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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 22, 1985

The Honorable Don Bennett
President of the Senate
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Senator Bennett:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill authorizing observers to be on board fishing vessels. Onboard observer programs would enhance management of particular fisheries, primarily by facilitating information-gathering, and additionally by improving enforcement effectiveness.

Some Alaska fisheries include a large component of vessels that rarely or never enter Alaskan ports, while vessels in some other fisheries have much more contact with the shore. For example, the following table provides a comparison of processing activities for two crab and ground-fish fisheries.

<u>Fishery</u>	<u>Year</u>	<u>Total Harvest in Millions of Pounds</u>	<u>Percent Processed Off Shore</u>	<u>Percent Processed On Shore</u>
Kodiak king crab	1982	8.7	30	70
St. Mathews king crab	1982	8.8	100	0
Westward Pacific cod	1984	79.9	60	40
S.E. Alaska sable fish	1984	7.7	10	90

When the majority of the catch is processed off shore, it is virtually impossible to monitor the fishery without observers on board the vessels. Without the monitoring, it is impossible to gather data needed to estimate factors such as population abundance, recruitment, exploitation rate, life history, and by-catch. This information is

essential to proper management to maintain the sustained yield and attain the best yield for the industry.

If vessels in a particular fishery are required to allow observers on board, collection of necessary data and the accompanying increase in enforcement effectiveness will result because of the systematic coverage. The attorney general has concluded that an onboard observer program is constitutionally permissible, as discussed in the attached memorandum, 1984 Inf. Op. Att'y Gen. (April 26; 366-46784). This conclusion is based, in part, on the fact that fishing is such a heavily regulated industry, as explained in the attached letter, 1983 Inf. Op. Att'y Gen. (June 10; 366-595-83).

we do
not have

In drafting the attached bill, consideration was given to the factors discussed in those attorney general's opinions in analyzing the legality of an onboard observer program. The bill specifically states that no program can begin without a written finding by the Board of Fisheries that such a requirement is the only feasible data gathering or enforcement mechanism available for a particular fishery. This will ensure that programs are not imposed on fisheries where other methods would suffice. Further, the bill requires that the Department of Fish and Game implement any program in as unintrusive and predictable a manner as practicable. Recording predetermined data about catches and operations on forms, for example, would not intrude greatly into the operations aboard a vessel. Predictability will be enhanced by having the observers' schedules, and information on the scope of their duties, available in advance to the vessels in a fishery subject to an onboard observer program. Further, the bill specifically declares that no search warrant, criminal or administrative, will be required in the implementation of a program, since the process of obtaining one would be so cumbersome as to defeat the purpose of the program.

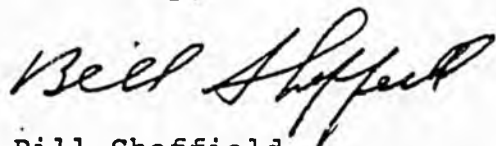
The establishment of an onboard observer program in any fishery will generate costs to the state, including administrative costs, and costs related to the transportation, housing, and salaries of observers. The bill would authorize the Department of Fish and Game to establish fees not to exceed the costs of the program, to be paid by the operators of all vessels in the affected fishery. The fees would be deposited in the general fund and the Department of Fish and Game would request appropriations for the observer programs through the regular budgetary process.

The bill would authorize the Board of Fisheries to require, in a particular fishery, observers on board fishing vessels that are registered under the laws of the state. "Fishing vessel" is defined by reference in the bill to include catcher/processors and floating processors. "Registered under the laws of the state" is defined by reference in the bill to mean that a vessel license has been obtained, which is required of any vessel "taking or attempting to take fish or transporting fish which have been taken or any operation of a vessel aiding or assisting in the taking or transportation of fish..." 5 AAC 39.120(a)(2). See also AS 16.05.475.

Thus, a vessel may be registered under the laws of the state although it does not fish in state waters. The state could have a clear interest in having observers on board such vessels, as well as those that fish within three miles of our shore. The state has an interest in having observers on board vessels that either (1) only fish in the fishery conservation zone (FCZ), (2) only fish within three miles of shore, or (3) fish both because the fish stocks do not recognize those boundaries and freely migrate across them. The ability to observe the total fishing effort is necessary in order to develop an overall picture of the fishery, including the levels and locations of fishing effort, stock abundance, and migration. Anything else would not allow consistent management over the range of the targeted stocks.

Onboard observers are required under the Magnuson Fishery Conservation and Management Act for all foreign vessels operating within the fishery conservation zone. 16 U.S.C. sec. 21. Further, U.S. Department of Commerce regulations requiring federal observers to be stationed on vessels in the domestic tuna fishery were upheld in Balelo v. Baldrige, 724 F.2d 753 (9th Cir. 1984), as discussed in the attached memorandum, 1984 Inf. Op. Att'y Gen. (April 26; 366-467-84). The concept has proved useful and workable in other fisheries already. Specifically authorizing the Board of Fisheries to require onboard observers in particular fisheries under the conditions set out in this bill will go far to enhance state management abilities, without imposing impermissible burdens upon the participants in the fishery.

Sincerely,



Bill Sheffield
Governor

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: SB 79
 Title: An Act Authorizing the Board of Fisheries to Est. Observer Prog.
 Sponsor: Rules Committee
 Requestor: Governor
 Date of Request: _____

FISCAL DETAIL

Agency Affected: Department of Fish and Game
 Program Category Affected: Fisheries Resources Conservation
 BRU, Program or Subprogram(s) Affected: Commercial Fisheries BRU and Component

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES		720.0	763.2	809.0	857.5	909.0
200 TRAVEL		16.5	17.5	18.5	19.7	20.8
300 CONTRACTUAL		73.5	77.9	85.9	91.1	96.6
400 SUPPLIES		17.3	18.3	20.6	26.9	23.2
500 EQUIPMENT		7.0	6.0	-0-	-0-	-0-
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		834.3	882.9	934.0	990.2	1049.6

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

GENERAL FUND		834.3	882.9	934.0	990.2	1049.6
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		1	1	1	1	1
PART-TIME		24	24	24	24	24
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

(please see attached page)

Prepared By: Greg Thornburgh

Division: Commercial Fisheries

Phone: 465-4210

Date: 11/2/84

Approved by Commissioner: On Beleneworth

Agency: _____

Date: 12-20-84

Distribution (by Agency preparing fiscal note):

Legislative Finance

Legislative Sponsor

Requestor

Office of Management and Enterprise

Analysis:

In recent years, catcher/processors and mobile processors have played an ever increasing role in "on-the-grounds" processing of shellfish resources in Alaska. The development of this new segment of the industry has created severe resource management problems. These include:

- 1) The inability to inspect catch leads to the high probability that undersize or female crab are being processed illegally.
- 2) Catch may be taken from closed waters, then transported to and processed within areas open to fishing.
- 3) Vital biological data that are required to assess stock status and set harvest goals, such as species composition, size, sex ratio, and age, cannot be obtained from the harvest.

Increment #43 - Shellfish Fishery Observers. Funding is requested to monitor the harvest to ensure compliance with regulations and obtain needed biological data. Specifically, the program funds: 1) salary support to place observers on board catcher processors and floating processors, 2) transportation costs for observers to meet vessels at ports of departure, 3) costs for reimbursing vessel owners for provided room and board, 4) salary support and associated costs for a single fisheries biologist to administer, compile, and provide data collected to regional fishery managers and scientists.

Cost projections beyond FY 86 are based on FY 86 costs increased 6% per year for inflation. A total of 25 new positions (24 F&G Technician IIIs and 1 Fishery Biologist I) will be created by the project.

This project is not expected to have a fiscal impact on local governments. If fee provisions of the proposed bill (Section 2, Part 14D) are enacted, economic impacts on the state's budget will also be minimal. In the absence of a fee structure to recover costs, however, additional costs to the state's general fund will exceed \$900.0 per year. }

1.	POSITION TITLE Fish and Game Technician III (24 positions)	RANGE/STEP 11A	DARG. UNIT GGU	PAGE/LINE	COV.	APPROV.	DISAPP.	
2.	TYPE OF POSITION Seasonal	STAFF MONTHS 123.8	RP NUMBER	PCN NUMBER (see below)	BRU PRIORITY 8	LOCATION Dutch Harbor	ELECTION DISTRICT 26 & 27	LEG.
3.	CONTINUATION LEVEL	ADDITION	X					
4.	TYPE OF EXPENDITURE		AMOUNT					
	1	2	3					
	PERSONAL SERVICES							
5.	Salary	517.9						
6.	Benefits	148.3						
7.	Supplemental Benefits							
8.	XXXXXX (Total cost this position =		\$666.2)					
9.	TOTAL PERSONAL SERVICES	01	720.0					
10.	Travel	02	16.5					
11.	Contractual	03	73.5					
12.	Commodities	04	17.3					
13.	Equipment	05	7.0					
14.	Other							
15.	TOTAL COST		834.3					
JUSTIFICATION								
<p>These are the 24 seasonal observers for the shellfish fishery observer program. They will provide on-board monitoring and sampling of the commercial catch, primarily on catcher/processor vessels. This program will function in the Aleutian and Bering seas.</p> <p>The line item detail reflects the total FY 86 costs of this project, as requested in increment #43, Shellfish Fishery Observers.</p> <p>Position PCNs: N188 through N192 N194 through N212</p>								
16.	RECEIPT CODE	FUNDING SOURCE						
17.		Federal Receipts	1002					
18.		G.F. Match	1003					
19.		General Funds	1004	834.3				
20.		I-A Receipts	1005					
21.		Program Receipts	1028					
		Other						
FOR BSM USE ONLY								
KEY NUMBER _____								

REQUEST FOR
NEW POSITION

AGENCY Department of Fish and Game

PROGRAM Fisheries Resource Conservation

BRU Commercial Fisheries

COMPONENT Commercial Fisheries

FY 86

Page 1 of 2

Revised Date _____

1.	POSITION TITLE Fishery Biologist II (1 position)				RANGE/STEP 16A	DARG. UNIT GGU	PAGE/LINE	COV.	APPROV.	DISAPP.
2.	TYPE OF POSITION Full Time	STAFF MONTHS 12	RP NUMBER	PCN NUMBER N213	BRU PRIORITY 8	LOCATION Dutch Harbor	ELECTION DISTRICT 26 & 27	LEG.		
3.	CONTINUATION LEVEL				JUSTIFICATION					
4.	TYPE OF EXPENDITURE			AMOUNT						
	1	2	3							
	PERSONAL SERVICES									
5.	Salary	41.4								
6.	Benefits	12.4								
7.	Supplemental Benefits									
8.	XXXXXX (Total this position = \$53.8)									
9.	TOTAL PERSONAL SERVICES	01	720.0							
10.	Travel	02	16.5							
11.	Contractual	03	73.5							
12.	Commodities	04	17.3							
13.	Equipment	05	7.0							
14.	Other									
15.	TOTAL COST		834.3							
16.	RECEIPT CODE	FUNDING SOURCE								
17.		Federal Receipts 1002								
18.		C.F. Match 1003								
19.		General Funds 1004		834.3						
20.		I-A Receipts 1005								
21.		Program Receipts 1028								
		Other								
FOR BSM USE ONLY KEY NUMBER _____										

New Position Justification

This new fishery biologist II position supervises the shellfish observer program. This position will be responsible for hiring observers, coordinating their activities and summarizing and reporting the data collected.

The line item detail reflects the total FY 86 costs of this project, as requested in increment #43, Shellfish Fishery Observers

**REQUEST FOR
NEW POSITION**

AGENCY Department of Fish and Game

PROGRAM Fisheries Resource Conservation

BRU Commercial Fisheries

COMPONENT Commercial Fisheries

Page 2 of 2

Revised Date _____

FY 86

OK

Extend authority - for ability to go past 3 miles

Introduced: 1/22/85
Referred: Resources and Finance *OK*

① question of authority
② fees - ability to generate up to
③ targeted areas
④ rights of seizure - etc

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

1 IN THE SENATE

open
? Revenue not yet established

SENATE BILL NO. 79

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IN THE LEGISLATURE OF THE STATE OF ALASKA
FOURTEENTH LEGISLATURE - FIRST SESSION
A BILL

⑤ Drafting not consistent with all in certain areas

6 For an Act entitled: "An Act authorizing the Board of Fisheries to estab-
7 lish onboard observer programs; and providing for an
8 effective date."

⑥ Court suit
⑦ Reg in place

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

10 * Section 1. FINDINGS. The legislature finds that, in particular fish-
11 eries, observers on board fishing vessels would greatly enhance management,
12 primarily by facilitating information gathering, and additionally by im-
13 proving compliance. In fact, in those fisheries, onboard observers may be
14 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, which 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, onboard observer programs in
21 particular fisheries if the board determines that it (1) is the only prac-
22 tical data gathering or enforcement mechanism, (2) will not unduly disrupt
23 the 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. No search warrant, criminal or administrative, should
28 be required in the implementation of a program, since the process of ob-
29 taining one would be so cumbersome as to defeat the purpose of the program.

This is not a searching program its a monitoring of catch.

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

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

5 (1) assist the United States Fish and Wildlife Service in
6 the enforcement of federal laws and regulations pertaining to fish and
7 game;

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

13 (3) design and construct hatcheries, pipelines, rearing
14 ponds, fishways, and other projects beneficial for the fish and game
15 resources of the state;

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

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

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

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

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

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

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

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

14 (A) the optimum yield from the harvest of the species
15 has not been reached;

16 (B) a substantial portion of the allowable harvest of
17 the species has been allocated to fishing vessels of a foreign
18 nation; or

19 (C) a commercial harvest of the fish species has
20 recently developed;

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

23 (13) enter into cooperative agreements with agencies of the
24 federal government, educational institutions, or other agencies or
25 organizations, when in the public interest, to carry out the purposes
26 of this title except AS 16.51 and AS 16.52;

27 (14) implement an onboard observer program authorized by the
28 Board of Fisheries under AS 16.05.251(a)(12); any implementation

29 (A) must be as unintrusive to vessel operation as

Program exp.

Program exp.

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practicable;

(B) must make scheduling and scope of observers' activities as predictable as practicable;

(C) does not require criminal or administrative search warrants; and

(D) may include a requirement that the operators of all vessels registered under the laws of the state that participate in that fishery pay a fee specified by the commissioner, which may not exceed the costs of operating the onboard observer program.

are designed to cover

* Sec. 3. AS 16.05.251(a) is amended to read:

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

(1) setting apart fish reserve areas, refuges and sanctuaries in the waters of the state over which it has jurisdiction, subject to the approval of the legislature;

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

(3) setting quotas, bag limits, harvest levels, and sex and size limitations on the taking of fish;

(4) establishing the means and methods employed in the pursuit, capture and transport of fish;

(5) establishing marking and identification requirements for means used in pursuit, capture and transport of fish;

(6) classifying as commercial fish, sport fish or predators or other categories essential for regulatory purposes;

(7) watershed and habitat improvement, and management, conservation, protection, use, disposal, propagation and stocking of

Highly relevant to shore collection / processing water
Ground fish improvement permit

1 fish;

2 (8) investigating and determining the extent and effect of
3 disease, predation, and competition among fish in the state, exercis-
4 ing control measures considered necessary to the resources of the
5 state;

6 (9) prohibiting and regulating the live capture, posses-
7 sion, transport, or release of native or exotic fish or their eggs;

8 (10) establishing seasons, areas, quotas and methods of
9 harvest for aquatic plants;

10 (11) establishing the times and dates during which the
11 issuance of fishing licenses, permits and registrations and the trans-
12 fer of permits and registrations between registration areas is al-
13 lowed; however, this paragraph does not apply to permits issued or
14 transferred under AS 16.43;

15 (12) requiring, in any fishery, observers on board fishing
16 vessels, as defined in AS 16.05.475(d), which are registered under the
17 laws of the state, as defined in AS 16.05.475(c), upon a written
18 determination that an onboard observer program

19 (A) is the only practical data gathering or enforce-
20 ment mechanism for that fishery;

21 (B) will not unduly disrupt the fishery; and

22 (C) can be conducted at a reasonable cost.

23 * Sec. 4. AS 16.05.940 is amended by adding a new paragraph to read:

24 (28) "fishery" means the commercial taking of a specific
25 fishery resource in a specific administrative area with a specific
26 type of gear; however, the Board of Fisheries may designate a fishery
27 to include more than one specific administrative area, gear type, or
28 fishery resource; for the purposes of this paragraph "gear" and "type
29 of gear" are defined as in AS 16.43.990.

*not
included*

1 * Sec. 5. This Act takes effect immediately in accordance with AS 01.-
2 10.070(c).
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The onboard observer program authorized by this bill would monitor commercial fish catches that otherwise are nearly impossible to measure accurately. The area of immediate concern is the volume of undersize and female crab lost to illegal processing.

AUTHORITY - This bill would extend Board of Fisheries authority specifically to include the requiring of observers on vessels where necessary to control harvests.

The provisions of this bill would apply to all vessels registered under state laws and would be applicable both within state waters as well as within the FCZ (from 3-200 miles).

State jurisdiction to impose this requirement within state waters is clear.

State authority over non-residents beyond the 3 mile limit, in this regard, is based on legal precedent rather than constitutional directive. Precedent for state action derives from the critical need to control overall harvests of free ranging species where no federal plan or regulation is in place in the impacted federal waters. This need has been recognized by federal courts and, as discussed by the AG in appended memos, the state would need to demonstrate that no feasible alternatives exist to onboard observers. The language of SB 79 has been designed to meet this test.

FISHERIES AFFECTED - The proposed statute would apply to all fisheries but its criteria for justifying onboard observers are strict enough to preclude hasty or unreasonable expansion of the concept. Salmon fisheries, for example, are adequately monitored by other means.

FEDERAL OVERLAP - The federal government utilizes an extensive onboard observer program among foreign fisheries, as provided for in the MFCMA. The feds are considering amendments to that Act that will extend the program to domestic fleets. Federal amendments will not occur within a time-frame that can meet the state's present need. If federal coverage does become possible in some future year, the state and fed programs could be coordinated to preclude duplication. This would not require legislative action.

COSTS - One provision (Sec 16.05.050 (14) (D)) would allow ADFG to recover program costs through fees. The proposed language is permissive in this regard. Committee notes indicate some interest in amending this language to clarify that fees will be designed to cover costs.

ADF&G projections indicate annual program costs of .8 to 1 million dollars.

PUBLIC REACTION - Secondhand reports indicate that fishermen recognize that observers may be necessary to curtail the substantive illegal loss occurring in the crab fishery.

There will be valid complaints, however, that an extra person on vessels is inconvenient. In this regard, SB 79 would require ADF&G to make the program as unintrusive to fishing activities as possible.

There will be objections to fees sufficient to offset program costs. The question of recovering management costs through user fees is increasingly relevant in all fields of resources management. In this time of fiscal concern, the establishment of realistic fees offers a starting point in generating public awareness of the cost of doing business.

There could be a legal challenge testing state jurisdiction over non-residents in the FCZ. As discussed above, however, recent precedent favors the state. Fisheries managers believe it is timely, in this situation, for the state to assert its control over state resources that are being seriously impacted.

ENDORSEMENT - ADF&G, Board of Fisheries, and the North Pacific Fisheries Management Council all endorse the proposed onboard observer program. The Council supports this state action in recognition of the urgency of the situation.

OPPOSITION - None known except for the possibilities discussed above. I did not solicit input from fishermen's groups since I did not know the status of the committee's public hearing process,

(Information sources used were the above agencies and AG correspondence of 6/10/83 and 4/26/84)

Introduced: 1/22/85
Referred: Resources and Finance

? on drafting

? on Auth

? on targeted areas

? on employee status

? on fees (program receipts)

what shares on rec
BY THE RULES COMMITTEE BY
REQUEST OF THE GOVERNOR

1 IN THE SENATE

SENATE BILL NO. 79

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

impact on
REGS BF

6 For an Act entitled: "An Act authorizing the Board of Fisheries to estab-
7 lish onboard observer programs; and providing for an
8 effective date."

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28 be required in the implementation of a program, since the process of ob-
29 taining one would be so cumbersome as to defeat the purpose of the program.

Z
Fed inv.
help pay

60' on board
necessary
off shore
safe

size of
boat type
& position

appeal mechanism -1-

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7 game;

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9 purchase, or lease, or other lawful means, land, buildings, water,
10 rights-of-way, or other necessary or proper real or personal property
11 when the acquisition is in the interest of furthering an objective or
12 purpose of the department and the state;

13 (3) design and construct hatcheries, pipelines, rearing
14 ponds, fishways, and other projects beneficial for the fish and game
15 resources of the state;

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

21 (5) collect, classify, and disseminate statistics, data and
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18 nation; or

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

23 (13) enter into cooperative agreements with agencies of the
24 federal government, educational institutions, or other agencies or
25 organizations, when in the public interest, to carry out the purposes
26 of this title except AS 16.51 and AS 16.52;

27 (14) implement an onboard observer program authorized by the
28 Board of Fisheries under AS 16.05.251(a)(12); any implementation

29 (A) must be as unintrusive to vessel operations as

1 practicable;

2 (B) must make scheduling and scope of observers'
3 activities as predictable as practicable;

4 (C) does not require criminal or administrative search
5 warrants; and

6 (D) may include a requirement that the operators of
7 all vessels registered under the laws of the state that partici-
8 pate in that fishery pay a fee specified by the commissioner,
9 which shall be designed to cover
10 which may not exceed the costs of operating the onboard observer
11 program.

11 * Sec. 3. AS 16.05.251(a) is amended to read:

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

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

18 (2) establishing open and closed seasons and areas for the
19 taking of fish;

20 (3) setting quotas, bag limits, harvest levels, and sex and
21 size limitations on the taking of fish;

22 (4) establishing the means and methods employed in the
23 pursuit, capture and transport of fish;

24 (5) establishing marking and identification requirements
25 for means used in pursuit, capture and transport of fish;

26 (6) classifying as commercial fish, sport fish or predators
27 or other categories essential for regulatory purposes;

28 (7) watershed and habitat improvement, and management,
29 conservation, protection, use, disposal, propagation and stocking of

1 fish;

2 (8) investigating and determining the extent and effect of
3 disease, predation, and competition among fish in the state, exercis-
4 ing control measures considered necessary to the resources of the
5 state;

6 (9) prohibiting and regulating the live capture, posses-
7 sion, transport, or release of native or exotic fish or their eggs;

8 (10) establishing seasons, areas, quotas and methods of
9 harvest for aquatic plants;

10 (11) establishing the times and dates during which the
11 issuance of fishing licenses, permits and registrations and the trans-
12 fer of permits and registrations between registration areas is al-
13 lowed; however, this paragraph does not apply to permits issued or
14 transferred under AS 16.43;

15 (12) requiring, in any fishery, observers on board fishing
16 vessels, as defined in AS 16.05.475(d), which are registered under the
17 laws of the state, as defined in AS 16.05.475(c), upon a written
18 determination that an onboard observer program

19 (A) is the only practical data gathering or enforce-
20 ment mechanism for that fishery;

21 (B) will not unduly disrupt the fishery; and

22 (C) can be conducted at a reasonable cost.

23 * Sec. 4. AS 16.05.940 is amended by adding a new paragraph to read:

24 (28) "fishery" means the commercial taking of a specific
25 fishery resource in a specific administrative area with a specific
26 type of gear; however, the Board of Fisheries may designate a fishery
27 to include more than one specific administrative area, gear type, or
28 fishery resource; for the purposes of this paragraph "gear" and "type
29 of gear" are defined as in AS 16.43.990.

1 * Sec. 5. This Act takes effect immediately in accordance with AS 01.-
2 10.070(c).
3

STATE OF ALASKA

DEPARTMENT OF FISH AND GAME

DIVISION OF BOARDS

APR 26 1985
BILL SHEFFIELD, GOVERNOR

BOX 3-2000
JUNEAU, ALASKA 99802
PHONE: (907) 465-4110

April 22, 1985

The Honorable Arliss Sturgulewski
Chairman, Senate Resources
Alaska State Senate
Pouch V
Juneau, Alaska 99811

Dear Senator Sturgulewski:

The Alaska Board of Fisheries met in Anchorage from March 20-26, 1985, to discuss shellfish regulations and issues. We received many supporting comments from fishermen and industry participants about the on-board observer program.

The crab population has declined in recent years and is being managed in an extremely conservative manner with some area restrictions and total area closures. Testimony indicates that serious violations are probably occurring. Between 1979/1980 - 1981/1982, cases involving one fishing vessel and two catcher processors revealed 682,939 pounds of king crab had been taken from closed areas.

The Alaska Board of Fisheries is extremely concerned about the fragile health of the crab stocks. The observer program would provide another tool to accurately manage these fisheries and minimize violations. It is unfortunate that honest participants have to be penalized because of illegal activities. But in order not to jeopardize these stocks, the Board of Fisheries may have to consider future restrictions, including total closures.

Perhaps ironically, the fledgling bottomfish industry, which was spurred by the failure of many crab fisheries, has generated its own set of problems. For example, in 1984 joint ventures took approximately 59,000 immature king salmon. Nearly 80% of these were taken near Kodiak. This means that these salmon were probably bound for Cook Inlet and Prince William Sound. Given the importance of these fish, we feel it is extremely important to monitor in season harvest so staff can close specific areas to prevent the interception of prohibited species. Without an on-board observer program, the board may have to institute much larger closures which could impair the viability of the trawl fishery, or, absent necessary data, forego any closures and accept the loss of some salmon.

April 22, 1985

The Board of Fisheries would therefore strongly encourage the passage of SB79. We received much positive testimony for this program. Further, it has been our experience that the industry will fully cooperate to solve problems and address these concerns.

Sincerely,

Ben Shivers / for Ron Jolin

Ron Jolin
Chairman
Alaska Board of Fisheries

5879

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UNITED FISHERMEN OF ALASKA

Jack Cadigan
Executive Director
907-586-2820
1-800-478-FISH

FEB 20 1986

Mr. Anthony Calio
NOAA Administrator
U.S. Department of Commerce
14th and Constitutional Ave. N.W.
Washington, D.C. 20730

18 February 1986

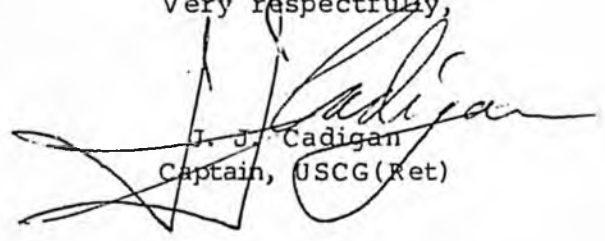
Dear Mr. Calio:

United Fishermen of Alaska have been supporting efforts for better control and enforcement of all fisheries, both foreign and domestic. We today testified in support of legislation before the (Alaska) House Special Committee on Fisheries that would authorize on-board observers for domestic vessels operating in state waters. We plan to continue lobbying hard for this legislation so that it will clear the legislature this session.

The state pilot program has a fiscal tag of \$300,000. This is, however, insufficient to meet what is really needed. We therefore solicit your support for the allocation of \$250,000 submitted by the Alaska office of NMFS for a pilot observer program. This should meld the federal and state governments into creating a multi-funded comprehensive observer program, and set the stage for continued teamwork for a common goal.

Your interest and assistance in this significant proposed step is most appreciated.

Very respectfully,



J. J. Cadigan
Captain, USCG (Ret)

Copy to: Rep. Peter Goll (Ch. Spec Comm. on Fisheries)
Rep Adelheid Herrmann (Ch. House Resources)
Senator Arliss Sturgelewski (Ch. Senate Resources)



BUSINESS • FISHERMEN • PROCESSORS • INDIVIDUALS

ALASKA COASTAL COMMUNITIES ALLIANCE

P.O. Box 382 Kodiak, Alaska 99615 Phone (907) 486-5096

MAR 25 1985

March 21, 1985

Senator Arliss Sturgulewski
Senate Resources Committee
Pouch V (MS 3100)
Juneau, Alaska 99811

Dear Senator Sturgulewski,

The Alaska Coastal Communities Alliance would like to express its support for Senate Bill 79 which would authorize an onboard observer program on certain fishing vessels engaged in Alaskan fisheries. We agree that direct benefits would be derived through enhanced management, more reliable data gathering, and improved compliance.

In addition to the obvious improved enforcement and compliance, the data gathered could certainly aid in the management of a particular fishery or fisheries. New knowledge gained could include, but definitely not limited to; predator-prey relationships between species of different fisheries, the effects that catching non-targeted species (incidental catch) have on one fishery by another fishery, the optimum timing or area of harvesting a given fishery to reduce any impact on other fisheries or to enhance the impact on the primary fishery, the benefits of a total ecological approach to managing a fishery versus a single species approach, and of course many other areas of needed new information.

Of particular concern to many fishermen and processors lately is the predator-prey and incidental catch relationships between fisheries. Examples of some questions that reflect on these relationships are in the following sentences. If one fishery targets on and harvests a predator species, does it directly enhance the yields and fortunes of another fishery engaged in harvesting a prey species? If one fishery takes a proportionately high incidental catch of a species being targeted on by another fishery, does it significantly detract from the yields and fortunes of the other fishery? We feel these and other questions could best be answered through the implementation of an onboard observer program.

Our support for the onboard observer program is not without qualifications however. First and foremost among these is the addition of subsection 14(D) to section 2AS 16.05.050 dealing with fees being assessed to the operators of vessels within the given fishery to pay for the onboard observer program. We are adamant and unanimous in our opposition to the assessment of any new and extraneous fees to cover the cost of this program. We feel the operators of these vessels and processors are currently paying sufficient fees (such as gear, vessel, and crew licenses, and etcetera) and taxes to support this and other management programs. We further feel that with the improved compliance resulting from this program the State should realize particular cost

Senator Arliss Sturgulewski
March 21, 1985
Page 2

savings through reduced enforcement burden and overhead. Again, we ask that the offending 14(D) subsection be stricken from this bill.

A related area of concern is the increased operational costs incurred by the vessel operator due directly to the onboard observer program. We feel an actual reimbursement to these vessel operators needs to be considered. An example being the cost of food. Some operators pay insurance premiums based on crew size and with the addition of an observer onboard could be liable for increased insurance costs. Costs which we might add are already out of reach of some vessel operators and owners. In the case of insurance, simple reimbursement of increased premiums is not enough. We feel that the State should bear the full liability for the observer beyond the gross negligence of the operator or vessel owner. Some sort of hold-harmless clause protecting the vessel operators from frivolous or occupational related lawsuits needs to be considered to make this bill palatable to the majority of our fishermen.

If the above concerns are addressed then we feel we can be wholeheartedly behind the passage of Senate Bill 79. This bill properly enacted could go a long ways toward enhancing and protecting the various fisheries of Alaska.

In closing we wish to thank you for taking the time to consider this letter and wish you the very best in your decisions and deliberations. Again, thank you.

Sincerest Regards,
ALASKA COASTAL COMMUNITIES ALLIANCE



Slim M. Jorgensen
Member-Director

cc: Alliance's Member Organizations
Representative David W. Thompson
Senator Fred F. Zharoff

January 22, 1985

85

SB 78 cont'd

In addition, the bill fills an apparent statutory omission regarding the bulk fuel revolving fund and the residential energy conservation loan fund programs, by granting statutory authority to the Department of Commerce and Economic Development to adopt regulations necessary for these programs (secs. 12 and 14 of the bill, respectively).

This bill makes a number of significant improvements to the state loan programs, particularly the state commercial fishing loan program. I urge your support of and prompt action on this measure.

Sincerely,

Bill Sheffield
Governor

SB 79

SENATE BILL NO. 79 by the Rules Committee by request of the Governor, entitled:

"An Act authorizing the Board of Fisheries to establish onboard observer programs; and providing for an effective date."

was read the first time and referred to the Resources Committee and the Finance Committee.

Fiscal note appears in Supplement No. 6.

Governor's transmittal letter dated January 22:

Dear Senator Bennett:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill authorizing observers to be on board fishing vessels. Onboard observer programs would enhance management of particular fisheries, primarily by facilitating information-gathering, and additionally by improving enforcement effectiveness.

Some Alaska fisheries include a large component of vessels that rarely or never enter Alaskan ports, while vessels in some other fisheries have much more contact with the shore. For example, the following table provides a comparison of processing activities for two crab and groundfish fisheries.

SB 79 cont'd

<u>Fishery</u>	<u>Year</u>	<u>Total Harvest in Millions of Pounds</u>	<u>Percent Processed Off Shore</u>	<u>Percent Processed On Shore</u>
Kodiak king crab	1982	8.7	30	70
St. Mathews king crab	1982	8.8	100	?
Westward Pacific cod	1984	79.9	60	40
S.E. Alaska sable fish	1984	7.7	10	90

When the majority of the catch is processed off shore, it is virtually impossible to monitor the fishery without observers on board the vessels. Without the monitoring, it is impossible to gather data needed to estimate factors such as population abundance, recruitment, exploitation rate, life history, and by-catch. This information is essential to proper management to maintain the sustained yield and attain the best yield for the industry.

If vessels in a particular fishery are required to allow observers on board, collection of necessary data and the accompanying increase in enforcement effectiveness will result because of the systematic coverage. The attorney general has concluded that an onboard observer program is constitutionally permissible, as discussed in the attached memorandum, 1984 Inf. Op. Att'y Gen. (April 26; 366-46784). This conclusion is based, in part, on the fact that fishing is such a heavily regulated industry, as explained in the attached letter, 1983 Inf. Op. Att'y Gen. (June 10; 366-595-83).

In drafting the attached bill, consideration was given to the factors discussed in those attorney general's opinions in analyzing the legality of an onboard observer program. The bill specifically states that no program can begin without a written finding by the Board of Fisheries that such a requirement is the only feasible data gathering or enforcement mechanism available for a particular fishery. This will ensure that programs are not imposed on fisheries where other methods would suffice. Further, the bill requires that the Department of Fish and Game implement any program in as unintrusive and predictable a manner as practicable. Recording predetermined data about catches and operations on forms, for example, would not intrude greatly into the operations aboard a vessel. Predictability will be enhanced by having the observers' schedules, and information on the scope of their duties, available in advance to the vessels in a fishery subject to an onboard observer program. Further, the bill specifically declares that no search warrant, criminal or administrative, will be required in the implementation of a program, since the process of obtaining one would be so cumbersome as to defeat the purpose of the program.

SB 79 cont'd

The establishment of an onboard observer program in any fishery will generate costs to the state, including administrative costs, and costs related to the transportation, housing, and salaries of observers. The bill would authorize the Department of Fish and Game to establish fees not to exceed the costs of the program, to be paid by the operators of all vessels in the affected fishery. The fees would be deposited in the general fund and the Department of Fish and Game would request appropriations for the observer programs through the regular budgetary process.

The bill would authorize the Board of Fisheries to require, in a particular fishery, observers on board fishing vessels that are registered under the laws of the state. "Fishing vessel" is defined by reference in the bill to include catcher/processors and floating processors. "Registered under the laws of the state" is defined by reference in the bill to mean that a vessel license has been obtained, which is required of any vessel "taking or attempting to take fish or transporting fish which have been taken or any operation of a vessel aiding or assisting in the taking or transportation of fish..." 5 aac 39.120(a)(2). See also as 16.05.475.

Thus, a vessel may be registered under the laws of the state although it does not fish in state waters. The state could have a clear interest in having observers on board such vessels, as well as those that fish within three miles of our shore. The state has an interest in having observers on board vessels that either (1) only fish in the fishery conservation zone (FCZ), (2) only fish within three miles of shore, or (3) fish both because the fish stocks do not recognize those boundaries and freely migrate across them. The ability to observe the total fishing effort is necessary in order to develop an overall picture of the fishery, including the levels and locations of fishing effort, stock abundance, and migration. Anything else would not allow consistent management over the range of the targeted stocks.

Onboard observers are required under the Magnuson Fishery Conservation and Management Act for all foreign vessels operating within the fishery conservation zone. 16 U.S.C. sec. 21. Further, U.S. Department of Commerce regulations requiring federal observers to be stationed on vessels in the domestic tuna fishery were upheld in Balelo v. Baldrige, 724 F.2d 753 (9th Cir. 1984), as discussed in the attached memorandum, 1984 Inf. Op. Att'y Gen. (April 26; 366-467-84). The concept has proved useful and workable in other fisheries already. Specifically authorizing the Board of Fisheries to require onboard observers in particular fisheries under the conditions set out in this bill will go far to enhance state management abilities, without imposing impermissible burdens upon the participants in the fishery.

Sincerely,

Bill Sheffield
Governor

SB 80

SENATE BILL NO. 80 by the Rules Committee by request of the Governor, entitled:

"An Act relating to the number of psychiatrists or psychologists appointed to examine a criminal defendant; and providing for an effective date."

was read the first time and referred to the Health, Education and Social Services Committee, the Judiciary Committee and the Finance Committee.

Fiscal note is zero. Analysis by Richard I. Pegues, Director, Administrative Services, Department of Law: "This bill would allow a criminal defendant and the prosecuting attorney to waive the requirement that the court appoint two qualified psychiatrists or forensic psychologists to examine certain defendants. If that requirement is waived, the court would only have to appoint one psychiatrist or psychologist, saving considerable expense on the part of the Division of Mental Health and Developmental Disabilities. This bill will not have a fiscal impact on the Department of Law's operations."

Governor's transmittal letter dated January 22:

Dear Senator Bennett:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that allows a criminal defendant and prosecuting attorney to waive the requirement that the court appoint two qualified psychiatrists or forensic psychologists to examine certain criminal defendants. If that requirement is waived, the court would only have to appoint one such psychiatrist or psychologist.

Under present law (AS 12.47.070(a)), if a defendant has filed notice of intent to rely on the defense of insanity or notice of intent to rely on evidence tending to negate a culpable mental state; if there is reason to doubt the defendant's fitness to proceed; or if there is reason to believe that a mental disease or defect of the defendant will otherwise become an issue in the case, the court is required to appoint at least two psychiatrists or psychologists to examine the defendant. The waiver authorized by this bill would avoid unnecessary duplication in cases in which the prosecution is satisfied with the appointment of a single psychiatrist, and the defendant does not wish to undergo more than one court-ordered examination. This waiver will be especially helpful in cases in which two state psychiatrists from the Alaska Psychiatric Institute would be appointed to perform the examinations.

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.

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

STATE OF ALASKA

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

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. Van Spaandonk, 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),

Representative Fred Zharoff
Alaska State Legislature
366-595-83

June 10, 1983
Page 4

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, Hjelle v. Brooks, 377 F. Supp. 430, 441 (D.C. Alaska 1974); State v. Bundrant, 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

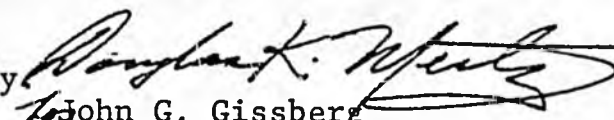
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area of law. Therefore, unless exigent circumstances require immediate action by enforcement personnel, a warrant should be obtained.

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 
for John G. Gissberg
Assistant Attorney General

JGG:djc

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May, 1986

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Jeanie Henry

SENATE RESOURCES COMMITTEE, 1/30/85, 1:35