RICHARD B. COHEN
Antitrust Division
U.S. Department of Justice
450 Golden Gate Avenue
Box 36046, Room 10-0101
San Francisco, California 94102
Telephone: (415) 436-6660
Cal. Bar #: 79601

Attorney for the United States

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

STATE OF OREGON, ex rel., Attorney General HARDY MYERS STATE OF WASHINGTON, ex rel., Attorney General CHRISTINE O. GREGORIE, STATE OF CALIFORNIA, ex rel., Attorney General DANIEL LUNGREN, UNITED STATES OF AMERICA, Plaintiffs, v. JEFF MULKEY, JERRY HAMPEL, TODD WHALEY, BRAD PETTINGER, JOSEPH SPEIR, THOMAS TIMMER, RICHARD SHELDON, DENNIS STURGELL, ALLAN GANN and RUSSELL SMOTHERMAN, Defendants.	CIVIL ACTION NO. 97-234MA COMPETITIVE IMPACT STATEMENT - Antitrust Filed: February 11, 1997

/ / /

/ / /

COPY

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.

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

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

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

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

III.

EXPLANATION OF THE PROPOSED CONSENT DECREE

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

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

Decree sets forth such a finding.

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

A. Prohibitions And Obligations

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

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

B. Scope Of The Proposed Consent Decree

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

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

C. Effect Of The Proposed Consent Decree On Competition

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

IV.

ALTERNATIVES TO THE PROPOSED CONSENT DECREE

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

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

V.

REMEDIES AVAILABLE TO PRIVATE LITIGANTS

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

VI.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED CONSENT DECREE

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

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

VII.

DETERMINATIVE DOCUMENTS

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

Dated: February 6, 1997

CHRISTOPHER S CROOK

RICHARD B. COHEN

Attorneys
Antitrust Division
U.S. Department of Justice