

SJR

18

COMMITTEE REPORT

HOUSE

FURTHER:

March 9, 1979

Date: 4/4/79

Mr. Speaker:

The Committee on RESOURCES has had SJR 18

Urging passage of a bill in Congress to amend the Shipping Act, 1916, to provide that a state, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States be considered a citizen of the United States for the purposes of the Act.

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass do not pass
- do pass with attached amendments(s)
- replace with CS for _____ same title
 new title
- and recommends _____
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation
- referred to the _____ Committee

**MEMBERS SIGNING
DO PASS**

[Signature]

[Signature]

[Signature]

[Signature]

[Signature]

[Signature]

[Signature]

[Signature]

**MEMBERS HAVING
OTHER RECOMMENDATIONS:**

[Signature]

CHAIRMAN

4/4

Hearing - Pete Jeans, Dir. of Business
lans. in State Commerce Dept.
testified

Reported out - unanimous Do PASS



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 30, 1979

The Honorable Ted Stevens
United States Senate
260 Russell Building
Washington, D.C. 20510

Dear Senator  Stevens:

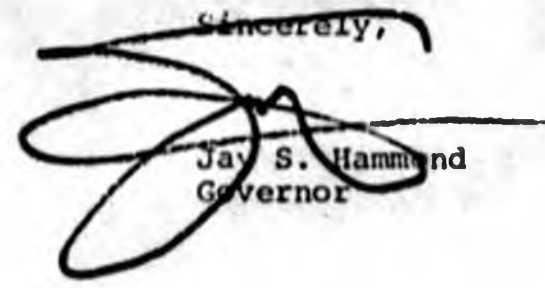
On behalf of the State of Alaska, I strongly urge your support for favorable action on a bill similar to S. 291, which you introduced on January 18, 1977. S. 291 would amend the Shipping Act of 1916 (46 U.S.C. 801) in order to provide that a state, the District of Columbia, the Commonwealth of Puerto Rico, and a territory of the United States shall be considered to be a citizen of the United States for the purposes of such act.

The bill, if it had passed, would have allowed any state, Alaska included, to proceed to create and hold preferred ship mortgages.

The amendment of 46 U.S.C. 801 would completely cover our needs since 46 U.S.C. 922(a)(5) refers back to 46 U.S.C. 888, which in turn refers back to 46 U.S.C. 801-803 for the definition of a citizen. Moreover, the amendment of 46 U.S.C. 801 would cover a state's ownership interest as well as mortgage interest in a vessel in the event a preferred ship's mortgage had to be foreclosed.

I sincerely appreciate this opportunity to present my views on S. 291, and urge your support for similar legislation during the current session of Congress.

Sincerely,


Jay S. Hammond
Governor

93TH CONGRESS
1ST SESSION

S. 247

To amend the Shipping Act, 1916, in order to provide that a State, the District of Columbia, the Commonwealth of Puerto Rico, and a territory or possession of the United States shall be considered a citizen of the United States for the purposes of such Act.

IN THE SENATE OF THE UNITED STATES

JANUARY 29 (legislative day, JANUARY 15), 1979

Mr. STEVENS introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To amend the Shipping Act, 1916, in order to provide that a State, the District of Columbia, the Commonwealth of Puerto Rico, and a territory or possession of the United States shall be considered a citizen of the United States for the purposes of such Act.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That section 1 of the Shipping Act, 1916 (46 U.S.C. 801), is
4 amended by adding the following definition: "The term 'citi-
5 zen of the United States' also includes a State, the District of
6 Columbia, the Commonwealth of Puerto Rico, and a territory
7 or possession of the United States".

MUNDT MACGREGOR HAPPEL FALCONER & ZULAUF
ATTORNEYS AT LAW

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BANK OF CALIFORNIA CENTER
SUITE 1230
SEATTLE WASHINGTON 98104
206 624-5250

March 17, 1978

Pete Jeans, Director
Division of Business Loans
Department of Commerce and
Economic Development
Pouch EE
Juneau, Alaska 99811

RECEIVED
MAR 22 1978

DEPARTMENT OF COMMERCE
DIVISION OF BUSINESS
LOANS

Re: Commercial Fishing Loan Program,
Alaska Statutes §§ 16.10.300-.370

Dear Mr. Jeans:

You have asked us to determine whether vessel mortgages held by the Alaska State Development Corporation, (the "Corporation"), would be valid preferred ship mortgages. We have reviewed the State enabling legislation describing the operation of the Corporation, the Shipping Act of 1916, as amended, the Ship Mortgage Act of 1920, as amended, (both codified in Title 46 of the U.S. Code), and the legislative histories and federal court interpretations of the two federal statutes. For the reasons set forth below, we are not able to assure you with certainty that vessel mortgages held by the Corporation will be valid preferred ship mortgages.

We began by considering whether ship mortgages held by the Corporation would be "valid" in the first instance. We next considered whether the mortgages, if valid, would be entitled to the "preferred" status set out in the Ship Mortgage Act. Section 1 of this letter discusses the validity of the proposed mortgages, Section 2 relates to their preferred status, and Section 3 contains our recommendations.

Section 1: Validity

Two sections of the Shipping Act discuss the validity of ship mortgages. Both sections prohibit mortgages of U.S. flag vessels to non-citizens. Each of the two statutory sections renders prohibited mortgages invalid and provides substantial criminal penalties for violators. The two sections are 46 USC §§ 808 and 835.

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Section 808 of Title 46 of the U.S. Code (§ 2 of the Shipping Act) provides in part that:

"...it shall be unlawful, without the approval of the Secretary of Commerce, to sell, mortgage, lease, charter, deliver, or in any manner transfer... to any person not a citizen of the United States... any vessel or any interest therein owned in whole or in part by a citizen of the United States and documented under the laws of the United States..."

Section 835 of Title 46 (§ 37 of the Shipping Act) provides in part that:

"...during any national emergency, the existence of which is declared by proclamation of the President, it shall be unlawful, without first obtaining the approval of the Secretary of Commerce...to sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States...any vessel documented under the laws of the United States, or any interest therein..."

At the present time a Presidentially proclaimed state of national emergency is in effect.

Both of the statutes referred to above prohibit the granting of vessel mortgages to any person who is not a "citizen of the United States." 46 USC § 802 (§ 2 of the Shipping Act) is the statutory section which defines the "citizenship" of a corporate mortgagee for both 46 USC §§ 808 and 835. Section 802 provides, in pertinent part, that:

"(a) Within the meaning of this chapter no corporation...shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and...unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are non-citizens and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof..."

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(b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or, (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States."

The question becomes whether the Corporation meets the requirements of Section 802. In order to do so, the Corporation would have to show, pursuant to § 802(a), that (1) its President is a citizen of the United States, (2) its Chairman of the Board of Directors is a citizen of the United States, (3) the number of non-citizens on the Board are less than the number necessary to constitute a quorum, and (4) the Corporation is organized under the laws of a State. It appears to us that the Corporation can comply with these requirements.

Section 802, however, contains an additional "controlling interest" test defined primarily in § 802(b) which requires the Corporation to show that the Corporation's voting power is not exercised in behalf of a non-citizen. Since the voting power of the Corporation is exercised in behalf of the State itself, we are faced with the problem posed originally by the Alaska Attorney General in that it is not clear that the State is a citizen.

The rather specific provisions of Section 802 together with other relevant sections of the Shipping Act, lend little support to the argument that a State should be considered a citizen of the United States. If anything, the language and the legislative history indicate that the Congress was simply not thinking of States when it enacted the statute.

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Additionally, we have found no reported court cases which discuss whether a State is a citizen of the United States for purposes of Section 802. The only federal cases on the general question of State citizenship involve other sections of federal law unrelated to the Shipping Act. In those unrelated cases, however, the courts have consistently held that a State is not a "citizen," Illinois vs. City of Milwaukee, Wisconsin, 406 U.S. 91 (1972).

We conclude that the Corporation does not clearly qualify as a U.S. citizen and thus ship mortgages held by the Corporation may be invalid. To summarize:

1. The citizenship of the Corporation turns on the citizenship of the party in whose favor the corporate voting power is exercised, i.e., the State;
2. It is not clear that the State is a citizen;
and
3. Therefore, it is not clear that the Corporation is a citizen.

The Secretary of Commerce can, however, approve an otherwise prohibited mortgage to a non-citizen. The authority for this approval is found in both 46 USC §§ 808 and 835. That special approval could be sought and possibly obtained on a blanket basis from the Secretary. Since the policy behind Sections 808 and 835 was to insure that aliens not obtain significant ownership interests in vessels documented under U.S. laws, we are confident that the Secretary would look favorably upon a request for approval because the proposed mortgages certainly are not contrary to the policy of the Act. If the request were made and approval obtained, the mortgages would thereafter be valid.

Section 2: Preferred Status

While the Corporation's mortgages would be valid if the approval of the Secretary of Commerce were obtained, they would not be entitled to first-lien preferred status unless the provisions of the Ship Mortgage Act were satisfied. 46 USC § 922 (§ 30 of the Ship Mortgage Act) provides in pertinent part:

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"A valid mortgage which...includes the whole of any vessel of the United States...shall have... preferred status...if -

[t]he mortgagee is a citizen of the United States and for the purposes of this section the Reconstruction Finance Corporation shall, in addition to those designated in sections 888 and 802 of this title, be deemed a citizen of the United States."

The preferred status of the Corporation's mortgages thus depends again on the citizenship definition in 46 USC § 802 (§ 888 merely refers to § 802). As we set out in the first part of this letter, it is not clear that the Corporation is a citizen for purposes of Section 802 and therefore we are not able to assure you that the mortgages will enjoy preferred status even if made "valid" by approval by the Secretary of Commerce. As you can see by comparing the text of § 922 to the texts of §§ 808 and 835, the Secretary of Commerce does not have statutory authority to grant preferred status to mortgages (§ 922) in the same fashion as she can validate otherwise unlawful mortgages (§§ 808 and 835).

Section 3: Recommendations

Several avenues are open to the State. The avenues (which are not mutually exclusive) are: administrative, judicial, legislative, and contractual.

Administratively, an application to the Secretary of Commerce could be made asking for approval of the mortgages themselves pursuant to 46 USC §§ 808 and/or 835. Simultaneously, the Secretary could be asked to grant preferred status to the mortgages as a matter of general administrative discretion. As we indicated above, we suspect that the Secretary would approve the mortgages pursuant to 46 USC §§ 808 and/or 835. We have no way of predicting whether the Secretary would also grant preferred status to the mortgages although we are not confident that she would react favorably. The defect in the approach is that even if the Secretary did designate the mortgages as preferred, the designation might not survive subsequent challenge because the Secretary has no statutory authority to grant preferred status to otherwise non-preferred mortgages. Such a designation would have little or no effect. We do not recommend the administrative approach.

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Judicially, an effort could be made to obtain a declaratory judgment from a federal court clarifying the status of the Corporation (or the State) as a citizen. It is difficult to predict what the outcome of such a lawsuit would be. This approach suffers from a similar defect as the administrative approach in that, even if successful, a subsequent challenge to a mortgage might reach a different result because the declaratory judgment would serve as precedent but would not necessarily be binding. In addition, the judicial avenue would be time consuming; we do not recommend it.

The legislative approach is more simple, and would be entirely satisfactory if successful. The approach involves seeking a legislative change in Title 46 of the U.S. Code such that the States of the United States were clearly included within the citizen category. Changes in federal law are, of course, not achieved without some difficulty, and we are mindful that the avenue has already been tried without success. Nevertheless, the change should be non-controversial and many Senators and Congressmen interested in maritime and fisheries matters would likely be interested in offering their support. If the amendment were obtained, the State itself could freely take valid preferred ship mortgages and could operate its commercial fishing loan program free from constraints. We recommend that you attempt to obtain the amendment because it would provide a complete solution and because we think the Congress would react favorably. We estimate that the legislative approach would entail an expenditure of \$5,000 - \$10,000 in legal fees.

The last avenue is one which is designed to improve the present situation and eliminate as many of the current difficulties as possible without obtaining any action by the government. The contract under which the trust program is being currently operated could be refined such that your State agency took additional responsibility for servicing the loans. The Trustee's role would become nominal only to conform to the requirements of the Shipping Act. If you should decide not to pursue the legislative remedy we would then recommend that you attempt to alter your contractual arrangement with the Trustee.

If you should have any questions concerning the foregoing, please feel free to call. Kindest regards.

Sincerely yours,

MUNDT, MacGREGOR, HAPPEL,
FALCONER & ZULAUF



J. Carl Mundt