

1 RICHARD B. COHEN
Antitrust Division
2 U.S. Department of Justice
450 Golden Gate Avenue
3 Box 36046, Room 10-0101
San Francisco, California 94102
4 Telephone: (415) 436-6660
Cal. Bar #: 79601
5 Attorney for the United States
6
7
8

9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF OREGON

11 STATE OF OREGON, ex rel.,)
Attorney General HARDY MYERS)
12)
STATE OF WASHINGTON, ex rel.,)
13 Attorney General)
CHRISTINE O. GREGORIE,)
14)
STATE OF CALIFORNIA, ex rel.,)
15 Attorney General)
DANIEL LUNGREN,)
16)
17 UNITED STATES OF AMERICA,)
)
18 Plaintiffs,)
)
19 v.)
)
20 JEFF MULKEY, JERRY HAMPEL,)
TODD WHALEY, BRAD PETTINGER,)
21 JOSEPH SPEIR, THOMAS TIMMER,)
RICHARD SHELDON,)
22 DENNIS STURGELL, ALLAN GANN)
and RUSSELL SMOTHERMAN,)
23)
Defendants.)
24

CIVIL ACTION

NO. 97-234MA

COMPETITIVE IMPACT
STATEMENT - Antitrust

Filed: February 11, 1997

25 / / /
26 / / /

COPY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

COMPETITIVE IMPACT STATEMENT

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), the United States files this Competitive Impact Statement relating to the proposed Consent Decree submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

The United States and the states of Oregon, California, and Washington have filed a civil antitrust suit alleging that ten (10) commercial crab fishermen and various unnamed co-conspirators conspired to restrain competition among commercial fishermen in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. The Complaint asks the Court to find that the defendant fishermen have violated § 1 of the Sherman Act, requests that the defendants pay civil penalties and the costs of the investigation to the plaintiff states and further requests the Court to enjoin the continuance of the alleged unlawful acts.

Entry of the proposed Consent Decree will terminate the action, except that the Court will retain jurisdiction over the matter for further proceedings which may be required to interpret, enforce or modify the Consent Decree or to punish violations of any of its provisions.

II.

PRACTICES GIVING RISE TO THE ALLEGED VIOLATION

The defendants are commercial crab fishermen who fish in waters off the coasts of California, Oregon, and Washington.

1 The Oregon defendant fishermen are not members of a
2 fishermen's marketing association. They are thus not entitled to
3 the exemption given to fishermen's marketing associations by the
4 Fishermen's Collective Marketing Act of 1934 ("FCMA"), 15 U.S.C. §§
5 521-522. The exemptions provided by the FCMA do not apply to
6 fishermen who do not belong to fish marketing associations formed
7 pursuant to the FCMA or to FCMA association members who enter into
8 marketing agreements with non-FCMA association fishermen. Price
9 fixing and horizontal boycott agreements which are not protected by
10 the FCMA are per se violations of §1 of the Sherman Act (15 U.S.C.
11 §1) and are subject to criminal prosecution by the United States
12 Department of Justice. The United States chose not to proceed
13 criminally in this matter because most of the defendants mistakenly
14 believed their conduct was protected by the FCMA from prosecution
15 under the Sherman Act.

16 The United States and the states of Oregon, California, and
17 Washington contend and were prepared to show at trial, that
18 beginning in or about December 1995 and continuing up until at
19 least January 1996, the defendants were leaders in a conspiracy
20 with unnamed co-conspirators to restrain competition among
21 commercial crab fishermen in violation of § 1 of the Sherman Act.
22 The conspiracy consisted of an agreement and concert of action
23 between the defendants and co-conspirators to fix the "ex vessel"
24 price (price at which fishermen sell their catch to purchasers such
25 as processors) at a minimum of \$1.25 per pound and to eliminate
26 competition among commercial fishermen in the sale of crab. In

1 furtherance of this conspiracy the defendants and co-conspirators:
2 (1) agreed to sell crab at a minimum "ex vessel" price of \$1.25 per
3 pound; (2) agreed not to fish for crab until all purchasers
4 operating in the major West Coast crab fishing ports had agreed to
5 pay a minimum "ex vessel" price of \$1.25 per pound; and (3)
6 compelled, through threats of physical and economic harm,
7 harassment and other forms of intimidation, other fishermen not to
8 fish for crabs until all the purchasers agreed to pay a minimum
9 \$1.25 "ex-vessel" price.

10 This conspiracy fixed the "ex vessel" price of crab sold by
11 commercial fishermen, eliminated price and other forms of
12 competition among commercial fishermen in the sale of crab and
13 deprived purchasers of commercial crab of the benefits of free and
14 open competition in the sale of crab.

15 III.

16 EXPLANATION OF THE PROPOSED CONSENT DECREE

17 The United States and the defendants have stipulated that the
18 Court may enter the proposed Consent Decree after compliance with
19 the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h).
20 The proposed Consent Decree provides that its entry does not
21 constitute any evidence against or admission by either party with
22 respect to any issue of fact or law.

23 Under the provisions of Section 2(e) of the Antitrust
24 Procedures and Penalties Act, 15 U.S.C. § 16(e), the proposed
25 Consent Decree may not be entered unless the Court finds that entry
26 is in the public interest. Section XII of the proposed Consent

1 Decree sets forth such a finding.

2 The proposed Consent Decree is intended to ensure that the
3 defendants discontinue all practices which restrain competition
4 among commercial fishermen.

5 A. Prohibitions And Obligations

6 Under Section IV of the proposed Consent Decree, the
7 defendants are enjoined from participating in any discussion,
8 communication or agreement, except as members of FCMA fishermen's
9 marketing associations interacting with other members of such
10 associations, regarding: (1) the "ex vessel" prices to be
11 negotiated between purchasers and the defendants; (2) any terms or
12 conditions to be offered for the sale of seafood; or (3) refraining
13 from fishing while commercial fishermen are negotiating with
14 purchasers on an "ex vessel" price. Section IV also enjoins the
15 defendants from requesting or coercing other fishermen to refrain
16 from fishing or to sell fish to processors at specified prices or
17 under specified terms or conditions. The defendants are also
18 enjoined from any interference with any other commercial
19 fishermen's business through threats or other means of
20 intimidation. The Consent Decree further enjoins the defendants
21 from impeding, obstructing, or preventing any person from
22 processing, purchasing, or selling or offering to purchase or sell
23 crab or any other seafood. Finally, the Consent Decree restrains
24 the defendants from compelling any fishermen or other person to
25 become a member, or to participate in the activities, of any
26 association.

1 Section V. of the Consent Decree requires the defendants to
2 pay the states of Oregon, California and Washington pursuant to ORS
3 646.760 and ORS 180.095, RCW 19.86.080 and 19.86.090, and Cal.
4 Prof. & Bus. Code 16750 \$90,874.00 for civil penalties and
5 reimbursement of attorney fees and investigative costs.

6 B. Scope Of The Proposed Consent Decree

7 Section XI. of the proposed Consent Decree provides that the
8 Consent Decree shall remain in effect for five years.

9 Section III. of the proposed Consent Decree provides that the
10 Consent Decree shall apply to the defendants and all of their
11 managers, agents, employees, affiliates, successors and assigns,
12 and to those persons in active concert or participation with any of
13 them who shall have received actual notice of the Consent Decree.

14 C. Effect Of The Proposed Consent Decree On Competition

15 The relief set out in the proposed Consent Decree is designed
16 to prevent recurrence of the activities alleged in the Complaint.
17 The proposed Consent Decree's provisions are intended to ensure
18 that commercial crab fishermen act independently, except as members
19 of a FCMA fish marketing association interacting with other
20 association members, in any marketing or pricing decisions and that
21 they not interfere with the marketing and price decisions of other
22 commercial crab fishermen.

23 IV.

24 ALTERNATIVES TO THE PROPOSED CONSENT DECREE

25 The alternative to the proposed Consent Decree would be a full
26 trial of the case. In the view of the Department of Justice and

1 the states of Oregon, California and Washington, such a trial would
2 involve substantial cost to the plaintiffs and is not warranted
3 since the proposed Consent Decree provides almost all the relief
4 sought in the Complaint.

5 V.

6 REMEDIES AVAILABLE TO PRIVATE LITIGANTS

7 Section 4 of the Clayton Act (15 U.S.C. § 15) provides that
8 any person who has been injured as a result of conduct prohibited
9 by the antitrust laws may bring suit in federal court to recover
10 three times the damages suffered, as well as costs and reasonable
11 attorney fees. Under the provisions of Section 5(a) (15 U.S.C.
12 § 16(a)), this Consent Decree has no prima facie effect in the
13 lawsuits which may be brought against the defendants.

14 VI.

15 PROCEDURES AVAILABLE FOR
16 MODIFICATION OF THE PROPOSED CONSENT DECREE

17 As provided by the Antitrust Procedures and Penalties Act, any
18 person believing that the proposed Consent Decree should be
19 modified may submit written comments to Christopher S Crook, Acting
20 Chief, San Francisco Office, U.S. Department of Justice, Antitrust
21 Division, 450 Golden Gate Avenue, Box 36046, Room 10-0101, San
22 Francisco, California 94012, within the 60-day period provided by
23 the Act. The comments and the Government's responses to them will
24 be filed with the Court and published in the Federal Register. All
25 comments will be given due consideration by the Department of
26 Justice, which remains free to withdraw its consent to the proposed


1 Consent Decree at any time period to its entry if it should
2 determine that some modification of the Consent Decree is necessary
3 to the public interest. The proposed Consent Decree itself
4 provides that the Court will retain jurisdiction over this action,
5 and that the parties may apply to the Court for such orders as may
6 be necessary or appropriate for the modification or enforcement of
7 the Consent Decree.


8 VII.

9 DETERMINATIVE DOCUMENTS

10 No materials and documents of the type described in Section
11 2(b) of the Antitrust Procedures and Penalties Act (15 U.S.C.
12 § 16(b)) were considered in formulating this proposed Consent
13 Decree. Consequently, none are filed herewith.

14
15 Dated: February 6th, 1997

16
17 
18 _____
CHRISTOPHER S CROOK

19 
20 _____
RICHARD B. COHEN

21 Attorneys
22 Antitrust Division
23 U.S. Department of Justice
24
25
26