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RE: State Agency Immunity from Federal Antitrust Laws (MASGP 08-007-15)

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Dear Quentin,

Below is the summary of research regarding the question posed to you by Dr. Keith Criddle, Professor of Marine Policy at the University of Alaska Fairbanks. Dr. Criddle asked whether the Alaska Department of Fish and Game (DFG) would be in violation of federal antitrust laws if DFG imposed a cap on total harvests of sockeye salmon for the express purpose of increasing ex-vessel price and does the legality depend on whether the salmon are sold into the U.S market. The following information is intended as advisory research only and does not constitute legal representation of Alaska Sea Grant, the Alaska Department of Fish and Game, the University of Fairbanks, or their constituents. It represents our interpretations of the relevant laws and cases.

Federal antitrust law is an extremely complicated body of law and this memo should not be taken as a comprehensive discussion of all the legal issues. Rather, I have attempted to provide the analytical framework that a court in Alaska might use to review a DFG regulation with anti-competitive impacts. The imposition of a harvesting cap would restrict supply and could increase the price of sockeye salmon. It is important to note that a harvesting cap could be imposed for a number of legitimate policy reasons, such as reducing fishing pressure on salmon stocks, which would not run afoul of federal antitrust laws.

If the regulation was imposed solely to increase the ex-vessel price of sockeye salmon, the DFG would be engaging in anti-competitive conduct because the agency is replacing market conditions

with regulations. However, through a long line of cases starting with *Parker v. Brown*[1] in 1934, the U.S. Supreme Court has indicated that "a state's decision that competition should yield to some form of regulation or control will, under certain circumstances, result in immunity from antitrust scrutiny."[2]

State Action Doctrine

State actions are sometimes immune from, or not subject to challenge under, federal antitrust laws. *Parker* arose out of the challenge of a raisin distributor to a 1940 California regulation, adopted pursuant to the California Agricultural Prorate Act, which limited the supply and raised the price of California raisins. The Court found "nothing in the language of the Sherman Act or in its history which suggest[ed] that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[3] The facts of *Parker* also suggested that "a state's activities may be immunized from antitrust scrutiny even when the anti-competitive effects may be felt outside the state."[4]

The "state action doctrine," therefore, operates to shield anticompetitive action undertaken by states if certain conditions are met. The analysis varies depending on the type of actor alleged to have violated federal antitrust laws. The U.S. Supreme Court has created three broad categories of actors who may raise the defense of "state action": state legislatures and state supreme courts; municipalities and political subdivisions; and private parties acting pursuant to state regulations.

State Legislatures and State Supreme Courts

The first category involves actions of the state itself. State legislatures "ipso facto are exempt from the operation of the antitrust laws," because the adoption of legislation by state legislatures are actions of the state.[5] State supreme courts, when acting in their legislative capacity to regulate the practice of law for example, also qualify for immunity.[6]

If the Alaska Legislature were to pass a law directing the DFG to limit salmon harvests to increase ex-vessel prices, that regulatory action would be immune to a challenge under federal antitrust laws. The law, unfortunately, is not as clear when a state agency on its own initiative engages in anticompetitive conduct.

Political Subdivisions of the State

Political subdivisions, including municipalities, are immune only if the challenged conduct "has been undertaken pursuant to a clearly articulated and affirmatively expressed state policy to replace competition with regulation."[7] Municipalities receive closer scrutiny because they are not "sovereign" entities and their actions cannot always be attributable to "actions of the state." Therefore, for the state action doctrine to apply, political subdivisions must prove that their anticompetitive conduct is required by the state.

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[1] 317 U.S. 341 (1934).
[2] FEDERAL ANTITRUST LAW § 76.1.
[3] *Parker*, 317 U.S. at 350-351.
[4] FEDERAL ANTITRUST LAW § 76.2.
[5] *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984).
[6] *See Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).
[7] *Alaska Cargo Transport, Inc. v. Alaska R.R. Corp.*, 834 F.Supp. 1216, 1224 (D. Alaska 1991).

State Agencies
The U.S. Supreme Court has never determined how state agencies should be classified for the purposes of the state action doctrine. There is currently a split in the federal Circuit Courts of Appeals on this issue. Two circuits, the Second and Sixth Circuits, appear to treat state agencies similarly to municipalities and require them to meet the clear articulation test.[8] In these circuits, a state agency would have to prove that its anticompetitive conduct was taken pursuant to a clearly articulated state policy.

However, three circuits, the First, Fifth, and Ninth Circuits, classify the action of state agencies as actions of the state and therefore immune to challenge. The First Circuit Court of Appeals has held that "states" include "their executive branches quite as much as their legislatures and their courts."[9] More importantly, the Ninth Circuit Court of Appeals, which includes the state of Alaska, has concluded that "state executives and executive agencies, like the state supreme court, are entitled to *Parker* immunity for actions taken pursuant to their constitutional or statutory authority, regardless of whether these particular actions or their anticompetitive effects were contemplated by the legislature."[10]

Summary
Therefore, in Alaska, the actions of the DFG could be entitled to immunity under the state action doctrine if the action, the harvesting cap, was taken pursuant to statutory authority. The DFG has statutory authority to implement a wide variety of programs under state law. For example, under Alaskan law, the Commissioner of the DFG is required to "manage, protect, maintain, improve, and extend the fish, game and aquatic plant resources of the state in the interest of the economy and general well-being of the state."[11] If the DFG used this statutory authority to enact a harvesting limit to raise ex-vessel prices, the legal question would be whether that action is "in the interest of the economy and general well-being of the state." There may be other state laws that provide stronger authority to set harvesting limits.

I hope you find this information helpful. For a more detailed discussion of the state action doctrine and state agencies, I recommend the following article: Shane L. Keppner, *Clear Inarticulation – State Action Antitrust Immunity and State Agencies:* Neo Gen Screening, Inc. v. New England Newborn Screening Program, available at http://findarticles.com/p/articles/mi_qa3736/is_/ai_n8887794 .

Please let me know if you have any follow-up questions or would like additional information. I did not find any authorities suggesting that where the goods are sold (i.e., into the U.S. market) changes the analysis.

Sincerely,

Stephanie EShowalter

Stephanie Showalter
Director, National Sea Grant Law Center

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[8] *See* Shane L. Keppner, *Clear Inarticulation – State Action Antitrust Immunity and State Agencies:* Neo Gen Screening, Inc. v. New England Newborn Screening Program, 2000 BYU L. REV. 1651 (2000).
[9] *Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 187 F.3d 24, 29 (1st Cir. 1999).
[10] *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 876 (9th Cir. 1987).
[11] ALASKA STAT. § 16.05.020(2).