

**Harvesting Cooperatives
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**Joe Sullivan
Mundt MacGregor LLP**

1. What are harvesting cooperatives?

- **At their simplest, they are collective harvesting arrangements implemented through private agreement. They may be, but need not be, formed under the Fishermen’s Collective Marketing Act (“FCMA”) (15 USC § 521).**
- **Harvesting cooperatives, as opposed to traditional FCMA organizations, generally restrict the scope of their activity to allocating harvest privileges among their members, and enforcing those allocations.**
- **They may do so either because one or more of their members fails to meet the Hinote vertical integration standards (see below), or because their members prefer to conduct processing, marketing and sales activity independently or through one or more different organizations.**

2. What are the conditions to formation?

A. Practical conditions:

- **Adequate barriers to entry by free riders, such as limited entry licensing, IFQs, “groundfish history”**

allocations, sub-sector allocations; DAS allocations may serve this purpose.

- **A community of interest among participants that enables negotiation and produces a reasonable environment for monitoring and enforcement of agreements.**
- **The potential to attain additional value through reduced cost, improved recovery, and/or production of higher valued products, which outweighs incentives to compete and cooperative formation transaction costs.**
- **Adequate data transparency and enforcement mechanisms, i.e., adequate means for verifying harvest allocation compliance (such as observer coverage), rapid data transmission, a trusted third party monitoring agent, and consequences for non-compliance**

B. Legal Conditions:

- **Private fishery shares are a market allocation among competitors; the Sherman Act outlaws unreasonable combinations in restraint of trade. (However, governmental privileges that have the effect of restraining trade are permissible under the Noerr-Pennington doctrine.)**
- **Collaboration among competitors is judged under the per se rule or the rule of reason**

- **Per se rule applies to inherently anti-competitive activity, such as price fixing. If a per se violation is found, there is no need to prove the act caused competitive harm – the court moves to the penalty phase.**
- **Rule of reason applies to activity that is not inherently anti-competitive. It involves a factual inquiry to determine whether activity is more pro-competitive than anti-competitive from the point of view of the U.S. consumer**
- **Market allocations are generally considered equivalent to price fixing. Resource market allocations are judged the same as sales market allocations.**
- **The FCMA provides an antitrust exemption for collective activity among fishermen. It permits properly qualified organizations to conduct activity that would otherwise result in per se liability. The United States v. Hinote case (823 F.Supp 1350, 1993) discusses the standards for FCMA eligibility. The Hinote case balances the degree of the participants' vertical integration against the nature of the collective activity, in context of traditional arrangements in the fishing industry.**
- **A properly qualified FCMA organization may, but is not required to, conduct collective harvesting, processing, marketing and sales activity. These functions can also be distributed among two or more qualified FCMA organizations.**

- Under certain circumstances, resource market allocations may be analyzed under the rule of reason. If they survive ROR analysis, the organization need not qualify under the FCMA. Two factors have proven important: a “regulated output setting” and a restricted scope of activity.

3. A blended approach, that uses State or Federal action to facilitate cooperative formation and/or to address collateral impacts of rationalization, is becoming more common.

- Transaction costs or disparate interests among fishermen may impair formation of cooperatives in sectors with significant latent capacity or large sectors. Governmental action can remove latent capacity and provide sector or sub-sector allocations.
- Fishermen in non-rationalized fisheries may object to potential spillover of excess harvesting capacity into non-rationalized fisheries. This issue can be addressed through governmental sideboards on non-target fishery catch.
- Fishermen who may depend on the resource but who are not vested with an access privilege may object to the exclusionary effect of harvest privilege allocation. This issue can be addressed by preserving an entry level fishery with low barriers to entry, by maintaining small access privilege units that are not subject to consolidation, or by creating attenuating privileges on transfer to create secondary pools of privileges with

alternative allocation eligibility criteria or thresholds.

- **Communities may object to potential migration of landings and fishery businesses that can result from the transition into fishery rationalization. This issue can be addressed through measures such as regionalization, community fishery quota allocations and community quota purchases.**
- **Public trust advocates may object to quasi-privatization of fishery resources. This issue is currently being considered in connection with the State waters component of the Gulf of Alaska groundfish rationalization program. Measures being considered by the Alaska Board of Fisheries include:**
 - **applying the Australian drop-through model (i.e., issuing dedicated access privileges in successive, time limited generations, and conditioning second through nth generation eligibility on compliance with social standards) (see NRC's Sharing the Fish);**
 - **adjusting second through nth generation eligibility pools in response to changes in stock size and/or product values; and**
 - **attenuating (i.e., taxing) DAPs on transfer, and using the resulting pool to fund allocations to communities, crew members and/or others.**

4. How are harvesting cooperatives formed?

- **A sector or sub-sector obtains a discrete fishery allocation and entry limitations. These can be through sector TAC and license limitation, through governmental allocation, or through individual fishing privilege allocation.**
- **Participants determine internal allocation formula and other essential terms of agreement. Allocations are typically based on a blend of catch history (subject to definition of relevant years) and capacity (the “outside option”). Allocations may be based on bycatch performance standards, if bycatch constrains the target fishery.**
- **Participants identify monitoring and enforcement agent. Timely reporting of verifiable data is critical.**
- **A legal entity is formed, and bylaws (rules of governance) and a membership agreement (the harvest share allocation and enforcement contract) are negotiated.**

5. How do harvesting cooperatives operate?

- **Through the membership agreement, each member holds a contractual right to harvest a certain percentage of the resource pool available to the cooperative.**
- **Members may harvest their share themselves, or may transfer some or all of their harvest share to other members under the terms and conditions of**

the membership agreement. These terms can limit consolidation or limit private rights in one or more elements of the resource pool.

- **Members may collectively reduce harvesting capacity within the cooperative through joint purchase of short or long term harvest shares of one or more members.**
- **The harvesting cooperative acts as a clearing house for harvests and transfers, to insure the cooperative's pool is not over-harvested. This is typically done through a monitoring agent, who reports to the cooperative Board of Directors.**
- **The Board of Directors takes enforcement action if a member violates the agreement. This results in enforcement costs being shared.**
- **Enforcement mechanisms may include injunctive relief, liquidated damages and pledges of collateral to secure penalty obligations.**
- **Cooperatives may file performance reports with Federal or State management agencies.**
- **Cooperatives may sponsor research on issues of common interest, such as stock assessments or gear modifications.**

6. Case studies:

A. The Pacific Whiting Cooperative

- **Four companies held all licenses available for trawl catcher/processor sector of the U.S. Pacific Coast whiting fishery.**
- **The participants had common fisheries experience, and communicated very well.**
- **The fishery sector had a high potential of additional value through de-capitalization, increased product recovery, and fishery management corrections**
- **The sector allocation was limited by a hard TAC and fully harvested.**
- **The vessels had voluntary 100% observer coverage and reported to a sophisticated, trusted private monitoring service.**
- **Some member companies were highly vertically integrated, so the cooperative formed under the rule of reason rather than the FCMA.**
- **Antitrust issues were addressed through Department of Justice business review process (28 C.F.R. § 50.6). DOJ applied the rule of reason, issued a “no enforcement intention” letter and a supportive press release on May 27, 1997. DOJ explicitly recognized that cooperative harvesting arrangements address the waste and inefficiencies of Olympic fishery management and benefit the US consumer.**
- **The fleet experiences immediate results on implementing the cooperative harvesting**

arrangement. Prior to implementation, the fleet was achieving a surimi recovery rate of 17.2%. Upon implementation, the recovery rate increased to 20.6%, and several vessels exited the fishery. The fleet was able to manage its collective harvest to within 1-2% of the TAC. Processing line modifications lead to 24% surimi recovery rate in 1998, and substantial shift to fillet production.

B. The Pollock Conservation Cooperative and High Sea Catchers Cooperative.

- **Initially, practical conditions precedent were not met; the sector too diverse, and there were too many latent licenses.**
- **The American Fisheries Act – October 1998 split the fishery into three sectors and eliminated latent capacity. A separate catcher/processor sector was created for Bering Sea pollock fishery, and the class of eligible vessels narrowly defined – 20 + 1 catcher/processers, 7 catcher vessels.**
- **In December of 1998, 20 catcher/processers formed Pollock Conservation Cooperative (PCC), 7 catcher vessels formed Offshore Pollock Catchers Cooperative (OPCC, now HSCC). Intercoop agreement permits leasing of HSCC shares to PCC.**
- **Operations were immediately modified: 16 of 20 catcher/processers were employed, all catcher vessels retired or reassigned. The 16 remaining catcher processors reduce daily catch rate by 60%; made 45% fewer tows per day than olympic mode; harvested 27% less fish per tow (92 ton average to**

**67 ton average); dispersed fishing effort over time
– took twice as long to harvest half the fish.**

- The fleet significantly improved utilization, with a focus on selective fishing activity and market-oriented processing. The product recovery rate increased approximately 20%, the percentage by weight of higher value products increased, i.e. deep ski fillet production increased by approximately 40%, surimi production increased by approximately 8%, standard fillet and mince production decreased by approximately 40%**
- The under-harvest resulting from the reserve maintained by NMFS under olympic management ended.**
- The arrangement produced significant environmental benefits. The fleet was able to voluntarily comply with ESA sea lion mitigation measures requiring temporal and spatial dispersion of harvests and reduced removals from critical habitat. The fleet instituted an inter-cooperative salmon bycatch management system (with shore-side catcher vessel cooperatives) that closes salmon bycatch hot zones to fishing by private contract rather than regulation.**