

MEMORANDUM

TO: Council, SSC and AP Members  
FROM: Clarence G. Pautzke  
Executive Director  
DATE: June 6, 1997  
SUBJECT: Halibut Subsistence



ESTIMATED TIME  
4 HOURS

**ACTION REQUIRED**

Final Review of Halibut Subsistence EA/RIR.

**BACKGROUND**

In April 1997, the Council approved release of the public review draft of the EA/RIR to create and define a subsistence or personal use fishery for halibut in Alaska. In response to public testimony, the Council added an alternative to create a personal use halibut fishery. The EA/RIR was mailed to you on May 21, 1997. The three alternatives and numerous options and suboptions are listed in item C-4(a)

Alternative 2, Option 4, Suboption B and Alternative 3, Option 3, Suboption B address the conflict of Alaska Native subsistence practices and halibut CDQ regulations in Western Alaska. The remaining options under Alternatives 2 and 3 address legalizing existing halibut fishing practices by Alaska rural residents. Approximately 88,663 rural residents in coastal communities with customary and traditional halibut use would be eligible under Alternative 2, Suboption A, of which 42,004 are Alaska Native and 46,659 are non-Native. This option includes all members of Alaska Native Tribes with customary and traditional uses of halibut, regardless of their permanent legal residence.

Suboption A will result in approximately 6,492 more Alaska Native Tribal members than Suboption B because the former includes Alaska Native Groups in four urban areas (Juneau, Ketchikan, Kenai-Soldotna and Ninilchik). Included within this suboption are all other residents of the rural communities in areas with customary and traditional uses in which those Alaska Native Tribes are identified. Suboption A is predicted to result in approximately 1,530,299 lb of halibut removed by subsistence fishermen. About 636,813 lb may be harvested by Alaska Natives, and about 893,486 lb may be harvested by non-Natives. Note, however, that this estimate includes subsistence, personal use, and recreational harvests. It is not possible to differentiate subsistence harvests from among these sources.

Suboption B would qualify approximately 82,171 persons in rural areas with customary and traditional uses of halibut. Of these, 35,512 are Alaska Natives and 46,659 are non-Natives. Suboption B does not include any residents from Juneau, Ketchikan, Kenai-Soldotna, or Ninilchik since these communities are not rural places. About 6,400 fewer Alaska Natives from four urban communities would be excluded from proposed subsistence regulations. Under Suboption B, approximately 1,437,981 lb of halibut may be harvested for non-commercial purposes. About 544,495 lbs may be harvested by Alaska Natives, and about 893,486 lb may be harvested by non-Natives.

Like Suboption A, Suboption C is a mix of group and place-defined eligibility with 88,663 eligible rural residents in 114 rural places and 118 Alaska Native groups, of which 42,004 are Alaska Native and 46,659 are non-Native. It is distinguished from Suboption A in that it would require individual determinations of "who has legitimate subsistence needs" for non-Native residents. Under Suboption C, an estimated 1,530,299 lb of halibut may be harvested. About 636,813 lb may be harvested by Alaska Natives, and about 893,486 lb may be harvested by non-Natives. The harvest by non-Natives may be less under Suboption C since individual eligibility standards for non-Natives may reduce the number of eligible persons.

In determining legal gear, it should be noted that 'true' subsistence or personal use fishing, that is fishing to feed families, is likely to remain at current per capita levels regardless of the type of gear allowed. Whether the physical costs of harvesting halibut arise from rod and reel gear with two hooks or a longline skate with 60 hooks, an individual or family group can consume only a certain amount of halibut. If halibut are truly to be harvested to feed families, those rates of consumption should not increase measurably due to harvesting efficiency. This may be true more of subsistence fishing than personal use fishing since personal use fishing currently does not exist for halibut. Expanded food fishing opportunities by non-Natives in a subsistence fishery, or the creation of a personal use fishery for rural Alaskans or all U.S. citizens may increase halibut harvests and result in reduced recreational halibut harvests.

The Council directed staff to analyze Alternative 3 using the Alternative 2, Option 2 eligibility definitions. An alternative eligibility discussed by the Council was for all U.S. citizens, since the Council can not institute regulations that discriminate between residents of different states. Data recently obtained from ADF&G Sportfish Division showed that approximately 137,100 halibut were harvested by non-chartered anglers in 1995; over 88,000 halibut by Alaska residents, 46,300 halibut by other U.S. residents and 2,800 by non-U.S. citizens. All U.S. citizens would be eligible to harvest halibut under personal use regulations if the Council applied this definition to a halibut personal use fishery (subsistence halibut was attempted to be distinguished from 'sport' halibut). If the Council used a more liberal definition, and both guided and non-guided halibut were eligible for a personal use fishery, then approximately 134,200 halibut by Alaska residents and 184,900 halibut by other U.S. residents in 1995 could have been harvested under personal use regulations.

### Halibut Subsistence Alternatives

- ALTERNATIVE 1. Status quo.
- ALTERNATIVE 2. Allow the harvest of halibut for subsistence.
  - OPTION 1. Define subsistence. Halibut subsistence regulations are needed to allow the continued practice of long-term customary and traditional practices of fishing halibut for food for families in a non-commercial manner for non-economic consumption. Subsistence is defined as 'long-term, customary and traditional use of halibut.'
  - OPTION 2. Define eligibility for halibut subsistence:
    - Suboption A. Members of Alaska Native Federally-recognized Tribes with customary and traditional use of halibut and other permanent rural residents in such Native villages.
    - Suboption B. Alaska rural residents as defined in ANILCA and identified in the table entitled 'Alaska Rural Places and Native Groups with Subsistence Halibut Uses,' and will also include other communities for which customary and traditional findings are developed in the future.
    - Suboption C. Tribal members and other permanent residents of Native villages who have legitimate subsistence needs.
  - OPTION 3. Define legal gear.
    - Suboption A. rod-and-reel gear.
    - Suboption B. hook-and-line gear (including set and hand-held gear) with a range of:
      - 1. 2 hooks;
      - 2. 10 hooks;
      - 3. 30 hooks;
      - 4. 60 hooks.
    - Suboption C. Allow Tribal governments to contract with NMFS to register designated fishermen to fish for the community using:
      - 1. 1 - 3 skates of gear, up to 60 hooks each;
      - 2. any gear type
  - OPTION 4. Define minimum size.
    - Suboption A. No minimum size be imposed for subsistence harvests of halibut.
    - Suboption B. Revise the commercial halibut minimum size regulations to allow the retention of halibut under 32 inches caught with authorized commercial halibut gear in Area 4E ~~for subsistence use.~~

*Table*  
*CDQ Fisheries.*  
*Table further action until Feb 1998 Council mtg.*

**OPTION 5. Allow the customary and traditional trade of subsistence halibut.**

**Suboption A. Prohibit the customary and traditional trade of subsistence-caught halibut.**

**Suboption B. Allow the customary and traditional trade of subsistence-caught halibut limited to:**

- (i) an annual amount of:**
  - 1. \$200;
  - 2. \$400;
  - 3. \$600.
- (ii) and exchanges with:**
  - 1. other Alaska Tribes;
  - 2. any Alaskan rural resident;
  - 3. any Alaskan resident;
  - 4. anyone.

**OPTION 6. Define a daily bag limit of between 2-20 halibut.**

**OPTION 7. Develop cooperative agreements with Tribal, State, and Federal governments to collect, monitor, and enforce subsistence harvests and develop local area halibut subsistence use plans in coastal communities.**

**ALTERNATIVE 3. Provide for personal consumptive use of halibut.**

**OPTION 1. Define legal gear.**

- Suboption A. 1-3 hooks per line**
- Suboption B. 1-3 skates, up to 60 hooks each**
- Suboption C. any gear type.**

**OPTION 2. Define legal gear by area.**

- Suboption A. statewide**
- Suboption B. IPHC halibut regulatory area**
- Suboption C. through local use plans.**

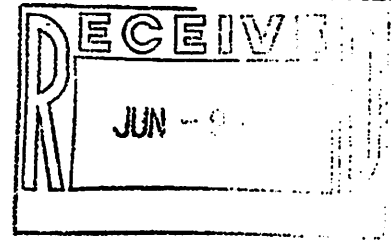
**OPTION 3. Define minimum size.**

- Suboption A. No minimum size be imposed for personal use harvests of halibut.**
- Suboption B. Revise the commercial halibut minimum size regulations to allow the retention of halibut under 32 in caught with authorized commercial halibut gear in Area 4E for personal use.**

**OPTION 4. Define trade and barter of personal use halibut.**

- Suboption A. Prohibit the customary and traditional trade of personal use halibut.**
- Suboption B. Allow the customary and traditional trade of personal use halibut.**

Emil W. Berikoff  
P.O. Box 81  
Unalaska, Alaska 99685



Clarence G. Pautzke  
Executive Director  
North Pacific Fisheries Management Council  
605 West 4th Avenue Suite 306  
Anchorage, Alaska 99501-2252

Dear Mr. Pautzke:

A group of Commercial Fishermen, Sport Fishermen, Tribal Members, and Charter Operators met on May 25th and on June 1, 1997 and agreed to the following for Unalaska Bay Halibut Subsistence Plan.

We presented this plan to the Qawalagin Tribe of Unalaska, They are the Federally recognized Tribe of Unalaska and have their support (letter attached), We also presented it to the City Council of Unalaska, hopefully they will send a representative to the Kodiak meeting to testify.

Thank you for allowing us to comment and provide you with our suggestions on Halibut Subsistence, a very important issue to many people throughout the State.

Sincerely,

  
Emil W. Berikoff

# UNALASKA BAY

## HALIBUT SUBSISTENCE

A Local group of Halibut Commercial Fishermen, Subsistence Fishermen, Sport Fishermen, Tribal Members, and Charter Boat Operators, met at the Parks, Culture and Recreation Facility on May 25th and June 1, 1997 and support the following.

1. Recommend that Option #7 be implemented and given the highest priority, this will give each and every Community the control over it's own Subsistence Fishing, since we all realize that each area of the State is uniquely different.

A. Close Unalaska Bay to Commercial Fishing and Guided Charters.  
( Constantine Bay to Cascades) see map.

Option #7 Develop Cooperative agreements with Tribal, State, and Federal Governments to Collect, monitor, and enforce subsistence harvests and develop local area halibut subsistence use plans in coastal communities.

If the above is not adopted then we will recommend the following

2. Recommend Option #7 for Unalaska

A. Close Unalaska Bay to Commercial and Guided Sport  
(Constantine Bay to Cascades) see map.

3. Adopt Alternate #2 -allow the harvest of halibut for subsistence.  
option 1. define subsistence.

long-term costumery shall be.

a. must maintain a permanent place of residence  
the prior twelve (12) consecutive months in the  
community they are subsidng in to qualify to fish  
halibut subsistence.

4. Option #2

Combine suboptions B & C

suboption B. Alaska rural residents as defined in ANILCA and identified in the table entitled " Alaska Rural Places and Native Groups with subsistence Halibut uses", and will also include other Communities for which customary and Traditional findings are developed in the future.

suboption C. Tribal members and other permanent residents of Native Villages who have a legitimate subsistence need.

Option #3 define legal gear.

~~suboption A. Red and reel gear~~

suboption B Hook and line gear (including set and hand-held gear) with a range of:

2. 10 hooks

suboption C. Allow Tribal Governments to contract with NMFS to register designated fishermen to fish for the Community using:

1. 1-3 skates of gear, up to 60 hooks each.

~~suboption 2. any type of gear.~~

Option #4. define minimum size

suboption A. no minimum size be imposed for subsistence harvests of halibut

Option #5 Allow the customary and Traditional trade of subsistence caught halibut.

~~suboption A. prohibit the customary and traditional trade of subsistence halibut.~~

~~suboption B. allow the customary and traditional trade of subsistence caught halibut limited to:~~

~~(i) an annual amount of:~~

~~1. \$200.~~

~~2. \$400.~~

~~3. \$600.~~

adopt (ii) and exchanges with:

1. other Alaska Tribes
2. any Alaskan rural resident

delete ~~3. any Alaskan resident~~

~~4. anyone.~~

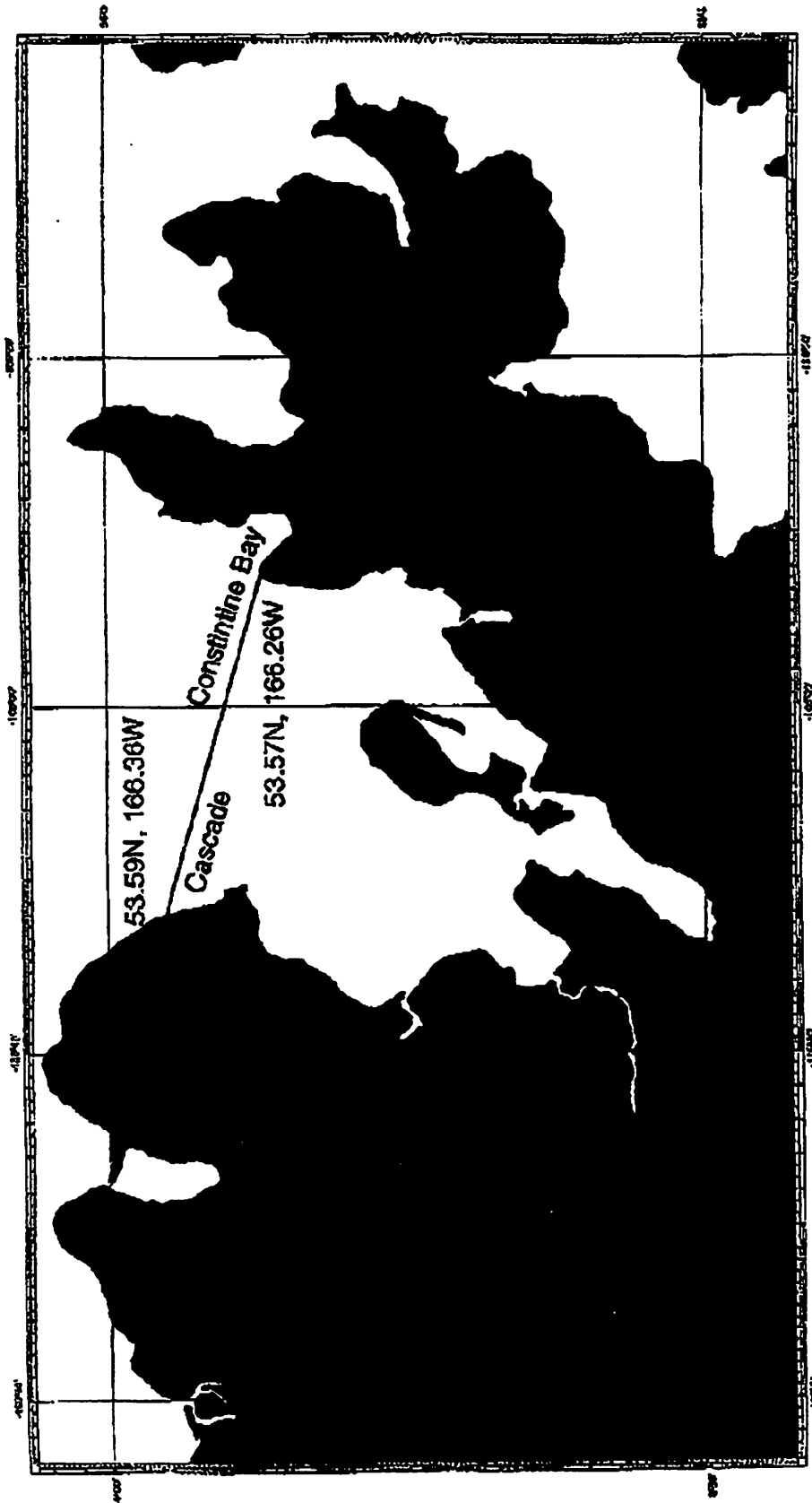
Option #6. define daily bag limit of between 2-20 halibut.

1. daily bag limit of 5 halibut
2. yearly/ seasonal limit of 20 halibut per household.

Option #7 highly recommend that this option be adopted for the State of Alaska and also for the community of Unalaska.

Alternative #3 we recommend that this be deleted in it's entirety.





UNALASKA BAY



# QAWALANGIN

Tribe of Unalaska

Clarence G. Pautzke  
Executive Director  
North Pacific Fisheries Management Council  
605 West 4th Avenue Suite 306  
Anchorage, Alaska 99501-2252

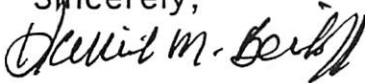
Dear Mr. Pautzke,

The Qawalangin Tribe of Unalaska is in support of the Halibut Subsistence plan for Unalaska Bay. The Tribe has Subsistence Fishing as one of it's highest priorities, it has been a way of life for our people for thousands of years, and expect that the practice will continue.

We would also urge that the Council will look favorably at option #7, so each Community can write their own guidelines for their Subsistence Halibut Fishery.

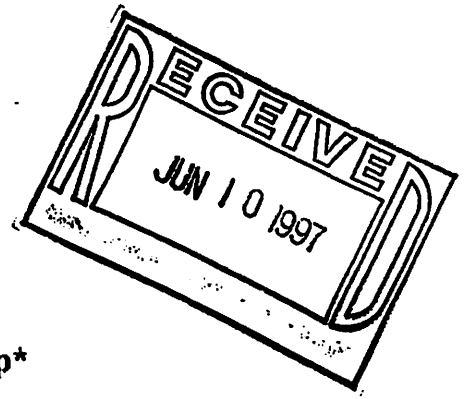
We would like to express our appreciation to the Council for dealing with the issue of Subsistence Halibut, something that the State of Alaska refuses to deal with. Thank You very much.

Sincerely,



Harriet M. Berikoff  
President





**Comments of  
Native Halibut Subsistence Working Group\***

**on  
Environmental Assessment/Regulatory Impact Review  
for a Regulatory Amendment  
for creating and defining a halibut subsistence fishery category**

**Prepared by  
Carol H. Daniel, Legal Consultant  
RurAL CAP**

**June 10, 1997**

**\*Members of Working Group:**

**David Bill, Toksook Bay  
Theodore Borbridge, Sitka Tribe of Alaska  
Jude Henzler, Bering Sea Fishermen's Association  
Matt Kookesk, Southeast Alaska  
Flore Lekanof, Aleutian Pribilof Island Association  
Harold Martin, Southeast Native Subsistence Commission  
Robert Sundown, Association of Village Council Presidents**

## **Introduction**

The Native Halibut Subsistence Working Group is composed of tribal representatives from Southeast, the Gulf of Alaska, the Bearing Sea and the Aleutian Islands who served on the Council's Halibut Subsistence Committee. The Committee was formed to advise the Council on the management of subsistence halibut harvests. The Committee met in January, 1997, and offered its recommendations for the development of regulations that would legalize the existing and long-standing harvest of halibut for subsistence purposes by Alaska federally recognized Tribes. Following its report in February, the members of this group decided to formally organize to advocate for the recognition of the historic and current use of halibut as a subsistence resource by the indigenous peoples of Alaska.

Members of the Working Group have attended every meeting of the Council where the issue of development of regulations for halibut subsistence fishing has been considered. They have closely followed the Council's work and offered testimony at previous Council meetings. After careful review of the May 19, 1997, draft EA/RIR for a regulatory amendment for creating and defining a halibut Subsistence/Personal Use Fishery Category, the Working Group offers the following comments in support of Alternative 2 and various options outlined under that alternative that will recognize and make legal the existing harvest of halibut for subsistence uses by Alaska Native tribes, and in opposition to Alternatives 1 and 3.

## **Alternative 1**

Alaska Natives living in coastal areas of Alaska have fished for halibut since prehistoric times to provide food for their families and tribal communities. Currently, subsistence use of halibut fishing is not recognized by the International Pacific Halibut Commission (IPHC), the North Pacific Fishery Management Council (NPFMC) or the National Marine Fisheries Service (NMFS) or by federal regulations. Regulations for Alaska limit all non-commercial harvests of halibut to two fish per person per day, caught on a single line with a maximum of two hooks or a spear, from February 1 through December 31. These regulations do not reflect the customary and traditional use of halibut by Alaska Native tribes. In the absence of development of halibut subsistence regulations that recognize the customary and traditional practices of Alaska Natives in coastal communities, Alaska Natives will continue to face prosecution for violation of commercial

and/or sport regulations that are inconsistent with their customary and traditional subsistence harvest practices.

The Alaska Department of Fish and Game (ADF&G) has estimated that the existing subsistence harvest of halibut in Alaska accounts for less than one percent of the total halibut removals. Given the small number of halibut harvested for subsistence purposes, there is no biological reason Alaska Natives should be denied the right to continue to harvest halibut in customary and traditional ways for personal and family consumption and for customary barter and trade. By legalizing existing halibut subsistence fishing practices, the Council should be able to obtain better estimates of the subsistence harvests in Alaska, which should lead to better data for the IPHC calculations.

Finally, while Alaska Native tribes do not have treaty rights with the U.S. Government, as is the case with the tribes in Washington and Oregon, they still possess aboriginal fishing rights in the Outer Continental Shelf (OCS). As the EA demonstrates, much of the halibut subsistence fishing that occurs off the coast of Alaska takes place in waters beyond the State's territorial waters. The Ninth Circuit Court of Appeals in *Village of Gambell v. Hodel*, 869 F.2d 1273 (9th Cir. 1989) (*Gambell III*), held that the Alaska Native Claims Settlement Act (ANCSA) did not extinguish aboriginal hunting and fishing rights of Alaska Native tribes in the OCS. To the extent tribes of coastal communities in Alaska can demonstrate their historical use and occupancy of their traditional fishing areas in the OCS, they have a right under federal law to continue to hunt and fish in those areas without interference.

For all of these reasons, the Working Group strongly supports adoption of regulations that will recognize the historical harvests of halibut for subsistence purposes by Alaska's federally recognized tribes, and for the same reason strongly opposes the "no action" Alternative.

### **Alternative 2**

In developing regulations that would recognize and allow the harvest of halibut for subsistence uses, the Working Group urges the Council to do so in a way that will recognize and accommodate the customary and traditional practices of Alaska's federally recognized tribes. In terms of the various options outlined under Alternative 2, the Working Group offers the following comments and recommendations:

**Option 1. Define Subsistence.** The Working Group recommends that the definition of subsistence be amended to read as follows:

Halibut subsistence regulations are needed to allow the continued practice of the long-term customary and traditional taking of, use of, and reliance upon halibut by members of Alaska's federally recognized tribes and permanent non-tribal member residents of rural areas with subsistence halibut uses, for direct personal or family consumption as food and for the customary trade, barter or sharing in a non-commercial manner for personal or family consumption. Subsistence is defined as the "long-term, customary and traditional use of halibut."

In defining subsistence, it is important that the Council understand that the word "subsistence" has been used to describe the most central and complex aspect of Alaska Native life. Thomas Berger, on behalf of the Inuit Circumpolar Conference, conducted a statewide village hearing process in the early 1980's to document Alaska Native views on land and subsistence. He summarized the concept of subsistence in spiritual as well as economic terms:

The traditional economy is based on subsistence activities that require special skills and a complex understanding of the local environment that enables the people to live directly from the land. It also involves cultural values and attitudes: mutual respect, sharing, resourcefulness, and an understanding that is both conscious and mystical of the intricate interrelationships that link humans, animals, and the environment. To this array of activities and deeply imbedded values, we attach the word "subsistence," recognizing that no one word can adequately encompass all these related concepts.

T. Berger, *Village Journey, The Report of the Alaska Native Review Commission*, (1985) at 51. Subsistence has been defined by some Native people as their "way of life." Berger at 51 (Moses Toyukuk, Manokotak).

As noted in the EA at page 5, subsistence patterns for Alaska Native Tribal members are different from the harvest patterns of non-Natives. For tribal

members, it is a "cultural tradition, an integrated pattern of tribal community life and the substance of Native self-definition. It is a matter of inherent historical, cultural identity." For the most part, non-Native subsistence is the opposite: an individual activity governed by the rules affecting individual rights. Therefore, while non-tribal members may engage in what they believe to be "subsistence," i.e., the taking of fish and game for personal sustenance, they would actually have to become a participating member of a Native community in order to actually practice subsistence as a communal activity. In short, non-Native and Native subsistence are not the same thing. Native subsistence harvests should be regulated in a way that is consistent with this unique way of life. Non-native taking of halibut for personal consumption can be accommodated under the existing sport and state personal use regulations.

In sum, the Council needs to define subsistence in a way that will recognize Alaska Native Tribes' understanding of that term. It means much more than simply putting food on the table for personal and family consumption.

**Option 2. Define Eligibility.** The Working Group recommends that the Council adopt **Suboption C**, with the language change recommended by the staff at page 11 of the EA. Eligibility would then be defined as follows:

Members of Alaska Native federally recognized tribes with customary and traditional use of halibut, and other permanent residents of rural areas with subsistence halibut uses who have legitimate subsistence needs.

The Working Group recommends adoption of Suboption C because it more accurately matches the current, existing halibut subsistence fishery. If the Council's goal is to legitimize the existing subsistence fishery without increasing the number of subsistence fishers or halibut removals, this is the only option currently under consideration that would accomplish that goal.

The Working Group also recommends that the Council expressly provide a process to allow a tribe inadvertently left off of the list of tribes with customary and traditional uses of halibut, to be added to that list, as is contemplated for rural places under Suboption B.

The only difference between Suboption A and Suboption C, assuming the Council adopts the language change recommended by the staff at page 11, is the need to make individual eligibility determinations for non-tribal members under Suboption C. Both suboptions include members of Alaska Native Tribes with

customary and traditional halibut uses. However, as amended, Suboption A would automatically make all residents of rural communities with customary and traditional subsistence uses eligible for subsistence fishing. This would mean that the large non-tribal populations in places like Kodiak and Sitka (12,055 and 7,272 respectively) would automatically be eligible to participate in the subsistence halibut fishery. Most of the non-Native residents of these larger communities do not participate in the existing, historical subsistence halibut fishery. Instead, most non-tribal members of these communities satisfy their personal consumptive needs under the existing sport fishing regulations. Suboption C, modeled after the eligibility standards contained in the protocol amendments to the Migratory Bird Treaty Act, offers more flexibility in terms of limiting eligibility to those who are legitimate subsistence users.

The Working Group also strongly recommends that the individual eligibility determinations required under Suboption C should be made by the co-management bodies established under Option 7. Those who participate in the traditional, long-standing tribal subsistence fisheries are well known to the tribal leaders in the communities.

Short of limiting eligibility to members of Alaska's federally recognized tribes, Suboption C is the only option under consideration that will not result in an expanded halibut food fish fishery. Since it will neither increase the number of eligible subsistence fishers nor the halibut removals, the Native Halibut Subsistence Working Group recommends adoption of Suboption C.

### **Option 3. Define Legal Gear**

The Working Group urges the Council to adopt Suboption B, which would allow the use of hook-and-line gear (including set and hand-held gear), and that it provide for the use of "up to" a maximum of 60 hooks. It further recommends that rod and reel gear be included as legal subsistence gear.

Subsistence regulations need to be consistent with the customary and traditional harvest practices of Alaska Native tribes. The evidence presented to the Council through the FA and staff reports, as well as through the public testimony from subsistence users demonstrate that tribes in different areas of the state use different gear to harvest halibut for subsistence uses. For example, in western Alaska, the practice is to use three hooks per line, although some continue to use a single hook rod and reel. In southeast Alaska, a variety of gear is used, including an 1,800 ft. skate with up to 100 hooks. If gear restrictions must be imposed, it would be better to do so on an area or community basis so that



customary and traditional uses of that area or community can be accommodated. In fact, we recommend that the gear restrictions be incorporated into area management plans developed by the co-management bodies established under Option 7.

As noted in the EA, the Council need not be concerned about imposing gear restrictions since subsistence fishing is self-limiting, i.e., the current per capita levels are not likely to increase since the purpose of subsistence fishing is essentially to provide for the consumptive uses of families (and communities) with customary and traditional uses of halibut. Native subsistence uses are characterized by efficiency and economy of effort and cost. It is expensive to harvest halibut -- it requires a boat, equipment and gasoline, not to mention the time involved in getting to and from the fishing grounds. Many tribal members do not have their own equipment and rely on others in the village to fish for them and their extended families. As a result, a few fishermen may share their subsistence harvest with others in the community who cannot fish for themselves. Subsistence fishers cannot afford to make multiple trips to harvest halibut. Weather is often another limiting factor. In many communities in western Alaska and along the Aleutian chain, the weather may make it impossible to go out day after day to harvest halibut needed to meet their subsistence needs, as would be required if restrictive bag limits are imposed.

Since the total use levels of halibut for subsistence is constrained by the consumption needs of the individual family (or collectively, the needs of the village), there is no need to impose restrictive gear requirements, seasons or bag limits. Families stop fishing when they have met their consumption needs (and collectively, when the food requirements for the community have been met). See EA at page 134. While the EA notes that there may be an exception to this rule in the larger communities with a mix of cultural traditions, like Kodiak City, Unalaska, Sitka, Petersburg, and Cordova, the Working Group believes these sorts of area specific problems can be addressed on an area or community basis through local management plans developed by co-management bodies.

Finally, the Native Halibut Subsistence Working Group does not support Suboption C, which would require communities to "designate" fishermen to fish for the entire community using any gear type or up to 3 skates, with up to 60 hooks per skate. The Council is urged to adopt Suboption B, with the changes noted.

#### **Option 4. Define Minimum size.**

The Working Group recommends that the Council adopt both Suboptions A and B, since they address different problems. Suboption A would set no minimum size for subsistence harvests of halibut, as is the case for all non-commercial halibut fisheries. Suboption B would revise the commercial halibut minimum size regulations to allow the retention for subsistence uses of undersized halibut caught in the CDQ fishery in Area 4E.

Since there is no minimum size limit on the sport harvests, one should not be imposed on the subsistence fishery. The EA reports that there would be no biological advantage to imposing a minimum size limit in the subsistence fishery, *see EA* at 140, so one should not be imposed. Also, many Alaska Natives, particularly in western Alaska, believe that returning hooked fish to the water spiritually damages the stock. They view "hook and release" fishing to be wrong and as something that will cause the fish not to return. Accordingly, fishermen in Area 4E should be allowed to retain undersized halibut for subsistence uses. As noted in the EA at 12, the regulations could be written to allow retention, but not commercial sale, of fish less than 32 inches in Area 4E.

#### **Option 5. Allow the customary and traditional trade of subsistence halibut.**

The Halibut Working Group recommends that the Council adopt Suboption B, which would allow the customary and traditional trade and barter of subsistence-caught halibut. It also recommends that the Council allow small-scale cash exchanges for subsistence harvested halibut. The Working Group suggests that the annual amount of such cash exchanges be limited to \$200 per person and that the exchanges be limited to exchanges between tribal members within the village and/or with members of other Alaska Native tribes.

Customary and traditional trade, barter and sharing are all characteristics of the subsistence economy in Alaska Native communities. See EA, pages 141-143. While the Working Group does not support the commercial sale of subsistence caught halibut, we recognize and support the continuation of the current practice of small-scale cash exchanges. Even though most of the subsistence harvested halibut is distributed between households through sharing and does not involve the exchange of cash, there are some villages, particularly in Southeast Alaska, where small-scale cash exchanges are part of the long-established, non-commercial distribution systems. Small amounts of money, less than the commercial value of

the product, are sometimes given to fishermen to partially compensate them for the expenses involved in taking the fish, i.e., to help defray the cost of fuel. These long-established practices should be recognized and not restricted. By restricting the trade to and among tribes and tribal members, the Council can prevent the development of new subsistence harvest patterns for customary trade.

**Option 6. Define a daily bag limit of between 2 and 20 halibut.**

The Native Halibut Subsistence Working Group strongly urges the Council to reject the imposition of daily bag limits for the same reasons it opposes restrictive gear options: subsistence harvests are self-limiting. When enough fish have been harvested to meet the family (or community's) needs, fishing will stop. There is no need to impose daily bag limits. The public testimony by Alaska Native subsistence fishermen indicated that they prefer to catch their subsistence fish in as few trips as possible in order to maximize effort and their fish processing. Moreover, given frequent severe weather conditions, it may be simply impossible for a subsistence fisherman to harvest enough halibut to adequately provide for his family if such bag limits are imposed. If the total harvest of halibut for subsistence uses increases significantly in a particular community or area, the matter can be addressed in a local management plan developed by co-management bodies contemplated by Option 7.

**Option 7. Develop cooperative agreements with Tribal, State and Federal governments to collect, monitor, and enforce subsistence harvests and develop local area halibut subsistence use plans in coastal communities.**

The Native Halibut Subsistence Working Group strongly supports adoption of Option 7. To the fullest extent possible, the subsistence halibut fishery should be implemented through co-management bodies composed of tribal, state and federal representatives. These management bodies can be used to develop area management plans that include recommendations for all aspects of the subsistence harvest, including but not limited to gear restrictions, bag limits, enforcement policies, population and harvest monitoring, research and the use of traditional knowledge, and habitat protection. These bodies can address local concerns on a wide range of issues. They can also be used to make the individual eligibility determinations called for under Alternative 2, Option 2(c).

As noted in the EA, improved data collection will be a significant element of proposed co-management of the halibut subsistence fishery. Basic characteristics of the fishery can be documented by local residents, such as fishing locations, gear types, size, and trends that can be used to monitor the effectiveness

and appropriateness of the regulations adopted. If the harvests increase over the current estimates for the fishery, co-management bodies can develop recommendations to address the problem on an area or community basis.

The Working Group feels very strongly that a meaningful management role for Alaska Native tribes is essential for the well-being of their way of life and for the wise and effective management of the halibut subsistence fishery in Alaska.

### **Alternative 3**

The Halibut Subsistence Working Group opposes Alternative 3. This Alternative was added as a result of public testimony received during the Council's April, 1997, meeting in Anchorage, in which the leadership of the State Legislature testified that the proposal to implement subsistence regulations would conflict with the Alaska State Constitution. Rep. Gail Phillips advocated for a personal use fishery that would be open to "all Alaskans." Since the Northern Halibut Act of 1982 does not allow for the development of regulations that discriminate between residents of different states, the fishery would have to either apply to all U.S. citizens or be restricted to rural residents who have a customary and traditional use of halibut. As the EA notes, limiting such a fishery to rural residents would not satisfy the Territorial sportsmen, nor would it comply with the Alaska Constitution.

The personal use fishery proposed by the State legislature, if open to all Alaskans and all U. S. citizens, would clearly create a new fishery. The sheer volume of eligible users would create a potential biological impact on the stock. As the EA points out, the halibut sportfish removals in 1995 exceeded 6.3 million lbs. There would also be reallocation concerns. Any increase in halibut removals as a result of creating a halibut personal use fishery would mean a corresponding reduction in the commercial and/or sport fisheries. There would likely be impacts on the charterboat fleet, and a reduction in guided trips. It would be difficult, if not impossible, to monitor and enforce regulations prohibiting the commercial sale of personal use halibut outside the State of Alaska.

Despite apparent similarities between some of the options presented for a personal use fishery and those presented for the subsistence fishery, there are fundamental differences between a personal use fishery and a subsistence fishery. This difference lies in the difference in the world views of Alaska's indigenous people and those of European origin. The ideology and world view of Alaska's Indigenous peoples and their ability to survive is based on communal living. It is as simple as the difference between the belief in individual ownership of land in

western society versus the communal ownership of land by Native Americans. In Alaska Native villages, the utilization of fish, game and plant resources is absolutely essential for the health and well being of the community. As discussed in our comments to Option 1, and expressly noted in the EA at page 5, (*quoting* Smith and Kancewik (1995)), "subsistence is a Native cultural tradition, an integrated pattern of tribal community life and the substance of Native self-definition. It is a matter of inherent historical, cultural identity." By contrast, personal use fisheries are based on "individual" activity. Both should be accommodated, but it is essential for the Council to recognize that they cannot be accommodated in exactly the same manner.

The personal consumptive needs of non-tribal members in Alaska are already being accommodated through the existing sport regulations that allow the harvest of 2 halibut per day per person. It simply makes no sense to extend subsistence regulations that are developed to accommodate the customary and traditional harvest practices of Alaska Native tribes, to individuals who have no such customary and traditional practices or beliefs. To do so only invites a significant increase in the harvest of halibut, and runs counter to the Council's stated goal of legalizing the existing subsistence halibut fishery.

Finally, there is no legal bar to adoption of subsistence regulations that recognize the customary and traditional harvest needs and practices of Alaska Native tribes. Alaska Native tribes are federally recognized governments. The United States Supreme Court has recognized that the federal government can provide special rights and opportunities for tribes based on their political status. Such special treatment does not constitute "racial" discrimination, but rather a recognition of the government-to-government relationship between the federal government and Alaska Native tribes and the federal government's special trust responsibility to Native Americans. This special trust relationship was most recently recognized by the federal government in the signing of amendments to the migratory bird treaty with Canada. There, as here, a treaty was enacted which overlooked the subsistence harvest rights of Alaska Natives. The federal government has corrected that mistake by recognizing a special harvest right for the indigenous people of Alaska and has ensured Native Village Councils a co-management role in implementing that harvest.

The Alaska Constitution has no effect on this debate because the Council is not bound by state law, but by federal law. State law, including the state Constitution, is preempted by federal law.

### **Conclusion**

**The Working Group urges the Council to adopt subsistence regulations that will recognize and fully accommodate the existing subsistence harvest of halibut by Alaska Native tribes with customary and traditional uses of halibut. The regulations need to accommodate the customary and traditional practices of Alaska Native tribes, including customary trade and barter. They also need to allow tribes a meaningful co-management role in regulating the subsistence harvests of halibut.**

# North Pacific Fishery Management Council

Richard B. Lauber, Chairman  
Clarence G. Pautzke, Executive Director

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April 23, 1997

Lisa Lindeman  
NOAA General Counsel  
P. O. Box 21109  
Juneau, Alaska 99802-1109

Dear Lisa:

Proposed Council action on a variety of management issues has raised several legal issues for which the Council has requested clarification. In particular, there are numerous issues related to the VBA program, and a few specific issues related to the halibut subsistence initiative. I need to consult with my staff so that we can better synthesize the VBA issues for you, so I will contact you in the next few weeks on those issues. For now, we need more immediate feedback on the subsistence issues in order to complete that analysis for public review. We need to get that document out for public review by May 15, for a final decision at our June meeting in Kodiak. The three specific issues for which we need help from your office are:

- (1) The Council requested augmenting the public review draft of the Subsistence EA/RIR with a discussion of current case law relative to halibut in the British Columbia Indian food fishery, and the Washington state treaty rights uses of halibut.
- (2) A response to issues raised by the Alaska State Legislature's letter, particularly question 2 (below) including a discussion about racial versus aboriginal based allocations and a summary of the status of sovereignty status in current case law. ["Under what authority can the Council adopt allocation criteria based on race which are in conflict with the State's constitution?"]
- (3) Relative to enforcement concerns, whether in fact a conflict exists with the Alaska State Constitution.

Jane DiCosimo is working on the document in our office, and needs to have it completed by May 15 for release to public review. Please let us know if your office will be able to provide us some assistance by then on these three issues.

Sincerely,

A handwritten signature in cursive script that reads "Clarence G. Pautzke".

Clarence G. Pautzke *for*  
Executive Director

**TESTIMONY  
BY  
HAROLD P. MARTIN  
TO  
THE NORTH PACIFIC FISHERIES MANAGEMENT COUNCIL  
RE: HALIBUT AS A SUBSISTENCE RESOURCE**

Thank you Mr. Chairman, members of the council for this opportunity to testify.

For the record, my name is Harold P. Martin. I am the Subsistence Director for the Central Council Tlingit and Haida Indian Tribes of Alaska. The Central Council is a federally recognized tribe with an enrollment of slightly more than 23,000 members.

I am also the President of the Southeast Native Subsistence Commission. The Commission is made up of 17 commissioners, each elected in their respective communities and 4 appointed positions, 1 each by the sanctioning organizations which are the Central Council, the Alaska Native Brotherhood/Sisterhood Grand Camps and the Sealaska Corporation.

The Native Halibut Subsistence Committee is composed of the tribal representatives from southeast, the Gulf of Alaska, the Bering Sea, and the Aleutian Islands.

The committee was appointed by the NPFMC to advise the council on the management of subsistence halibut harvests. The committee met in January, 1997 and submitted its recommendations for the development of regulations that would legalize the existing and historical harvest of halibut for subsistence purposes by Alaska Native tribes. Following its report in February, the members of this committee formally organized to advocate for the recognition of the historic and current use of halibut as a subsistence resource by the indigenous peoples of Alaska.

Harold P. Martin was elected as the interim President of this working group and as such, I speak on behalf of the group.

Members of the group have attended every meeting by the council where halibut as a subsistence resource was considered. We have offered testimony at all previous council meetings.

After careful review of the May 19, 1997, draft EA/RIR, the working group offers the written comments submitted and written comments submitted and written by Ms. Carol Daniel on behalf of the Native Halibut Subsistence Working Group. The group supports alternative 2 and various options outlined under that alternative that will recognize and make legal the existing harvest of halibut for subsistence uses by Alaska Native tribes.



We oppose alternatives 1 and 3. The comments submitted are self-explanatory, however we would like to emphasize some important points.

For Alaska Natives, subsistence is a cultural tradition. A way of life for tribal communities that has existed for centuries.

Sportsfish regulations do not reflect the customary and traditional uses of halibut by Alaska Native tribes and ignores the customary and traditional means, methods and practices.

Under new methods of estimating numbers of halibut by the NMFS, it was found that there are much more halibut in the seas than previously estimated. As a result quotas for commercial take was increased. We make this point to establish that halibut taken for subsistence purposes is a non-conservation issue and does not pose a threat to other user groups.

Since there is no minimum size limit on the sports harvests, one should not be imposed on the subsistence fishery.

Customary and traditional trade, barter and sharing are all characteristics of the subsistence economy in Alaska rural communities.

We reject the imposition of daily bag limits for the same reasons we oppose restrictive gear options: subsistence harvests are self-limiting. When enough fish is caught to meet a families needs, fishing stops.

We believe that subsistence halibut fishery should be implemented through co-management bodies composed of tribal, state and federal representatives (option 7).

We oppose and commercial sale of subsistence halibut.

We are not in favor and oppose the designation of fishermen to fish for the community using 1 to 3 skates of gear with up to 60 hooks each.

We oppose alternative 3. The personal use fishery proposed by the state legislature, if open to all Alaskans and all U.S. citizens would clearly create a new fishery, which is what they are accusing us of creating.

The Alaska Constitution has no effect on this halibut debate because the council is not bound by the state law, but by the federal law. State law, including the state constitution is pre-empted by the federal law.

We applaud the Governor office for its attempts to bring the subsistence issue before the voters of the state.

The Native Halibut Subsistence Group recognizes the urgency of pending federal takeover of fisheries on navigable waters within the state.

The working group is willing to cooperate with the governors appointed task force pending decisions towards resolving the subsistence issue by October.

We enter a plea and request that we revisit the issue at the December 1997 meeting.

We also do not want to lose the momentum and dialogue we have established with the council.

We do not want this issue to become a casualty of the states impasse on subsistence.