

H B

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Offered: 4/21/86
Referred: Finance

Original sponsors: Thompson, Goll,
Binkley, et al

1 IN THE HOUSE BY THE RESOURCES COMMITTEE
2 SENATE CS FOR CS FOR HOUSE BILL NO. 355 (Resources)
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 FOURTEENTH LEGISLATURE - SECOND SESSION
5 A BILL

For an Act entitled: "An Act authorizing the establishment and implementa-
7 tion of on-board observer programs; and providing for
8 an effective date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 * Section 1. FINDINGS. (a) The legislature finds that, in particular
11 fisheries, observers on board fishing vessels would greatly enhance manage-
12 ment, primarily by facilitating information gathering, and additionally by
13 improving compliance. In fact, in those fisheries, on-board observers may
14 be the only practical data-gathering or enforcement mechanism. Some Alaska
15 fisheries include a large component of vessels, such as catcher/processors
16 and floating processors, that rarely or never enter Alaskan ports. These
17 situations are virtually impossible to monitor without the systematic
18 coverage of observers actually on board. The legislature therefore finds
19 it necessary to authorize the Board of Fisheries to establish, and the
20 Department of Fish and Game to implement, on-board observer programs in
21 particular fisheries if the board determines that it (1) is a practical
22 data-gathering or enforcement mechanism. (2) will not unduly disrupt the
23 fishery, and (3) can be conducted at a reasonable cost. The board may
24 require observers on board vessels registered under the laws of the state,
25 even if the vessels do not take fish within three miles of shore, because
26 the catch beyond three miles can have significant impact upon state manage-
27 ment considerations.

28 (b) The legislature finds that it is important to explore long-term
29 financing mechanisms that ensure a stable on-board observer program not

1 solely dependent upon state and federal appropriations. The legislature
2 believes that the program should be funded through a variety of sources.
3 The legislature also finds it critical that fishing vessels in state and
4 federal waters be subject to identical regulations, permits, and fees.

5 * Sec. 2. AS 16.05.050 is amended to read:

6 Sec. 16.05.050. POWERS AND DUTIES OF COMMISSIONER. The commis-
7 sioner has, but not by way of limitation, the following powers and
duties:

9 (1) assist the United States Fish and Wildlife Service in
10 the enforcement of federal laws and regulations pertaining to fish and
11 game;

12 (2) through the appropriate state agency, acquire by gift,
13 purchase, or lease, or other lawful means, land, buildings, water,
14 rights-of-way, or other necessary or proper real or personal property
15 when the acquisition is in the interest of furthering an objective or
16 purpose of the department and the state;

17 (3) design and construct hatcheries, pipelines, rearing
18 ponds, fishways, and other projects beneficial for the fish and game
19 resources of the state;

20 (4) accept money from any person under conditions requiring
21 the use of the money for specific purposes in the furtherance of the
22 protection, rehabilitation, propagation, preservation, or investiga-
23 tion of the fish and game resources of the state or in settlement of
24 claims for damages to fish or game resources;

25 (5) collect, classify, and disseminate statistics, data and
26 information that, in the commissioner's discretion, will tend to
27 promote the purposes of this title except AS 16.51 and AS 16.52;

28 (6) capture, propagate, transport, buy, sell, or exchange
29 fish or game or eggs for propagating, scientific or stocking purposes;

1 (7) provide public facilities where necessary or proper to
2 facilitate the taking of fish or game, and enter into cooperative
3 agreements with any person to effect them;

4 (8) exercise administrative, budgeting, and fiscal powers;

5 (9) construct, operate, supervise, and maintain vessels
6 used by the Department of Fish and Game;

7 (10) authorize the holder of an interim-use permit under
8 AS 16.43 to engage on an experimental basis in commercial taking of a
9 fishery resource with vessel, gear, and techniques not presently
10 qualifying for licensing under this chapter in conformity with stan-
11 dards established by the Alaska Commercial Fisheries Entry Commission;

12 (11) not later than January 31 of each year, provide to the
13 commissioner of revenue the names of those fish and shellfish species
14 which the commissioner of fish and game designates as developing
15 commercial fish species for that calendar year; a fish or shellfish
16 species is a developing commercial fish species if, within a specified
17 geographical region,

18 (A) the optimum yield from the harvest of the species
19 has not been reached;

20 (B) a substantial portion of the allowable harvest of
21 the species has been allocated to fishing vessels of a foreign
22 nation; or

23 (C) a commercial harvest of the fish species has
24 recently developed;

25 (12) initiate or conduct research necessary or advisable to
26 carry out the purposes of this title except AS 16.51 and AS 16.52;

27 (13) enter into cooperative agreements with agencies of the
28 federal government, educational institutions, or other agencies or
29 organizations, when in the public interest, to carry out the purposes

John

1 of this title except AS 16.51 and AS 16.52;

2 (14) implement an on-board observer program authorized by
3 the Board of Fisheries under AS 16.05.251(a)(12); implementation

4 (A) must be as unintrusive to vessel operations as
5 practicable; and

6 (B) must make scheduling and scope of observers'
7 activities as predictable as practicable.

8 * Sec. 3. AS 16.05 is amended by adding a new section to read:

9 Sec. 16.05.055. ON-BOARD OBSERVER PROGRAM. (a) The
10 commissioner may enter into appropriate contracts and agreements with
11 agencies, such as the National Marine Fisheries Service, North Pacific
12 Fishery Management Council, and the International Pacific Halibut
13 Commission, designed to ensure that on-board observer programs
14 conducted in the fisheries of the state are coordinated and consistent
15 with each other for vessels operating in state and federal water.

16 (b) The master of a vessel, as a condition of participating in a
17 fishery for which an on-board observer program is authorized by the
18 Board of Fisheries under AS 16.05.251, shall consent in writing to the
19 placement of an observer aboard the vessel.

20 * Sec. 4. AS 16.05.251(a) is amended to read:

21 (a) The Board of Fisheries may adopt regulations it considers
22 advisable in accordance with the Administrative Procedure Act (AS 44.-
23 62) for

24 (1) setting apart fish reserve areas, refuges and sanctu-
25 aries in the waters of the state over which it has jurisdiction,
26 subject to the approval of the legislature;

27 (2) establishing open and closed seasons and areas for the
28 taking of fish;

29 (3) setting quotas, bag limits, harvest levels, and sex and

*under
AS 16.05.251
to participate
in program*

- 1 size limitations on the taking of fish;
- 2 (4) establishing the means and methods employed in the
3 pursuit, capture and transport of fish;
- 4 (5) establishing marking and identification requirements
5 for means used in pursuit, capture and transport of fish;
- 6 (6) classifying as commercial fish, sport fish or predators
7 or other categories essential for regulatory purposes;
- 8 (7) watershed and habitat improvement, and management,
9 conservation, protection, use, disposal, propagation and stocking of
10 fish;
- 11 (8) investigating and determining the extent and effect of
12 disease, predation, and competition among fish in the state, exercis-
13 ing control measures considered necessary to the resources of the
14 state;
- 15 (9) prohibiting and regulating the live capture, posses-
16 sion, transport, or release of native or exotic fish or their eggs;
- 17 (10) establishing seasons, areas, quotas and methods of
18 harvest for aquatic plants;
- 19 (11) establishing the times and dates during which the
20 issuance of fishing licenses, permits and registrations and the trans-
21 fer of permits and registrations between registration areas is al-
22 lowed; however, this paragraph does not apply to permits issued or
23 transferred under AS 16.43;
- 24 (12) requiring, in a fishery, observers on board fishing
25 vessels, as defined in AS 16.05.475(d), that are registered under the
26 laws of the state, as defined in AS 16.05.475(c), after making a
27 written determination that an on-board observer program
- 28 (A) is the only practical data-gathering or
29 ment mechanism for that fishery;

1 (B) will not unduly disrupt the fishery;
2 (C) can be conducted at a reasonable cost; and
3 (D) can be coordinated with observer programs of other
4 agencies, including the National Marine Fisheries Service, North
5 Pacific Fishery Management Council, and the International Pacific
6 Halibut Commission.

7 * Sec. 5. AS 16.05.940 is amended by adding a new paragraph to read:

8 (28) "fishery" means a specific administrative area in
9 which a specific fishery resource is commercially taken with a speci-
10 fic type of gear; however, the Board of Fisheries may designate a
11 fishery to include more than one specific administrative area, gear
12 type, or fishery resource; in this paragraph "gear" and "type of gear"
13 have the meanings given in AS 16.43.990.

14 * Sec. 6. In order to further the goals set out in sec. 1(b) of this
15 Act, the commissioner of fish and game shall study funding and jurisdic-
16 tional issues related to the on-board observer programs, and submit a
17 report on the matter to the legislature not later than January 31, 1987.

18 * Sec. 7. This Act takes effect immediately in accordance with AS 01.-
19 10.070(c).

Offered: 2/19/86
Referred: Resources and Finance

Original sponsors: Thompson, Goll,
Binkley and Grussendorf

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BY THE HOUSE SPECIAL
COMMITTEE ON FISHERIES

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- 4 (7) watershed and habitat improvement, and management,
5 conservation, protection, use, disposal, propagation and stocking of
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*of the fishing
operation*

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*OF THE FISHING
OPERATIONS*

House

1 Pacific Fishery Management Council, and the International Pacific
2 Halibut Commission; and

3 (E. will require that the consent of the vessel's
4 master be given in writing before an on-board observer may be
5 placed on the vessel.

*Deleted
in CS(Res)
ADDED on
House
Floor*

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14 Act, the commissioner of fish and game shall study funding and jurisdic-
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17 * Sec. 7. This Act takes effect immediately in accordance with AS 01.-
18 10.070(c).

Carl P. [Signature]

Rick Lambert

A M E N D M E N T

Offered in the SENATE

By Eliason

TO: CSHB 355(Fish) am

Page 4, line 9:

After "PROGRAM." insert "(a)"

Page 4, after line 15, insert a new subsection to read:

"(b) The master of a vessel, as a condition of participating in a fishery for which an on-board observer program is authorized by the Board of Fisheries under AS 16.05.251, shall consent in writing to the placement of an observer aboard the vessel."

Page 5, line 27:

After "cost;" insert "and"

Page 6, line 2, after "Commission" delete all material through line 5 except "."

T-76 FUND

16.05.100

16.05.110

(g) During the open season for king crab, all shellfish pots, other than those described as dungeness, tanner and shrimp pots, must conform to the specifications in (f) of this section.

(h) When taking brown king crab only in statistical areas R, O, or Q, a person may long-line his pots. A buoy is not required for each pot, but each end of the longline must be marked by a cluster of four buoys as well as a pole and a flag. One buoy in the cluster must be marked in accordance with 5 AAC 34.050(b).

(i) Pots with all doors secured fully open and with all bait containers removed may be stored in water depths greater than the maximum permissible depth if the vessel operator has made contact, in person or by radio, with the local representative of the department at a landing port or inspection point specified in 5 AAC 34 or by the department, and has been granted a time extension due to a major breakdown or extreme weather conditions. (In effect before 1982; am 7/25/82, Reg. 83; am 6/30/83, Reg. 86; am 6/30/84, Reg. 90; am 7/14/85, Reg. 95)
 Authority: AS 16.05.251
 AS 16.05.632

5 AAC 34.055. PERMITS FOR PROCESSING VESSELS. The owner or operator of a vessel used in the processing of king crab must obtain a permit from the department before starting processing operations. The permit must contain the following requirements:

- (1) reporting of vessel location to the department;
- (2) reporting of harvesting or processing operations to the department;
- (3) reporting of unloading and transport operations to the department;
- (4) permission for local representatives of the department to inspect, at any time, the vessel's holds, live tanks, freezers, processing areas, and processed and unprocessed king crab; and
- (5) reporting of any other information required by the department for the conservation

and development of king crab resources. (Eff. 7/25/82, Reg. 83; am 6/30/83, Reg. 86)

Authority: AS 16.05.251
 AS 16.05.685

5 AAC 34.060. SIZE LIMIT FOR KING CRAB. (a) Male king crab seven inches (178 mm) or greater in width of shell may be taken or possessed, unless otherwise provided in 5 AAC 34.

(b) Width measurement of king crab shall be the straight-line distance across the carapace at a right angle to a line midway between the eyes to the midpoint of the posterior portion of the carapace and shall include the spines. (In effect before 1981; am 6/28/81, Reg. 78)

Authority: AS 16.05.251(a)(6),(7) and (10)

5 AAC 34.065. FEMALE AND UNDERSIZE KING CRAB. Male king crab less than minimum size and female king crab may not be taken or possessed. Such king crab which have been taken must be immediately returned unharmed to the sea. (In effect before 1981; am 6/28/81, Reg. 78)

Authority: AS 16.05.251(a)(6),(7) and (10)

5 AAC 34.070. REGISTRATION AND INSPECTION DOCUMENTS. (a) A vessel being registered for a registration area pursuant to 5 AAC 34.020, if the necessary information is provided, if properly licensed, and if the vessel is otherwise in compliance with the regulations of this title, shall be issued a registration certificate after the applicant completes a registration form available from the local representative of the department. The registration certificate must be signed by the registrant, kept immediately available at all times during fishing operations by the vessel operator, and must be shown upon request to any peace officer of the state.

(1) stop immediately and lay to or maneuver in such a way as to permit the representative and his party to come aboard:

(2) if requested, provide a safe ladder for the representative and his party:

(3) when necessary to facilitate the boarding, provide a man rope, safety line and illumination of the ladder:

(4) take such other actions as necessary to ensure the safety of the representative and party and to facilitate the boarding; and

(5) make every effort to comply with all lawful orders given by the representative, except that the owner or operator of the vessel is solely responsible for navigation, supervision, and control of the vessel and his decisions shall be final in all matters pertaining to proper navigation and safety of the vessel crew, and fishing gear. (In effect before 1985: 7/14/85, Reg. 95)

Authority: AS 16.05.180
AS 16.05.251

5 AAC 39.141. ONBOARD OBSERVER PROGRAM. (a) The Board of Fisheries finds that, in particular fisheries, observers on board fishing vessels would greatly enhance management, primarily by facilitating information gathering, and by improving regulatory compliance. Onboard observers may be the only practical fishery monitoring, data-gathering, or enforcement mechanism in some Alaska fisheries where a large component of vessels, such as catcher/processors and floating processors, rarely or never enter Alaskan ports. The Board of Fisheries, therefore, finds it necessary to authorize the Alaska Department of Fish and Game to implement onboard observer programs in particular fisheries when the board determines that it

(1) is the only practical data-gathering or enforcement mechanism;

(2) will not unduly disrupt the fishery; and

(3) can be conducted at a reasonable cost.

(b) Onboard observers of the Departments of Public Safety and Fish and Game shall have

free and unobstructed access to inspect the catch, equipment, gear or operations of the fishing vessel, tender or processor to which assigned while that vessel is

(1) within waters under the jurisdiction of the state:

(2) taking or intending to take any species of fish; or

(3) transporting or processing any species of fish.

(c) Onboard observers must be as unintrusive to vessel operations as practicable and must make the scheduling and scope of their activities predictable and practicable.

(d) Onboard observers are not required to obtain criminal or administrative search warrants to conduct their duties.

(e) Onboard observers shall carry out such scientific and other duties as deemed necessary or appropriate to manage, protect, maintain, improve, and extend the fish and aquatic plant resources of the state. (Eff. 7/14/85, Reg. 95)

Authority: AS 16.05.251

5 AAC 39.145. ESCAPE MECHANISM FOR SHELLFISH AND BOTTOMFISH POTS. A side wall of all shellfish and bottomfish pots must contain an opening with a perimeter equal to or exceeding one-half of the tunnel eye opening

no

House Special Committee on Fisheries
Amended Letter of Intent
for
CSHB 355 (Fisheries)

The Legislature believes it is critical that the state's on-board observer program be funded through a variety of sources and not be entirely dependent upon direct funding from the state and federal treasuries. The Legislature respectfully requests the commissioner of the Department of Fish and Game to thoroughly explore the following funding concepts: (1) reasonable fees upon the fishing fleets for which the observer coverage is targeted; and (2) the limited sale of "prohibited species" bycatches from vessels utilizing state-certified observers. The commissioner is requested to report back to the Legislature with the results of this study not later than January 31, 1987.

Finance Committee letter *yes*

adopted

DISTRICT 27:
AKHIQ
CHIGNIK
CHIGNIK LAGOON
CHIGNIK LAKE
CHINIAK
IVANOF BAY
KARLUK
KODIAK
LAPSEN BAY
OLD HARBOR
OUZINKIE
PERRYVILLE
PORT IONS
WOMENS BAY

Alaska State Legislature



Representative
Dave Thompson

P.O. BOX V
JUNEAU, ALASKA 99811
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(907) 465-2498

P.O. BOX 75
KODIAK, ALASKA 99615
(H) (907) 486-4899
(LIO) (907) 486-8116

April 8, 1986

To: Senator Arliss Sturgulewski
Chair, Senate Resources

From: Representative Dave Thompson *DWT*

Re: HB 355

This is to confirm my request to have HB 355, Onboard Observe Program, heard in your Resources Committee as soon as possible. Please let me know what assistance you might need.

Thank you.

STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : CSHB 355 (Fisheries)
 Title : authorizing the establishment & implementation of on-board observer programs & providing an effective date
 Sponsor : Thompson, Goll & Birkley
 Requestor : House Finance
 Date of Request : _____

FISCAL DETAIL

Agency Affected : Public Safety
 BRU : Fish & Wildlife Protection

 Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
----------------	---	---	---	---	---	---

REVENUE	0	0	0	0	0	0
----------------	---	---	---	---	---	---

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS :

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS : Attach a separate page if necessary

Prepared by : Captain J. R. Nutgrass
 Division : Fish & Wildlife Protection

Phone : 269-5509
 Date : 3/18/86

Approved by Commissioner : [Signature]
 Agency : Public Safety

Date : 3/19/86

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER - CSHB 355 (Fisheries)

SUPPORT

March 18, 1986

CSHB 355 (Fisheries)- "An Act Authorizing the establishment and implementation of on-board observer programs; and providing for an effective date."

The Department of Public Safety is in support of Committee Substitute for House Bill No. 355 (Fisheries).

The State has experienced in recent years a sharp decline in the shellfish stocks being available in the commercial crab fisheries.

In conjunction with the Department of Fish and Game management program, this Department has over the years expended a considerable amount of effort through inspection of vessels and shore plants, extended vessel patrol days and air patrol hours monitoring the fishing activity of the State's crab fisheries.

The State has experienced in recent years an increase in numbers of catcher/processor vessels in the crab fishery since the first one was operational in 1973.

The catcher/processor type vessel has proven to be economically superior in its ability of being mobile in catching and processing crab at any time or place within a fishing ground.

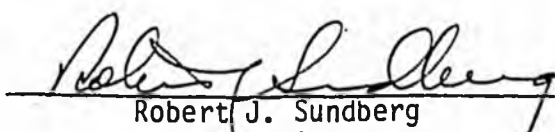
This situation does create a management and enforcement problem by the inability to monitor catches being processed and to receive or accurately monitor catch composition.

The major concern that exists in this situation is the inaccurate management data being received and the capability of a catcher/processor type vessel harvesting undersize crab undetected, thus placing the present and future stocks in jeopardy by the illegal take and the lack of accurate data for properly managing the resource.

Since 1973 to the present the following type of violations have been documented involving catcher/processor vessels:

The taking of king crab after the closure of the fishery and reporting the poundage on a shellfish ticket as being tanner crab and processing sublegal crab.

The quota system that is established for a specific area allowing specified poundage of crab to be harvested can be affected by the misinformation provided on shellfish tickets, which is detrimental to sound management and an economical disadvantage to the majority of the hard working, honest fishermen.


Robert J. Sundberg
Commissioner

STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

APR 18 1986

Revision Date : _____

REQUEST

Bill/Resolution No. : CSHB 355(Fish) am
 Title : re on-board observer program

Sponsor : Thompson
 Requestor : Senate Resources
 Date of Request : 4/17/86

FISCAL DETAIL

Agency Affected : Public Safety
 BRU : Fish & Wildlife Protection

Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE	0	0	0	0	0	0
----------------	----------	----------	----------	----------	----------	----------

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS :

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS : Attach a separate page if necessary

K. Miller

Prepared by : J. R. Nutgrass
 Division : Fish & Wildlife protection

Phone : 269-5509
 Date : 4/14/86

Approved by Commissioner : [Signature]
 Agency : Public Safety

Date : 4/16/86

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER - CSHB 355 (Fisheries) am

SUPPORT

April 14, 1986

CSHB 355 (Fisheries) am - "An Act Authorizing the establishment and implementation of on-board observer programs; and providing for an effective date."

The Department of Public Safety is in support of Committee Substitute for House Bill No. 355 (Fisheries) am.

The State has experienced in recent years a sharp decline in the shellfish stocks being available in the commercial crab fisheries.

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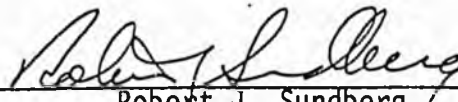
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Robert J. Sundberg
Commissioner

Alaska State Legislature

ARLISS STURGULEWSKI, Chairman
BETTYE FAHRENKAMP, Vice Chairman
JACK COGHILL
DICK ELIASON
VIC FISCHER
RICK HALFORD
FRED ZHAROFF



P. O. BOX V
JUNEAU, ALASKA 99811
(907) 485-4907

Senate Committee on Resources

M E M O R A N D U M

April 17, 1986

TO: All Members
Senate Resources Committee

FROM: Staff, ^{JK} Senate Resources Committee

RE: CS HB 355 (Fisheries) am

"An Act authorizing the establishment of on-board observer programs; and providing for an effective date"

HB 355 sets up an on-board observer program for the domestic fishing fleet under state jurisdiction.

The bill allows the state to require that certain fishing operations have on-board observers.

Permanent funding for this program is still being worked out, but HB 355 would allow for a one-year pilot project. Funds would come from two sources: (1) a \$75,800 appropriation from the general fund; and (2) a \$200,000 appropriation from the Fish and Game Fund as a result of the civil settlement of the "Baranof" case.

A letter of intent included with HB 355 requests the Commissioner of Fish and Game to report back to the legislature next session with funding recommendations.

Alaska State Legislature

ARLISS STURGULEWSKI, Chairman
BETTYE FAHRENKAMP, Vice Chairman
JACK COGHILL
DICK ELIASON
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RICK HALFORD
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M E M O R A N D U M

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TO: All Members
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RE: CS HB 355 (Fisheries) am

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A letter of intent included with HB 355 requests the Commissioner of Fish and Game to report back to the legislature next session with funding recommendations.

There was an amendment made on the House floor that requires written consent from the master of the vessel before an on-board observer may be placed on the vessel. This amendment has caused serious concern with Fish and Game since its effect would be to weaken the program.

Enclosures: House Letter of Intent
Fiscal Note from Fish and Game
Description of Program by Fish and Game
Memo from Rep. Peter Goll
Memo from Steve Pennoyer, Fish and Game
Attorney General's opinion dated 6-10-83
Attorney General's opinion dated 4-26-84
Letter from Kodiak Fish and Game Advisory
Committee
Newspaper Articles

House Special Committee on Fisheries
Amended Letter of Intent
for
CSHB 355 (Fisheries)

The Legislature believes it is critical that the state's on-board observer program be funded through a variety of sources and not be entirely dependent upon direct funding from the state and federal treasuries. The Legislature respectfully requests the commissioner of the Department of Fish and Game to thoroughly explore the following funding concepts: (1) reasonable fees upon the fishing fleets for which the observer coverage is targeted; and (2) the limited sale of "prohibited species" bycatches from vessels utilizing state-certified observers. The commissioner is requested to report back to the Legislature with the results of this study not later than January 31, 1987.

Robert J. Hall

adopted

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : 3/20/86

REQUEST

Bill/Resolution No. : CSHB 355
 Title : ... Authorizing the
establishment of onboard observer
programs ...
 Sponsor : Thompson
 Requestor : _____
 Date of Request : _____

FISCAL DETAIL

Agency Affected : Fish and Game
 BRU : Fisheries Resource Conservation

 Components : Commercial Fisheries

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		252.8	288.2	328.5	374.5	426.9
TRAVEL		18.0	20.3	22.8	25.7	29.0
CONTRACTUAL		2.2	2.5	2.8	3.2	3.6
SUPPLIES		2.8	3.2	3.6	4.1	4.6
EQUIPMENT		-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES		-0-	-0-	-0-	-0-	-0-
GRANTS, CLAIMS		-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS		-0-	-0-	-0-	-0-	-0-
TOTAL OPERATING		275.8	314.2	357.7	407.5	464.1

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING : (Thousands of Dollars)

GENERAL FUND		75.8	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER		200.0	314.2	357.7	407.5	464.1
TOTAL		275.8	314.2	357.7	407.5	464.1

POSITIONS :

FULL-TIME						
PART-TIME		2	2	2	2	2
TEMPORARY		12	14	16	18	20

ANALYSIS : Attach a separate page if necessary

This revision corrects an error that was made in computing employee benefits for the revision dated 2/14/86.

Prepared by : Robert C. Clasby Phone : 465-4210
 Division : Commercial Fisheries Date : 3/20/86

Approved by Commissioner : [Signature] Date : _____
 Agency : _____

Distribution (by Agency preparing fiscal note) :

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

Analysis:

This fiscal note shows a reduction in expenses and change in funding source from the fiscal note dated 2/4/86. The expenditures have been reduced by 124.2 thousand dollars for FY 87, and reflected through FY 91, based on the assumption that the National Marine Fisheries Service will fund an onboard observer program for the Pacific cod fishery in the Bering Sea. The funding sources have been changed to show 200.0 thousand dollars as coming from the Fish and Game fund. This change is based on the assumption that the 200.0 thousand dollars from the civil settlement of the Baranof case will be approved by Legislative Budget and Audit for expenditure on the onboard observer program for FY 87. The "other" funding source for FY 88 through FY 89 is based on the assumption that the State of Alaska and the Federal Government will develop a funding mechanism that is acceptable to the fishing industry and will ensure adequate coverage of fisheries that take place in both state and federal waters.

Salmon catch sampling, such as the program for the South Unimak and Shumagin Islands fishery, is not covered under this fiscal note, as that program is funded under the Division of Commercial Fisheries operational budget.

On-Board Observer Program for groundfish and shellfish
fisheries in the Central Gulf of Alaska, Alaska Peninsula
and Bering Sea, and Southeast Alaska.

This document is designed to provide information and guidance for administrators in preparation of a budget document for a Westward groundfish--shellfish observer program. Attached is a detailed operational plan for groundfish observation procedures including the purpose, objectives and detailed sampling procedures. Included also is a table showing the proposed scheme of effort distribution relative to quarter, management area, and species for the proposed budget by line item.

The primary purpose of this observer effort would be to monitor and document the composition of catches as they come aboard commercial groundfish and shellfish vessels during fishing operations. This purpose would be achieved through accomplishment of the following objectives:

1. Monitor the composition and catch per effort of target, incidental, and prohibited species catches made by commercial shellfish-groundfish operations relative to time and area fished.
2. Study the spatial and temporal distribution of prohibited species catches in an effort to determine if cyclic spatial and/or temporal relationships can be detected for specific species groups.
3. Distribute observer effort on the various species based on the times and areas of primary fleet emphasis.
4. Work closely with the various user groups to learn the problem areas relative to prohibited species by-catches and the extent to which the fleet can avoid these species.
5. Continue to evaluate the sampling strategy, data collection procedures, and sampling methodologies used to collect, record and summarize shipboard observer data.

6. Determine the statistical validity of expanding prohibited species catch rates into the catch by the total fleet on a time-geographic area basis. Revise existing procedures, if necessary.
7. Continue to develop summaries and overviews of observer results. Attempt to develop routine summaries which answer the many questions posed by the various user groups.
8. Attempt to improve the data exchange on observer results with NMFS. The goal of this coordination would be to develop an integrated observer reporting system which includes the domestic as well as joint venture and directed foreign fishing effort.
9. Develop a data summarization program with the flexibility to summarize the accumulated data base on any desired group of parameters so as to satisfy needs of diverse user and agency groups.

This observation effort would be allocated quarterly on a prioritized basis among four fisheries management areas (Kodiak-Chignik, South Alaska Peninsula, the Bering Sea, and Southeast Alaska, and six species (Pacific cod, pollock, Tanner crab, Dungeness crab, king crab and sablefish). In terms of species priority, the catcher processing operations targeting on-king crab, cod and pollock would have first priority, with the shore-based fleet targeting on cod and pollock having second priority. Effort would be most intense during the April-June quarter due to heavy effort for pollock and sablefish, with the least effort scheduled during the June-September quarter. This prioritization scheme is incorporated into the effort distribution table (Table 1) by quarter, management area, and species group.

A breakdown of cost factors for this proposed observer effort by line item is shown in Table 2. Review of the proposed expenditures by line item shows that 88% of the costs would be in personnel services. These personnel services costs are based on Fishery Technician III salaries and the observers being paid sea pay for seven days a week during one-half of their total employment period. Sea pay is presently paid at the rate of 3.5 hours per weekday at sea

and 15 hours per weekend day or holiday while at sea. This calculates to 85 hours per full week at sea including base pay.

As mentioned above, this observation effort would be distributed over five fisheries-Pacific cod, king crab, pollock, sablefish and Tanner crab. The fisheries for cod and pollock use bottom trawl gear, those for king and Tanner crab utilize pots, and that for sablefish utilizes bottom trawls, longline gear as well as pots. While the majority of observation effort would be in the trawl and crab pot fisheries due to their higher potential for prohibited species catches, effort would be expended in the sablefish longline fishery on a time available basis due to its potential for catching halibut.

The final product of the observer data collection procedure would be estimates of the total catches of each species by haul. These estimates are coupled with the basic haul parameters from each tow via an integrated Lotus/R-base program which can summarize catches according to nearly any desired group of variables. In-depth operational plans for observation procedures including subsampling, effort distribution and data handling protocols trawl, have been developed and are available for use in this program.

Table 1. Distribution of FY 1987 shellfish and groundfish on-board observer effort (man-months) by quarter, management area, and species group.

Area	Species Group	Quarter				Totals
		Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	
Kodiak	PC-Pol	6	8	-	8	22
	Tanner	2	-	-	-	2
	Dungeness	-	2	0.5	-	2.5
	Sablefish	-	2	-	-	2
Shumagin	PC-Pol	2	2	2	-	6
	Tanner	2	-	-	-	2
Bering Sea	Tanner	-	-	-	-	-
	King Crab	-	-	-	2	2
Southeast	Rockfish	1.5	2	0.5	1.5	5.5
	Sablefish	-	2	0.5	-	2.5
	Flatfish	1.5	-	-	1.5	3.0
Totals		15	18	3.5	13	49.5

Table 2. Shipboard observer cost distribution.

ON-BOARD OBSERVER PROGRAM
Shellfish/Groundfish FY87
Proposed Expenditures

LINE ITEM

<u>100 Personal Services</u>	<u>COST</u>
FB I - 6.0 MM @ 2518/mo.	\$ 15.1
FT III - 43.6 MM @ \$2185/mo.	95.0
900 hrs. sea pay @ 16.78/hr (2 FB I's)	15.1
4938 hrs. sea pay @ 13.14/hr (12 FT III's)	64.9
	190.1
Employee Benefits @ 33%	62.7
Total	\$252.8
<u>200 Travel</u>	
3 Roundtrip Kodiak-Dutch Harbor @ \$854	\$ 2.6
756 days per diem on vessels @ 20	15.1
4 days commercial per diem @ \$80	0.3
Total	\$ 18.0
<u>300 Contractual Services</u>	
Xerox charges	\$ 0.4
Contingency inter-island air charter	0.6
Telephone charges	0.6
Printing of forms	0.2
Computer supplies	0.4
Total	\$ 2.2
<u>400 Commodities</u>	
Sampling Equipment:	
Plastic baskets	\$ 0.4
Scales	0.4
Repair & equipping of survival equipment	0.4
Misc. sampling equipment	0.3
Raingear	0.3
Professional and scientific supplies	1.0
Total	\$ 2.8
GRAND TOTAL	\$275.8



Official Business

Alaska State Legislature

House of Representatives

Special Committee on Fisheries

Pouch V
Juneau, Alaska 99811

Phone:
(907) 465-4924

M E M O R A N D U M

February 8, 1986

TO: Members, House Special Committee on Fisheries

FROM: Representative Peter Goll *P. Goll*

SUBJECT: House Bill 355 (Onboard Observer Program)

House Bill 355 authorizes and funds an onboard observer program for the domestic fishing fleet under state jurisdiction. It will be considered at a public hearing at 8:30 a.m. Tuesday, February 11.

The legislation allows the state of Alaska to require that certain fishing operations have on-board observers hired by the state. The observers monitor catches coming aboard the vessel to gather biological information and to enforce some regulations.

The federal government now requires observers on foreign fishing operations in our 200-mile zone. The cost of the federal observer program is paid by the foreign fishermen through a fee process. The need for a program placing observers on domestic fishing vessels is a source of concern as American fishermen displace the foreign fleets in our offshore fisheries.

Under the terms of the Magnuson Fisheries Conservation Management Act, the federal government is precluded from assessing U.S. fishermen for more than the basic costs of administering the program. Their fees cannot be used to pay observer salaries, provide insurance coverage for sea duty or cover training costs.

The National Marine Fisheries Service recently submitted a \$250,000 request to fund a pilot domestic observer programs, but the cost-cutting atmosphere currently surrounding the federal budgeting process raises many questions about whether the project will be funded.

Onboard Observers
February 8, 1986
Page Two

The North Pacific Fishery Management Council may have discovered a mechanism that may help alleviate the funding issue. The NPFMC recently closed an area of the Bering Sea to domestic trawlers, except for vessels targeting on Pacific cod which have federal observers onboard. The U.S. fishermen will have to pay for the cost of the observers if they wish to fish in that particular area.

The Alaska fishing industry and state fisheries managers have been closely watching the progress with the federal program. The offshore trawl and pot fishing operations can catch large numbers of "incidental" species as they target on stocks, such as pollock, sole and crab. Since these incidental catches include salmon, halibut, sablefish and crab, the support on the state level for a domestic observer program appears to be very widespread.

Trawl and pot fishermen are prohibited from keeping most of the higher value species taken as incidental catches, although most are dead by the time they are hauled aboard the vessels. Many of the offshore fisheries have incidental catch lids that will close the target fishery once a certain number of so-called "prohibited species" are taken. A primary function of the onboard observers is to monitor the incidental catch and take of these prohibited species. Many Alaskans who depend on these higher value "prohibited species" obviously favor the close monitoring.

The observer data also can benefit the trawl fleet because fisheries managers are conservative unless solid, unbiased information is available. Unverified reports from trawlers that they have reduced incidental catches in a particularly fishery often are not sufficient to convince managers to allow more fishing time.

Since the state only has clear jurisdiction over fishing vessels that operate within three miles of our coastline, a state observer program must be accompanied by a cooperative agreement with federal authorities to be truly effective. Jim Branson, executive director of the NPFMC, is confident that federal officials would be pleased to work with the state under a cooperative program.

The Alaska Board of Fisheries has established authority for a state-run domestic observer program by regulation (5 AAC 39.141). House Bill 355 clearly establishes statutory authority for such a program and provides funding (fiscal note attached) for implementation.

MEMORANDUM

State of Alaska

DRAFT

TO: Molly McCammon
Special Staff Assistant
Office of the Governor

DATE: February 4, 1986

FILE NO:

TELEPHONE NO: 465-4100

FROM: Steven Pennoyer
Deputy Commissioner
Department of Fish and Game

SUBJECT: Onboard Observer Bills,
SB 79 and HB 355

Enclosed is a bill analysis and fiscal note for HB 355, Representative Thompson's onboard observer bill. It is identical to the department's bill, SB 79, except that it contains no provision to fund the observer program through a fee structure system, or any other method.

During the last few years, there has been a growing interest, on the part of the public and the federal and state agencies, to develop an onboard observer program for the domestic fisheries. All feel that such a program is needed to provide basic biological data, particularly in the case of groundfish, as the domestic fleet replaces the foreign fleet. Observers can also be used to enforce regulations, such as those dealing with size and sex restrictions in the king and Tanner crab fisheries. Any effective observer program will have to be legally achievable in both federal and state waters and be funded.

The Magnuson Fishery Conservation and Management Act (MFCMA) allows the federal government to place observers on domestic fishing vessels. This authorization is by statute so does not require implementing regulations. The Board of Fisheries has authority to require onboard observers by regulation. Both the board and the North Pacific Fishery Management Council in 1984 decided to work towards a goal of complimentary onboard observer programs in state and federal waters. Since the regulatory mechanisms are in place, the major hurdle has been funding.

The department, in conjunction with the Department of Law, developed SB 79 as the state's answer to the funding problem. The primary purpose of that bill is to provide a source of funding, via permit fees, for the program. Declining revenues have caused reductions in operational budgets. The department cannot fund the observer program without taking cuts in other ongoing projects of high priority to the management of established fisheries. One option is for the program to fund itself. Originally, we thought this concept might be feasible. As it turns out, we are now unsure. The federal government cannot use such a fee structure to fund a domestic observer program since it is forbidden by the MFCMA. If the state accepts the king crab delegation, and I believe we will, we

February 4, 1986

most likely will fall under that prohibition. Since the king crab fishery is one of the two fisheries most in need of observers, this loss of a funding source will gut the program. Additionally, there seems to be a great deal of opposition from fishermen and processors for a fee structure. They are saying the state should fund the program out of current revenue sources.

The bottom line is that there is no money for an onboard observer program in the FY 86 or FY 87 budget. The department priority for such a program is above the increment level, and it is very unlikely the Legislature will approve a permit fee structure. Since the Board of Fisheries has already adopted a program identical to that suggested in the bill, the legislation is no longer necessary for the department to legally implement such a program if funds were made available.

The key point to get across to the Legislature and the public is that passage of either bill, without some funding source, will not cure the problems they perceive are happening.

The enclosed fiscal note and proposal reflect the minimum level observer program that both we and the Board of Fisheries feel is needed to provide basic coverage of current fisheries. Any increase in the king and Tanner crab harvests or implementation of additional prohibited species catch levels in the groundfish fisheries would require increased funding above the level in the fiscal note.

Enclosures

cc: J. Ayers
B. Clasby
K. Parker

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

June 10, 1983

The Honorable Fred Zharoff
Representative
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: Inspection of Floating
Processors
Our File No. 366-595-83

Dear Representative Zharoff:

The Department of Law has received your request for an opinion on the State of Alaska's authority to board and inspect floating processors in the state's territorial sea from zero-three miles (43 U.S.C. § 1312) and in offshore waters to the 200 mile limit of the Fishery Conservation Zone (F.C.Z.) (16 U.S.C. § 1811).

No Alaska case has considered the application of inspection authority to floating processors. However, the cases cited below evidence approval of warrantless inspection on fishing vessels within the territorial sea and at processing plants on shore. We believe that the same principles relied on in those cases apply to floating processors and justify warrantless inspections. Further, because the states are responsible for assuring compliance with state fishing regulations beyond the three mile limit of the territorial sea, F.V. American Eagle v. State, 620 P.2d 657, 662 n. 10 (Alaska 1980), appeal dismissed 454 U.S. 1130 (1982), this inspection authority applies beyond the territorial sea, as a necessary tool to enforce state conservation regulations. However, because the Magnuson Fishery Conservation and Management Act (FCMA) indicates that extra-territorial regulations can be imposed on "vessels registered under the laws of such State", 16 U.S.C. 1856, we have limited

Representative Fred Zharoff
Alaska State Legislature
366-595-83

June 10, 1983
Page 2

our inspections to vessels and floating processors that are registered under state law. 1/

Our office has previously opined that the constitutional protections against unreasonable searches and seizures (Alaska Const. art. I, § 14) do not prohibit the following:

- (1) searches based on consent,
- (2) searches based on probable cause to find evidence of a crime,
- (3) searches based on a valid search warrant, and
- (4) observations of items in "plain view".

1961 Op. Atty. Gen. No. 19 (July 12); see also 1980 Inf. Op. Atty. Gen. (Feb. 1, File No. A66-154-80).

Further, the Alaska supreme court has held that art. I, § 14 does not prohibit inspection of fishing gear where the fishermen "could not harbor an actual (subjective) expectation of privacy." Wamser v. State, 600 P.2d 1359, 1361 (Alaska 1979), citing Nathanson v. State, 554 P.2d 456, 459 (Alaska 1976). Therefore, Fish and Wildlife Protection Officers can retrieve baited king crab pots during warrantless onsite inspections of harvesting operations.

A recent federal case similarly concluded that, since fishing is a "highly regulated industry," no warrant is necessary to conduct an inspection of a fishing vessel. United States v. Kaizo Maru No. 53, 699 F.2d 989 (9th Cir. 1983). A district court opinion in Kodiak has also approved a vessel inspection because "[a] fishing boat is an industry" that operates during a short season in a highly mobile status during "the roughest kind of weather." State v. Va. Paandonk, Kodiak District Court No. 77-12974 (December 12, 1977) (emphasis added). Recently the U.S. Supreme Court decided a case which may allow authorities an even greater leeway in boarding vessels. In U.S. v. Villamonte-Marquez, No. 81-1350, decided 6/17/83, the Court upheld convictions in a drug-smuggling case, holding that customs officers may board vessels without warrants, and even without reasonable suspicions, to determine compliance with vessel documentation requirements.

1/ The term "fishing vessel" specifically includes support vessels used for "processing". 16 U.S.C. § 1802 11(B).

Although there is some doubt that the Alaska Supreme Court would go as far as the federal courts in expanding occasions for warrantless searches, state courts have also given the authorities a degree of flexibility in this area. Our Alaska supreme court has not yet had an occasion to consider the degree of privacy that should be associated with a fish processing operation. However, in State v. Westside Fish-Co., 570 P.2d 401, 403 (Or. App. 1977), the Oregon court of appeals found that a state law providing for inspections of fish plants was consistent with constitutional search and seizure provisions because:

- (1) fish are a common property resource,
- (2) the industry is subject to pervasive regulation,
- (3) processing proceeds quickly at odd hours so advance notice of inspections would not be possible, and
- (4) there is no reasonable expectation of privacy in the plant.

The Alaska supreme court in Woods and Rohde, Inc. v. State, Department of Labor, 565 P.2d 138, 151 (Alaska 1977) required the OSHA inspectors obtain search warrants from the court before conducting inspections because the owner of a business is "deserving of the ... significant constitutional solicitude and protection afforded Alaskan citizens in criminal prosecution." However, the court, in dicta, noted that broader powers of inspection may exist in the fishing industry because of the fact that "nearly every phase of the operation [is] under public scrutiny." Id. at 150. In addition, the fishing industry deals with a common property resource and our constitution mandates its development "for the maximum use consistent with the public interest." Alaska Constitution, art. VIII, § 1; see also §§ 2, 3 and 4.

Therefore, we do not believe that an Alaskan court would impose a warrant requirement on inspections of a floating or stationary processor. Fish processors deal with the same "common property resources" harvested by fishermen and they are subject to the same degree of pervasive regulation that governs actual fishing activities. For example, processing vessels are engaged in "commercial fishing" under AS 16.05.475(d) and AS 16.05.940(3), so all vessels must be registered and licensed under AS 16.05.475 and AS 16.05.480, respectively. Detailed weekly and sometimes daily reporting requirements are imposed on processing operations under AS 16.05.690 and 5 AAC 39.130(b). In addition, the location of all operations must be reported immediately to the department of fish and game under 5 AAC 39.130(f),

and 5 AAC 39.130(g) imposes special reporting requirements on roe processors.

Accordingly, we believe that the same inspection requirements that can be imposed on shore based processing plants and fishing operations within the territorial sea also apply to operations of floating processors in and beyond the three mile limits of the territorial sea. Without such authority, it would be impossible to ensure compliance with state conservation regulations that govern fishing of state registered vessels in these extraterritorial waters. See, Hielle v. Brooks, 377 F. Supp. 430, 441 (D.C. Alaska 1974); State v. Bundrang, 546 P.2d 530, 552 (Alaska 1976); F.V. American Eagle v. State, 620 P.2d 657, 662-663 (Alaska 1980), appeal dismissed 454 U.S. 1130 (1981).

You should be aware, however, that the issue of preemption of state management authority beyond the three mile limit under the FCMA is currently pending before the Alaska supreme court. F.V. Baranof v. State, Supreme court file nos. 7287 and 7324. The case has been briefed and submitted to the court. A request for oral argument is pending. A decision should be issued late this year or early next year.

Although we believe the correct interpretation of the relevant constitutional provisions, statutes and legal authorities does not justify preemption, an adverse decision in this appeal could invalidate extraterritorial state regulations of commercial fishing operations. If so, inspections beyond the outer limits of the territorial sea would no longer be necessary or valid.

In order to avoid unnecessary points on appeal in search and seizure cases, it has been our policy to recommend the issuance of an administrative search warrant whenever possible. Such an "umbrella" warrant was described in Woods and Rohde, Inc. v. State, Department of Labor, 565 P.2d at 151, quoting Camara v. Municipal Court, 387 U.S. 523, 535 (1967), and allows inspection of all facilities in a specific geographical region or inspections of a specific type of plant as opposed to only a specific vessel. This procedure also avoids the risk that a court will decline to exempt fisheries inspections from search warrant requirements, especially where there is "ample time to obtain a valid search warrant." State Conservation Department v. Seaman, 240 N.W. 2d 206, 213 (Mich. 1976).

In summary, the state does have authority to inspect floating processor vessels within and beyond the territorial sea. However, searches and seizures represent a dynamically changing

Representative Fred Zharoff
Alaska State Legislature
366-595-83

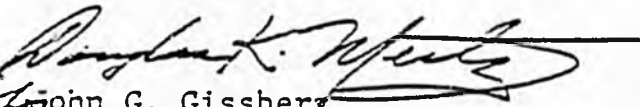
June 10, 1983
Page 5

area of law. Therefore, unless exigent circumstances require immediate action by enforcement personnel, a warrant should be obtained.

Please let us know if we can be of further assistance or if you would like any advice regarding specific circumstances of interest.

Yours very truly,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By 
John G. Gissberg
Assistant Attorney General

JGG:djc

MEMORANDUM

State of Alaska

TO: Norman Cohen
Special Assistant
Dept. of Fish & Game

DATE: April 26, 1984

FILE NO: 366-467-84

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General ^{LIS}

SUBJECT: Onboard observer
program

By: Larri I. Spengler
Assistant Attorney General
Department of Law

You have asked four questions about the establishment of an onboard observer program in selected domestic commercial fisheries. As explained below, the state could require onboard observers for both enforcement and scientific research purposes on fishing vessels, floating processors, and catcher/processors in state waters and on state-registered vessels in the Fishery Conservation Zone. However, any such program must be carefully designed in order to avoid potential constitutional challenge.

1. Can the state require observers for enforcement purposes?

The constitutional issue raised by this question is whether a mandatory onboard observer program would violate the state and federal constitutional protections against unreasonable searches. In general, a warrant is required unless a search falls within certain specific exceptions. One such exception involves closely regulated industries. Balelo v. Baldrige, 724 F.2d 753 (9th Cir. 1984), State v. Salit, 613 P.2d 245, 251 (Alaska 1980). Alaskan cases have noted that the fishing industry is closely regulated. Woods and Rohde, Inc. v. State Department of Labor, 565 P.2d 139, 150 (Alaska 1977) ("nearly every phase of the operation ... [is] under public scrutiny," citing Nathanson v. State, 554 P.2d 456 (Alaska 1976) which involved crab fishing). A recent federal case has concluded that no warrant is necessary to inspect a fishing vessel, since fishing is a "highly regulated industry." United States v. Kaiyo Maru No. 53, 699 F.2d 989 (9th Cir. 1983). Further, an Alaska court of appeals decision held that there is no reasonable expectation of privacy on a vessel participating in commercial fishing, a "heavily regulated industry." Dye v. State, 650 P.2d 418, 422 (Alaska App. Ct. 1982).

Balelo v. Baldrige, 724 F.2d 753 (9th Cir. 1984) upheld a mandatory onboard observer program in the tuna fishery. The program was established by regulations promulgated under the Marine Mammal Protection Act, 16 U.S.C. § 1373, although that Act does not specifically authorize warrantless searches. The court noted that not only is fishing a pervasively regulated industry, but the particular observer program being challenged was crafted

to be only as intrusive as necessary to accomplish the purpose. The scope of observation was limited to simply recording predetermined data on forms. There was a high degree of predictability in the operation of the program, since the observers' schedules were available to the ships well in advance. Additionally, the record supporting the necessity of the program as the only feasible enforcement mechanism was discussed, and relied upon heavily by the court.

In light of that analysis, any state observer program established for any domestic commercial fishery should be grounded on an excellent record demonstrating the necessity in that specific fishery of that particular enforcement mechanism, and should be designed for precision of scope and predictability of implementation. In addition, it would be best if an observer program were based on express statutory authorization, rather than on Board of Fisheries regulations (although we believe that latter course would be defensible). */

2. Can the state require observers for scientific research purposes?

Since a mandatory onboard observer program aimed at enforcement activities could be authorized, as discussed above, a program focused solely on scientific research also would be valid. In fact, if information gathering for scientific purposes only would not expose the vessels involved to direct legal jeopardy, such a program would be even less at risk in the absence of a specifically authorizing statute than would an

*/ Balelo v. Baldrige, 724 F.2d 753 (9th Cir. 1984) overturned Balelo v. Klutznik 519 F. Supp. 573 (S.D. Cal. 1981), which held that although fishing is a pervasively regulated industry, a warrantless search in the form of a mandatory onboard observer program is only valid if specifically authorized by Congress. That reasoning was also developed in the dissenting opinion in Balelo v. Baldrige at 768. Since there is no way to predict which analysis the United States Supreme Court or the Alaska supreme court would adopt, the safest way to assure that an onboard observer program for enforcement purposes could withstand challenge would be to base it on a statute specifically authorizing it. However, a program adopted under the general authorities of the Board of Fisheries (AS 16.05.251(a)(4) and (7)) could, we believe, be defended under the holding in Balelo v. Baldrige.

Norman Cohen, Special Assistant
Department of Fish and Game
File no. 366-467-84

April 26, 1984
Page 3

enforcement program. (However, this might depend on whether it could be guaranteed that the data would not be used at some point for enforcement, a question probably not necessary to resolve, since observers for enforcement purposes could be required in those cases where necessary, as discussed above.)

3. Are there different considerations involved in requiring observers on board fishing vessels, floating processors, and catcher/processors?

Observers could be required on board any category of commercial fishing vessel. As discussed in the attached June 10, 1983 letter from our office to Representative Zharoff, A.G. file no. 366-595-83, the same principles regarding warrantless searches apply to fishing vessels, floating processors, and catcher/processors. However, a separate demonstration that no feasible alternatives exist to observers would have to be made for each category of vessels, in each fishery. The facts of each situation would have to be scrutinized carefully.

4. Can observers be required on board vessels operating in the Fishery Conservation Zone?

The attached letter to Representative Zharoff discusses state authority over state-registered vessels operating in the Fishery Conservation Zone, that zone defined in the Magnuson Fishery Conservation and Management Act as extending from the limit of the 3 mile territorial waters out to 200 miles. Under that analysis, and the recent ruling in F/V Baranof v. State, P.2d ___, Op. No. 2324 (Alaska, Feb. 10, 1984), observers could be required on board state-registered vessels operating in the Fishery Conservation Zone. However, the state would need to be prepared to carry a heavy burden to demonstrate that in a particular fishery, no feasible alternatives exist to onboard observers.

LIS:djc

cc w/attachment:

Don Collinsworth
Steve Pennoyer
Dennis D. Kelso
Ken Parker
Beth Stewart
Department of Fish and Game

Liza McCracken
Katheleen McGuire
Department of Law

KODIAK FISH & GAME ADVISORY COMMITTEE
211 Mission Rd.
Kodiak, Alaska 99615

January 7, 1986

JAN 13 1986,

Alaska State Board of Fish
Box 3-2000
Juneau, Alaska 99802

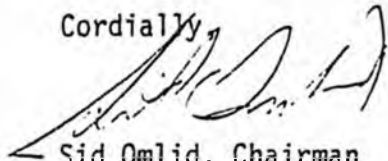
Dear Board Members,

The Kodiak Fish & Game Advisory committee met on January 3, 1986 to discuss time and area closures for trawl gear in king crab sensitive areas. Approximately seventy eight people were in attendance. As mentioned in our January 4 letter to you, the K.A.C. recommends specific time and area closures for hard on the bottom trawling and strongly urges protection of Kodiak's rebuilding king crab stocks.

One important issue discussed was ADF&G funding for observers on trawl vessels to document incidental catch statistics on all species, i.e. salmon, halibut, tanner crab, etc. The K.A.C. voted unanimously, vote 9-0, to put pressure on the ADF&G and the legislature stressing the importance of obtaining funds for observer programs for all fisheries which ADF&G needs to obtain incidental catch information.

It was brought to the K.A.C. attention that \$100,000 in fines from the "Baranof case" was earmarked to be spent on observers. The committee is also aware that in most cases fines from violations are deposited directly into the state's general fund. However, in this case, since the \$100,000 from the "Baranof case" has been specifically earmarked already for use in funding observers, the K.A.C. requests your assistance in assuring this much needed observer money does not get deposited into the General Fund but into the ADF&G observer program.

Cordially,



Sid Omlid, Chairman
Kodiak Fish & Game Advisory Committee

cc Governor Sheffield
Don Collinworth, Commissioner ADF&G
Senator Fred Zharoff
Representative Dave Thompson

KODIAK FISH & GAME ADVISORY COMMITTEE
211 Mission Rd.
Kodiak, Alaska 99615

January 7, 1986

JAN 13 1986,

Alaska State Board of Fish
Box 3-2000
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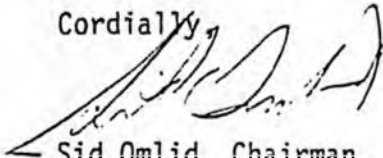
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Cordially,



Sid Omlid, Chairman
Kodiak Fish & Game Advisory Committee

cc Governor Sheffield
Don Collinsworth, Commissioner ADF&G
Senator Fred Zharoff
Representative Dave Thompson



breakwater

by
chris blackburn

The bycatch rate of king crab in the Southwestern Section Tanner crab fishery was two male king crab and 5.5 female king crab per every ten legal-size male Tanner crab, according to Fish and Game observer data.

Observers looked at the contents of 325 pots during the early part of the fishery. Observations were made in the Southwest District because it contains the highest concentrations of king crab.

For every 10 legal-size male Tanner crab taken, observers also recorded an average of six female Tanner crab and 7.5 sublegal Tanner crab taken as bycatch.

The only damage noted by observers was some leg damage to .1 percent of the female king crab.

Fish and Game had invitations from a number of crab vessels willing to take observers, but did not have people to go out on all the vessels willing to carry an observer.

Fish and Game plans to continue monitoring the catch of non-targeted species in both the crab and groundfish fisheries.

Three p.m. today was the official opening of the Shelikof Strait joint venture pollock fishery.

There is no restriction on when American vessels can fish Shelikof Strait pollock — just on when joint ventures can operate. Since a joint venture operates when a U.S. vessel makes a delivery to a foreign vessel, the 3 p.m. starting time is the time when U.S. vessels may make the first deliveries to foreign floating processors.

The fleet heading out Thursday expects a short, swift, "Seven Day Olympics" on the Shelikof Strait pollock biomass before the 40,000 metric ton allocation for joint ventures is taken.

Another 35,000 metric tons of pollock is available outside Shelikof Strait for joint venture operations. It was the North Pacific Fishery management Council's intention to promote some exploratory fishing outside the well-known Shelikof Strait area.

JOINT VENTURE PRICE for pollock went up about \$10 per ton this year. Total price, as usual, varies from venture to venture and according to what other services are paid for or given free.

Because of the weakening of the dollar on the international market, foreign countries buying pollock are paying more dollars, but actually less in their own currency's value than in 1985.

However, not long ago U.S. vessels vying for joint ventures were blamed for decreasing exvessel prices in U.S. dollars. This year's increase is attributed not only to a weakening dollar, but to more demand for U.S. catcher boats than there are U.S. draggers to fish.

The increased demand for U.S. draggers is the result of increased joint venture purchases by both Korean and Japanese companies — purchases made to protect directed fishing allocations.

THE NATIONAL WEATHER SERVICE is improving the model used to forecast icing conditions for mariners. Between Feb. 16 and 28 the service intends to collect icing condition reports from vessels calling in their weather to Peggy Dyson. The on-grounds icing reports will be used to refine the forecasting model.

REQUIRING FOREIGN fishing vessels, including transport and joint venture processors, to stop in a U.S. port for a Coast Guard inspection before starting fishing and again before leaving U.S. waters would double the cost of enforcing the 200-mile limit and cause traffic jams at the inspection docks, according to Rear Adm. Robert Lucas, commander of the 17th Coast Guard District.

Lucas' conclusions were made in a letter to the North Pacific

This is the type of information needed to manage our fishery resources.

DW



breakwater

by
chris blackburn

National Marine Fisheries Service in Washington, D.C., managed to file an emergency order with the Federal Register to close the Eastside Kodiak Tanner crab fishery at 1 p.m. Friday, 26 hours after the fishery had been scheduled to close.

The NMFS staff in Juneau made their best effort to get the emergency order through and had to rework the justification for the closure until it suited attorneys in D.C.

"The problem was the faulty regulations we have involving the criteria for justifying a field order," said Jim Brooks with NMFS in Juneau.

"Our regulations require that the condition of the stock must be different from that at the opening of the season. When we can't show that, we can't issue a field order," Brooks said.

Since the quota was low and effort heavy, the decision to close had to be made on minimal data — a problem which will occur in any short season fishery.

THE SOUTHEAST SECTION and Westside Section close to Tanner crab fishing at noon Wednesday. Brooks said he thought the problems with issuing a federal closure announcement had been overcome.

"I think we've overcome the objections that held things up last time and are moving along okay," he said.

NMFS plans to rewrite the criteria which allow a regional director to issue a field order so that closures won't be delayed in the future.

THROUGH SUNDAY, 3.3 million pounds of Tanner crab had been delivered from the Eastside Section and fish tickets are still being tallied. Preseason projection was for 2.2 million pounds.

Deliveries from the Northeast Section totaled 703,231 pounds. Preseason projection was 1 million pounds.

Deliveries from the Southeast Section, which closes Wednesday, totaled 924,913 pounds. The preseason projection was 1.8 million pounds. From the Westside, which also closes Wednesday, deliveries totaled 142,385 pounds. Preseason projection was 200,000 pounds.

In the Southwest Section 237,684 pounds had been delivered. Preseason projection was 900,000 pounds.

Projection for the North Mainland was 1.4 million pounds. Through Sunday deliveries totaled 148,211 pounds. Weather and high tides which cover the pot buoys have slowed catches.

So far no deliveries have been reported from the South Mainland and the Semidi sections.

THROUGH SUNDAY an estimated 1.8 million pounds of the 3.9 million pound South Peninsula Tanner crab quota had been delivered.

FISH AND GAME had an observer aboard a commercial crab vessel working in the Southeast area. Nearly a dozen crab vessels volunteered to take observers, but Fish and Game didn't have people to spare.

SO FAR EIGHT shorebased plants in the Kodiak Island area are looking for vessels to deliver groundfish, according to Al Burch, manager of the Alaska Draggers Association.

Also looking for vessels are two joint venture operations and one U.S. floating processor.

Most of the operations are looking for two or three species from the menu of black cod, Pacific cod, pollock and flatfish. It appears that the groundfish industry is developing to the point where draggers will be able to sell most of their catch instead of throwing pollock overboard and keeping cod one trip and then on the next trip keeping cod and throwing pollock overboard.

IN ORDER TO ASSURE that the regulations requiring the closing of all fisheries when the black cod quota is taken doesn't stop the development of groundfish, the North Pacific Fishery Management Council recommended that the NMFS regional director close the black cod fishery in time to leave enough fish for a bycatch in both the trawl and longline fisheries.