

*Bering Sea and Aleutian Islands crab fisheries
Council motion – December 2011
North Pacific Fishery Management Council*

C-4(a) – Active participation, entry opportunities, crew compensation, and lease rates

The Council adopts the following problem statement and alternatives for analysis.

Problem statement:

The Bering Sea/Aleutian Islands (BSAI) Crab Rationalization Program is a comprehensive approach to rationalize an overcapitalized fishery. Conservation, safety, and efficiency goals have largely been met under the program. Provisions that allow for absentee ownership of crab harvest shares support long-term investment by persons or corporations with little or no involvement in the prosecution of the fisheries and limits the amount of quota available for active participants. This action is intended to ensure that ownership of quota transitions to persons who are actively involved in the prosecution of the fisheries.

Alternative 1: No action

No action, status quo.

Alternative 2: Active Participation - Eligibility criteria for purchase of owner shares

To be eligible to permanently transfer and retain CVO or CPO QS, the QS holder or an individual that is at least a 10, 20, or 33% (options) share holder when the QS is held by a partnership or corporation must meet one of the following requirements:

- a. hold 5, 10, or 20% (options) ownership of a vessel with participation in a rationalized Bering Sea/Aleutian Islands crab fishery in any of the previous 2 to 4 seasons or
- b. provide documentation of participation as a captain or crew in a rationalized crab fishery (verified by a signature on a fish ticket or crew members' affidavit) for at least 1, 2, or 4 (options) fishing trips in a rationalized Bering Sea/Aleutian Islands crab fishery in any of the 3 or 4 (options) previous seasons.

Discussion paper

The Council's intent for requesting the following discussion paper is to promote quota acquisition by crew and active participants and promote equitable crew compensation practices. The Council requests a discussion paper that examines options for requiring all cooperatives to adopt provisions in their cooperative agreements. Best practices could include:

- Minimum crew pay standards such as a minimum threshold of gross vessel revenue for crew compensation.
- Maximum lease rate caps.
- Maximum amount of lease rates that may be charged against crew compensation.
- Provisions to promote quota share ownership among crew and active participants.

C-4(b) – Binding arbitration

The Council will form a workgroup to develop means of establishing the golden king crab formula. In addition, the Council tasks staff with the development of a discussion paper to: 1) examine the lengthy season approach to arbitration and the dynamics of arbitration proceedings under that approach, (including the timing of proceedings and the effects of the lengthy season approach on the relative position of the parties in arbitration), 2) the potential for publishing arbitration findings, and 3) the potential for allowing either side to initiate arbitration proceedings.

C-4(c) – Modifications to rights of first refusal

The Council made the following changes to the alternatives to modify rights of first refusal (changes are dividing Action 2 into two options and the addition of Action 5, both of which are shown in bold):

Purpose and Need Statement

The Council has adopted the following the purpose and need statement for this action:

The Bering Sea/Aleutian Islands crab rationalization program recognizes the unique relationship between specific crab-dependent communities and their shore-based processors, and has addressed that codependence by establishing community “right of first refusal” agreements as a significant feature of the program. These right of first refusal agreements apply to the Processor Quota Shares initially issued within each community, and are entered into and held by Eligible Crab Community Organizations on behalf of each respective community.

To date, there have been several significant Processor Quota Share transactions, resulting in Eligible Crab Community Organizations now owning between 20 percent and 50 percent of the PQS in each rationalized fishery. However, the ability of the right of first refusal to lapse may diminish the intent to protect community interests. Also, limiting the time period to exercise the right may conflict with the ability to exercise and perform under the right of first refusal. In addition, some communities, when exercising the right of first refusal may have no interest in purchasing assets located in another community and feel the right of first refusal contract should exclude any such requirement; therefore stronger measures must be considered.

Alternatives

The specific elements and options identified by the Council are:

Action 1: Increase a right holding entity’s time to exercise the right and perform as required.

Alternative 1 – status quo

- 1) Maintain current period for exercising the right of first refusal at 60 days from receipt of the contract.
- 2) Maintain current period for performing under the right of first refusal contract at 120 days from receipt of the contract.

Alternative 2: Increase an entity’s time to exercise the right and perform.

- 1) Require parties to rights of first refusal contracts to extend the period for exercising the right of first refusal from 60 days from receipt of the contract to 90 days from receipt of the contract.

- 2) Require parties to rights of first refusal contracts to extend the period for performing under the contract after exercising the right from 120 days from receipt of the contract to 150 days from receipt of the contract.

Action 2: Increase community protections by removing the ROFR lapse provisions.

Alternative 1 – status quo

- 1) Maintain current provision under which the right lapses, if IPQ are used outside the community of the entity holding the right for three consecutive years.
- 2) Maintain current provision, which allows rights to lapse, if the PQS is sold in a sale subject to the right (and the entity holding the right fails to exercise the right).

Alternative 2 – Strengthen community protections under circumstances where ROFR may lapse.

Option 1: Require parties to rights of first refusal contracts to remove the provision that rights lapse, if the IPQ are used outside the community for a period of three consecutive years

Option 2: Require that any person holding PQS that met landing thresholds qualifying a community entity for a right of first refusal on program implementation to maintain a contract providing that right at all times

Action 3: Apply the right to only PQS.

Alternative 1 – status quo

The right of first refusal applies to all assets included in a sale of PQS subject to the right, with the price determined by the sale contract.

Alternative 2: Apply the right to only PQS.

Require parties to rights of first refusal contracts to provide that the right shall apply only to the PQS subject to the right of first refusal. In the event other assets are included in the proposed sale, the price of the PQS to which the right applies shall be determined by a) agreement of the parties or b) if the parties are unable to agree, an appraiser jointly selected by the PQS holder and the entity holding the right of first refusal.

For any transaction that includes only PQS, the community entity may request that an appraiser value the PQS. If the appraiser's valuation differs from that of the contract, the right of first refusal shall be at the price determined by the appraiser.

The appraiser shall establish a price that represents the fair market value of the PQS, but may adjust the price to address any diminishment in value of other assets included in the PQS transaction subject to the right.

Timeline for assessment and performance (from the date of receipt of the sale contract by the community entity):

Within:

10 days: community may request an assessor

20 days: jointly selected assessor chosen, or if the parties do not agree on a single assessor, then each party chooses an assessor

40 days: if no single assessor is chosen, the two assessors will choose a third assessor

60 days after the assessor is chosen (by either method): assessor(s) establish a price

120 days after assessor is chosen: notification of community entity of intent to exercise ROFR
180 days after assessor is chosen: community representative must perform under the contract

The cost of the assessor will be paid equally by the PQS holder and the community entity. If a third assessor is chosen, the PQS holder and community entity will pay their chosen assessor and divide equally the cost of the third assessor.

Action 4: Require community approval for IPQ subject to the right to be processed outside the subject community.

Alternative 1 – Status quo

Intra-company transfers of PQS and IPQ outside the subject community are permitted without requiring the PQS holder to notify the community entity that holds the right.

Alternative 2 – Require community consent to move IPQ outside the community

Require the PQS holder to obtain written approval from the community prior to processing IPQ subject to the right (or formerly subject to the right), at a facility outside the subject community.

Action 5: Require additional notices to right holders and NMFS

Require the following notices from PQS holders:

- 1) **To the right holder, a notice of all transfers of IPQ or PQS that are subject to the right (regardless of whether the PQS holder believes the right applies to the transfer) (*as a required contract provision*);**
- 2) **To NMFS as a part of any application to transfer PQS subject to the right to any party other than the right holder, either:**
 - a. **A certification of the transferor of the PQS that the right holder was provided with 90 days notice of the right and did not exercise the right during that period (in which case the PQS may transfer and the right will no longer apply); or**
 - b. **A certification of the new PQS holder and the right holder that a contract has been entered establishing the right with respect to the new PQS holder or that the right holder has elected to waive the right with respect to the new holder.**
- 3) **To NMFS, as a part of the annual application for IPQ (and copied to the right holder), a statement as to whether the right has lapsed as a result of use of the IPQ outside of the community for 3 consecutive years; and**
- 4) **To the right holder annually, the location of use of IPQ that are subject to a right and whether the IPQ were processed by the PQS holder (*as a required contract provision*).**