QS holder is represented on the vessel by a master employed by the corporation.

At its meetings in 1995, the Individual Fishing Quota Industry Implementation Team expressed concern that the current regulations inadvertently encourage nominal ownership of vessels by initial recipients due to inexact language related to ownership of vessels on which QS is fished. An individual may take part ownership in a vessel temporarily (say, for as little as $1) in order to hire a vessel and skipper to fish his QS. In April 1995, the Team recommended that the Council implement a "controlling interest" (e.g., 51%) or other requirement to prevent "paper" ownership that circumvents Council intent for an owner/operator IFQ fleet. In May 1995, the Council relayed to NMFS the Implementation Team's recommendation for a 51% ownership requirement as evidenced by U.S. Coast Guard Abstract of Title, Vessel Registration, etc., that included a more responsible level of interest and liability in a vessel than do "paper" transfers. In November 1995 and in October 1996, the Team reiterated its support of a 51% controlling interest requirement.

In December 1996, the Council took action to initiate an analysis of ownership requirements, with alternatives for requiring that QS holders possess specific minimum percentages (20% and 51%) of interest in vessels.

1.2 Management Action Alternatives

Alternative 1: Status Quo. Ownership requirements for hiring a skipper to fish a QS holder's IFQ remain unspecified, allowing for minimal interest in vessels.

Alternative 2: Revise regulations to require a specific minimum percentage of interest in vessel required for QS holders wishing to hire skippers.

Option A: Require 20% minimum interest in vessel.

Option B: Require a 51% minimum interest in vessel.

1.3 Management Background

The Northern Pacific Halibut Act of 1982 (NPHA), P.L. 97-176, 16 U.S.C. 773 c (c) authorizes the regional fishery management councils having authority for the geographic area concerned to develop regulations governing the Pacific halibut catch in U.S. waters, which are in addition to but not in conflict with regulations of the International Pacific Halibut Commission. The halibut IFQ program is implemented by federal regulations under 50 CFR part 679, Fisheries in the EEZ off Alaska, under authority of the Magnuson-Stevens Act, P. L. 94-265, 16 U.S.C. 1801.

The halibut and sablefish IFQ program was implemented under Amendments 15/20 to the groundfish FMPS of Alaska (NPFMC 1992). A history of the Council's actions with respect to Alaska's halibut and sablefish IFQ fisheries is summarized in Amendments 31/35 (Modified Block Amendment) (NPFMC 1994a). Recent amendments to the IFQ program have allowed a block exemption and one-time transfer of CDQ compensation QS (Amendments 32/36) (NPFMC 1995), prohibited the use of halibut catcher vessel QS on freezer/longline vessels and allowed the freezing of non-IFQ species along with sablefish catcher vessel QS on freezer/longline vessels (Amendments 33/37) (NPFMC 1996a), allowed the use of larger catcher vessel QS on smaller vessels (Amendments 42/42) (NPFMC 1996c), and increased the halibut and sablefish sweep-up levels (Amendments 43/43) (NPFMC 1996d).

This section contains the draft Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) for a regulatory amendment to require that QS holders who are initial issuees of QS and wish to employ hired skippers to fish their IFQ must own a specific minimum percentage of interest in the vessel harvesting the IFQ. The options presented for this specified minimum percentage are 20%, which would require that the QS holder possess a substantial share of interest in and liability for the vessel, and 51%, which would require the QS holder to possess the controlling share of interest in the vessel.

2.0. NEPA REQUIREMENTS: ENVIRONMENTAL IMPACTS OF THE ALTERNATIVES

An environmental assessment (EA) is required by the National Environmental Policy Act of 1969 (NEPA) to determine whether the action considered will result in significant impact on the human environment. If the action is determined not to be significant based on an analysis of relevant considerations, the EA and resulting finding of no significant impact (FONSI) would be the final environmental documents required by NEPA. An environmental impact statement (EIS) must be prepared for major Federal actions significantly affecting the human environment.

An EA must include a brief discussion of the need for the proposal, the alternatives considered, the environmental impacts of the proposed action and the alternatives, and a list of document preparers. The purpose and alternatives are discussed in Sections 2.1, 2.2, 3.1 and 3.2. Sections 2.4 and 3.4 contain a discussion of the environmental impacts of the alternatives. Section 5

contains the summary and conclusions of the analysis. The list of preparers is in Section 8.

The environmental impacts generally associated with fishery management actions are effects resulting from (1) harvest of fish stocks which may result in changes in food availability to predators and scavengers, changes in the population structure of target fish stocks, and changes in the marine ecosystem community structure; (2) changes in the physical and biological structure of the marine environment as a result of fishing practices, e.g., effects of gear use and fish processing discards; and (3) entanglement/entrapment of non-target organisms in active or inactive fishing gear.

None of the proposed alternatives would have such impacts on the environment. The contemplated action would not change the amount or type of fishing gear use or the time or location of its use. A change in ownership requirements would affect only the financial affairs of QS holders. Therefore, this action would have no significant impact on the environment.

2.1 Impacts on Endangered, Threatened or Candidate Species

Endangered and threatened species under the ESA that may be present in the Gulf of Alaska and the Bering Sea and Aleutians Islands include:

Endangered

Northern right whale	*Balaena glacialis*
Sei whale	*Balaenoptera borealis*
Blue whale	*Balaenoptera musculus*
Fin whale	*Baleanoptera physalus*
Humpback whale	*Megaptera novaeangliae*
Sperm whale	*Physeter macrocephalus*
Snake River sockeye salmon	*Oncorhynchus nerka*
Short-tailed albatross	*Diomedea albatrus*

Threatened

Steller sea lion	*Eumetopias jubatus*
Snake River spring and summer chinook salmon	*Oncorhynchus tshawytscha*
Snake River fall chinook salmon	*Oncorhynchus tshawytscha*
Spectacled eider	*Somateria fischeri*

None of the alternatives for either management action is expected to have an effect on endangered, threatened, or candidate species, for the same reasons cited above.

2.2 FINDING OF NO SIGNIFICANT IMPACT

None of the alternatives is likely to significantly affect the quality of the human environment; preparation of an environmental impact statement for selection of any of the alternatives as the proposed action would not be required by Section 102(2)(C) of the National Environmental Policy Act or its implementing regulations.

3.0 REGULATORY IMPACT REVIEW: ECONOMIC AND SOCIOECONOMIC IMPACTS OF THE ALTERNATIVES

This section provides information about the economic and socioeconomic impacts of the alternatives including identification of the individuals or groups that may be affected by the action, the nature of these impacts, quantification of the economic impacts if possible, and discussion of the trade offs between qualitative and quantitative benefits and costs.

The requirements for all regulatory actions specified in E.O. 12866 are summarized in the following statement from the order:

> In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environment, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

This section also addresses the requirements of both E.O. 12866 and the Regulatory Flexibility Act to provide adequate information to determine whether an action is "significant" under E.O. 12866 or will result in "significant" impacts on small entities under the RFA.

E. O. 12866 requires that the Office of Management and Budget review proposed regulatory programs that are considered to be "significant." A "significant regulatory action" is one that is likely to:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or

communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

A regulatory program is "economically significant" if it is likely to result in the effects described above. The RIR is designed to provide information to determine whether the proposed regulation is likely to be "economically significant."

3.1 Identification of Individuals Affected by this Proposed Action

The action proposed under Alternative 2 would affect all individuals, corporations, or partnerships who received initial allocations of QS. Because of appeals cases yet undecided or appeals to be filed in the future, the number of initial issuees of QS continues to vary. To date approximately 6000 persons have been issued QS as initial allocations and would, therefore, be allowed to hire skippers under 50 CFR 679.42(i) and (j). A significant number of QS issued as initial allocations has transferred out of the hands of initial issuees, thus reducing the total number of persons allowed to hire skippers.

An individual holding an initial allocation of QS may choose to hire a skipper to fish his or her IFQ; a corporation or partnership which received an initial allocation of QS, however, is required by 50 CFR 679.42(j) to hire a skipper to fish the IFQ resulting from the corporation or partnership's QS. As of April 1, 1997, 337 corporations and partnerships held initial allocations of QS. In the first two years of the IFQ program, NMFS/Restricted Access Management division (RAM) had liberally interpreted the regulations to allow corporations to fish IFQ using representative cards issued to a corporation or partnership in the corporation's name but required no proof of vessel ownership on the part either of the corporation or the individual representative. This practice ceased at the end of the 1996 IFQ season. Beginning with the 1997 IFQ fishing season, RAM notified all non-individual QS holders that they would be required to hire a master to fish their IFQ and that the representatives cards would be useable only for checking vessel and IFQ account balances. RAM also notified non-individual QS holders that, for the 1997 season only, vessels owned by individuals who are members of a partnership or corporation holding QS may be used to fish IFQ allocated to the non-individual QS holding entity.

Of initial issuees, 232 QS holders, representing 285 instances of ownership and 197 vessels,

applied to NMFS/Restricted Access Management for IFQ/CDQ Hired Skipper cards for the 1996 IFQ season.

Of the 285 instances of ownership claimed for the purpose of hiring a skipper to fish an initial recipient's IFQ, 97 represent vessel ownership interests of one percent or less. An additional ten ownerships represent interests over one percent but less than 20 percent. Nine of these ten ownerships comprise nine QS holders who each own 11.11% interest in the same vessel. The total number of interests less than 20% is 107, all of which would have been prohibited by Option A of Alternative 2.

Of the 285 instances of ownership claimed in 1996, an additional 40 instances represent interests between 20% and 50%. These 40 instances of ownership represent the following percentages of interest:

Number of Ownerships	Percentage of Interest
4	23.75
5	25
5	33.33
1	39.6
1	48
24	50
Total 40	

The 40 instances of ownership above, plus the 107 ownerships of less than 20%, add up to a total of 147 instances of ownership which would be prohibited by Option B of Alternative 2, which requires a minimum of 51% interest in a vessel.

3.2 Economic and Social Implications

Option A of Alternative 2, which requires a 20% interest only, would allow most partnerships of equal interests to continue to take advantage of the hired skipper provisions, except when equal interests in a vessel are shared by six or more partners (which would require that each equal interest fall below the 20% interest required by this option). Of the 107 ownership claims under 20%, 97 constituted interests of one percent or less: the kind of minimal vessel interest

that the proposed alternative 2 is intended to discourage. Option B might have the effect of discouraging vessel ownerships of equal interest because it would require that one owner possess a controlling percentage of vessel interest, i.e. 51% or greater. Under Option B, an initial issuee of QS who shares equal interest in a vessel with his or her spouse as common property of the marriage would be prohibited from hiring a skipper under Option B--as would other such partnerships where equal interests are shared by the parties or no one party owns a controlling share.

3.3. Administrative, Enforcement, and Information Costs

No additional enforcement costs are expected from the proposed alternative to the status quo. Nor will administrative and information costs be significantly affected by this action: The documentation already required as proof-of-ownership to accompany applications to NMFS for an IFQ/CDQ Hired Skipper Card (a copy of USCG Vessel Documentation or Abstract of Title) also establishes the percentage of an owner's interest in a vessel.

4.0 INITIAL REGULATORY FLEXIBILITY ANALYSIS

The objective of the Regulatory Flexibility Act is to require consideration of the capacity of those affected by regulations to bear the direct and indirect costs of regulation. If an action will have a significant impact on a substantial number of small entities, an Initial Regulatory Flexibility Analysis (IRFA) must be prepared to identify the need for the action, alternatives, potential costs and benefits of the action, the distribution of these impacts, and a determination of net benefits.

NMFS has defined all fish-harvesting or hatchery businesses that are independently owned and operated, not dominant in their field of operation, with annual receipts not in excess of $2,000,000 as small businesses. In addition, seafood processors with 500 employees or fewer, wholesale industry members with 100 employees or fewer, not-for-profit enterprises, and government jurisdictions with a population of 50,000 or less are considered small entities. A "substantial number" of small entities would generally be 20% of the total universe of small entities affected by the regulation. A regulation would have a "significant impact" on these small entities if it reduced annual gross revenues by more than 5 percent, increased total costs of production by more than 5 percent, or resulted in compliance costs for small entities that are at least 10 percent higher than compliance costs as a percent of sales for large entities.

If an action is determined to affect a substantial number of small entities, the analysis must include:

(1) a description and estimate of the number of small entities and total number of entities in a particular affected sector, and total number of small entities affected; and

(2) analysis of economic impact on small entities, including direct and indirect compliance costs, burden of completing paperwork or recordkeeping requirements, effect on the competitive position of small entities, effect on the small entity's cashflow and liquidity, and ability of small entities to remain in the market.

4.1 Economic Impact on Small Entities

The "total universe" of small entities affected by this action would comprise all QS holders who received initial allocations of QS. Because of appeals cases yet undecided or appeals to be filed in the future, the number of initial issuees of QS continues to vary. To date approximately 6000 persons have been issued QS as initial allocations and would, therefore, be allowed to hire skippers under 50CFR679.42(i) and (j). Some QS have since transferred out of the hands of initial issuees, thus further reducing the number of QS holders affected by this proposed action to approximately 5000 QS holders. A "substantial number" (20 %) of those who hold initial allocations of QS and would be affected by this action would thus be 1000 QS holders.

Of initial issuees, 232 QS holders, representing 285 instances of ownership and 197 vessels, applied to NMFS/Restricted Access Management (RAM) for IFQ/CDQ Hired Skipper cards for the 1996 IFQ season. Of these 232 QS holders, approximately 97 held less than 20%, and approximately 134 held less than 51%.

Assuming that the number of QS holders who apply for hired skipper cards remain generally constant, the number of QS holders affected by either option of Alternative 2 would be substantially fewer than "20% of the total universe of small entities affected by the regulation."

Neither alternative would impose new paperwork or recordkeeping burdens on small entities, other than those already required by and approved for the IFQ Program. The documentation currently required as proof-of-ownership to accompany applications to RAM for an IFQ/CDQ Hired Skipper Card (a copy of USCG Vessel Documentation or Abstract of Title) also establishes the percentage of an owner's interest in a vessel and would be sufficient to satisfy the information requirements of Option A or Option B of the alternative.

Because this action would affect fewer than 20% of the QS holders issued initial allocations of QS and would impose no new information or paperwork burdens, NMFS determines that a regulatory change adopting either one of the alternatives would not have a significant impact on a substantial number of small entities.

5.0 Summary and Conclusions

The proposed action would prevent nominal ownership of a vessel, require that QS holders who received initial allocations of QS and wish to hire skippers hold substantial interests in the

vessels used to fish their IFQs, and thus reinforce one goal of the IFQ Program: to assure that QS remain in the hands of professional fishermen.

Two alternatives were evaluated. Alternative 1, the "no action" or status quo alternative required by NEPA and E.O. 12866, would perpetuate a loophole in the IFQ regulations that allows nominal or mimimal ownership of vessels for the purpose of hiring skippers to fish a QS holder's IFQ. Alternative 2, the proposed alternative submitted by industry representatives, would require a QS holder to have a substantial amount of interest in a vessel and is presented here with two options: Option A would require 20% minimum in a vessel, and Option B 51% minimum.

Option A would reduce the number of ownerships claimed for the purpose of hiring skippers by some 40% of the number of QS holders who hired skippers in 1996, but would continue to provide for most partnerships of equal interest in a vessel (such as spouses who hold equal interests in a vessel as the common property of the marriage).

Option B would reduce the number of ownerships claimed for the purpose of hiring skippers by approximately 58% of the number of QS holders who hired skippers in 1996 and would prohibit a QS holder who has equal interest in a vessel in partnership with one or more parties from hiring a skipper to fish his IFQ, since he would not possess a controlling interest in a vessel.

A review of the economic and social impacts of the alternatives indicates that either option under alternative 2 would provide a net benefit to the nation by reinforcing the intended effect of the IFQ Program both on the halibut and sablefish resources in the Gulf of Alaska and Bering Sea/Aleutian Islands areas and on the fishing communities that rely on these resources.

None of the alternatives is expected to have a significant impact on endangered, threatened, or candidate species. Nor are the alternatives expected to have any significant impact on a substantial number of small entities.

6.0 Individuals Consulted

Tracy Buck, NMFS/Restricted Access Management
Jessica Gharrett, NMFS/Restricted Access Management
Philip Smith, NMFS/Restricted Access Management

7.0 Preparer

James Hale
National Marine Fisheries Service

Institute of Marine Science; Susan Barco, marine mammal scientist, Virginia Science Museum; Charles Bergman, independent fisher, New Jersey, and member of the Mid-Atlantic Fishery Management Council; Ernie Bowden, independent fisher, Virginia, and member of the Eastern Shore Watermen's Association; David Bower, fishery manager, Virginia Marine Resources Commission; Kevin Chu, fishery biologist, National Marine Fisheries Service; Victoria Cornish, fishery biologist, National Marine Fisheries Service; Gordon Elliott, independent fisher, North Carolina; Bruce Halgren, fishery manager, New Jersey Division of Fish, Game and Wildlife; Thomas Hoff, fishery scientist, Mid-Atlantic Fishery Management Council; George LaPointe, fishery scientist, Atlantic States Marine Fisheries Commission; Matt Linnell, independent fisher, Massachusetts; Richard Luedtke, independent fisher, New Jersey; Bridget Mansfield, fishery biologist, National Marine Fisheries Service, Rick Marks, fishery scientist, North Carolina Fisherman's Association; Dave Martin, independent fisher, Martin Fish Company; William McLellan, marine mammal scientist, University of North Carolina; Robert Munson, independent fisher, New Jersey; Jeff Oden, independent fisher, North Carolina; Bill Outten, fishery manager, Maryland Department of Natural Resources; Andrew Read, marine mammal scientist, Duke University; Tom Smith, independent fisher, Maryland; Michael Street, fishery manager, North Carolina Division of Marine Fisheries; Leonard Voss, Jr., independent fisher, Delaware; Rob West, independent fisher, North Carolina; Nina Young, conservationist, Center for Marine Conservation; Sharon Young, conservationist, Humane Society of the United States. Other individuals from NMFS, state and Federal agencies may be present as observers or for their scientific expertise. The team will be facilitated by RESOLVE Center for Environmental Dispute Resolution, Washington, DC.

The team is officially established upon publication of the first meeting notice in the Federal Register. NMFS fully intends to convene the Take Reduction Team process in a way that provides for national consistency yet accommodates the unique regional needs and characteristics of the team. Take Reduction Teams are not subject to the Federal Advisory Committee Act (5 App. U.S.C.). Meetings are open to the public.

Dated: February 19, 1997.

Patricia A. Montanio

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 97–4591 Filed 2–24–97; 8:45 am]

BILLING CODE 3510–22–F

[I.D. 020697A]

Formation of Advisory Panels for National Academy of Sciences Study on Individual Fishing Quotas

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: Notice is hereby given that NMFS is accepting nominations for two advisory panels for an Individual Fishing Quota (IFQ) study to be conducted by the National Academy of Sciences' National Research Council (NRC). This action is taken to comply with the Magnuson-Stevens Fishery Conservation and Management Act as amended by the Sustainable Fisheries Act of 1996.

DATES: Interested parties should submit a statement of interest by March 24, 1997. See SUPPLEMENTARY INFORMATION for specific details about the statement.

ADDRESS: Send statements of interest to the Director of the Office of Science and Technology, NMFS, 1315 East-West Highway, Silver Spring, MD, 20910.

FOR FURTHER INFORMATION CONTACT: Amy Gautam, NMFS, Office of Science and Technology. Telephone: (301)713–2328.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, as amended by the Sustainable Fisheries Act of 1996, mandates that "The Secretary of Commerce shall, in consultation with the National Academy of Sciences, the Councils, the fishing industry, affected States, conservation organizations and other interested persons, establish two individual fishing quota review groups to assist in the preparation of the report, which shall represent: (A) Alaska, Hawaii, and the other Pacific coastal States; and (B) Atlantic coastal States and the Gulf of Mexico coastal States. The Secretary shall, to the extent practicable, achieve a balanced representation of viewpoints among the individuals on each review group * * *" Therefore, NMFS is establishing two advisory panels, one serving the East coast and one serving the West coast.

The East and West coast panels will be comprised of no more than fifteen members each. Members of the panels will serve as technical advisors to the NRC committee with respect to any issues relating to IFQ implementation. Members may give expert testimony at the public hearings on IFQs. Members may also be asked to assist in the facilitation of NOAA's public hearings in terms of developing questions to be asked at the hearings and in guiding the discussions. Members will be expected to attend one public hearing or one public NRC meeting on IFQs but will not be asked to attend NRC committee meetings. No other meetings are anticipated for the advisory panels. There is no compensation for membership on an advisory panel. NMFS will pay for the travel of each advisory panel member to one public hearing or one NRC public meeting on IFQs. Finally, the advisory panels will serve as an "information clearinghouse."

Interested parties should submit a statement of interest. The statement should include a description of the nominee's background and experience, particularly with respect to IFQs; current occupation and position; reasons for wishing to participate on an advisory panel; and a statement identifying why the nominee should be considered for membership on an advisory panel. Interested parties need not include additional letters of support or sponsorship other than their own self-nominating statements. NMFS will announce the selection of advisory panel members no later than April 14, 1997.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: February 19, 1997.

Rolland A. Schmitten,

Assistant Administrator, National Marine Fisheries Service.

[FR Doc. 97–4592 Filed 2–24–97; 8:45 am]

BILLING CODE 3510–22–F

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting

AGENCY: U.S. Consumer Product Safety Commission, Washington, DC 20207.

TIME AND DATE: Tuesday, March 4, 1997, 10:00 a.m.

LOCATION: Room 410, East West Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Closed to the Public.

AGENDA C-3
APRIL 1997
SUPPLEMENTAL

Queen Anne Fisheries, Inc.
1939 Eighth Avenue West
Seattle, Washington 98119
(206) 284-9158
fax (206) 282-6175

F/V Masonic
Mark S. Lundsten

March 19,1997

Rick Lauber, Chairman
North Pacific Fishery Management Council
605 West Fourth Avenue, Suite 306
Anchorage, Alaska 99501

Dear Rick,

I am enclosing an editorial I have written for Pacific Fishing magazine. It's intent is self-evident. I hope that you can close the loophole I describe and somehow still provide opportunities for the new entrants and the first-generation IFQ holders.

As far as closing the loophole, we have two alternatives before the Council now:

One is to try 20% as the minimum ownership level of a boat that a first generation IFQ owner must have in order to hire a skipper and see if it stops "landlording." Given the ingenuity of our legal brethren, I'm not so sure this will work.

The other is to make that level 51%. This would diminish first generation grandfather rights without eliminating them by requiring any corporation to be majority owner of a vessel if they want to hire a skipper. I think this is virtually guaranteed to stop "landlording." It seems that 50% might be a better number, though, to accomodate partnerships that legitimately split the duties of running a boat.

A third possibility not on the table right now is to eliminate grandfather rights altogether (or, to sunset those rights after a certain period, say five years). If you own IFQs, you have to be on the boat to fish them. That would settle this issue for sure. If the Council can't find a way to close the loophole, I recommend we consider this option.

But stopping the landlords is only half the problem. The other half is to provide more opportunities for IFQ owners who want more fish and who have been the lessors in these arrangements with landlords.

A few options exist already. The Magnuson-Stevens Act now provides a loan program for new entrants that soon will become effective. A plan for a central lien registry should make it easier for anyone to borrow against quota they're buying. Some boats, my own included, have formed a "co-op" of funds to buy quota for everyone on the crew who wants it. Further, the CCF program may be liberalized to allow any IFQ owner or bona fide crewmember to have a CCF for IFQs.

At the Council level, we could liberalize the percentages of IFQs that any IFQ owner could lease legitimately, perhaps increasing the cap up to 20% of the total owned for each species instead of the 10% limit per area that we now have. Small pieces of original allocation often go unfished because they are too small to make the trip worthwhile in areas like the Aleutians, Bering Sea, and Area 4. These pieces currently are also virtually unmarketable and unleasable. This change in the regulations would make fish available to those who need it without allowing any landlords. Everyone would have to fish at least 80% of their IFQs on their own boat or on a boat on which they're working.

We can also give advantages to the second generation that we can deny to the first and thereby encourage first-generation IFQ owners to give up their grandfather rights for something better. For example, perhaps the second generation could buy 3 or 4 blocks per area per species instead of the first generation's limit of two, thereby allowing crew and new entrants to accumulate more cheap quota (blocks sell for much less per pound than unblocked quota does). Any first-generation fisherman could give up all grandfather rights if he/she wanted to take advantage of that.

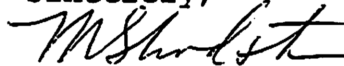
In my view of the fishery, we should be doing all we can to encourage crewmembers to own significant pieces of quota. That is what will keep as equitable as possible any negotiations over any IFQ fees on any operation. Also, if a skipper hires a crew that cumulatively owns a large amount of IFQs, then that skipper needs less IFQs of his own to make a good season. I strongly believe that for the health of the fishery, that is the direction we should be going.

The block system itself, one I have complained about and wanted to modify in the past, is another example of a benefit to crew that I think we should maintain and further adjust to crew-members' advantage. Linda Behnken was right.

Our first order of business though should be to close the loophole since it is being abused. As I said in the editorial, it does provide opportunity right now for those trying to get more quota on their boats. But it is a false opportunity that we can and should replace with lasting ones.

I hope my comments are helpful in your deliberations. This April meeting is one I would like to attend. This is an important issue that we need to meet head-on. I made plans months ago to go fishing, though, and am now committed to that. Good luck.

Sincerely,



Mark S. Lundsten

"No Landlords Allowed"- Mark S. Lundsten 3/21/97

When the North Pacific Council passed IFQs, they gave us an incredibly beneficial program, better than we thought it would be. I believe that we who received initial allocations incurred a few obligations. We owe something to our crews, to the industry as a whole, and to society in general. If we allow some of our peers to take undue advantage of this system, allow them to become landlords of fish, we'll be selling our souls.

IFQs are working. Our fishery is safe again and our season is civilized - we can actually plan our lives. We have no bycatch problems. The cumulative waste of fish, gear, fuel, time, cold storages, and nerves of the derby days is gone. We have reliable crews who are in it for the long haul now - no longer is this a game just for the young and the adrenaline-obsessed. The value of our fish has basically doubled with the reviving of the fresh halibut market and the distribution of sablefish to cold storages over eight months instead of one week. If you're looking to deal, opportunities exist for skippers, crew, and CDQ groups to develop operations that never before were possible. Bankers are loaning us money because we're bankable. It's a success.

Our IFQ system has a serious flaw, though. The problem is that unlike second-generation IFQ owners, first-generation IFQ owners have grandfather rights that allow them to hire skippers to run their boats. Nothing is wrong with that <u>except</u> when owners of large pieces of IFQs divest themselves of any meaningful ownership of a boat. Then they are no longer vessel owners at all, but just shoreside landlords of fish, "coupon clippers" with no obligations or liabilities, or ties to the fishery at all.

This season a fisher I know is tying up his boat and laying off his crew. He is buying a negligible percentage of another boat, then "hiring" the real owner of that boat as its skipper. He will take a large percentage off the top without having to do any work or take any risk. He is essentially hiring a boat and crew cheaper than his own to fish at quite a discount. They do all the work, take all the risks, and send him a check. I think the current term is corporate welfare.

Maybe I'm just in the wrong century, but this coupon-clipping is upside down socio-economic policy to me. I'm embarrassed and pained to see it happen.

This flaw in the system was not something anyone planned. Does anyone believe that if the Council heard of

such a scenario in 1990 that they would've passed our system? No way. We asked only for a viable fishery with a future. The Council labored for years to give us that, and succeeded. To blatantly take advantage, to the point of abuse, of a system already so beneficial to us is nothing but excessive greed. A landlord is acting without any social conscience or responsibility for the fishery, two commodities that have sustained our fleet for decades.

In the debate over IFQs, I told my own crew that none of their jobs would be lost under IFQs. To the Deep Sea Fishermen's Union, I said I would not charge any fees for any initial allocation. To the Council I said fishers designed this program, it's a good one, and we will use it as intended. To Senators, Congressmen and Congresswomen, and to the Secretary of Commerce, I said we deserve this program because we have been good stewards of this fishery and will remain so. I assured them all, as countless other fishers did, that we were an honorable fleet who would fine-tune this system, overcome its inevitable glitches, and make it work over time as a WORKING fishers' system. I, for one, am keeping my word.

I am completely willing to detail the success of our program to any of these people. Plus, I am willing to justify to any them the value generated by the allocation of IFQs to our fleet. That value has been a necessary part of the success of IFQs because it has enabled the fleet to rationalize effort through the buying and selling of quota. Because quota has value, the fleet has been able to conduct its own industry-funded buy-back program. The alternative was non-transferable quota and annual reallocation through politics, a process no one got excited about.

But I cannot justify the allocation of that valuable quota when it is used at the expense of the working fishery and only for the benefit of a non-involved ex-fisher. That completely twists the intent of our program. Quota should be used to generate income for crew and skipper shares, for vessel costs, and for building equity through the purchase of that quota or other quota. That necessary economic dynamic is crippled when an outside landlord uses quota only for royalties, at extra cost to the lessor, instead of fishing or selling that quota.

When the Council developed our IFQs, they thought fishers who historically had hired skippers to run their boats should be able to continue doing business in that fashion with IFQs. They wanted to cause as little disruption as possible with the new system, a system based on a whole

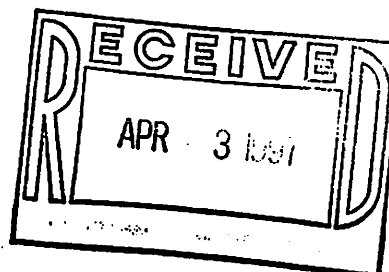
new paradigm that fundamentally changed the way we do business. Good idea. But they inadvertently created a loophole. The economics that will eventually result from this loophole are obvious: some non-working, non-involved IFQ owners will have complete leverage over non-IFQ-owning vessel owners, skippers, and crew. In those cases can we honestly say our system is wise? Can we defend it as good public policy?

There definitely are short-term benefits of this loophole right now. Some operations have access to extra fish. But we can figure out better, long-term ways to benefit the recipients of smaller allocations and the second-generation owners. We certainly owe them that effort - and we can do it without creating a class of landlords.

But we owe no fisher the right to become a landlord. Allowing this practice to continue could eventually ruin the nature of our fishery. In addition, we made a contract with our government when they passed our IFQ system. We need to hold up our end of that contract.

PACIFIC OCEAN FISHERIES, INC.

F/V KRISTIANA
1828 NORTHWEST 204TH STREET SHORELINE, WA. 98177
(206) 542-2017



March 28,1997

Mr. Richard Lauber, Chairman
North Pacific Management Council
605 West 4th Avenue, Suite 306
Anchorage, Alaska 99501-2252

Dear Mr. Chairman:

One of the greatest fears surrounding the IFQ issue was that the fishing resource would fall into the hands of a few rich people or corporations. Currently, there is a small group of fishermen from the Seattle area who are promoting the concept that a fisherman must own 51% of a vessel in order to consider that he or she was indeed the owner of the vessel, with all the privileges thereby granted. If they are successful in this ,it will be the first step toward consolidating the fishery into the hands of a few.

One of the most important concepts of the IFQ program was to promote efficient and cost effective prosecution of the fisheries involved. Small quota owners can most easily realize this cost effectiveness and efficiency by combining their efforts on fewer vessels, while maintaining a broad base of quota share ownership.. Existing regulations allow this and should be maintained in their current form. Therefore we fully support status quo in this regard.

However, in the spirit of compromise even though we cannot support any arbitrary number such a 10%,20% or 51% or any other number which is arbitrary.. We could support an amendment which would provide that any individual, partnership or corporation who was initially allocated quota share and chooses to purchase a portion of a vessel so as to use their quota, would only be required to purchase that portion which reflects their percentage of poundage verses a vessel cap. As an example if the vessel cap is 450,000 pounds of both halibut and blackcod and their transferred poundage is 50,000 pounds they would be required to purchase 11% of the vessel. This would be as easy to track as status quo or any arbitrary percentage number, and would be much more fair.

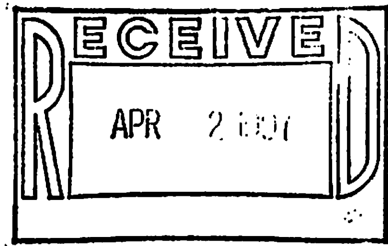
Please consider this alternative to what is currently being considered. It is likely it may fall into the present analysis work being done.

Sincerely,

John O. Crowley

Jack E. Crowley

March 20, 1997



Dear Members of the North Pacific Fishery Management Council:

We are full share, dues paying union deckhands from Seattle. We have recently begun to be quite interested in the politics of the IFQ fishery, which is very unusual for most deckhands. Our first project was to look into this ownership issue of 1%, 20%, and 51% options, as some of our income is dependent from obtaining quota share units and fishing them. We first needed to educate ourselves on this issue before we could begin to educate any other deckhands on their particular situation. We were able to talk and discuss with most boat owners at Fishermen's Terminal in Seattle, and a lot of deckhands. One thing we found out is no one realizes what these options mean or have they thoroughly investigated them. We asked each boat owners directly if they thought a 51% ownership requirement would solve the ownership debate. Most owners did not think that was a very reasonable option because it creates way too many other problems and takes the partner out of partnership.

All we want, as full share union deckhands, whose only concern is for the deckhand and jobs is some reasonable job security. We believe a 51% ownership requirement will wipe out many jobs. Twenty percent ownership seems to be an arbitrary number which does not resolve the apparent "real issue". At first, this issue seemed to separate very good friends, who have strong opinions, with very substantial grounds for concern. We've seen many hardliners re-evaluate their stand because they really didn't know what the change would entail, especially for fishermen in Alaska. As deckhands waiting for the fishery to stabilize before we buy fish, we think the best time to buy, will be when the Magnuson Act comes out with their Loan program for fishermen sometime in 1999. They say it is in the "infant" stage. We are taking this project very seriously so all fishermen will be in line ready and fully prepared to act on this loan program. We the deckhands, do not pay close enough attention to the politics of fishing, because we never really had to. We've always looked to our captain or owner for advice and leadership on most decisions. I've seen plenty of disagreements between owners and captains with no clear and precise or convincing reason why increasing the ownership of a vessel will resolve the issue of leasing quota. We truly and honestly believe that the NPFMC did an excellent job creating and developing a very viable and lucrative fishery for those involved including the badly needed conservation of fish stocks. Safety for the fisherman was a big key in the design. We have lost more than is acceptable to the ocean. We can't thank the Council enough for making safety an important part of the program. We believe you've eliminated all the real defects of Canada's and New Zealand's IFQ programs by making ownership caps and boat caps, second generation being on board the vessel and in a fisherman's name. Our program is in its early stages of developing into a long lasting program for all fishermen to utilize.

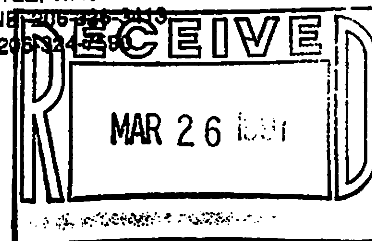
We would strongly urge the Council to take time to evaluate other possible solutions that make real sense to everyone. We firmly believe the Council will make the right decision. I only represent the fishermen who are directly affected by another change in the fishery and who depend entirely on the little bit we have to live on. We are fishermen but we do what we do in order to

survive. We support no change (status quo) at this time. We are not willing to lose one more job or one more dollar without proper cause or proper representation or justification. We hear some boat owners say an ownership change will force people to sell and put more quota on the market. Well it might, it will definitely take away or seriously impair our jobs and we are not convinced any of your options resolve anything.

Thank you for taking the time to read this letter.

HALIBUT ASSOCIATION OF NORTH AMERICA

P.O. BOX 20717
SEATTLE, WASHINGTON 98102
PHONE: 206-323-3413
FAX: 206-324-4338


RECEIVED
MAR 26 1997

OFFICERS

PRESIDENT
PATRICK J. KELLY
Norton Sound Seafood Products

VICE PRESIDENT/SECRETARY
JEFF OTNESS
Sitka Sound Seafoods, Inc.

TREASURER
LORRIE TRUESS
Dory Seafoods, Inc.

TRUSTEES

ALASKA
KEN ALLREAD
Western Alaska Fisheries
BRIAN BIGLER
Wards Cove Packing Co.
MARK S. SANDVIK
Icicle Seafoods, Inc.
JOHN SEVIER
Sitka Sound Seafoods, Inc.

BRITISH COLUMBIA
J. P. R. (RICK) DUNN
British Columbia Packers Ltd.
DONALD McCLEOD
The Canadian Fishing Co. Ltd.

WASHINGTON
WILLIAM J. KELLIHER
Kelliher Fish Co.
EDD A. PERRY
Trident Seafoods Corp.
BARRY LESTER
Seafood Producers Cooperative

MEMBERS

ALASKA
Alka Pride Seafoods
Dragnet Fisheries Company Inc.
Icicle Seafoods, Inc.
Kanaway Seafoods, Inc.
NorQuest Seafoods, Inc.
Norton Sound Seafoods, Inc.
Sitka Sound Seafoods, Inc.
Taku Fisheries
Wards Cove Packing Co.
Western Alaska Fisheries, Inc.
YKI Fisheries, Inc.

BRITISH COLUMBIA
British Columbia Packers Ltd.
Ocean Fisheries Ltd.
The Canadian Fishing Co., Ltd.

WASHINGTON
Arrowac Fisheries
Bornstein Seafoods, Inc.
Dory Seafoods, Inc.
Kelliher Fish Co.
Northern Products Corp.
Pacific Salmon Co., Inc.
Seafood Producers Cooperative
Trident Seafoods Corp.
UniSea, Inc.

March 25, 1997

Mr. Rolland A. Schmitten
Assistant Administrator for Fisheries
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
1335 East-West Highway
Silver Spring, MD 20910 VIA FAX: 301 713-2258

RE: Inadequate monitoring and enforcement of halibut IFQ program in Alaska.

Dear Mr. Schmitten:

The basic goal of fishery management is to sustain the resource. A critical component to achieving that goal is a strong and viable monitoring and enforcement program. In fact, the integrity of IFQ programs is especially predicated on these requirements.

Frankly, we are appalled at the inadequate level currently employed in Alaska's halibut IFQ program and planned for the remainder of the year. The IFQ season opened with only eight uniformed NMFS officers -- a 66 percent decrease since the program began. This falls far short of the NMFS Enforcement Division's own standards for monitoring new fish management programs. It is especially inadequate given the complexity of the program, the volume, number of participants, length of Alaska's coastline and the trim design of the initial 1995 monitoring effort.

We are told that budget constraints and a freeze on hiring are at the root of the problem. Quite simply, that is not a satisfactory response and we expect the NMFS to find some creative way to quickly relieve the situation.

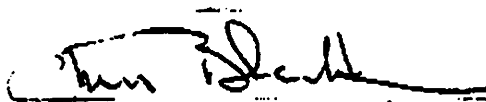
The development of all future individual and bycatch quota programs are at risk if the halibut

IFQ program fails because of poor monitoring and enforcement efforts. Eventually, industry assessments will relieve the problem, but until then, we need your help to make this one work.

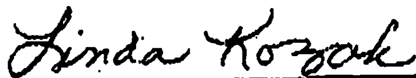
We would appreciate your immediate attention and reply.

Sincerely,

Halibut Ass'n North America



Groundfish Data Bank



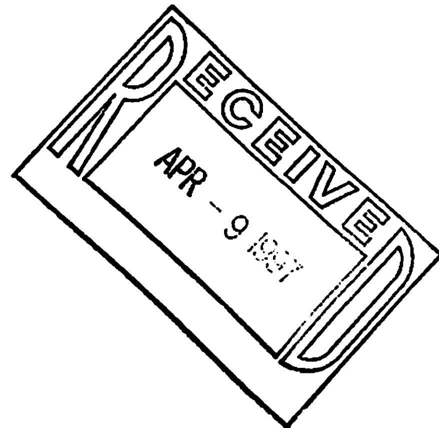
Kodiak Vessel Owners Ass'n

Pacific Seafood Processors Ass'n

cc: Senator Stevens
Senator Gorton
Senator Murray
Congressman Young
Governor Knowles
IPHC Commissioners
NPFMC Councilmembers
Steve Pennoyer

+1-907-874-3006 ALASKA VISTAS CO.

Sylvia Ettefagh
P.O. Box 2281
Wrangell, Alaska 99929



April 9, 1997

NPFMC
Anchorage Alaska

Dear Council:

In December of 1991 I attended the meeting during which you passed the IFQ program. Despite the fact that public testimony from almost all those present were against this program, in a close decision, mainly based on the testimony and recommendation of the IPHC, the plan passed. During the break immediately following that decision, some of us fishermen had the opportunity to explain our view and observations of the stock abundance to the councilmen. Upon return to council chambers a recall of the vote was taken, and once again the resolution passed by one vote. Don Mc Chocran presented graphs to convince us the stable quotas during 1990,91 and projected 92, were a result of a single large year class. He stated that the IPHC was spreading the catch of the (1983?) year class over time in order to help stabilize the economic impact of the fishery. He further stated that the overall condition and biomass of the stock was in jeopardy.

Now, two years after the implementation of this program , the IPHC has decided that the stock analysis of the halibut population should be modified, resulting in a higher quota. As a fisheries biologist and a fisherman I understand the changing nature of fish stocks and the biological/statistical methods used to determine harvest levels. I also understand that to change the formulas used to determine ABC's and total biomass requires much research and time. When asked about the wisdom of increasing the quota, Mr. Mc Chocran replied that the change in methods was under way since 1990. If indeed it was, why were we not informed of this during that pivotal decision making process? Mr. Lauber himself has already asked this question.

Too many financial decisions have been made based on IFQs to simply ask that they be withdrawn. I do however propose, that as a result of the actions of the IPHC a percentage of the quota be set aside for those of us that have participated in the halibut fishery but were denied IFQ shares. The amount of the quota should be the difference in the allowable harvest as calculated by the "old" and "new" stock analysis method. This poundage will change as the biomass does. The special quota will be available for harvest by those persons who do <u>NOT</u> have any IFQs . Furthermore any boat that is registered to fish IFQ shares during that year is also not eligible. This program should help those of us who participated in the fishery but were denied access. It will also help prove that the decision on IFQs was based on biological not political concerns.

I am not able to attend this meeting , but am happy to answer any questions you may have. Feel free to contact me at 907-874-3006.

Sincerely,

Sylvia Ettefagh

F/V Fidelia

LIMITED ACCESS

Central Registry System Workshop

Facilitator - Laine Welch
Phone (907) 487-2722 Fax (907) 486-6963
P. O. Box 2316 Kodiak, Alaska 99615

Post-it® Fax Note 7671	Date 3/31/97	# of pages ▸ 1
To Jane DiCosimo	From	
Co./Dept. NPFMC	Co.	
Phone # 271-2809	Phone #	
Fax # 271-2817	Fax #	

March 31, 1997

TO: Industry Representative
FR: Laine Welch, Facilitator

RE: Workshop Summary

The March 20 workshop regarding implementation of a Centralized Lien Registry (CLR) system for federal limited access permits was very well attended by a cross section of lenders, brokers, investors (fishermen/processors) and state and federal officials.

The intent of the workshop was to generate comments on 28 questions posed in the Advanced Notice of Proposed Rule Making (ANPR), the first formal step being taken by the National Marine Fisheries Service to implement the Magnuson-Stevens Act mandate that a CLR be created to record title to, and security interests in, limited access permits issued by NMFS. Deadline for public comment is April 7.

Workshop presenters included Phil Smith (NMFS/RAM Division); attorney Joan Travestino (Preston Gates & Ellis); broker Debbie Ramos (Graves & Schneider, Inc.); broker Lynn Walton (Access Unlimited, Inc.); attorney Joe Sullivan (Mundt MacGregor); John Lepore (NMFS); attorney Cameron Jensen (Jensen & Jensen/Alaska Draggers Assoc.); and Robert Hernandez (IRS).

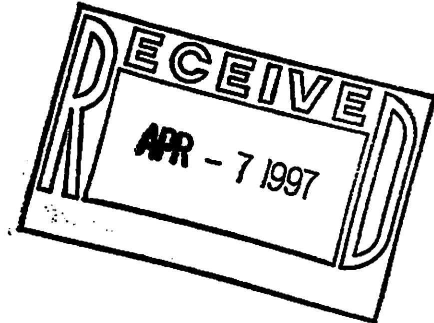
The group's unanimous recommendation was that a six month extension is needed for industry representatives to provide meaningful input to federal managers who are tasked with drafting regulations for the CLR.

It was agreed that Joe Sullivan and Joan Travestino by April 7 will submit a formal request for a six month extension, and provide comments on the questions posed in the ANPR per workshop participants. Sullivan and Travestino also volunteered to take the lead in drafting regulations for the CLR, providing the extension is granted.

A more complete transcript of the CLR workshop proceedings will follow at the end of the week.

PRESTON GATES & ELLIS LLP
ATTORNEYS

April 7, 1997



Mr. Michael L. Grable
Chief, Financial Services Division
National Marine Fisheries Service
1315 East West Highway
Silver Spring, MD 20910

Re: Docket No. 970213030 - Central Title and Lien Registry for Limited Access Permits; Advance Notice of Proposed Rulemaking 62 Fed. Reg. 10249

Dear Mr. Grable:

This firm represents the Coalition for Stability in Marine Financing, a group of lenders which have advocated for a central lien registry since 1993. The purpose of this letter is to provide you with comments in response to the Advance Notice of Proposed Rulemaking published in the Federal Register on March 6, 1997, concerning the matter referenced above.

The Coalition is committed to working with NMFS and other industry participants to draft proposed regulations which will be effective for the industry. The legal issues associated with coordinating the regulations and the existing body of law which cover security interests and liens require more analysis than that available in the past 30 days. Accordingly, we request that this docket remain open for the receipt of additional comments as proposed regulations are drafted. Adopting regulations that are unclear with other applicable law would cause uncertainty regarding the validity and priority of the liens in the registry and likely result in litigation. Having more time to prepare a detailed response will decrease the risk of unclear regulations and allow the lenders to propose regulations which work practically and are cost effective.

While anxious to implement the central registry, members in the Coalition have devised their own methods for determining priority of liens affecting and title to quota shares which certainly can work for a few more months as effective regulations are drafted which will be a significant improvement over the current methods. By copy of this letter, we are requesting that the North Pacific Regional Fishery Management Council and Senator Stevens' office support the request of industry to take the additional time necessary to draft workable implementing regulations.

A LIMITED LIABILITY PARTNERSHIP INCLUDING OTHER LIMITED LIABILITY ENTITIES
ANCHORAGE • COEUR D'ALENE • LOS ANGELES • PORTLAND • SEATTLE • SPOKANE • HONG KONG • WASHINGTON, D.C.
SUITE 400 420 L STREET ANCHORAGE, ALASKA 99501-1937 PHONE: (907) 276-1969 FACSIMILE: (907) 276-1365 www.prestongates.com

Assuming NMFS is willing to keep this docket open, the Coalition will prepare more substantial comments and assist in preparation of proposed regulations. In the meantime, the Coalition has the following specific comments.

1. **Who should administer the registry?** The Coalition agrees that NMFS should administer the registry because of the need for continuity and because the agency has and will have a significant amount of the information necessary to the successful operation of the registry. Some members of the Coalition suggest that NMFS allow an outside business access to the information so that it can become available through the Internet and that outside companies can do searches.

2. **Where should we locate the registry?** The majority of the Coalition prefer that the registry be in Juneau, Alaska, with all Coalition members preferring a registry in the Pacific Northwest.

3. **Should the registry register Limited Access Permits (LAPs) that are not transferable?** The Coalition is divided on this issue. Some members are neutral on this type of registration. Other members think that all LAPs should be registered because they may become transferable in the future.

4. **Should initial title registration be voluntary or mandatory?** The Coalition supports mandatory registration.

5. **How should the registry treat seasonal LAPs?** For the majority of the sablefish and halibut LAPs, the seasonal LAPs should not be separated from the general fishery rights. For example, the IFQ should not be separated from the quota share rights. Therefore, the seasonal permits should not have a separate registry. In the circumstance in which a seasonal permit can be owned or used by a person other than the general fishery permit holder entitled to the seasonal permit, registry of the seasonal permit makes sense.

6. **How should LAP values be established?** NMFS should establish a flat fee for all fee transactions for simplicity. Only in the smallest transactions would the flat fee exceed the one half of one percent of the LAP value. The other alternative would be to track the sales information similar to the Alaska Commercial Fisheries Entry Commission.

7. **What fees should the registry charge?** The Coalition supports the idea that the fees charged should cover the cost of the registry. The Coalition also agrees that fees should be charged for placing liens on quota shares, if a lien can be defined as a transfer of an interest in a LAP. A flat fee approach for all chargeable transactions is the most efficient approach, although a flat fee based on a unit of quota shares might also be workable.

8. **How should NMFS respond when registration fees are not paid?** NMFS should not issue the IFQ if the registration fee is not paid.

9. **What types of liens should be registered?** Options a, b, and c, as stated by NMFS, should be registered. One Coalition member could not identify any other liens beyond the ones mentioned in a, b, and c.

10. **Should the registry attempt to validate liens?** No.

11. **Should the lien registry require validation of signatures?** The majority position is that validation is not necessary. The minority position is to require notarized signatures.

12. **Should the registry require the use of a standard form?** Yes. The idea is for a one page form which would allow for attachments. For consensual liens, the form should state the name of the LAP owner, the alpha-numeric designation of the permits, or all permits if that is the situation, address, social security number and phone number. For the lienholder, there should be a name, address, and phone number. For non-consensual liens, the social security number, specific permits number, address and phone numbers should not be required.

13. **Should the lien registration form be accompanied by underlying documentation?** The majority view is no. There is a minority in favor of requiring underlying documentation for a non-consensual lien so that a lender searching the files could determine the validity of the lien. If there is no standard form, then underlying documentation is necessary.

14. **Should lien registration require renewal?** The Coalition is evenly divided between no renewal and renewal based on the underlying law creating the lien.

15. **How should the registry handle lien releases?** The registry should have a standard form for a release. There is support for the requirement that the lienholder's signature be notarized to prevent false releases.

16. **What lien data should the registry register, and how long should the registry retain that data?** Various state Uniform Commercial Code offices have different approaches to this question, and lenders need additional time to determine what works and what doesn't. For example, Alaska does not purge, and Oregon does. In addition, the amount of information differs from a Uniform Commercial Code filing compared to a real estate recording or a maritime lien filing. The majority support including the name of the lienholder, the address of the lienholder, and the specific quota shares involved in the lien or the designation of all quota shares, if that is the coverage of the lien. Some members support including the amount of the lien, the type of the lien, and the maturity of the lien.

17. **Should the lien registry require using a specific form for filing LAP title transfers for registration and, if so, what should it include?** The Coalition supports a specific form. The information suggested by NMFS is sufficient.

18. **Should evidence of title transfer require original signatures?** The Coalition is divided on this point.

19. **Should the lien registry perpetually maintain any evidence of title transfer it might require?** The Coalition views are mixed. Some support perpetual retention, others support retention for 10 years, and yet others support no retention.

20. **Should the registry make available for public inspection any evidence of title transfer it might maintain and, if so, how and under what circumstances?** The Coalition member views are mixed. Some support public inspection in general. Some support public inspection through a lien search, others support no public inspection, just allow the public to view summary information. Both Questions 19 and 20 would benefit from further time to discuss the practical aspects.

21. **Should the registry provide title abstracts?** Yes. Another way to approach this would be for the NMFS database to have appropriate information so that a lender could determine the names of prior quota share owners for specific numbers and allow the public to search that database.

22. **How should the registry best provide for nonjudicial foreclosure (NJF)?** This area requires more time for discussion and analysis. As an initial response, the majority of the Coalition favors the approach suggested by NMFS, a minority favors a strict adherence to the Uniform Commercial Code procedure. Some types of liens cannot be foreclosed non-judicially under current law. Whether the regulations should allow for non-judicial foreclosure for these liens needs further discussion. The Coalition agrees that NMFS should not decide among conflicting liens.

23. **If NMFS adopts the alternative suggestion in comments under Question 22, what certification requirement should the registry impose?** For those Coalition members in support of the NMFS approach under Question 22, the alternative under Question 23 is acceptable. Others prefer the standard Uniform Commercial Code procedure for security interests under the Uniform Commercial Code.

24. **When NJF title transfer is based on consent, should the registry require using a standard filing form?** This discussion requires more time to think about the situations

in which consent would apply. For lenders there could be consent at the time of making the loan, and consent at the time of default. It is important for lenders to have a way of obtaining consent at the time of making the loan which NMFS will honor if there is a default on the loan, which could affect quota shares, at some later time. A standard form would simplify this process.

25. **When NJF title transfer is based on certification, should the registry require using a standard form of certification?** Yes.

26. **Under what circumstances should the registry register title transfer for judicial foreclosure, as a result of judgment, enforcement, or otherwise by involuntary transfer?** This needs further discussion. In some jurisdictions, a judgment, once recorded with a recording district, is a lien on all personal property held by the judgment debtor. (An example is California.) In other jurisdictions, a judgment is not a lien on all personal property, but only real property. (Examples are Washington and Alaska.) The judgment creditor must obtain a writ of attachment and sell the personal property in order to control the personal property. Because of these differences, there are different views in the Coalition whether a court order should be required.

27. **How best should the registry provide public access to registry data, and what registry data should be public?** The information could be available through the Internet, or allow an outside contractor to make the information available to the public by computer for a charge. If one did not want to pay the charge, one could go to the Registry Office and review the information there. The list of information provided by NMFS is good. Another suggested addition is the amount of the lien.

28. **How should the registry best provide for the perfection of pre-registry liens?** This needs further discussion, but the Coalition members provide some initial reactions. What ever liens NMFS currently has, as a number of lenders have sent information to NMFS since 1995, should be automatically registered, without the need to send more paper to NMFS. In some cases, lenders have sent NMFS copies of the filed Uniform Commercial Code financing statements, which would show the filing aspects of perfection. The date of the lien for the purpose of filing, should be the date on the document, not the creation of the registry. There are state laws which govern the perfection of state agency liens, such as state taxes and Alaska Child Support Enforcement liens. These perfections need to be considered.

In summary, there are a number of areas which need further thought and consideration. The Coalition is committed to working with NMFS to develop language for regulations which

will address the concerns identified above. If you have questions regarding this letter, please feel free to contact me or Bill Myhre.

Very truly yours,

PRESTON GATES & ELLIS LLP

By:
Joan Travostino

JT:jt
c: Trevor McCabe - Senator Stevens' Staff
Jane DiCosimo - NPFMC
Phil Smith - NMFS
Steve Pennoyer - NMFS

J:\JMT\32467-99.999\38L1N7.DOC

MUNDT, MacGREGOR, HAPPEL, FALCONER, ZULAUF & HALL
ATTORNEYS AT LAW

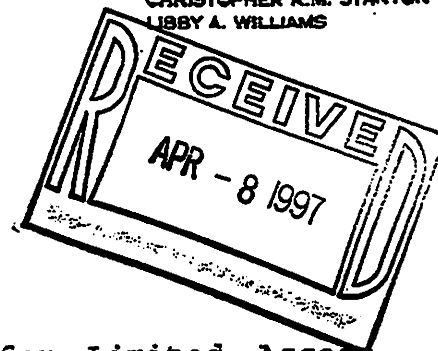
SPENCER HALL, JR.
JAY H. ZULAUF
HENRY HOWARD HAPPEL, III
WM. PAUL MacGREGOR
MICHAEL J. HYDE
J. DAVID STAHL
MATTHEW L. FICK
JOHN WARNER WIDELL
W. SCOTT ZANZIG
JOSEPH M. SULLIVAN

JANET H. CHEETHAM
OF COUNSEL

4200 FIRST INTERSTATE CENTER
SEATTLE, WASHINGTON 98104-4082
FACSIMILE: (206) 624-5469
(206) 624-5950

JOHN H. CHUN
L. MARK EICHORN
DAVID P. HOFFER
KATHRYN Y. KIM
COLLEEN M. MARTIN
LISA E. RIVELAND
JOE B. STANSELL
CHRISTOPHER R.M. STANTON
LIBBY A. WILLIAMS

April 7, 1997



Mr. Michael L. Grable
Chief, Financial Services Division
National Marine Fisheries Service
1315 East West Highway
Silver Spring, Maryland 20910

Re: Central Title and Lien Registry for Limited Access Permits

Dear Mr. Grable:

The purpose of this letter is to provide you with comments in response to the Advance Notice of Proposed Rulemaking published in the Federal Registry on March 6, 1997 (the "ANPRM") concerning the matter referenced above. The following comments were developed during an "investor's group" discussion at a workshop concerning the proposed title and lien registry held in Kodiak, Alaska on March 20, 1997. A list of the investors group discussion participants is attached for your reference.

We request a six month extension of the time period during which comments responding to the ANPRM may be submitted for National Marine Fisheries Service ("NMFS") for consideration. We further propose that the title and lien registry regulations be developed on a collaborative basis by NMFS and representatives of industry participants and lenders during that period. There are two reasons for this request.

First, the ANPRM summary and supplementary comments raise legal issues concerning the extent to which the central title and lien registry provisions of the Sustainable Fisheries Act preempt otherwise applicable law, and to the extent that they do so, the nature and scope of the substantive law that will be substituted through the related regulatory process. To prevent the title and lien registry regulations from introducing uncertainty regarding the validity and priority of limited access permit ("LAP") liens, it is critical that the relationship between otherwise applicable law and the new regulations be carefully structured prior to implementation of the new regulations. Further, it is of particular importance that NMFS's ministerial role in maintaining records of title and liens through the registry be clearly

distinguished from its discretionary role in connection with LAP management. If the comment period is extended, and a collaborative regulation development process adopted, it is our intention to assist NMFS in addressing these issues, with the goal of minimizing the need for curative law or regulations in the future, and minimizing the probability of litigation.

Second, the investors group and others in the fishing industry strongly desire that registry operations cause the minimum of disruption to the LAP acquisition and transfer process, and that the registry operate at the lowest reasonable cost. Achieving these goals will require that registry regulations be as compatible as possible with otherwise applicable LAP procedures, and that registry procedures be as simple and efficient as possible. If the comment period is extended, it is our intention to assist NMFS in addressing these issues, by providing suggestions with reference to existing UCC and governmental forms and practices.

We understand that the Sustainable Fisheries Act calls for the registry to be implemented within six months of the Act's adoption. However, that time period has already been exceeded, and for the reasons set forth above, it is extremely important that the registry regulations be in proper form when they take effect. Further, lenders and lien claimants have adequate (albeit less than optimal) means for protecting their interests under the current state of affairs. Therefore, granting the proposed extension should not have a significant adverse impact on their interests. By copy of this letter, we are requesting that the North Pacific Fishery Management Council and Senator Stevens's office provide you with independent assurances that the collaborative rule making process and associated delay in implementation is desirable.

Because approximately 90% of the transferable LAPs involve Alaska's fisheries, and because the quota shares issued in connection with the Alaskan halibut and sablefish Individual Fishing Quota program are likely to be in both dollar value and volume among the most, if not the most, significant forms of LAP to be addressed under the rule, we request that Mr. Philip J. Smith of the Alaska region be informally designated to serve as coordinator between the industry and the agency in connection with the rule development process. We also request that NOAA general counsel be actively involved in this process from its inception, to insure that legal issues of concern to the agency are adequately addressed.

If NMFS is willing to grant our request that the rule comment period be extended as necessary to permit a collaborative development process, we assume that the bulk of our substantive

comments in response ANPRM will be provided during that process. However, the following comments are provided in the interim.

1. <u>Who should administer the registry</u>? We concur with the suggestion that NMFS administer the registry, for reasons set forth in the ANPRM, i.e., continuity, and because the agency must retain responsibility for many of the administrative functions involved in issuing and transferring LAPs. It may be beneficial for the agency to consider contracting with a private service provider to provide Internet access to the title and lien data base.

2. <u>Where should we locate the registry</u>? Because the vast majority of the LAPs involve Alaska fisheries, the registry should be located at the Alaska Region offices in Juneau, Alaska.

3. <u>Should the registry register LAPs that are not transferable</u>? The registry should register any LAPs that persist apart from the vessel. If an LAP that is otherwise not severable from a vessel persists despite vessel loss (for assignment to a replacement vessel, for example), it should be registered. The registry data base should contain a data field that identifies the transferability of each LAP, both as a matter of LAP regulation, as well as in connection with impairments to transferability stemming from fishing violations, etc.

4. <u>Should initial title registration be voluntary or mandatory</u>? NMFS should establish an opening register containing all records of LAP title on the agency's records. There should be no fee charged in connection with initial registration.

5. <u>How should the registry treat seasonal LAPs</u>? Any seasonal LAP rights that are capable of being transferred separately from the underlying qualification should be separately registered, and should be capable of having liens recorded against them independently of the underlying qualification. For example, title to and security interests in the seasonal IFQ associated with "A" class IFQ shares should be separately registerable.

6. <u>How should LAP values be established</u>? To eliminate any incentive to underreport or inconsistently allocate LAP values in connection with the transfer application process, we suggest that LAP values be established separately from the information gathering conducted in connection with that process. Instead, we propose that NMFS conduct an annual survey of sources of information such as LAP brokerages, and develop a list of stipulated values per class of LAP.

7. What fees should the registry charge? As noted above, the registry should not charge a fee in connection with initial registration. Otherwise, the fee charged should be the minimum necessary to support the title and lien registry. In addition, there should be a "de minimis" exemption for LAPs below a certain threshold in value. There should be a lien registration fee, to distribute the costs more equitably. We suggest that the possibility of treating lien registration as a "transfer of an interest" under the enabling legislation be explored for that purpose.

8. How should NMFS respond when registration fees are not paid? This will not be a problem if initial registration is free and mandatory, and fees are required to be paid as a condition to all further registration.

9. What types of liens should be registered? The registry should permit recordation of any LAP lien, encumbrance or security interest capable of being recorded under applicable law.

10. Should the registry attempt to validate titles or liens? Generally, no. This area should be governed by the Uniform Commercial Code and other applicable law. The registry should function as a central filing system for recording LAP title, liens, encumbrances and security interests that are otherwise governed by the substantive law concerning their validity. See, e.g., UCC 9-302(3), Official Comment No. 8.

11. Should the registry require validation of signatures? The registry should not require validation of signatures for lien filings. The registry should require that title transfer documents be acknowledged by a notary.

12. Should the registry require use of a standard form? The registry should require that filings contain the minimum information necessary to meet the UCC requirements. However, it should not be necessary to file a specific form to record a lien. The UCC, for example, permits a security agreement to be recorded as a financing statement.

13. Should the lien registration form be accompanied by underlying documentation? The underlying documentation should not be required. However, the filing party should have the option of attaching the underlying documentation and/or exhibits.

14. Should lien registration require renewal? Lien registrations should remain valid for the term of the underlying obligation, as stipulated in the lien filing, without renewal; if

the term of the underlying obligation is not stipulated, the original registration should be valid for the default term of five years, with renewal permitted by action of the secured party alone.

15. How should the registry handle lien releases? The registry should have a release form, equivalent to the UCC-3 form.

16. What lien data should the registry register, and how long should the registry retain that data? The lien data should include the lienholder's name and address, a NMFS-stipulated collateral description, the lien amount (optional), lien maturity date maturity date (optional). The lien registry should not purge the data it contains. The lien registry should be capable of producing an abstract of title for all LAPs that reflects all liens and title transfers.

17. Should the lien registry require using a specific form for filing title transfers? Yes. The form should include the names and addresses of the transferor and transferee, a NMFS-stipulated description of the LAP to be transferred and the effective date of the transfer. The signatures of transferor and the transferee should be required to be acknowledged. Filing of underlying documents (purchase and sale agreements, etc.) should not be required to effect an LAP transfer.

The agency should consider making the registry title transfer form the "bill of sale" that actually effects transfer of legal title to the LAP between the parties upon signing, and as to all third parties upon filing. Transfer of legal title through execution and filing of the "bill of sale" would not, however, be binding on NMFS as to any use privileges associated with the LAP; the eligibility to exercise such privileges would remain subject to NMFS's discretion pursuant to the applicable LAP regulations.

For involuntary transfers, the form should be contain the same information as for a voluntary transfer, but should only require the signature of the transferee. Involuntary transfers should require filing of the underlying instrument effecting the transfer of title.

18. Should evidence of title transfer require original signatures? As noted above, yes, with acknowledgement. For lien filings, a copy by fax should be adequate.

19. Should the registry perpetually maintain any evidence of title transfer it may require? The registry should permanently maintain copies of all title transfer documents, and should perpetually maintain a record of all title transfers and lien

filings such that an "abstract of title" for any LAP on the register is capable of being produced on request.

20. Should the registry make available for public inspection any evidence of title transfer it might maintain? Yes. Copies of all "bills of sale" and any supporting documents filed in connection with the same should be available to any member of the public upon request.

21. Should the registry provide title abstracts? Yes, to any member of the public, upon request. The data should be generally the same in nature as that reflected on a Coast Guard abstract of title for a vessel, i.e., records of all transfers, liens, claims, encumbrances, and releases of the same. There should be a fee charged, to offset the cost borne in connection with title transfers.

22. How should the registry best provide for nonjudicial foreclosure ("NJF")? Exercise of nonjudicial foreclosure should be governed by the applicable substantive law (UCC 9-504 and 9-505, for example). The registry regulations should not adopt a substantive foreclosure process, nor should the regulations preempt otherwise applicable foreclosure law. If the registry regulations do so, NMFS may be forced to adjudicate the validity of claims regarding LAP title, a function that it is neither legally appropriate nor cost-effective for the agency to assume.

23. If the agency adopts the alternative suggested in Question 22, what certification requirements should be imposed? See the comment above.

24. When NJF title transfer is based on consent, should the registry require use of the standard filing form? We need clarification on this point. Is this intended to refer to strict foreclosure under the UCC?

25. When NJF title transfer is based on certification, should the registry require a standard form of certification? We need clarification on this point, also. Is this question in reference to certification that a nonjudicial foreclosure has been conducted in accordance with applicable law?

26. Under what circumstances should the registry register transfer of title by judicial foreclosure? When title has transferred per applicable substantive law. We question whether judgements should be registered as liens; it seems that a party should be required to obtain a writ of attachment in order to qualify for status as a registry lienholder.

27. How should the registry provide public access to registry data, and what registry data should be made public? The registry should provide access to data via the Internet, electronic bulletin board, and via responses to requests for written information. The registry should provide all of the types of data listed in the comment to this question.

28. How should the registry best provide for perfection of pre-registry liens? The process for perfecting pre-existing liens outlined in the Sustainable Fisheries Act and the ANPRM appears to be adequate. The issues regarding the priority of pre-existing liens and liens under "otherwise applicable law" should be further addressed as part of the collaborative rulemaking process.

As you can see, there are a number of significant registry matters that need further work. We sincerely hope that NMFS will agree to extend the rulemaking comment period and undertake a collaborative rulemaking process. We look forward to your response. Should you have any questions or concerns regarding this matter, please feel free to contact me.

Very truly yours,

Joseph M. Sullivan

JMS:
cc: Mr. Trevor McCabe (via fax)
Ms. Jane DiCosimo, North Pacific Fishery Management Council via fax)
Mr. Steve Pennoyer, Director, Alaska Region, National Marine Fisheries Service (via fax)
Mr. Philip J. Smith, Chief, Restricted Access Management Division, Alaska Region, National Marine Fisheries Service (via fax)

LGrable.435

"Central Title and Lien Workshop" March 20, 1997

CLR WORKSHOP ATTENDEES

Linda Kozak, Kodiak Vessel Owners Assoc.
Charles Soxie, Norton Sound Economic Development Cncl.
Phil Smith, NMFS/RAM Robert Hernandez, IRS
John Lepore, NMFS Pat Galvin, Copeland Landry etc.
Kelley Sharp, AK Division of Investments
Charlie Pointer, Farm Credit Services
Martin Richard, AK Division of Investments
Lynn Walton, Access Unlimited Inc.
Joan Travostino, Preston Gates & Ellis
Joe Sullivan, Mundt Macgregor Happel etc.
Jim O'Connell, National Bank of AK
Tammay Kamai, TransAlaska Title
Terry Bryan, TransAlaska Title
Al Burch, Alaska Draggers Association
Debbie Ramos, Graves & Schneider, Inc.
Stephen Street, AK Business Development Center
Cameron Jensen, Jensen & Jensen/Alaska Draggers Assoc.
Cesar Ramos, Graves & Schneider, Inc.
LeRoy Cossette, Alaska Draggers Association
Mark Dierking, Dock Street Brokers
Gary Selk, AS Business Development Center
Paul Vaughn, fisherman
Jason Barry, SeaFresh AK

INVESTOR GROUP
Joe Sullivan
Patrick Galvin
Linda Kozak
Al Burch
Cameron Jensen
John Lepore
Stephen Street
Gary Selk
LeRoy Cossette

IFQ/CDQ FEE COLLECTION PROGRAM
Progress Report and Discussion of Issues Raised
Alaska Region
National Marine Fisheries Service
April 1997

This is the second report on the IFQ/CDQ Fee Collection Program currently being developed at the Alaska Region Office for the fisheries operating under the individual fishing quota (IFQ) and community development quota (CDQ) programs. The first report was presented to the Council at its meeting in February 1997.

The IFQ/CDQ Fee Collection Team (Team) met on March 3, 1997, and again on April 7, 1997, to review and discuss preliminary matters concerning the development and operation of a fee collection program for IFQ and CDQ fisheries as required by the Magnuson-Stevens Act (Act). Team members are identified at the end of this report.

1. BACKGROUND

The Magnuson-Stevens Fishery Conservation and Management Act (Act), at section 304(d)(2), requires the Secretary of Commerce to "...collect a fee to recover the actual costs directly related to the management and enforcement of any individual fishing quota program; and community development quota program that allocates a percentage of the total allowable catch of a fishery to such program." Other parts of the law also authorize:

- -- A Limited Access System Administration Fund into which the IFQ/CDQ fees are to be deposited (sec. 305(h)(5)(B));
- -- A program, funded by collected fees, to aid the financing of IFQ permits by certain fishermen (sec. 303(d)(4)); and
- -- A central registry system for limited access system permits (sec. 305(h)).

Specific requirements and limitations of the law were reviewed in the first discussion paper presented to the North Pacific Fishery Management Council at its meeting in February, 1997. The purpose of this paper is to review certain issues raised, but not fully resolved, by the Team, and to present alternatives developed by the Team for analysis. Some of these issues will require interpretation of the statutory language of the Act. These issues are presented here simply as unresolved questions on which NMFS has no formal position. They will be examined in greater depth, however, in the analysis of alternatives.

2. MAGNUSON-STEVENS ACT ISSUES

An initial issue that needs resolution is the "partitioning" of deposits and the priority of disbursements of the Limited Access System Administration Fund (LASAF). The Act does not specifically identify what funds should be used for which programs and the priorities of those programs if the funds in LASAF are insufficient to meet all the stated uses. Section 305(h)(5)(B) establishes:

> [I]n the Treasury a Limited Access System Administration Fund. This Fund shall be available, without appropriation or fiscal year limitation, only to the Secretary [of Commerce] for the purposes of--
> (i) administering the central registry system; and
> (ii) administering and implementing this act ***in the fishery in which the fees were collected.*** Sums in the Fund that are not currently needed for these purposes shall be kept on deposit or invested in obligations of, or guaranteed by, the United States. (emphasis added)

This paragraph provides for a single fund and limits disbursements to administering the central registry system and administering and implementing the Magnuson-Stevens Act ***in the fishery in which the fees were collected.*** (emphasis added). The preceding paragraph, section 305(h)(5)(A), describes some of the fees that "shall be deposited" in the LASAF, namely, a reasonable fee of not more that one-half of one percent of the value of a limited access system permit (1) upon registration of its title with the central registry and (2) upon transfer of that title.

Other fees that "shall be deposited" in the LASAF are described in section 304(d)(2). Section 304(d)(2)(C)(i) provides:

> Fees collected under this paragraph [assumably meaning paragraph (d)(2)] . . . shall be deposited in the Limited Access System Administration Fund established under section 305(h)(5)(B), ***except that the portion of any fees reserved under section 303(d)(4)(A) shall be deposited in the Treasury and available, subject to annual appropriations, to cover the costs of new direct loan obligations and new loan guarantee commitments as required by section 504(b)(1) of the Federal Credit Reform Act (2 U.S.C. 661c(b)(1)).*** (emphasis added)

The fees collected under section 304(d)(2) are:

[Fees] to recover the actual costs directly related to the management and enforcement of any--

(i) individual fishing quota program; and

(ii) community development quota program that allocates a percentage of the total allowable catch of a fishery to such program.

Also, "[fees provided for in paragraph (d)(2)] shall not exceed 3 percent of the ex-vessel value of fish harvested."

Finally, section 303(d)(4)(A) provides that:

> A Council may submit, and the Secretary may approve and implement, a program that reserves up to 25 percent of any fees collected from a fishery under section 304(d)(2) to be used . . . to issue obligations that aid in the financing the--
>
> (i) purchase of individual fishing quotas in that fishery by fishermen who fish from small vessels; and
>
> (ii) first-time purchase of individual fishing quota in that fishery by entry level fishermen.

As for disbursements, section 304(d)(2)(C)(ii) provides:

> Upon application by a State, the Secretary shall transfer to such state up to 33 percent of any fee collected pursuant to subparagraph (A) ***under a community development program*** and deposited in the Limited Access System Administration Fund in order to reimburse such state for actual costs directly incurred in the management and enforcement of such program. (emphasis added)

Also, section 305(i)(3) provides:

> The Secretary shall deduct from any fees collected from a community development quota program under section 304(d)(2) the costs incurred by participants in the program for observer and reporting requirements which are in addition to observer and reporting requirements of other participants in the fishery in which the allocation to such program has been made.

As the foregoing illustrates, several income sources for LASAF, and several targets for disbursements, are identified. Some of the income sources, such as fees from section 304(d)(2), are reduced prior to depositing in LASAF. These reductions are either reimbursed to the payer for costs incurred for observer

and reporting requirements that are more than required of others in the same fishery, as in the case of community development program participants, or they are directly deposited in the Treasury and subject to annual appropriations, as in the case of fees (up to 25 percent of the total) reserved under section 303(d)(4)(A) and that are collected under section 304(d)(2).

Several issues regarding income sources and priorities must be clarified before a fee collection program can be established. First, should the up to 25 percent of the total fees that is reserved, i.e., funds not in the LASAF and subject to appropriation, be based on fees collected from IFQ program(s) exclusively, or from IFQ and CDQ program(s) collectively? A Guide to the Sustainable Fisheries Act (February 1997), prepared by NOAA GC, indicates that the wording in the Act says that the program would use the full amount of fees authorized under section 303(d)(4), which provides that up to 25 percent ***of any fees collected from a fishery under section 304(d)(2) may be used to issue obligations.*** (emphasis added) Section 304(d)(2) authorizes the collection of fees from any IFQ program and any CDQ program based on a percentage of TAC. The Guide further indicates, however, that despite the wording of the Act, the Senate report indicates Congress intended that the North Pacific IFQ loan guarantee program would be financed from fees collected from the IFQ fishery and not from the CDQ fishery.

Second, can the money deposited in LASAF be partitioned for specific purposes? This issue is extremely relevant to the priority of disbursements. Establishing a priority for disbursements might prove to be critical to program design and accounting if, for example, fees collected from a fishery are to benefit only qualifying participants in that fishery. Further need for partitioning is indicated by section 304(d)(2)(C)(ii), which requires the Secretary to transfer to a State up to 33 percent of any fee ***collected . . . under a community development program.*** (emphasis added) A method to account for, or partition, the money will be necessary to ensure that only fees collected under a CDQ program are reimbursed.

A related issue is whether central registry fees should be commingled with IFQ/CDQ fees. Should the one-half of one percent fee collected under the central registry be held separate from the three percent fee collected from IFQ/CDQ participants? Or, should all the fees (excluding those used to guarantee loans) be deposited together into LASAF and used to administer the central registry system and the Act in the fishery in which the fees were collected?

3. DETERMINATION OF "ACTUAL COSTS DIRECTLY RELATED TO THE MANAGEMENT AND ENFORCEMENT OF ANY IFQ AND CDQ PROGRAM."

Very rough estimates of IFQ/CDQ costs have already been determined for the Restricted Access Management Division and NMFS Enforcement. These estimates need to be further refined. Costs related to management and enforcement of IFQ/CDQ programs must be calculated also for other Alaska Region divisions and NOAA General Council and for the State of Alaska. An important consideration is what to include as costs. For example, enforcement personnel that are needed but not actually hired due to staffing limitations, hardware and support, planning and developing the program, are costs but are they "directly related"?

4. DETERMINATION OF EX-VESSEL VALUE.

Several suggestions were made concerning the determination of ex-vessel value. For example, the ex-vessel values estimates developed for the Research Plan can be updated and used. Another alternative is to use the same values used by the State of Alaska, Department of Revenue for "landings" tax collection. Landed value for purposes of Alaska's tax collection is based on an annual report required of commercial operators. From these reports, the State annually publishes a list of average fish prices statewide on which taxes for the previous year's landings are calculated. Fish prices on fish tickets are not used because State law does not require price data on fish tickets (except for salmon). The State of California also taxes commercial fish landings based on a schedule of fish values established by the legislature. In general, using annually determined ex-vessel prices would be easier than using the reported prices at time of landing. This approach, however, was contested during Research Plan development by the affected fishermen and processors. The Team will investigate further into different methods of determining ex-vessel values.

An alternative suggested for the CDQ program was to use the revenues reported in the community development plans for fee collection purposes. This would alleviate some of difficulties in determining ex-vessel value for CDQ fish, which may or may not be sold on the open market.

5. HOW SHOULD FEES BE COLLECTED?

The Act provides at section 304 (d)(2)(B) that:

> [Fees] shall be collected at either the time of the landing, filing of a landing report, or sale of such

fish during the fishing season or in the last quarter of the calendar year in which the fish is harvested.

This language gives the agency little discretion on how and when to collect the fees. The general consensus of the Team was that it is better to collect from as few entities as possible. This can be easily achieved for the CDQ program because there are relatively few CDQ group entities from which to collect. Conversely, the IFQ program has numerous participants (over 5000). Given the number of participants, an annual collection would be a daunting task; collecting at the time of landing or sale could be more difficult. The number of entities from which to collect could be reduced by collecting from registered buyers (over 500). Some resistance to the Research Plan resulted from the collection method, i.e., using processors to collect the fee. Because registered buyers are typically processors, we may expect some opposition to this method of collection. The agency will weigh the pros and cons of collecting from processors vs. collecting from fishermen.

Another consideration for fee collection is whether billing statements should be generated. Billing statements could be a marginal convenience to participants, who would otherwise be required to account for their own landings or sales. Billing statements could be done annually (last quarter of calendar year) or connected with a landing report at multiple times throughout the year, e.g., send bill with a landing report to the participant, who must verify the information on the report, sign the report, and file it. Alternatively, collection could be made at the time of sale. This collection could be held by the registered buyer until such time as it has to be submitted to the agency, e.g., weekly, monthly, quarterly, or annually. For example, without being prompted by a billing statement, a registered buyer may be required to file a return, similar to a personal income tax return, at the end of each fishing year paying the fees collected on IFQ landings during that year.

6. DETERMINING COSTS THAT SHOULD BE DEDUCTED FROM CDQ FEES.

The Act provides in section 305(i)(3) that:

> The Secretary shall deduct from any fees collected from a community development quota program . . . the costs incurred by participants in the program for observer and reporting requirements ***which are in addition to*** observer and reporting requirements of other participants in the fishery in which the allocation to such program has been made. (emphasis added)

The primary issue is definition of observer and reporting costs that are in addition to those borne by other participants. Some costs, such as an extra observer, are easy to ascertain and no doubt will be recommended as "costs that are in addition to" those borne by others. Other costs, such as scales used to determine actual weight of harvested species, may present some difficulty. First, should such an item be included as a "cost that is in addition to" those borne by others? Second, if in fact there can be a deduction, should the entire cost be deducted in a single year, or amortized over its useful life? Regardless of the determination of whether an item or other cost will be included in "costs that can be deducted," the general consensus of the Team was that a list of allowable costs should be provided. A list would provide the certainty needed to make determinations in a fair and timely manner.

7. <u>CRITERIA FOR REIMBURSING THE STATE ". . . FOR ACTUAL COSTS DIRECTLY INCURRED . . ." WHILE MANAGING THE CDQ PROGRAM.</u>

The Secretary is required to transfer up to 33 percent of the fees collected from the CDQ program, upon application by the State, to reimburse the State for actual costs in managing and enforcing the program. These costs can be estimated through the budget process. The determination of what is included in "actual costs directly incurred" will most likely need to be the same as the costs determination for the agency discussed under item 3. Obviously, the amount of money that can be deducted by CDQ groups (discussed above) will impact the amount of money that can be reimbursed to the State.

8. <u>ALTERNATIVES FOR ANALYSIS.</u>

The requisite *status quo* alternative is untenable given the statutory requirements of the Act. This will be explained in the analysis. The Team has developed an array of other alternatives and options listed below basically dealing with the questions, who pays the fee? how? when? and how much? Other alternatives and options may be added to this list as the Team becomes aware of them.

Who pays: IFQ program -- QS holder
-- IFQ holder; card holder on vessel
-- Registered buyer
CDQ program -- CDQ group
-- Harvesting or processing partner

How to pay: -- Agency billing
-- Deduction at time of landing or sale

-- Required submission (e.g. tax return)

When to pay: -- At time of landing
-- Monthly
-- Quarterly
-- Annually (in last quarter)

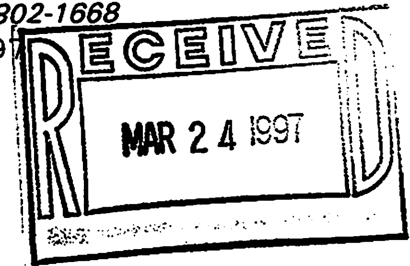
How much to pay--determining the basis for the fee:
-- Calculate average exvessel prices; published annually
-- Require reporting of exvessel value at time of landing (for catcher vessels; C/Ps would have to use standard price estimates)

9. TEAM MEMBERS

Alaska Region, Fisheries Management Division:
Jay Ginter (Chair), John Lepore, Sally Bibb, Kim Rivera;
Alaska Region, Restricted Access Management Division:
Phil Smith, Jessica Gharrett, Tracy Buck;
Alaska Fisheries Science Center:
Joe Terry;
North Pacific Fishery Management Council staff:
Chris Oliver;
Alaska Department of Fish and Game:
Seth Macinko;
Alaska Department of Community and Regional Affairs:
Julie Anderson; and
NOAA General Counsel:
Connie Sathre

C-3(e)(1)

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668



March 17, 1997

Richard B. Lauber, Chairman
North Pacific Fishery Management Council
605 West 4th Avenue, Suite 306
Anchorage, Alaska 99501

Dear Rick:

We have considered the industry's proposal for a weighmaster program. The proposal raises numerous substantive programmatic and enforcement issues, including questions about funding, accountability, and administrative oversight. A program which contracts weighmasters to the Federal government would require a large-scale program, similar in scope to the current observer program, to provide for

- management of contracts;
- education and training;
- certification and decertification; and
- tracking and managing of information.

We believe that the costs of such a program could be prohibitive, given the current status of our budget and FTE constraints.

Alternatively, a program in which weighmasters are contracted to industry raises a host of additional issues regarding

- fairness to small business owners
- accountability for misreporting
- certification standards and eligibility
- costs of NMFS administrative oversight
- increased costs to industry.

A preliminary inquiry into such issues suggests that they require more time and effort than we can devote to them at this time to provide the Council with a basis for meaningful discussion. Given current priorities and workload, NMFS does not have staff resources to begin to assess the proposal's various issues. While a weighmaster program may be a useful management tool, proper development of this proposal must be postponed until we have adequate staff resources.

Sincerely,

Steve

Steven Pennoyer
Administrator, Alaska Region

AGENDA C-3(e)
APRIL 1997
SUPPLEMENTAL

COMMISSIONERS:

RICHARD J. BEAMISH
NANAIMO, B.C.
GREGG BEST
COMOX, B.C.
BRIAN VAN DORP
...HMOND, B.C.
...I G. HOARD
...TTLE, WA
...RIS NOROSZ
PETERSBURG,AK
STEVEN PENNOYER
JUNEAU, AK

INTERNATIONAL PACIFIC HALIBUT COMMISSION

ESTABLISHED BY A CONVENTION BETWEEN CANADA
AND THE UNITED STATES OF AMERICA

P.O. BOX 95009
SEATTLE, WA 98145-2009

TELEPHONE
(206) 634-1838

FAX:
(206) 632-2983

April 9, 1997

Richard Lauber, Chairman
North Pacific Fisheries Management Council
605 West 4th Avenue, Suite 306
Anchorage, AK 99501

Dear Rick,

At its April 1997 meeting, the Council will discuss an industry proposal to initiate a weighmaster program for the IFQ fisheries. There appears to be concern from parts of the halibut industry that misreporting of landed weights is occurring. The Commission staff supported monitoring of all offloads when the IFQ program began, and believes that a weighmaster concept will increase accountability of halibut statistics. We do feel the weight validation program in the Canadian IVQ halibut fishery compliments the enforcement program. We support moving forward with a weighmaster program, to the degree practicable. However, we rely on assurance from NMFS that enforcement and monitoring are adequate to maintain high quality records of halibut landings. which are essential to halibut stock assessment and management.

Sincerely,

Donald A. McCaughran
Director

Corrected copy M.J. Jr

TESTIMONY OF MARK JACOBS, JR.

April 16, 1997

TO: International Pacific Halibut Commission

Honorable Members of Pacific Halibut Commission

Thank you for this opportunity to voice my opinions on pending proposals; for the record my name is Mark Jacobs, Jr., P.O. Box 625, Sitka, Alaska 99835. I am full blooded Tlingit Indian, age 73 ½ years.

I have served in leadership of Alaska Native Brotherhood for over fifty years (50 years) and also the Central Council of Tlingit and Haida Indian Tribes of Alaska, serving in executive capacity.

Since the Alaska Native Claims (Settlement) Act as amended by the "Alaska National Interest Lands Conservation Act, which provided for rural preference for take and use of wildlife and natural resources, we have had to deal with definitions, mostly to protect our rights to subsist. Since the policy was for Native and non-Native alike, the Sitka Alaska Native Brotherhood Camp #1 drafted a position paper endorsing the concept of non-Natives right to subsist in a true Alaskan lifestyle, as well as Native Alaskans; the sad part of definitions, rural preference was viewed as a "Native only law". There was even a statewide referendum which caused us to take a deeper look at our inherent rights. Along with defining the word subsistence, the Commission should also define a better and a more accurate definition of inherent rights; "note State and Federal regulators prefer to use traditional and customary" inherent rights is a "common law right", it cannot be outlawed by Statutes, it can only be suppressed by a stronger government, in other words, the legislatures and congress can enact all the laws within their powers, inherent rights still exist.

It has been perplexing to us as Native indigenous people to learn that the halibut as our food resources has been denied as a subsistence resource, our use and take has been for feeding our families, not for sport, trophies or picture taking then discarded and wasted.

We have been told halibut (Pacific species) is international in nature, therefore subject to international regulatory laws, as Tlingit and Haida Indians, we are also members of the world family of Nations. The boundaryline of the United States and Canada is not a line drawn by Native Americans residing on both sides of the border.

We recognize the need for regulating the harvest but we as indigenous people (Alaska Natives) are not the people who exploit this valuable resource nor are we the wasters. Traditionally, halibut has been a year round available resource while a large portion of the halibut migrate, there are some we call homesteaders. This local supply year round in the Tlingit language is called "chaatl eet" from these known sites enough halibut can be taken to fill an Indian smokehouse. When completely smoked and dehydrated, it will keep indefinitely without refrigeration. The large halibut is preferred because it dries to a flakier texture and much tastier than smaller halibut. Some of the larger halibut used to be skinned from the head end to use this outer skin as water proof bags. This was used for trade and barter by coast Indians with the Interior Indians.

Cash economy is a recent culture, Natives has been adapting to. As Natives of Alaska our unemployment by percentage is probably the highest in this prosperous nation. The sale of traditional smoke-dried halibut should allowed to compensate for labor time and expenses involved. There used to be street vendors of halibut and king salmon cut up in meal size portions. We are not allowed this lifestyle anymore.

The use of multiple hooks for home use in subsistence in no longer allowed. At my age, and reduced physical abilities in recent years proxy hunting and fishing has been a great help to me and my family the use of halibut skates - up to restrictive 60 hooks and a maximum of three skates should be allowed sanctioned to a Tribal Government to help Elders and handi-cap peoples.

Much more can be said; at the onset of rural preference under Title VIII of ANILCA, the State and Federal regulators used the language in subsistence regulations "in a non-wasteful manner when we know we are not the wasters". Take a good look at the State of Alaska's herring sac/roe fishing which we call insane/covert management.

Submitted by Mark Jacobs, Jr.
Telephone (907) 747-8168
Mark Jacobs Jr

Charlie Edwardson
C-3a

HUNTING, FISHING, AND TRADING RIGHTS SINCE TIME IMMEMORIAL
INUIT VIEW OF ORIGINAL UNDERSTANDINGS

Inuit unwritten sovereignty over Alaska since time immemorial has now come into conflict with the claim of the United States, for their laws are written in the form of a constitution.

The Americans have an assumption of superiority based upon written words copied upon paper. However, Inuit laws are original, customary, traditional, unwritten, and inherent. We, Inuit, must now apply the test of the written laws of the United States against their desire and causes of action against their very own constitution.

Our hunting, fishing, and trading rights do not derive from the written word but are inherent within ourselves. Our Creator has provided us with land, water, weather, animals, and birds plentiful to harvest, appropriate to season, and a desire for the longevity of our people. Inuit hunting, fishing, and trading rights are not derived from the United States constitution nor United States treaties.

Our claim to jurisdiction is inherent and it is for the Natives of Alaska to determine the destiny of our territory and not the territory to determine, from afar, the destiny of the Natives of Alaska. Inuit hunting, fishing, and trading rights have not been yielded to the United States during peacetime, at war, nor through the conveyance of a treaty. In United States v. Winans, (198 U.S. 371), the Supreme Court found that the right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of right to the Indians, but a grant of rights from them----a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose....There was an exclusive right of fishing reserved within certain boundaries.

We, Inuit, challenge the Marshall Trilogy as these three Supreme Court cases do not apply to Natives of Alaska. Hence, the claim to jurisdiction in Alaska is based upon conquest which has never occurred. These three cases are titled Fletcher vs. Peck, Johnson vs. McIntosh, and Worcester vs. Georgia. Therein the legal theory for the Unted States is based upon sovereign right of first purchase which refers to the exclusive rights that European explorers claimed over territory they discovered in the "New World." According to this policy, the

first to discover new territory obtained instant property rights against all other European explorers. These exclusive rights included the ability to "purchase" this land from the Indians and to establish settlements on the land.

For Alaska the case for the Inuit is of a different footing than the Indians of the Lower 48 states where formal and informal conquest occurred by colonial powers and the United States. Any claim that conquest has occurred in Alaska is without constitutional footing and a formal or informal declaration of war has never been declared by the United States Congress. The Marshall Trilogy is not applicable against Alaska Native (Inuit) Nations or their legal status. Moreover, on November 4, 1988 the United States elected to become civilized by signing the Genocide Treaty and the senate gave its advice and consent.

In a review of our original understanding of the constitution and its requirements for civilized activity, the desire of the American administration was to create inchoate title. It was the intent of the United States to perfect title over time. However, we, the indigenous people, holding original title, remain in peaceful occupancy. The Inuit not only hold original title but our claim to sovereignty and peaceful coexistence and a continuous display of our authority over our lands is contrary to the claim of the United States which has based their claim on the titles of discovery, of recognition by treaty and of contiguity, i.e. titles relating to acts or circumstances leading to the acquisition of sovereignty; they have, however, not established the fact that sovereignty so acquired was effectively displayed at any time. We, the Inuit, concur with the precedent set in the United States vs. Netherlands, wherein the United States lost its claim to inchoate title. (Palmas Island Arbitration, 1928).

For want of jurisdiction and possession, the United States government maintained in its negotiations with Russia concerning territorial questions that dominion cannot be acquired but by a real occupation and possession, and an intention to establish it is by no means sufficient. The mere desire and political ambition of the Russians and the United States throughout the negotiations of the Treaty of Cession of 1867, cannot extinguish the principle of the continuous and peaceful display of the functions of occupation by the Natives of Alaska within the territory of Alaska and is a constituted element of territorial sovereignty which is a recognized principle of international law.

We, Inuit, must now apply through the written word against their desires as written in their Constitution of September 18, 1787. From the period of 1776 to 1787, it was known to many colonists that the issue of sovereignty was not resolved by their Declaration of Independence. The concept of "sovereignty" continued to be the most important theoretical question throughout the decades following the Declaration.

The creation of American sovereignty was done on a theoretical plane and drawn upon blank sheets of paper. The confederation the colonists formed, therefore, was not a sovereign government. John Adams reflects this weakness in his diary in 1787:

"Regarding the greatest Question yet agitated----the idea of sovereignty, that in all civil states it is necessary that there should some where be lodged a supreme power over the whole----this was the heart of the Anglo-american argument that led to the Revolution."

Almost every writer, British or American, who groped for an acceptable compromise that would prevent the breach, had sooner or later stumbled over this problem of sovereignty. The doctrine of sovereignty, by itself, compelled the imperial debate to be conducted in the most theoretical terms of political science. It was the single most important abstraction of politics in the entire Revolutionary era.

In the contest between the states and Congress, the ideological momentum of the Revolution lay with the states, but in the contest between the People and the state governments it decidedly lay with the People. For the Continental Congress had realized that the Articles of Confederacy was not a government and the Articles held no sovereignty. In Massachusetts the General Court proclaimed, "In every government there must exist somewhere a 'supreme sovereign absolute' and an uncontrollable power."

"But this Power resides, always, in the body of the People, and it never was, or can be delegated, to on Man, or a few. In one sense this was a traditional utterance, for no one doubted, even most Tories, that all power ultimately resided in the people."

During the federal convention debate of 1787, Benjamin Rush said; "The people of America have mistaken the meaning of the word 'sovereignty.' It is often said that the sovereign and all other power is seated *in* the people. This idea is unhappily expressed for it should be all power is derived *from* the people."

The confusion continued surrounding the concept of "sovereignty." During the federal convention Noah Webster argued with great persuasiveness that Americans could not have their constitutional remedies without the evils and that all of the developments and devices of the decade since Independence were inextricably bound together "leading eventually, if not totally repudiated, to a subversion of all government." Webster wrote: eventually, if not totally repudiated, to a subversion of all government." Webster wrote:

A fundamental maxim of American politics is that sovereign power resides in the people. Written constitutions and bills of rights can never be effective

guarantees of freedom. Liberty is never secured by such paper declarations, nor lost for want of them."

Webster continued:

"The truth is that government takes its form and structure from the genius and habits of the people, and if on paper a form is not accommodated to those habits, it will assume a new form, in spite of all the formal sanctions of the supreme authority of a State. To credit a perfect wisdom and probity in the framers of the Constitution is both arrogant and impudent. The very attempt to make *perpetual* constitutions, is the assumption of a right to control the opinions of future generations and to legislate for those over whom we have as little authority as we have over a nation in Asia."

Finally, it was to remedy the defects of the Articles of Confederacy that the convention was called to frame the federal constitution. Under this constitution the United States became a government. For it is true, as a matter of history, that some new states are formed out of the sovereignty of the old, whereas others are created in violent opposition to the former territorial sovereign. Is it not reasonable to suppose, therefore, that a distinction between original and derivative titles are relevant to the proper interpretation of the change of territorial sovereignty that takes place when a new State is created, as in the case of the United States? The confusion surrounding the concept of sovereignty in the United States is rooted in its derivative title from England, versus the original sovereignty and title of the Inuit.

It has been said that the turth is stranger than fiction. In truth, the United States Constitution never conferred power over Alaska Natives. Today, we have two-hundred years of decisions by the United States Supreme Court and legislation by Congress and the President, lacking Constitutional authority over Natives of Alaska. The United States has also abrogated the liberty and the property of Alaska Natives under the color of the Constitution. This abrogation, however, was no part of the original understanding. If the United States, the Congress, the President, or the Supreme Court has any authority, with respect to Natives of Alaska, then the Constitution must confer it. And, any such provisions at one and the same time establishes and limits the scope of the power. Notwithstanding assignations of a plenary power to the Unted States, it remains competent to inquire whether the Constitution confers it or whether subsequent legislative or judicial glosses on the Constitution have, because "the Union meant more," concocted the power.

The Inuit inquiry into the original understanding about Natives of Alaska takes three forms. What does the text of the Constitution state and mean? What did the Framers intend? To what motives did they give effect through the text?

What powers does the structure of the Constitution necessarily imply, and did the Framers necessarily intend, without declaring them?

This is all the Framers said and recorded in the Federal Convention about the relation of Native Americans and the Constitution. First, the Indian commerce clause has been cited for a plenary legislative authority in Congress over Native Americans, but the analysis demonstrates that the clause conferred no such power. Secondly, the treaty clause, the property clause, and the war powers have each been cited to confer upon the federal government constitutional authority over Native Americans, but the Framers never mentioned Native Americans during their recorded debates about the treaty clause, the property clause, or the war powers of the Congress. Thirdly, Congress has since been embellished with a status and power of guardianship of Native American tribes, but the Constitution does not establish and the Framers never discussed such a status and plenary power.

We will now analyze the Constitutional text and the Framer's deliberations. This reveals that the original understanding of the national power with respect to Native Americans comprehended only two principles. First, the few Native Americans within the jurisdiction (not limits) of a state and taxed by that state would augment that state's proportions of taxation and representation. However, the three-fifths clause did not require members of Congress to represent these Native Americans nor their interests; the formula only determined the ratio of representation and taxation among the states. Native Americans, like women and African Americans, were not actually represented.

Secondly, the national legislative power is limited to commerce with Native American tribes, and extends no farther. The Framers restricted Mr. Madison's proposal of a separate and broad legislative power, "To regulate affairs with the Indians as well within as without the limits of the United States." This became a more partial and narrower power when abridged to; "To regulate Commerce with....the Indian Tribes."

The original understanding----that no plenary power exists in the national government----implies that many acts of the United States respecting Native Americans were and are *ultra vires* and therefore these acts cannot become "constitutional" even though Congress enacted them, the President signed them, and the Supreme Court upheld them. Nor could the United States confer upon states powers over Native Americans or Native Ameican lands which the United States did not have itself, such as taxation, civil jurisdiction, criminal jurisdiction, jurisdiction over hunting and fishing rights, and jurisdiction over water rights.

The Inuit inquiry to the original understanding regarding Natives of Alaska should examine not only the Constitution's text and the debates, but also whether the Constitution's structure necessarily implies and the Framers

necessarily intended any powers without declaring them. The United States Constitution forever remains silent for Natives of Alaska. The Natives of Alaska are unrestrained by those United States Constitutional provisions specifically as limited on Federal or State authority. United States vs. Kagama, (118 U.S., 383), Talton v. Mayes, (163 U.S., 396), and Santa Clara Pueblo v. Martinez, (436 U.S., 49).

The State of Alaska has been less inclined than has the National government to introduce humanity into their transaction with the Natives of Alaska and have themselves undertaken to dominate and to destroy Native Tribes of Alaska. This occurs in the guise and pursuant to the Tenth Amendment of the United States Constitution. The Tenth Amendment, of course, does not vest new powers in the States and Cannot exceed its original bounds. Under the Tenth Amendment the Natives of Alaska would not be subject to the jurisdiction of the State nor of the States in Congress assembled. By voiding National authority, this original understanding, therefore, implicates much more serious practical consequences for Natives of Alaska and the result is catastrophic as in the McDowell vs. State of Alaska.

The State of Alaska has exercised powers over Natives of Alaska, their lands, without authority, in taxes, in civil jurisdiction, criminal jurisdiction, zoning, hunting and fishing rights, water rights, religion, and general police powers. Congress mandated these activities without the consent of the Natives of Alaska. This mandate is in direct violation of the Compact of the 1959 Statehood Act for Alaska, Article XII, Section 12. The delegation of federal authority to the State of Alaska, under Public Law 280, without the consent of the Natives of Alaska, has now exposed this activity as an illegal and unconstitutional assault upon the integrity of real Inuit self-determination. This unconstitutional taking of powers not granted to the United States government and the unjust claim for jurisdiction by the State of Alaska is without United States Constitutional footing. This desire and claim for jurisdiction has created a cause of action for the Inuit, as the unconsented taking of jurisdiction falls under the color of the United States Constitution for the test of the supreme law of the land.

We, the Inuit of Alaska, or Natives of Alaska, conclude that the Statehood Act in no way restricts nor diminishes the inherent rights of the Inuit or their acts. The present claim of Walter J. Hickel, Governor of the State of Alaska, to "One People, one government" cannot muster the constitutional test in McDowell, v. State of Alaska. In McDowell, the Supreme Court of Alaska declared the 1986 Alaska Subsistence Law as violative of several sections of the Constitution, namely Article VIII, sections 3, 15, and 17.

The State of Alaska does not exist in a vacuum. Its genesis is rooted in the Constitution of the United States. Specifically, when congress enumerated the

Property Clause of the constitution; "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States...." (U.S. Constitution, Article IV, Section 3, Clause 2).

Accordingly, the people of Alaska implicitly acknowledged the powers reserved to congress under the property clause when they agreed in the Alaska State Constitution that:

"The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States or subject to its disposition, and not granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union. The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute desposition of the United States. They further agree that no taxes will be imposed upon any such property, until otherwise provided by the Congress. This tax exemption shall not apply to property held by individuals in fee without restrictions on alienation."

Against this background, the State of Alaska must sustain a heavy burden to show that Congress lacks the authority under the Property Clause to change the subsistence priority set forth by the Alaska National Interest Land Conservation Act of 1980. (ANILCA), and including State of Alaska selected lands.

The State of Alaska's primary argument against congressional power to enact ANILCA is blatently unconstitutional. Factually, the present ruling in MCDowell cannot, by itself, reverse the intent of the United States Constitution in Article IV, Section 3, Clause 2, nor the Alaska State Constitution, Article XII, Section 12. ANILCA, Section 810, is nothing more than an exercise of congressional power under the Property Clause to dispose of and make needful rules for the public property.

It appears that the Governor of Alaska and the shifting majority of Alaska's Supreme Court have left the scope of the Constitution of the State of Alaska and the intent provided by the people for the affirmative vote of the Statehood Act and the Compact with the Native People of Alaska. The People of Alaska had voted affirmatively but their democratic vote was subverted by the unconstitutionally concocted power of the Alaska State Supreme Court in McDowell vs. State of Alaska. And, in recent times, 1982, Alaskan voters rejected the measure of Proposition No. 7 by a vote of 111,770 to 69,679. (Personal Consumption of Fish and Game). This rejection disclaimed the present notion of "One people, one government." This recognition of Inuit

sovereignty is still intact within both the U.S. Constitution and by the people of Alaska.

In a third instance, the people of Alaska, with a resounding vote, created the Statehood Commission of Alaska, thereby recognizing the government to government relationships among the Natives of Alaska, the United States government, and the State of Alaska.

Although the United States has granted sovereignty to itself, it fell short of the Constitutional test to conquer, to defeat in war, to honor in peace, to enter into treaties for cession of lands now occupied by Natives of Alaska. The desire and the original transaction of Russia and the United States is infected with fraud. But, the real party, the Natives of Alaska, the Inuit, have not, with their agents, obligated the acts for the transfer of any rights to the Russians or the United States. Therefore, we are charging the United States and Russia for treaty fraud in the alleged purchase of Alaska. The United States and Russia cannot perfect and grant to themselves, sovereignty to the territory and historical waters presently occupied and used by Natives of Alaska. Neither can the United States of Russia grant sovereignty they do not possess as on September 16, 1991 in the United States and the Russian Maritime Boundary Agreement.

The United States-Soviet Maritime Boundary Agreement was signed by Secretary of State Baker and Foreign Minister Shevardnadze on June 1, 1990, after 9 years of negotiation, and was submitted to the Senate for its advice and consent last September, 1991. The Foreign Relations Committee held a hearing on the treaty on June 19, and ordered it reported on June 27, 1990 with the recommendation that the Senate consent to its ratification. On September 16, 1991, the U.S. Senate gave its advice and consent to the new United States and Soviet Maritime Boundary Agreement.

The Maritime Boundary Agreement addressed these conflicts: 1) declaring that the 1867 Convention Line is the maritime boundary between the United States and the Soviet Union. 2) establishing a precise geographic depiction of the line; and 3) providing for the transfer of jurisdiction and sovereign rights in four potential special areas. A treaty wherein negotiations involve fraud is invalid. Whereas the United States and Russia have granted to themselves claims of sovereignty within the territorial dominion of the Natives of Alaska; the Natives of Alaska, themselves, never assented nor consented in treaty to the United States and Russian negotiations. This is now a cause of action for the Natives of Alaska to terminate the military occupation of Alaska by the United States and Russia set forth on September 16, 1991. This can be best defined by Chief Justice Marshall in America Insurance Company vs. Peters, (United States Supreme Court, 1828, 1 Peters 542),: "The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace."

On the other hand, Alaska as occupied territory, is generally considered to be part of the occupant's realm as far as belligerent purposes are concerned. This common view was expressed long ago by the Supreme Court of the Unted States in the well-known case of Thirty Hogsheads of Sugar v. Boyle, 1815, 9 Cranch 191), when it held that,: "Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purposes, they are considered as a part of the domain of the conqueror, so long as he retains the possesion and government of them." Any attempt to supplant the legitimate sovereignty of the Natives of Alaska by absorption of occupied territory during the course of negotiations must be considered as an unlawful premature annexation, whether in 1867 or 1991.

The United States and Russia have created for themselves an international incident of world class folly. Therefore, in lieu of international arbitration over the sovereignty dispute of third parties, the Inuit, or Natives of Alaska, recommend a world class conference for the deliberation of legitimate and permanent sovereignty for the Inuit.

We, the Inuit, Natives of Alaska, recommend to the United States Senate through the leadership of the Senate Committee on Indian Affairs with the appropriate committees; Senate Foreign relations, Senate Judiciary, Senate Committee on Energy and National Resources, under the Senate Rule XXV Standing Rules of the Senate, to convene a joint hearing and an International Conference for the creation of the Republic of the Arctic with the United States and Russia to submit to the United Nations. This to be voted upon by the General Assembly for a final vote for the self-determination of the Inuit and their Republic of the Arctic.

Submitted to the Senate Commitee on Indian Affairs in 1992
Charles Etok Edwardsen and Nevelo
211B McCarrey #16
Anchorage, Alaska 99608
(907) 338-4930