



DEPARTMENT OF JUSTICE

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November 26, 1996

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Re: Oregon Department of Justice Antitrust Enforcement Position
on Commercial Fishermen and Fishermen Marketing Association
Activity

Dear Linda:

As promised, this letter will memorialize the Oregon Department of Justice's (DOJ) enforcement position regarding certain conduct among commercial fishermen who do business in Oregon. This letter is not and should not be considered legal advice from the Oregon DOJ. This letter is not and should not be considered the enforcement position of any other state or federal enforcement agency that has jurisdiction to enforce state or federal antitrust laws.

This letter is intended only to express the DOJ antitrust enforcement policy regarding certain commercial fishing and, within that context, the discussion within this letter is on the following points:

1. Whether and to what extent there is antitrust immunity for commercial crab fishermen under state and federal law;
2. What types of commercial fishermen activity will run the risk of an enforcement action by this office; and
3. What fishermen are entitled to do with or without certain exemptions from the antitrust laws.

Linda Brown
November 26, 1996
Page 2

Application of Antitrust Laws to Oregon Commercial Fishermen

Antitrust laws are designed to ensure a free marketplace. We enforce these laws because businesses -- particularly the small businesses that supply most of the jobs in Oregon's economy -- are most likely to thrive when they can negotiate the best possible price for their goods and services. Consumers and businesses alike benefit from free and vigorous competition.

Two sets of antitrust laws apply to Oregon commercial fishermen: federal law,¹ and state law.²

Both sets of laws prohibit competitors from entering into an agreement to raise, lower, or stabilize the price to be charged for their products and services. Competitors are also prohibited from entering into an agreement to engage in a group boycott against a supplier or buyer and to divide markets by agreeing to not compete in certain geographic areas in which their competitors do business.

Competitors are also prohibited from forcing, coercing, intimidating, or threatening other competitors to engage in certain conduct (such as price fixing or group boycotts) that they do not wish to engage in or join associations or groups they do not wish to join.

Oregon fishermen compete with one another and are considered "competitors" for purposes of the Oregon and federal antitrust laws. Therefore, **unless a specific exemption applies**, any two or more commercial fisherman who agree to engage in such conduct run the risk of being the subject of an enforcement action by this office for violation of state and federal antitrust laws.

This letter addresses some of the practices enforcement agencies have observed in this industry. Those practices are price fixing, group boycotts (known in the industry as "tie-ups" or "strikes"), territorial allocations, and coercion and intimidation.

¹Sherman Act, 15 USC §§ 1-7.

² The Oregon Antitrust Act begins at Oregon Revised Statute 646.705, et seq. Fishermen who compete in Washington and California will be subject to the antitrust laws of those states as well.

Conduct That is Never Exempt

DOJ takes the position that there is no exemption under any law that allows commercial fishermen to coerce, intimidate, threaten or otherwise force a commercial fishermen to engage in certain conduct or join an association of any type. DOJ views this activity as being among the most serious problems in the commercial fishing industry.

In fact, one of the primary reasons this office pursued its investigation into the commercial crabbing industry for the 1995-1996 season is because of the evidence we gathered relating to threats, coercion and intimidation by certain commercial fishermen against other commercial fishermen. Our evidence showed that the threats were intended to enforce adherence to an agreement among fishermen of a single coast-wide price of \$1.25 per pound for all fishermen and to stop fishermen from fishing until this goal was accomplished. Our investigation was initiated at the request of fishermen who had been subjected to unlawful coercion.

Coercion can include personal injury, damage to property, economic coercion, or threats of the same. These acts may, of course, also constitute crimes.

If anyone engages in this type of conduct, they will almost certainly be the subject of an investigation by this office and, perhaps, other federal and state enforcement agencies as well. If such evidence comes to light, then this office will pursue every available remedy it has to stop this conduct.

Another form of conduct that is not exempt under any law is territorial allocations. For example, two or more competing fishermen may not agree to stay out of certain waters or agree not to fish for certain types of fish.

Conduct That Is Illegal Without An Exemption

Two other forms of conduct alluded to - agreements to fix prices and agreements to tie-up - are also illegal without a specific exemption in the law. Before I discuss those exemptions, it is worth focusing on the requisite elements of the illegal activity in the first instance.

In each case, the operative word is "agreement". If there is no agreement between two or more fishermen, then there is no violation. Fishermen who decide on their own what price they will charge for their catch do not violate the law. The same is true if fishermen decide on their own not to go fishing or if they decide on their own to fish in a certain area of the ocean.

Linda Brown
November 26, 1996
Page 4

However, when there is an **agreement** between two or more commercial fishermen to set the price of their catch, to participate in a tie-up or strike, or to stay out of certain waters, the participants run the risk of being the subjects of an enforcement action by this office.

Exemptions

Limited exemptions do exist for certain price fixing agreements and tie-up agreements. However, the exemptions apply only if the activity is conducted within a fisherman's marketing association. And no exemption protects any fisherman from being held accountable for inflicting personal injury or property damage, or for any other form of unlawful coercion.

A. Threshold Test - Marketing Association Member

The Fisherman's Collective Marketing Act (FCMA) allows fishermen marketing association members to collectively catch, produce, prepare for market, process, handle, and market fish.³ Fishermen who are association members are allowed to agree on a single price for their fish and to engage in voluntary tie-ups in order to get the price they have agreed on.

B. The Difference Between State and Federal Law

Oregon law allows cooperative marketing agencies to market the goods of their members and otherwise act as agents for their members even though this activity would otherwise violate Oregon antitrust law.⁴

However, DOJ does not interpret Chapter 62 to mean that fishermen can fix prices or engage in group boycotts. This position is based on the literal language of Chapter 62 which does not specifically allow for price-fixing or group boycotts among fishermen. Exemptions to antitrust laws must be specifically stated and are rarely implied.

It is also worth mentioning that a bill was introduced in the 1995 legislative session that was designed to specifically immunize price fixing by commercial fishermen. A legislative committee held a hearing on that bill at which testimony was offered in support and in opposition to the bill. That bill was not adopted.

³Fisherman's Collective Marketing Act, 15 USC § 521.

⁴ORS 62.355 and 62.845.

Linda Brown
November 26, 1996
Page 5

Therefore, there may be a conflict between federal antitrust law, which immunizes fishermen for certain conduct, and Oregon antitrust law, which does not.

Under certain circumstances, a federal law covering the same activity as a state law will override, or preempt the state law. However, this preemption occurs only under very limited circumstances. There is no court decision which provides a clear answer whether the state law would be preempted because of this potential conflict.

DOJ Enforcement Policy Relating to the State-Federal Law Tension

DOJ recognizes that these unresolved issues can create uncertainty and perhaps even disruption in the marketplace. We have determined that if a commercial fisherman's activity is immune from antitrust liability under federal law (the FCMA), then that conduct will not be prosecuted by DOJ. This means, simply, that formal fishermen's marketing associations which are established to allow fishermen to collectively agree on prices and engage in voluntary tie-ups, will not be prosecuted as illegal price-fixing or group boycott conspiracies under Oregon antitrust law.

There are three important qualifiers to this policy.

First, in order to receive the benefit of this enforcement policy, fishermen marketing associations and their members must be in complete compliance with the requirements under the FCMA as discussed below.

Second, DOJ reserves the right to initiate an investigation against any commercial fishermen or fishermen's marketing association to determine whether they are in compliance with federal law.

Third, it is subject to change if and when the Oregon legislature amends existing law or passes new law that clarifies what a commercial fisherman can and cannot do under Oregon law. In other words, DOJ will not be precluded from enforcing any law that is passed, amended or clarified by the Oregon legislature.

Finally, fishermen should know that this enforcement policy would not have changed anything that this office did in conducting its recent investigation into allegations of price fixing and group boycotts. The activity at issue in this investigation falls outside any state or federal law exemption for commercial fishermen.

The Requirements of the FCMA - What Is and Is Not Prohibited

For any fishermen's marketing associations or its members to enjoy the benefit of the DOJ enforcement policy, the association and its members must be in complete compliance with the FCMA.

To comply with the FCMA, the association must be formally organized and operated as follows:

- (a) They must be operated for the mutual benefit of their members;
- (b) They may not allow any member more than one vote;
- (c) They may not pay dividends of greater than 8% per year; and
- (d) They may not handle products of non-members in an amount greater in value than handled for members.

A. What Activities May Members of a Marketing Associations Engage in?

Once a marketing association is properly established, association members can engage in the following conduct without fear of a DOJ enforcement action:

1. They may use the association to set one collective price for their catch. This is often referred to as a "coast-wide price" although it can mean one minimum price for a port or one minimum price for several ports. This means that fishermen may discuss and agree on prices as long as the agreement is made through formal association meetings where members are allowed to discuss and vote, and non-members are not part of the agreement.

2. Association members may agree on and carry out a tie-up to achieve an agreed-upon price so long as the tie-up is voluntarily among the members of the association; no coercion or intimidation is being or was employed to force any fisherman to join the tie-up; and non-members are not part of the agreement.

3. The association may be used as a marketing agent for its members. This may take place in one of three ways:

- (a) The association may purchase and resell its members' products;
- (b) The association may act as the members' bargaining agent with the processors; or

(c) The association may purchase and operate its own processing plant.

4. Two or more fishermen marketing associations can work together to engage in the conduct described above as long as they comply with the same rules that pertain to an single association.

The critical point to remember for association members, and a point DOJ will look very carefully at, is whether association members are entering into any of the agreements or conduct described above with fishermen who are not members of a marketing association.

Agreements with fishermen who are not association members, will cause the association members to lose their immunity. If non-association members participate in any association meetings, discussions, or communication with association members regarding the logistics or strategy of a price fixing agreement or a tie-up, this could be considered evidence of an agreement between association and non-association fishermen and could be a reason for this department to initiate an investigation.

5. Finally, association members can also exchange non-price information among themselves. Examples of the type of non-price information they can exchange include:

- (a) Historical price and cost information if it is aggregated in such a way that no individual fisherman's information is distinguished from any other's;
- (b) Any information necessary to prevent and deter fraud;
- (c) Information regarding technological advances, production techniques, and sales techniques;
- (d) Quality control information;
- (e) Information regarding current inventory levels and availability of fish;
- (f) Information necessary to implement collective advertising and credit schemes; or
- (g) Information necessary to lobby for or promote the industry.

B. What Association Members Cannot Do Regardless of the Existence of a Marketing Association

Fishermen marketing association members run the risk of an investigation and enforcement action if they engage in activities that are specifically prohibited by law - even with the existence of an association. These prohibited activities include:

- (a) Coercing anyone to join the association;
- (b) Collaborating with non-association fishermen;
- (c) Monopolizing or attempting to monopolize a local market;
- (d) Threatening or engaging in violence, intimidation, or property damage;
- (e) Regulating who may fish in a certain area; or
- (f) Any other activity which is predatory on its face.

Violation of any of the above rules regarding formation, operation, or activity within an association removes the antitrust exemption. That activity may be investigated and prosecuted as an antitrust violation by DOJ.

What If There is No Marketing Association?

Until very recently, the Oregon commercial crabbers were not members of any marketing association for crabbers. Only in the last few weeks have crab fishermen in certain Oregon ports begun to organize into marketing associations. However, as we understand it, the vast majority of crabbers are still not members of a formally established marketing association.

Commercial fishermen who are not members of a formal fisherman's association meeting all of the requirements may not engage in any collective activity with other fishermen regarding price or tie-ups. This means individual fishermen must set their own prices and negotiate individually with processors. They must individually decide whether to fish or not to fish.

In addition, fishermen who are not association members cannot attend meetings of fishermen's associations at which prices or tie-ups are discussed without risking an investigation. As mentioned above, if commercial fishermen who are not association members attend association meetings, the association members run the risk of losing their limited immunity.

However, commercial fishermen may still talk to their processors on price; they can still make their own decisions about price; and they can still decide on their own when, whether and where they will fish. This conduct is legal with or without an association. It is only when two or more commercial fishermen agree on price, tie-ups or other similar activity do they risk an enforcement action against them.

One area which appears difficult for fishermen to grasp is whether and to what extent they can informally discuss prices and other market conditions with other commercial fishermen or with other businesses such as processors or retail store personnel. The short answer is they can do all of this.

Where these discussions become a problem for this office is when they evolve into or serve as the basis for an express or implied agreement among the commercial fishermen to sell their catch at the same price or same price range. Therefore, it is important for commercial fishermen to understand that they can exchange information with people they do not compete with. They can even exchange information with other fishermen about price and their opinions about the prices offered to each of them. We understand this is often done informally over a cup of coffee.

Where fishermen sometimes run into problems, and where our concerns lie, is when these conversations evolve into an express or implied agreement among fishermen to fix prices or tie-up in order to get a single minimum price for their catch. There is no bright line between information exchanges and price agreements among fishermen which happen as a result of these information exchanges. Whether a particular conversation or meeting among competitors crosses over the line will often depend on the specific circumstances of that conversation or meeting.

What is clear is that exchanging information is one thing; agreeing to a set price is another thing entirely. Unless fishermen have the protection of a marketing association, they should steer clear of discussions that point toward an agreement to charge or accept from the processors a minimum price for their catch; and they should steer clear of discussions that point toward an agreement to tie-up their boats until the fishermen receive that price.

Conclusion

Fishermen should do whatever they can to ensure vigorous competition in their industry. That includes gathering as much information as possible in order to help each of them to make their own, well-informed, unilateral decision on whether to join a marketing association, when to fish, and at what price.

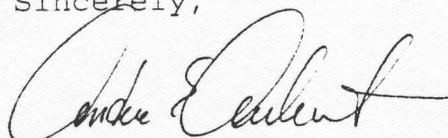
Linda Brown
November 26, 1996
Page 10

Fishermen must simply be aware that any decision they make on their own, and activity they do on their own (with the exception of coercion, intimidation or threats), does not raise antitrust concerns with this office. Antitrust concerns are raised when fishermen reach an agreement on pricing, boycotts or territorial allocations and/or when any fisherman - individually or collectively - coerces, intimidates or threatens another person.

If fishermen are members of a legally-established marketing association, they can take price discussions to the point of voluntarily agreeing among themselves on a single price in order to facilitate negotiations with the processors on the price of their catch. They can even voluntarily agree to tie-up their boats in order to enhance the success of their collective price position.

If the activity in question does not have a clear exemption under federal or state law, then the fishermen engaged in that activity may be subject to an investigation. To avoid that risk altogether, they should take all necessary steps to make sure they are acting within the law. If there are questions about particular conduct, fishermen should either refer to this letter or consult their attorney for legal advice to help guide them in their decisions.

Sincerely,



Andrew E. Aubertine
Assistant Attorney General

AEA/JEW/EWO0ED32

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