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Cooperatives in US fisheries: realizing the potential of the fishermen's collective marketing act

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Abstract

The economic successes of recent quota-based harvest cooperatives in the Pacific Northwest and an Alaskan salmon marketing cooperative highlight the potential for more extensive forms of collective behavior afforded by the Fishermen's Collective Marketing Act (FCMA) of 1934. Court rulings during the 1930s–1950s clarified what was considered anti-competitive behavior by fishermen's groups, but the lack of controls on entry and harvests in the mostly open access fisheries undermined the full potential of the FCMA. With more fisheries now being managed by limited access and quotas, fishery cooperatives will be better able to share harvest capacity and/or profits, reduce costs, improve product quality, and negotiate prices.

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1. Introduction

In 1997, the four catcher/processor companies in the US Pacific whiting fishery formed a cooperative to administer a privately negotiated agreement that specified members' shares of the total catch allocated to their sector by the Pacific Fishery Management Council [1]. Although joint activity was limited to negotiations over shares, the economic success of this arrangement motivated fishermen in the Bering Sea and Aleutian Islands pollock fishery to lobby the US Congress for sectoral quotas that would facilitate negotiations in this fishery. Congress responded with the American Fisheries Act (AFA) of 1998, which fostered the development of two pollock harvest cooperatives in 1999. Similar agreements were soon reached in the Alaska weathervane scallop fishery in 2000 and the Chignik sockeye salmon fishery in 2002.

This industry innovation in harvesting arrangements which is reducing excess capacity and improving product value in various overcapitalized fisheries, has surprised many people associated with US fisheries

including economists who have focused on individual fishing quotas (IFQs). Criddle and Macinko [2] argued that IFQs would now become obsolete because it is more costly to negotiate publicly before fishery management councils than privately or through Congress. Anderson [3], however, noted that circumstances exist where IFQs would be superior on efficiency grounds (i.e., when harvesters are heterogeneous and required to sell to particular processors, as they are by the AFA).

This debate is healthy, but we are interested in whether the recent success of harvest cooperatives will cause fishermen to consider more extensive opportunities for joint production and marketing as offered by the Fishermen's Collective Marketing Act of 1934 (FCMA). During the 1930s–1950s findings against fishermen's organizations left the impression that collective behavior by fishermen in negotiating price and coordinating production constituted per se violations of anti-trust legislation engendering severe financial penalties [4–9]. However, Sullivan [1] sees grounds for FCMA exemption under standards set by the federal district court case, *United States vs. Hinote*, 823 F. Supp. 1350, 1354 n.7 (S.D. Miss.1993). As such, the stage for widespread development of FCMA cooperatives by industry may well be set in many US fisheries where entry is limited and total allowable catch (TAC) quotas already exist.

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2. FCMA and the Capper-Volstead act

The primary law related to fishery cooperatives and antitrust concerns is the FCMA of 1934 (15 USC § 521, 522). This act was modeled after the Capper-Volstead Act (C-VA) of 1922 (7 USC § 291, 292) which played a major role in shaping US agriculture, especially the role of agricultural cooperatives. The intent of these acts is to allow farmers and fishermen to jointly market, price, and sell their products without being in violation of the Sherman Antitrust Act of 1890 (and the Federal Trade Commission and Clayton Acts of 1914). In addition, the FCMA also specifically mentions “collective catching”.

Section 1 of the Sherman Act prevents anti-competitive behavior, such as price agreements, agreements restricting output, group boycotts to force higher prices, and agreements dividing the market. Section 2 protects against monopolization by unreasonable exclusions of firms from the market. What constitutes anti-competitive behavior or an illegally pursued monopoly has been defined through a long history of court cases. The courts have found some actions to be “illegal per se” because, at face-value, these actions decrease competition and harm consumers. This standard is most frequently applied to cases involving agreements to fix prices and/or divide markets [10]. Less clear-cut actions fall under the “rule of reason” where courts determine whether combinations or conspiracies “‘unreasonably’ or ‘unduly’ restrain or monopolize trade” [10, p. 7].

The sponsors of the C-VA recognized that small-scale farmers required special consideration to compete with large agribusinesses. Small farms needed to band together to: (1) access more buyers in a larger geographic region; (2) guarantee an outlet for product; (3) collectively negotiate price; and (4) improve forecasting and data collection [11]. However, to do so without a legally authorized exemption from antitrust laws exposed farmers to serious legal and financial risk since treble damages can be awarded in antitrust cases. The C-VA provided farmers the necessary exemption to remain viable in an industry not conducive to small entrepreneurs. Agricultural cooperatives have a rich history of obtaining stronger bargaining positions. Examples of recognizable agricultural cooperatives—which started as associations of farmers, integrated forward, and subsequently increased market share—include Ocean Spray, Land O’Lakes, Sunkist, Welch’s, and Sun-Maid.

The FCMA has the same purpose as the C-VA and, except for references to fishermen and aquatic products and the addition of catching and producing to the list of allowable collective activities, contains identical language:

Persons engaged in the fishery (sic) industry, as fishermen, catching, collecting, or cultivating aquatic

products, or as planters of aquatic products on public or private beds, may act together in associations, corporate or otherwise, with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged. ...Such associations may have marketing agencies in common, and their members may make the necessary contracts and agreements to effect such purposes...

As recently as 1999, the similarities between FCMA and C-VA were noted in a Memorandum Opinion for the General Counsel Department of Commerce from Randolph D. Moss, Acting Assistant Attorney General, during deliberations about the inclusion of processor-owned catcher vessels in AFA pollock cooperatives. Moss stated that:

the FCMA exemption was patterned after a similar antitrust exemption for agricultural activities, set forth in section 1 of the Capper-Volstead Act, 7 USC § 291. In fact, the only court that has considered the scope of the FCMA exemption concluded that “though there are some differences between Capper-Volstead and the Fisherman’s Act, the two Acts provide exemptions from antitrust liability for essentially the same activities.” *United States vs. Hinote*, 823 F. Supp. 1350, 1354 n.7 (S.D. Miss.1993).” [12, p. 8]

The FCMA and C-VA address two central questions: (1) what types of organizational structures legally qualify as cooperatives and (2) what activities are protected by the antitrust exemption [11]. Regarding organizational structure, the acts require that a cooperative: (a) consists of farmers or fishermen who have a vested ownership interest and are engaged in production or catching, as opposed to processing, (b) is “operated for the mutual benefit of the members thereof” (7 USC § 291 and 15 USC § 521), (c) allows one vote per member (not according to amount of stock) or pay no more than 8% per year in dividends, and (d) limits dealings in products not produced by members.

The distinction between processing and catching/producing is important for fisheries. While the acts were designed to assist only farmers and fishermen, both legislative instruments recognize that collective gains can be achieved through cooperative processing of raw materials. Although some modern day agricultural cooperatives engage in processing, the C-VA requires that original members be exclusively composed of producers of agricultural products. Once formed, a cooperative can integrate forward [11]. In cases where processors were initially included in the formation of the

agricultural cooperatives, the courts determined that the antitrust protections did not apply.

Once properly formed under the FCMA or C-VA, cooperatives can legally engage in certain activities that would normally draw attention from antitrust authorities [10]. These activities fall into two categories—one related to prices and the other to market power. Regarding prices, cooperative members may agree on terms of sale and on minimum prices that they will accept for products. This would be unlawful for businesses in most industries. A representative of the cooperative may also negotiate and enter into agreements with a single buyer.

Monopoly power may be obtained legally through a cooperative's natural growth or through voluntary alliances, mergers, or acquisitions with/of other protected cooperatives. However, merging with or obtaining non-protected firms subjects the cooperative to the same scrutiny that mergers among independent businesses face under the Clayton Act. If competition were to be substantially reduced, the merger would be disallowed. Members of a cooperative may also agree to sell product to a single buyer or become a sole supplier. Cooperatives may engage in activities that affect the amount of product placed on the market. If a cooperative has limited facility capacity or a limited sales market, agreements can be made among members to limit the amount of product produced for the cooperative. Membership in the cooperative may also be constrained if capacity is being reached or if allowing new members would reduce services to existing members. Membership applications may also be rejected based on product quality.

While these protected activities offer cooperatives many advantages, cooperatives cannot freely engage in restraint of trade, undue price enhancement, or other anti-competitive practices. Cooperatives can be sued under the antitrust acts for engaging in certain activities [10]. With respect to price setting activities, cooperatives may not agree on prices with non-cooperative competitors. They may not unduly enhance price through limitations on production or other means, including coercing a buyer into a sole supplier agreement or refusing to sell to a willing buyer so as to fix prices (or to obtain monopoly power, greater market share, or stifle competition).

Regarding monopolization and market power activities, cooperatives may not obtain monopoly power through predatory or anti-competitive practices or through alliances with non-protected firms. They may not reject a membership application for anti-competitive reasons. They may not force non-members to use the cooperative, or to sell at cooperative prices, or to not sell to a particular buyer (boycott). Also, picketing retailers who buy from non-cooperative producers is a violation.

3. Fishery cooperatives

3.1. Application of the FCMA

Even though fishery cooperatives did not obtain government support, or increase in number, as extensively as agricultural cooperatives, there are many examples of FCMA cooperatives in fisheries. As of 1980, there were 102 cooperatives of which 70 were operating actively [13,14]. These cooperatives were organized primarily to provide supplies and services to members and to market catches. The ability of most cooperatives to control supply and entry into a fishery is limited when there is an absence of a TAC or limited access.

There are examples of groups of fishermen (not necessarily FCMA cooperatives) coordinating production. McCay [15] documented a New Jersey cooperative's attempts to coordinate production in the local whiting fishery. While this and other non-quota controlled cooperatives may be able to exert some control over entry and supply, they are limited to the opportunities presented by unique aspects of their particular fishery. Townsend [16] documents other non-FCMA cooperative agreements built around limited access and a TAC—the Oregon herring sac roe fishery and the Northwestern Hawaiian Islands lobster fishery.

Although rare, it is important to distinguish quota-controlled cooperatives from other types of FCMA cooperatives which restrict services to input purchases and marketing as the incentives for, and the potential benefits from, cooperation are quite different. For the remainder of this paper, we focus primarily on quota-controlled FCMA cooperatives.

3.2. Harvest cooperatives

The Pacific Whiting Conservation Cooperative was the first harvest cooperative established in the Northwest Region. Vessel owners in the offshore whiting fishery were prompted to organize by a sub-allocation of the overall TAC (set by the Pacific Fishery Management Council) to the offshore sector and by limited entry in the offshore sector [2].

After the creation of the Pacific Whiting Conservation Cooperative, vessel owners in the Bering Sea pollock fishery, some of which were in the whiting cooperative, sought congressional action to form pollock cooperatives. This action was taken because the North Pacific Fishery Management Council had not clearly defined limited entry groups and assigned TACs in the pollock fishery as it had in the whiting fishery [2]. As a result, the AFA was formed which authorized the allocation of Bering Sea pollock catches to inshore and offshore sectors as well as to specific vessels within these two

sectors. The AFA also allowed harvest cooperatives in the pollock fishery to be formed where vessels could redistribute quota and establish rent-share agreements [17]. In the offshore sector, allocations were made to catcher and catcher/processor vessels which subsequently formed separate cooperatives. In the inshore sector, allocations were made to plant-specific cooperatives in which vessels were bound to particular plants.

The Pacific whiting and Bearing Sea pollock cooperatives, as currently implemented, are particular types of FCMA cooperatives.¹ The reason for creating harvest cooperatives, rather than marketing cooperatives, relates to the inclusion of processor-owned vessels and catcher vessels engaged in processing. Had processors been excluded from special consideration, it seems likely that vessel owners would have formed marketing cooperatives.

In the case of Pacific whiting, the cooperative requested a business review letter from the Antitrust Division of the Department of Justice (DOJ). To obtain a favorable review, they agreed to only cooperate on harvest schedules and take the full TAC allocation [18]. Narrowing the cooperatives' activities to sharing quota satisfied antitrust authorities who recognized that Congress's intent in creating the C-VA and the FCMA was to exclude processors from cooperative membership.

The AFA, by contrast, was specifically designed to accommodate processor interests. In addition to the legislative authority of the AFA, the pollock cooperatives also sought business review letters from the DOJ and similarly agreed to restrain from joint marketing. In his letter to Joseph Sullivan, attorney for the Pollock Conservation Cooperative, Joel Klein, Assistant Attorney General, states:

the proposed Agreement affects only harvesting activity; it allocates the fixed annual catcher-processor quota among all the members of that group. The proposed collective activity does not extend to processing, marketing or sales of any of the Members' production, nor does it extend to their purchases of fish from others. Rather, the Agreement specifically prohibits any collective activity... with respect to their purchasing, processing, marketing and sales of any fishery products [19, p. 2].

The Klein letter also addresses the issue of the TAC and notes that since the vessels will operate in a "regulated output setting" [19, p. 3] there would be no anti-competitive effect from agreeing to coordinate harvest schedules. The DOJ recognized the inefficiencies

and wastefulness of vessels racing to catch quota and the benefits that would accrue by ending such a system. Given that the entire TAC had historically been taken and that sufficient capacity existed in the newly formed cooperatives to harvest the TAC, the DOJ found that harvesters would be unlikely to reduce production below the TAC. Therefore consumers would be protected. The harvest agreements allocate the full TAC among vessels and encourage vessel owners to take their full allotment. Sullivan notes that prior to addressing the various issues surrounding harvest cooperatives:

...antitrust authorities assumed that the fundamental purpose and effect of a resource output allocation agreement among competitors would be to reduce the amount of product available to the market, and thereby profitably raise the price of the product above that which would prevail in the absence of the agreement. ...It became immediately apparent that this assumption does not apply in many US fisheries off the Pacific Coast and Alaska [1, p. 4].

The inability of AFA-style harvest cooperatives (a term which refers to both Pacific whiting and Bearing Sea pollock cooperatives even though the whiting cooperative is not under the AFA) to harvest less than the TAC is a major distinction from quota controlled marketing cooperatives. In agriculture, the use of marketing agreements and market orders to align production with demand is common. Clearly, if an AFA-style harvest cooperative reduced its harvest below the TAC, it would invite scrutiny from antitrust authorities. However, if a quota controlled marketing cooperative reduced harvest, it is unclear if the courts would take the view that there is something inherently different about reducing the harvest of a natural resource and adopt a set of standards different from those used in agriculture. If the incentives are there, in terms of market structure and elasticities of demand, and a cooperative can reduce harvest without "unduly enhancing" the price, then significant additional resource benefits may be realized. Antitrust laws were designed to protect competition. In an overfished fishery, a short-run reduction in harvest to rebuild a stock typically results in more fish on the market for consumers in the long-run.

Coordinating production activities has produced measurable economic benefits for harvest cooperatives, including reducing the substantial costs associated with overcapitalized fleets. The Pacific Whiting Conservation Cooperative accomplished this by shifting excess capacity out of the fishery [1] and by allowing more efficient operators to lease harvest shares from less efficient operators. Similar cost-cutting measures were enacted by the two Bering Sea pollock cooperatives (i.e., Pollock Conservation Cooperative and Offshore Pollock Catchers' Cooperative [1]), the North Pacific Scallop

¹Section 210(b) of the AFA states that "the authority in section 1 of the Act... [the FCMA] shall extend to processing by motherships... solely for the purposes of forming or participating in a fishery cooperative...".

Cooperative (Joe Terry, personal communication), and the Chignik Seafood Producers Alliance (which reduced its members' combined fleet of 77 salmon purse seine vessels down to 19 [20]).

Gains were also made through improving product quality and form. The Chignik sockeye salmon cooperative was paid an \$0.08 per pound price premium above the \$0.63 base price for top grade salmon [20]. Catcher/processor vessels in the Pacific whiting cooperative increased their surimi recovery rate by 40 percent and profitably shifted some production from high volume surimi to more valuable fillet and block products [1,21]. In addition, whiting harvests were timed to coincide with peak roe ripeness. Similar gains in product recovery and value were made in the pollock fishery.

4. The FCMA and case law

4.1. Review of cases

There is a limited history of court cases which addresses legal aspects of FCMA cooperatives. Most cases are from the 1930s, 1940s, and 1950s and primarily focus on either the standing and antitrust exemptions of labor unions in fisheries or the activities found to be illegal regardless of an organization's status under FCMA. Interestingly, these cases do not challenge the authority of the FCMA to provide antitrust protection but illustrate the kinds of actions not protected.² The actions of the fishermen's organizations were evaluated in the court cases with respect to laws protecting labor unions and the FCMA. The courts consistently ruled that the organizations were not protected by labor laws (largely due to crew being paid on a share basis and/or vessel owners not being employees of the dealers who bought their fish). Where courts found that an organization was not formed for the purpose of collective marketing and did not qualify for FCMA protection, the cases illustrated the consequences of collusion by non-cooperative individuals.

In *Local 36 of International Fishermen & Allied Workers of America vs. United States* 177 F.2d 320 (1949), the fishermen's organization resorted to picketing and boycotting of dealers, withholding supplies from outside fishing vessels, and threats of violence to transporters. Regarding the FCMA, Judge Fee stated:

²See *Gulf Coast Shrimpers and Oystermans Association vs. United States* 236 F.2d 658 (1956), *Columbia River Packers Ass'n vs. Hinton* 34 F. Supp. 970, 975 (1939), *Manaka vs. Monterey Sardine Industries* 41 F. Supp.531 (1941), *Hawaiian Tuna Packers vs. International Longshoremen's and Warehousemen's Union* 72 F. Supp. 562 (1947), *Local 36 of International Fishermen & Allied Workers of America vs. United States* 177 F.2d 320 (1949), *Commonwealth vs. Patrick J. McHugh* 93 N.E.2d 751 (1950).

It might also have been possible to find that Local 36 was an association under the Fishermen's Marketing Act and that the members were joined together for the collective purpose of carrying on legitimate objectives of 'catching, producing, preparing for market, processing, handling and marketing fish caught by their members.'... However, the record shows that the fishermen here viewed as members of a cooperative had much broader purposes underlying the concert of action...

Also, "if... they were acting as members of a marketing cooperative, it would afford them no sanctuary for collaboration with others outside the association." The union, in this case, was found to be in violation of anti-trust laws.

In *Gulf Coast Shrimpers and Oystermans Association vs. United States* 236 F.2d 658 (1956), the Association's primary argument was that its coercive activities were exempt from Sherman Act liability under the Norris-La Guardia Act because it was a labor group. The court found that since the fishermen and crew members were paid on a share basis, they were not a labor group (employees of the dealers) but independent businessmen. Also at issue was whether the matter arose out of a labor dispute since "a labor organization's exemption from liability under the Sherman Act is restricted to activity occurring in a 'labor dispute'". The Association then argued that its activities were exempt under FCMA. However, the court found that:

in its price-fixing, the Association exceeded any possible privilege or exemption granted by the Fishermen's Collective Marketing Act when it undertook not simply to fix the prices demanded by its members [which is allowable among members of a properly structured cooperative], but to exclude from the market all persons not buying and selling in accordance with its fixed prices.

The court did not challenge the association's status as an FCMA cooperative or its agreement among members to set minimum prices but prosecuted the association because it exceeded its exemption.

Columbia River Packers Ass'n vs. Hinton 34 F. Supp. 970, 975 (1939) (subsequently upheld by the Supreme Court—315 US 143 (1942)) is a case where the defendant's organization was an FCMA cooperative and not a labor union. However, the cooperative was found to have acted illegally in its attempts to enforce agreements. Also of interest is the concern expressed by Judge McColloch over a fishermen's group "having substantial control of production in their given field". His concern was limited to the means by which a group gains such control and asked if the group:

could require of all buyers that they agree not to buy from any other producers, and could forbid and

prevent their members by fines and other disciplinary measures from selling to buyers who did not thus agree to buy only from members of the cooperative.

It does not appear that the Judge disputed a cooperative's ability to gain monopoly power through natural growth and merger and acquisition of other FCMA cooperatives. However, this point is not entirely clear since he noted that:

surely reasonable men will agree that the public's interest in an important item of food supply should not be put in jeopardy. If an exclusive and monopolistic arrangement, as here insisted upon, can be legally made as to fish, it can be made to milk, as to meat, and as to other necessities of life.

The defendant argued that his actions were justified because the intent was to conserve fish stocks. The judge's reaction was to commend his motives but found that this reason did not justify coercive actions. Since the defendants in this case had threatened to cut off supplies to particular canners to force them to only buy from the union, it appears that the Judge's statements were a reaction to gaining excessive market power through anti-competitive practices.

The court found that because the case did not involve a labor dispute over the terms or conditions of employment, the legality of the union's actions under the Norris-La Guardia Act could not be decided. In fact, Judge McColloch stated that the union "is truly a cooperative marketing association, and we look to the law of cooperative marketing rather than to labor law in the determination of the legality of the defendants' acts." He further acknowledged the FCMA while expressing his condemnation of excessive market power through anti-competitive practices:

Having organized the fishermen ninety per cent, the defendant union has a great power in its hands. Such control, approaching a complete monopoly in the production of one of life's necessities, calls for reasonableness and moderation in the exercise of the power. I am certain that with so complete an organization, the fishermen will find that the powers granted by the Federal cooperative statutes are ample to protect their markets. More power over their markets than exercised by the other producers of the nation in the fields of agriculture... the fishermen of the North Pacific... cannot expect and should not demand.

Another important case from the early 1940s regarding activities of an association of fishermen is *Manaka vs. Monterey Sardine Industries* 41 F. Supp.531 (1941). In this case, Frank Manaka, a fishermen of the Bay of Monterey area, was blocked by an association of fishermen (Monterey Sardine Industries) from supplying

fish to a local packer (Del Mar Canning Company). Del Mar and a few other canning and reduction plants processed "practically all the fish caught in California waters and on the high seas adjacent to Monterey. It may be also concluded that no other market is practicable or available for such fresh fish in quantities". The processors in the Monterey area all had contracts with the fishermen's association to assign vessels to specific plants. There were a number of "outside" fishermen not in the association, Frank Manaka being one, that attempted to sell to the processors. The processors often requested the association to assign these vessels to their plants. But if the association felt that the plant was supplied by too many vessels, the association would not permit other vessels already under contract to supply fish to that plant. By nature of the market and the restrictive contracts between the association and the processors, the fishermen's association gained monopoly power. The court ruled in favor of Manaka on the grounds that the cooperative's attempts to keep him from supplying fish to the canneries was restraint of trade. This case highlights the importance of defining the universe of eligible participants.

It is not clear whether the fishermen in the Manaka case justified their actions by a desire to conserve fish stocks (although they clearly recognized the economic benefits from doing so). Either in response to such a claim by the Monterey association or because such a claim was made in the Hinton case, Judge Fee stated that:

such an association as that of the boat owners is not freed from the restrictive provisions of the antitrust act, because they profess in the interest of the conservation of important food fish to regulate the price and manner of taking such fish "unauthorized by legislation and uncontrolled by proper authority". "Surely reasonable men will agree that the public's interest in an important item of food supply should not be put in jeopardy. If an exclusive and monopolistic arrangement... can be legally made as to fish, it can be made as to milk, as to meat, and as to other necessities of life", as my colleague, Judge McColloch, has so well said in the case of *Columbia River Packers Ass'n vs. Hinton*, DC, 34 F. Supp.970, 975.'

By referring to the Hinton case it appears that Judge Fee was equating Monterey Sardine Industries' actions to those of Hinton's union. The objectionable activity in each case was gaining control over a natural resource through restraint of trade. In both cases, the association manipulated fishermen and processors. Both judges found that the manipulation was not justified, especially when the activity was not authorized by proper authority. In the words of Judge McColloch, the action "amounted to the defendant's taking the law into their

own hands". However, since monopolies achieved through natural growth, merger, and acquisition are allowed under C-VA and FCMA, both judges must have stated their objections to achieving market power through coercive actions.

In *Commonwealth vs. Patrick J. McHugh* 93 N.E.2d 751 (1950) the court found that branches of the Atlantic Fishermen's Union in Massachusetts³ were not protected by FCMA because they were unions of crew members and not vessel owners. The opinion states that:

The wording of these sections [of the FCMA] seems to indicate that they refer to associations of independent entrepreneurs each of whom, or at least most of whom, are engaged in fishing on their own separate accounts...and not to a labor union of fishermen employed by others... It is difficult for us to imagine an association of hired farm help, having nothing of their own to sell, qualifying as a farmers' cooperative. The defendants are employees of the vessel owners and not entrepreneurs on their own accounts".

Even if they had been considered a protected cooperative, their actions may have overstepped the bounds of legal protection. The union excluded dealers from the selling room and refused bids from certain dealers even though they were the highest. Fishing captains were persuaded, coerced, intimidated, threatened with fines, and had supplies withheld. The Judge in the case stated that "by these acts the defendants have unduly enhanced the price of fish and have crippled the fish industry in a manner detrimental to the Commonwealth and the public".

The most recent (1993) court case involving FCMA cooperatives concerns the inclusion of processors in cooperatives. The issue in the Hinote case (*United States vs. Hinote*, 823 F. Supp. 1350, 1354 n.7 (S.D. Miss.1993)) was not whether the FCMA protects fishery cooperatives from antitrust prosecution of certain activities, but if Delta Pride Catfish's co-conspirators—Country Skillet and Farm Fresh—qualified as cooperatives of fishermen as defined by the FCMA. In finding that both Country Skillet and Farm Fresh were processors (due, in large, to their degree of vertical integration), the court did not have to determine Delta Pride's eligibility since protected price and production agreements must be between qualified organizations.

The Hinote case is important in a number of respects. The first is that it is a recent case involving the applicability of the FCMA. Even though Delta Pride's eligibility was not tested directly, this case was considered by antitrust authorities as an example of the similarities between the C-VA and the FCMA [12].

³For a detailed account of the union's activities and the fishing industry in New England at the time, see [22].

It also had important implications for the formation of harvest cooperatives. The case reiterated that the inclusion of processors in agricultural or fishery cooperatives would void the antitrust protections. This led to the design of harvesting, as opposed to marketing, cooperatives on the West Coast.

4.2. *References to FCMA cases in social science literature*

Scholars reviewing these cases have interpreted the court decisions to be unsupportive of collective action in fisheries and even illegal, even though there has been a long history of FCMA cooperatives that have not faced legal challenge. Groups faced charges because they were formed primarily as labor unions and not cooperatives, they sought protection primarily under labor law and secondarily under cooperative law, or where they were considered a cooperative the organization engaged in unprotected activities. What the courts consistently found was not that attempts to cooperate were illegal and that the FCMA offered no protection, but that coercive activities would not be tolerated, and that certain organizational qualities must be met to gain protection of allowable activities. While the FCMA protects some activities from antitrust laws, it does not provide *carte blanche*.

In discussing the fishermen's union cases, Crutchfield [4] suggests that the courts did not recognize the legitimacy of the FCMA protections, and doubted that fishermen could cooperate, and therefore gain the benefits of cooperation, given the legal environment at that time.

Johnson and Libecap [5] in their reference to these cases as an example of contracting problems in fisheries, took Judge Fee's remarks in the Manaka case (see above), including his quotation of Judge McColloch's statement about legislation and proper authority, and attributed them to language in the FCMA (see [5, p. 1008]). This presumably caused them to conclude that "currently, government regulation is the only means of increasing fishery rents, since sole ownership and other private efforts to control entry and effort have been rejected as illegal" [5, p. 1019].

These cases have demonstrated that private efforts (non-FCMA sanctioned) to control entry and effort, in the context of restraining trade through coercive activities, are illegal. However, the advantages of private bargaining solutions can be obtained legally through FCMA cooperatives if anti-competitive practices are avoided and entry and quota are mandated by a proper authority such as the Secretary of Commerce, a fishery management council, or Congress. Nonetheless, there may well be additional economic obstacles to overcome, such as the high transaction costs of agreement on internal catch or effort restrictions among

heterogeneous fishermen [5]. Although Johnson and Libecap [5] recognize that “one crucial advantage offered by sole ownership and trade associations over government regulation [is that] they will internalize the costs of regulation” [5, p. 1020], they seemingly overlook issues of contracting *with* state support (as opposed to the section of their paper titled Contracting in the Absence of State Support).

Later authors citing Johnson and Libecap [5] continued to attribute Judge Fee’s and Judge McCulloch’s remarks as language of the FCMA. In a review of the Johnson and Libecap [5] paper, Anderson and Leal [6] cited what they thought was language from the FCMA but in fact was Judge Fee’s and Judge McCulloch’s comments quoted above.

Durrenberger [7] discusses the history of shrimpers’ unions in Mississippi and suggests that a folk model, or misinterpretation, exists that characterizes fishermen as too independent to cooperate. He disputes this folk model by pointing to fishermen’s unions and the attempts fishermen have made to self-organize and suggests that the real reason more cooperation is not seen is because it is illegal. He also mentions that the unions did not control the supply of shrimp, which may be more germane since collective action is legal under the FCMA and numerous examples exist of marketing cooperatives.

Yandle [8] concludes, perhaps based on Johnson and Libecap [5], that the FCMA does not exempt cooperative associations of boat owners from the Sherman Act because he also attributes Judge Fee’s remarks in the Manaka case to the FCMA.⁴ Yandle then asks “is it better to ravish a commons than to form an association that limits access and thereby preserves a fishery?” [8, p. 39]. He goes on to argue that the benefits from cooperation far outweigh antitrust concerns and that the government should take a hands-off approach when it comes to collective action concerning common property resources. In the case of fisheries, this policy was already in effect, in part, through the FCMA.

In a discussion of the conditions needed for forming successful fishery cooperatives, Leal indicates that one of the conditions “must be a clear signal to fishers that such an arrangement will not be overturned by antitrust law” [9, p. 37]. Harvest cooperatives obtained such a signal through the positive business review letters acquired from the Department of Justice. Leal acknowledges this but notes that “colluding during the marketing phase would be illegal under the Sherman Antitrust Act” [9, p. 37]. It is not clear whether this a general statement or specific to AFA harvest cooperatives. If it is a general statement, then it does not recognize the protections offered by the FCMA. Regardless, the fact

that mention of FCMA cooperatives was omitted from a primer on institutional arrangements and property rights in fisheries suggests that widespread misunderstanding still exists about the legitimacy of the FCMA.

5. Potential for quota controlled FCMA cooperatives

The newly formed Chignik Seafood Producers Alliance in Alaska stands out as a model of a quota controlled cooperative which combines features of harvest and marketing cooperatives. The Alliance originated because purse seiners in the overcapitalized Chignik sockeye salmon fishery needed to reduce fishing costs and improve product quality in markets where supplies of cultured products from around the world had depressed dockside prices to fishermen [20]. Three fishermen in the already limited entry sockeye purse seine fishery asked the Alaska Board of Fisheries to approve a TAC allotment for a cooperative fishing group allocation. The proposal was supported by the Chignik Seiners Association which comprised the majority of the 101 permit holders. In the end, the Board of Fisheries approved an allocation of nearly 70 percent of the fishery’s 2002 TAC to the 77 permit holders who had formed the Alliance—a decision that was upheld by the Superior Court of Alaska later in that year.

The Alliance appears to be a unique form of cooperative, but one that is consistent with the parameters of the FCMA. Unlike the harvest cooperatives which were formed to negotiate harvest shares, the Alliance fishermen have unitized their salmon production, similar to that seen in other natural resource sectors of the economy such as oil and gas production [23]. That is, rather than agreeing to shares of the harvest, members of the cooperative agreed to profit shares earned by the fishery. Officers of the Alliance selected 19 of the 77 catcher vessels and deployed them based on run size and location during the season. For example, more vessels were actively catching salmon during June when the run is heaviest than in August when the run thins. Also, fishing could be deployed during low tides when the fish were aggregated spatially. These kinds of production decisions economize on common pool rents.

The Alliance also undertook other activities allowed under the FCMA. Price schedules were negotiated with processors in advance, including margins for top quality, and deliveries were made to a processor vessel that experimented with a new deboning technology. Eight tender vessels with refrigerated seawater systems were part of a program to deliver fresh native salmon to markets in the United States and Canada, including a new live fish market. Crew payments and purchases of food and other supplies were centralized, as were

⁴However, later in the paper Yandle [8] correctly cites the same passage from the Manaka case.

payments to owners of the catcher and tender vessels for use of their capital and fuel.

The structure of the Chignik salmon cooperative along with its allocation and legal protections seem to mirror the type of arrangement Crutchfield had in mind when he discussed the reasons why earlier attempts to organize (discussed above) failed:

If the bargaining organization controls only a small portion of potential supply [including substitutes] or if its control is precarious, intermarket mobility of buyers and the concomitant elasticity of demand for fishing services in any one port area would severely limit potential gains from collective bargaining [4, p. 550].

He also noted that it would be difficult to maintain a bargaining unit, similar to those in agriculture cooperatives, when there is:

no definite supply available (with respect to which returns should be maximized), and no definite relationship of cost of the quantity of supply, until it is known how many units of potentially available factors are represented by the monopoly, and how many excluded [4, p. 550].

Cooperatives are not a solution to management problems in all fisheries. However, in fisheries such as the Chignik salmon purse seine fishery where there is limited access, a TAC, and other characteristics amenable to changing property rights arrangements [24], many of the problems highlighted by Crutchfield [4] are resolved.

The Alliance also highlights an important function of governments in fisheries—in this case, the Alaska Board of Fisheries—in establishing the governance structure and providing what Scott identifies as one of the critical aspects of successful self-governance, i.e., an “exogenous distributional basis” [25, p. 195].⁵ Here, the Board handled the difficult job of allocating quota to a defined group. Once this was achieved, the negotiation of shares to individuals was left to the cooperative. The Chignik Alliance and the cooperatives in the Pacific whiting and East Bering Sea fisheries have shown that this function can be performed in short order by claimants to the benefits [1].

6. Conclusions

We are not legal experts, but we share Sullivan’s [1] positive outlook for the FCMA anti-trust exemption provided all members of an FCMA cooperative are fishermen and/or processors with tangible investments

in fisheries. Past judgements against fishermen’s organizations were due to predatory practices against non-members and the ill-advised strategy of claiming exemption through labor laws. Contextual analysis of the FCMA by the courts may some day reveal that vertical integration was common among fishermen during the early 1930s, and that fishermen had at times allocated harvesting opportunities among themselves to take advantage of efficiencies [1].

The economic perspective on FCMA cooperatives is also positive, judging from the recent North Pacific experience. Opportunities to reduce fishing costs (particularly where production is unitized in the Chignik salmon fishery) and to increase the value of landed products are substantial [21]. In addition, the transaction costs of negotiating and then monitoring and enforcing contracts will be minimized by the self-selected members of fishermen’s cooperatives groups compared to the entire fishery and other stakeholders who air demands in public at Council meetings [2]. For example, the two pollock cooperatives negotiated harvest shares and inter-cooperative rules within only two months of the AFA’s adoption [1]. Other benefits include reduced fishing capacity [26], and reduced regulatory bycatch (yellowtail rockfish in the Pacific whiting fishery, salmon in the Bering Sea pollock fishery, crabs in the weathervane scallop fishery).

Processors are also likely to benefit from the growth of quota-controlled FCMA cooperatives. Even if prices paid to harvesters increase, economic gains will be realized by having access to a reliable supply of top quality seafood and participating with harvesters in developing new markets (as seen in the Alliance).

The role played by government in facilitating new property rights and governance arrangements cannot be underestimated. When Congress passed the FCMA in 1934, certain activities undertaken by groups of fishermen were exempted from antitrust legislation. More recently, the AFA usurped the authority of the North Pacific Fishery Management Council when it set a pollock TAC and sectoral quotas and thereby paved the way for two harvest cooperatives in the Bering Sea fishery. In contrast, the Alaska Board of Fisheries endorsed industry’s proposal for separate allocations of sockeye salmon between the cooperative and open access sectors of the purse seine fishery.

Congress may be called upon again to resolve the seemingly contradictory positions it has taken over the years on issues of antitrust and conservation of fishery (and other natural) resources. Yandle [8] stressed that stewardship of natural resources may require fishermen to curtail harvests in the short run in order to sustain production over time. The Federal government and fishery management councils have the right to conserve fishery resources by setting harvest quotas, but the right

⁵Scott’s focus was on individual transferable quotas but the argument can justifiably be extended to cooperatives.

to set quotas has not yet been extended to harvesters in the United States.

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