


MEMORANDUM

TO: Council, SSC and AP Members
FROM: Chris Oliver 
Executive Director
DATE: September 20, 2012
SUBJECT: Rights of First Refusal (ROFR) revisions initial review

ESTIMATED TIME 12 HOURS (all C-6 items)

ACTION REQUIRED

(a) Initial Review

BACKGROUND

Under the crab rationalization program, a community that meets certain thresholds for historical processing received rights of first refusal on transfers of processing shares derived from processing that occurred in that community. Over the course of several meetings, the Council has considered an action to amend the rights of first refusal to make those rights more effective. At its April 2012 meeting, the Council directed staff to prepare an analysis of alternatives for initial review at this time. An executive summary of that analysis is attached (Item C-6(a)).

EXECUTIVE SUMMARY

In August of 2005, fishing in the Bering Sea and Aleutian Island crab fisheries began under a new share-based management program (the “program”). The program is unique in several ways, including the allocation of processing shares corresponding to a portion of the harvest share pool. These processor shares were allocated to processors based on their respective processing histories. To protect community interests, holders of most processor shares were required to enter agreements granting community designated entities a right of first refusal on certain transfers of those shares. Since implementation, community representatives and fishery participants have suggested that some aspects of the rights of first refusal may inhibit their effectiveness in protecting community interests. This amendment package considers actions intended to address the following five concerns:

- 1) the relatively short period of time allowed for exercising and performing under the right;
- 2) the lapse of the right after three consecutive years of use of the individual processing quota (IPQ) outside the community or if a community entity elects not to exercise the right on a transaction to which it applies;
- 3) the requirement that the right apply to all assets involved in a transaction, which could include assets outside the community;
- 4) the limited protection to community interests by the right of first refusal; and
- 5) the need for better notices to communities entities and NOAA Fisheries to track use and transfer of shares subject to the right.

Purpose and Need Statement

The Council has adopted the following purpose and need statement for these actions:

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 holding between 20 percent and 50 percent of the PQS¹ 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.²

¹ The Council should consider revising this clause to state that community organizations “hold substantial portions of the PQS in each rationalized fishery.” Although it is possible that organization holdings reach these levels in some fisheries, in some cases holdings are indirect. In addition, some holdings of PQS on which a community entity has never held a right of first refusal. Given these circumstances, the statement as written may not be fully accurate or may be misconstrued by readers. A more general statement may address these concerns.

² The Council should consider revision of the purpose and need statement to identify the need to improve notices of transfers and IPQ usage to community entities and NOAA Fisheries.

Alternatives

The Council has identified five actions for this amendment package. Under Action 1, the time available for a community entity to exercise a right of first refusal would be extended from 60 days to 90 days, and the time for a community entity to perform under the contract would be extended from 120 days to 150 days.³ Action 2 could be used to address two provisions. First, the action could be used to continue rights of first refusal regardless of whether IPQ are used outside of the community from which those shares originated. Under the current rule, the right expires if IPQ are used outside that community for three consecutive years. The action could also be used to change the community that benefits from the right, in the event a community entity fails to exercise the right on a transfer to which the right applies. Under this alternative, the new PQS holder would be permitted to identify the community that would benefit from the right, by selecting one of the community entities qualified to hold a right of first refusal. Options would either allow or prohibit the entity holding the right at the time of the transfer from being identified as the future right holder. Action 3 could be used to apply a community entity's right to either the subject PQS only or to the subject PQS and assets located in the community intended to benefit from the right of first refusal. The current rule applies the right to any assets included in the transaction with the subject PQS, which may include any assets outside of the community. Under Action 4, a PQS holder could only use IPQ yielded by PQS in the community that benefits from the right of first refusal, unless the community benefiting from the right consents to the use of the IPQ outside that community. Currently, IPQ may be used by the PQS holder in any location (subject to any applicable regional landing requirement). Action 5 would create new notice requirements intended to ensure that the right holder and NOAA Fisheries have adequate information to track use of IPQ and transfers of IPQ and PQS as needed to protect their interests under the right.

Effects of Action 1 – Increase the time for exercise and performance of the right of first refusal

In considering whether to exercise a right of first refusal, a community must examine the merits of the transaction and arrange its performance. These factors suggest that extending the period to exercise a right and perform under the contract could be beneficial to entities making that decision. The extension is likely to be particularly beneficial for communities that adopted provisions for public notice and meetings to decide whether to exercise the right. Even this extended time period, however, is likely to pose a challenge, for large transactions that include a variety of assets other than the subject PQS. Although lengthening the time for exercise and performance under the right may benefit community entities, lengthening those time periods could complicate transactions for parties affected by the right. Under the terms of the right, a PQS holder and buyer can prevent a community entity from intervening in the transaction, if the buyer agrees to grant a right of first refusal to the community entity and to use a portion of the IPQ yielded by the PQS in the community for a period of years. Although these concessions may affect the value of the assets transferred (including the PQS), the parties to the transaction can effectively limit the ability of the community entity to disrupt the transaction by exercising the right. This ability may reduce the difficulty posed by the time period extensions to PQS holders. As a result, the proposed time period extensions are likely to have only minor effects on PQS holders, the parties with which they might transact, and community entities.

Effects of Action 2 – Removing the provision under which the right lapses after use of the IPQ outside the community for three years and establishing a new right, if the original right holder elects not to exercise the right

This action could revise two provisions. The first part would remove a provision under which rights lapse if the IPQ are used outside the community for three consecutive years. So, once the right is triggered by a transfer, the right would supersede the interests of other parties, including communities where the yielded

³ Unless specified otherwise, all references to days in this document refer to calendar days.

IPQ had been processed in the intervening years. The exercise of a right in this circumstance could disrupt the dependence on the processing activity that developed in the community that attracted the processing. At the extreme, this dependence could be established through several years of processing activity. Extending the right without the lapse for use outside the community would reflect an interest in protecting the community from which the PQS originated, at the potential expense of other communities that might have developed a subsequent dependence on process of those shares.

The second part of this action would modify a provision under which rights lapse if the right is triggered by a transfer and the community entity fails to exercise the right. Under the first action alternative, the right would be extended for the same entity, regardless of the failure of that entity to exercise the right when it was triggered. Since the right is only triggered by transfer in which the recipient intends to use the shares outside the community, this change could result in an entity intervening in a transaction for PQS in which another community has developed a dependency. In addition, an entity could have multiple opportunities to exercise a right. Providing multiple opportunities could be viewed by some as unnecessary, since the community would have allowed transfers to transpire without intervening. On the other hand, the extension could benefit entities that allow transfers only because of their inability to exercise their rights. These future opportunities to exercise the right may be important, if the circumstances and financing of the community entity change or the second transaction is on more appealing terms, which could occur if fewer PQS are included in the transaction or prices change. Those entities may later develop the capacity to exercise rights. The second action alternative would allow the new PQS holder to designate a new right holder (after a transfer to which the right applies, but on which the right is not exercised). Allowing the PQS holder to designate the new right holder is intended to streamline administration (as dependence based criteria could be administratively cumbersome). Since use of the shares would be at the discretion of the PQS holder, that holder should be best situated for identifying the community that would be dependent on the shares in the future. Although it is not certain what criteria the PQS holder would use to select a community, selecting the community in which the PQS holder intends to use the shares might avoid complications that could arise from the application of the right to future transfers.

The action is intended primarily to benefit communities and their representative entities; however, PQS holders are also affected by these extensions of the right. To the extent that rights of first refusal diminish the value of PQS, that diminution would be perpetuated by extending the right. Despite the existence of the right, it remains likely that for most transactions PQS holders and buyers will avoid triggering the right by agreeing to use the IPQ in the right holding community to the extent required for avoiding triggering the right. In the long run, meeting this minimal requirement may be more difficult, particularly if processing activity is discontinued in some communities. To the extent that the right is intended to protect community interests, that protection may be lacking under the status quo, in part, because of its current lack of permanence. Yet, several other aspects of the right limit the effectiveness of the provision in protecting community interests. By its nature, the right only applies to transfers. Absent a transfer, shares may move freely among communities under other processing arrangements (including those internal to a company, as well as custom processing arrangements). This limitation on the right leaves a community entity unable to prevent the movement of processing from its community, as long as the PQS holder chooses not to transfer the shares. In addition, communities that become reliant on these allowed movements of processing activity are unprotected by the right in its current form.

Effects of Action 3 – Apply the right of first refusal to only subject processor shares or subject processor shares and assets in the community of the entity holding the right

Under the status quo, rights of first refusal apply to all assets included in a transaction that includes processor shares subject to the right of first refusal. Under the first action alternative, right of first refusal

contracts would be required to provide that the right shall apply to only the PQS. In the event assets other than PQS are included in the proposed sale, the price of the PQS shall be determined by an appraisal process.

PQS holders are likely to respond to the application of the right to only PQS in a few predictable ways. First, the PQS holder may attempt to negotiate an agreement with the community entity to allow the sale to proceed without the entity exercising the right. To secure an agreement, the PQS holder may need to provide something of value to the entity, which could be financial remuneration or a portion of the PQS. A community entity may have little leverage in this negotiation, if the PQS holder knows that the entity is without the wherewithal to exercise the right, but the community could receive some compensation for the security it provides in exchange for its agreement to allow the sale. CDQ groups that represent communities are likely to be better positioned to exercise the right than other community entities, but this could change over time if the other entities develop portfolios of fishing privileges and other interests. Alternatively, the person receiving the PQS could avoid the right being triggered by agreeing to use the requisite amount of IPQ in the community for the required period and extending the right to the entity in a second contract. This approach would maintain the community entity's interest in the PQS under the terms of the right with the new holder. A third way to avoid community entity intervention in a transaction is for the PQS holder, prior to the transfer, to use the IPQ outside of the community for three consecutive years causing the right to lapse.⁴ To use this approach, the PQS holder would only need to move the IPQ from the community ahead of the transaction to ensure the right lapsed; however, this approach provides the PQS holder with the greatest flexibility at the time of the PQS sale. Lastly, a PQS holder that is undertaking a transaction might also subdivide the transaction. One transaction could be for the PQS; the other transaction would be for any other assets. By subdividing the transaction in this manner, the PQS holder and the buyer may attempt to ensure that the price of PQS and the price of other assets in the transaction are set at an acceptable level, should the right holder intervene in the transaction. At the extreme, assets not subject to the right could be offered at a nominal price, with the PQS carrying the bulk of the value of the transaction. Although a right holder may contest the contract price for the PQS, the use of that process could be costly. Clearly, a variety of contractual arrangements might be made to increase the potential for the PQS holder to receive reasonable value for assets (including the PQS), particularly in cases where the value of the assets is highly dependent on the accompanying PQS. Given the costliness of any administrative process associated with determining a price for assets subject to the right and the potential for PQS holders to avoid triggering the right, it is questionable whether the action alternatives would provide substantially greater protection of community interests than the existing right.

Under the second action alternative, the right of first refusal would apply to processor shares and any assets based in the community benefiting from the right that are included in the transaction with the processor shares. In the event that this alternative is adopted, the Council must define a standard for determining items that are subject to the right (i.e., assets that are "community-based"). Many assets are mobile and can be moved among communities. For example, a company that sells its PQS with its floating platform may be confronted by a community (or processor) claim that the floating platform is (or is not) a community based asset. If the Council wishes to proceed with this alternative, a standard would need to be defined for determining the assets based in a community to which the right would apply. The current motion suggests that an arbitrator or appraiser could be used to make this determination, but a specific process and timeline are not specified. Those aspects of the alternative require additional attention.

⁴ This choice may be unavailable, if the Council elects to extend the right in perpetuity.

Assuming that assets to which the right will apply are well defined, the process for establishing a price for those assets (independent of other assets included in the transaction but excluded from the right) must be considered. As suggested in the motion, a jointly selected appraiser (or team of appraisers would be used). The time for selection and performance of appraisers and its effect on the timeline for exercising a right and performing under the contract should be considered.

Notwithstanding the specific development of this action, PQS holders are likely to respond to the application of the right to only PQS (and possibly community based assets) in a few predictable ways. First, the PQS holder may attempt to negotiate an agreement with the community entity to allow the sale to proceed without the entity exercising the right. To secure an agreement the PQS holder may need to provide something of value to the entity, which could be financial remuneration or a portion of the PQS. A community entity may have little leverage in this negotiation if the PQS holder knows that the entity is without the wherewithal to exercise the right, but the community could receive some compensation for the security it provides in exchange for its agreement to allow the sale. CDQ groups that represent communities are likely to be better positioned to exercise the right than other community entities, but this could change over time if the other entities develop portfolios of fishing privileges and other interests. Alternatively, the person receiving the PQS could avoid the right being triggered by agreeing to use the requisite amount of IPQ in the community for the required period and extending the right to the entity in a second contract. This approach would maintain the community entity's interest in the PQS under the terms of the right with the new holder. A third way to avoid community entity intervention in a transaction is for the PQS holder, prior to the transfer, to use the IPQ outside of the community for three consecutive years causing the right to lapse.⁵ To use this approach, the PQS holder would only need to move the IPQ from the community ahead of the transaction to ensure the right lapsed; however, this approach provides the PQS holder with the greatest flexibility at the time of the PQS sale. Lastly, a PQS holder that is undertaking a transaction might also subdivide the transaction. One transaction could be for the PQS and associated community based assets; the other transaction would be for any other assets. By subdividing the transaction in this manner, the PQS holder and the buyer can ensure that the price of PQS and the price of other assets in the transaction are set at an acceptable level, should the right holder intervene in the transaction. At the extreme, assets not subject to the right could be offered at a nominal price, with the PQS and community based assets carrying the bulk of the value of the transaction. Although the motion suggests a process that would allow a right holder to contest the price, the use of that process could be costly. Clearly, a variety of contractual arrangements might be made to ensure that the PQS holder receives reasonable value for assets (including the PQS), particularly in cases where the value of the assets is highly dependent on the accompanying PQS. Given the costliness of any administrative process associated with determining a price for assets subject to the right and the potential for PQS holders to avoid triggering the right, it is questionable whether the action alternatives would provide substantially greater protection of community interests than the existing right.

Effects of Action 4 – Require consent of the community benefiting (or formerly benefiting) from the right to use IPQ outside of the community

Under the status quo, a PQS holder may use the IPQ yielded by its PQS in any location that it chooses (provided it complies with regional landing requirements). This flexibility allows PQS holders to derive the maximum value from their PQS, choosing where and how to process IPQ, with limited geographic constraints. Thus, PQS holders have the option to move processing between communities to other plants that they own or through leasing or custom processing arrangements with other plant owners. This flexibility also allows a PQS holder to both derive greater value from their IPQ and to address contingencies that could arise in season, such as plants being disabled or inaccessible.

⁵ This choice may be unavailable, if the Council elects to extend the right in perpetuity.

While this flexibility to use PQS in any location (within a permitted region) benefits its holders, it also creates some uncertainties for communities that have developed dependency on processing of crab for economic activity and tax revenues. The use of IPQ outside of the community from which those IPQ historically originated (particularly on a large scale) may deprive a community of benefits. Transfer of the use of small amounts of IPQ outside of a community would likely only reduce tax revenues of the community (as the economic activity arising from marginal amounts of IPQ is likely to be minimal). The movement of larger amounts of IPQ from a community will likely have a broader effect on a community. Not only are tax revenues affected, but also economic activity in the community that is generated by activity at the plant, vessels making deliveries and their crews, and processing employees. This activity often sustains support businesses that are a critical part of the economies of most communities with processing.

The action alternative would require IPQ processing to occur in the community that benefits from the right of first refusal unless that right holding entity consents moving IPQ processing. While the action would strengthen the position of these entities considerably, the action would affect the ability of processors (and possibly harvesters) to achieve efficiencies and derive benefits from the fisheries. Processing consolidation to realize production efficiencies could only take place if agreed to by an entity. End of season consolidation of small amounts of remaining IFQ (and IPQ) in a single trip could require the consent of several communities. In addition, any attempt to respond to an emergency or redirect a landing that might be prevented by an unforeseen circumstance would only be possible with community consent. Even if these consents are reasonable granted, delays could arise, if communities are unable to respond to requests quickly. In deciding this action, these operational concerns should be balanced against community interests that some may believe are not adequately protected under the current program measures.

Effects of Action 5 – Require notices to the community entity and NOAA Fisheries concerning the use and transfer of shares subject to the right

Currently, right holders have little information on the use of IPQ that are subject to the right. In addition, NOAA Fisheries may not be aware of a right holder's contention that a right has lapsed from use of IPQ outside of the community that benefits from the right and may not know whether PQS holders have provided a right holder with either the ability to exercise the right or a new agreement extending the right. The fifth action would provide additional notices to NOAA Fisheries and right holders, as well as require PQS holders to certify that right holders have received an opportunity to exercise the right or a new agreement extending the right at the time of a transfer. These notices and certifications will impose a very slight burden on PQS holders, but will ensure that the public, fishery managers, and right holders have better information concerning the status of rights of first refusal and their effects.

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SEP 25 2012



RESOLUTION 2012-09-24.01

A RESOLUTION BY THE GULF OF ALASKA COASTAL COMMUNITIES COALITION BOARD OF DIRECTORS SUPPORTING ACTIONS BY THE NORTH PACIFIC FISHERY MANAGEMENT COUNCIL MODIFYING THE COMMUNITY PROVISIONS OF THE FISHERY MANAGEMENT PLAN FOR THE BERING SEA AND ALEUTIAN ISLANDS KING AND TANNER CRABS.

WHEREAS, the Gulf of Alaska Coastal Communities Coalition (GOAC3) mission in part is to 'support, enhance and protect the fishing villages of the Gulf of Alaska'; and

WHEREAS, GOAC3 supports stronger community provisions be in place for the Bering Sea and Aleutian Islands (BSAI) Crab Rationalization program, through a regulatory amendment to the fishery management plan (FMP); and,

WHEREAS, the North Pacific Fishery Management Council (NPFMC) has an October 2012 agenda item C-6(a), Initial Review draft, Regulatory Impact Review and Initial Regulatory Flexibility Analysis (RIR/IRFA) to modify the community provisions, including Right of First Refusal (ROFR).

NOW THEREFORE BE IT RESOLVED the GOAC3 Board of Directors supports the following alternatives be adopted for an amendment to the FMP for BSAI King and Tanner Crabs, as described in the Initial Review draft of the RIR/IRFA for Modifications to Community Provisions:

- Action 1, Alternative 2 - Increase an entity's time to exercise the right and perform as required.
- Action 2, Provision 1, Alternative 2 - Remove provision under which ROFR lapses if IPQ are used outside the community.
- Action 3, Alternative 2 - Apply the right to only the PQS.
- Action 4 - Require additional notices to right holders and NMFS.

BE IT FURTHER RESOLVED the GOAC3 Board of Directors supports the following notices required from PQS holders be added under Action 4:

- To NMFS, as part of the annual application for IPQ, certification of a current ROFR agreement in place with the community/entity.

PASSED AND APPROVED by the GOAC3 Board of Directors on this 25th day of September, 2012.

Robert Sanderson 9-25-12

Charles M. Galloway 9-25-12

ATTEST:

Danni Mullis 9-25-12



September 24, 2012

Mr. Eric Olsen, Chair
Mr. Chris Oliver, Executive Director
North Pacific Fishery Management Council

Re: Agenda Item C-6(a) Crab Community ROFRs

Gentlemen,

On behalf of the North Pacific Crab Association, comprised of two western Alaska CDQ organizations and most of the community-based crab processors eligible to participate in the BSAI Crab Rationalization program, I am submitting several comments related to Agenda Item C-6(a), Community ROFRs.

The Associations detailed comments are attached. In summary we support:

1. **Action 1, Alternative 2;** which extend the time period for a community to exercise it's ROFR rights and to complete the transaction.
2. **Action 2, Provision 1, Alternative 2 COMBINED WITH Action 2, Provision 2, Alternative 3;** which would make ROFRs a permanent characteristic of (most) PQS and allow the associated ROFRs to move to a new community, should the community of origin fail to exercise their rights. This will give the "new" community some long term stability to make associated infrastructure investments.
3. **Action 3, Alternative 1.** We also think that Alternative 3 may have merit, though it is clearly under-developed at this stage of the RIR/IRFA process.
4. **Action 4, Alternative 1.** We are strongly opposed to Alternative 2 because it will essentially erase "regionalized landings" as a program characteristic, remove all in-season flexibility from processors and harvesters, and it will upend the three-way balance (harvesters, processors and communities) that has been developed as the framework for the Emergency Relief regulations adopted by the Council.
5. **We fully support Action 5, Alternative 2.**

Finally, we assume that all new regulations and/or regulatory amendments will be applicable to transactions going forward, and not applied retroactively to transactions that have already been completed in accordance with current and previous regulations.

Thank you for your consideration,

A handwritten signature in black ink, appearing to be 'S. K. Minor', written over a horizontal line.

Steven K. Minor, Executive Director
North Pacific Crab Association

Detailed Comments

1. We continue to support Action 1, Alternative 2; which extends the time period for a community to exercise it's ROFR rights and to complete the transaction.

This proposal was developed by the "Crab Committee" about four years ago, and it has never been controversial. In addition, at that time all of the participating stakeholders agreed that there should be some effort to try to secure a source of long-term funding to help ECCOs finance PQS purchases.

2. We support Action 2, Provision 1, Alternative 2 COMBINED WITH Action 2, Provision 2, Alternative 3; which would make ROFRs a permanent characteristic of (most) PQS and allow the associated ROFRs to move to a new community, should the community of origin fail to exercise their rights. This will give the "new" community some long-term stability to make associated infrastructure investments.

If a "community of origin" fails to exercise it's ROFR rights and PQS is transferred to a new community, that new community should become the holder of the ROFR rights so that it can make infrastructure investments with confidence. For that reason, we support the package above.

3. We support Action 3, Alternative 1. We also think that Alternative 3 may have merit, though it is clearly under-developed at this stage of the RIR/IRFA process.

Action 3 could result in the forced divestiture of a multi-species, integrated business operations, so the "problem" that is being addressed should be significant. While designing the program, the Council rejected these sorts of individual-community mandates in favor of "regionalization", to allow both harvesters and processors some operational flexibility to maintain their economic health. "Regionalization" also provided a "Cooling Off" period, the creation of ECCO's (which allow community investment in crab related assets) and ROFRs to protect communities.

A review of landings patterns and ECCO purchases of PQS in both the Three Year Review and the Five Year Review show that those goals have been met. The only significant disruptions documented to date have been the result of fleet consolidation, not PQS transfers.

The Council clearly established that the objective for the ROFR program was to give communities a seat at the table to either purchase the subject PQS or to seek other forms of mitigation. The system seems to work. We do not believe that there has been any "problem" identified that is significant enough to force the divestiture of selected business assets under this program.

If the Council chooses to continue it's analysis of this issue, we strongly recommend that Alternative 3 be given further consideration. The author of the RIR/IRFA has identified the need for the Council to develop a timeline and two step process that would be necessary (page 37) for the regulation to be developed.

4. We support Action 4, Alternative 1. We are strongly opposed to Alternative 2 because it will essentially erase "regionalized landings" as a program characteristic, remove all in-season flexibility from processors and harvesters, and it will upend the three-way balance (harvesters, processors and communities) that has been developed as the framework for the Emergency Relief regulations adopted by the Council.

Alternative 2 takes all effective control of the IPQ away from the PQS holder (and by extension, the IFQ holder who is share-matched), it gives the community veto power over even the smallest in-season transfers, and it undermines the carefully crafted balance that communities and industry have negotiated as the foundation for the "Emergency Relief from Regionalization" regulations.

The end result is an expropriation of the PQS without any compensation. It cannot be sold, transferred or even moved in-season to clean up small amounts of crab or in response to emergencies without approval of the local ECCO. If the Council is intent on analyzing this Action, we request that a much broader range of analysis - including alternatives for compensation to the PQS/IPQ (and under some circumstances the matched QS/IFQ holders) - be addressed.

Purpose and need statement

At least one PQS transfer is believed to have occurred without the right holder (Aleutia Corporation) being informed of the transaction, denying that right holder of the ability to exercise its right of first refusal to acquire PQS as intended by the program. This lack of notice allowed the transfer of PQS to a party other than the right holder and the movement of the processing to another community. Providing that right holder with a direct allocation of PQS could mitigate the negative impacts arising from that transaction. In addition, providing for notice of the location of use of IPQ and transfers of PQS to right holders could prevent similar circumstances from arising in the future and make the right more effective in protecting communities' historical interests in processing and ensure that community entities are better able to assert their interests as provided for by the right.

Alternatives

The Council requests staff to analyze the following alternatives:

- 1 Status quo
- 2 Bristol Bay red king crab PQS shall be allocated to Aleutia Corporation in an amount that would result in that corporation receiving 65 percent of the PQS in that fishery. This allocation would be made exclusively from newly issued PQS.

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October 1, 2012

Eric Olson, Chairman
 North Pacific Fishery Management Council
 605 West 4th Ave, Ste 306
 Anchorage, AK 99501

Dear Chairman Olson and Members of the Council:

I am writing this letter on behalf of the Aleutia Board of Directors in support of the attached resolution passed by the Board on Oct. 1, 2012. The resolution focuses on Community Right of First Refusal (ROFR) modifications now being considered by the Council. As you will see in the attached resolution, the Aleutia Board of Directors respectfully requests that the Council move forward with the strongest community protections possible.

Aleutia makes this request as the Eligible Crab Community Organization (ECCO) for all non-CDQ crab communities in the Aleutians East Borough. Aleutia was designated the ECCO by unanimous vote of the Aleutians East Borough Assembly on April 18, 2005 in an effort to protect and empower local residents and local economies impacted by crab rationalization.

In 2005, the Assembly believed the Council's promise that Right of First Refusal rules would adequately protect its local fishing communities and Aleutia, its designated ECCO. In practice, however, ROFR has failed.

Because of this failure, Aleutia and local residents—through no fault of their own—have lost an important opportunity to control their own destinies and protect their communities as they see fit. This has led to a lack of confidence in the system, economic loss to the organization and loss of the benefits that come from Aleutia's good works.

For illustration purposes I will briefly outline what happened in Aleutia's case. My hope is that the following will help the Council understand the importance of supporting the most protective ROFR provisions possible. As you will see, despite the harm Aleutia has suffered, its only recourse today seems to be to file suit. A lawsuit of this magnitude obviously poses many difficulties for a modest organization like Aleutia.

In October 2008, Snopac Seafoods (Snopac) sold a block of processor quota share (PQS) to the Aleutian Pribilof Island Community Development Association (APICDA) following a dispute between the two parties regarding crab processing in St. George.

The general understanding at the time was that all the PQS transferred in this highly publicized sale was earned by Snopac in St. George. Press releases and press accounts confirming the sale explicitly stated that this was the case.

In fact, a block of 2,147,761 PQ shares of Bristol Bay red king crab (BBRKC) that was derived from crab processed in Port Moller, a non-CDQ crab community in the Aleutians East Borough was also included in that sale. As you will recall, Aleutia is the designated ECCO for Port Moller.

Crab rationalization regulations at the time required that before a transfer was approved, buyers and sellers in a quota transfer of this sort prove to NMFS that they had notified the appropriate ECCO of the sale. An affidavit attesting to notification was required as part of the transfer application.

In this case, however, the required affidavit of notification was not submitted. Aleutia was not notified. As a result Aleutia was not given the opportunity to exercise its ROFR rights.

Aleutia did not discover that the 2008 sale of PQS from Snopac to APICDA included BBRKC PQS derived n Port Moller until 2011.

Aleutia has since attempted to remedy the situation through discussions with APICDA, without success. It has also asked the Restricted Access Management Division (RAM) to rescind its approval of the transfer of this block of BBRKC PQS so that Aleutia could exercise its ROFR.

RAM denied Aleutia's request, stating that "[i]f Snopac violated the terms of its civil contract with Aleutia, Aleutia's remedy lies with Snopac."

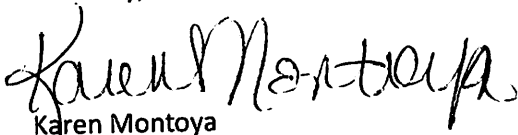
RAM did ask Snopac to supply the missing affidavit, but no such affidavit was provided. Instead, the company simply stated its belief that "all rules pertaining to the transfer of PQS from Snopac to APICDA were followed," and that all documentation "was destroyed in the process of our shutting down the company."

This response is incorrect; Aleutia obtained a copy of the transfer application from RAM and it did **not** contain the required affidavit of notification. Further, an affidavit could not have been included because Aleutia was not notified. Unfortunately, as indicated in Snopac's response to RAM, the company is in the final stages of selling its assets to another company and "will no longer exist once the sale is complete."

Aleutia hopes that failure of the community protection provisions that harmed the communities and residents it represents will act as a cautionary tale about the need to strengthen protections as much as possible. The Aleutia Board of Directors feels strongly that other ECCOs should not suffer the same fate it did. The Board hopes the Council will agree that ECCOs should be adequately protected and able to fully realize the benefits of the crab rationalization program.

I am happy to answer any questions about this issue or provide any documentation on behalf of the Board.

Sincerely,


Karen Montoya



RESOLUTION 13 - 01

A RESOLUTION BY THE ALEUTIA BOARD OF DIRECTORS SUPPORTING STRENGTHENED COMMUNITY PROTECTIONS IN FISHERY MANAGEMENT PLAN

WHEREAS, Aleutia is the Eligible Crab Community Organization (ECCO) for all non-CDQ communities within the Aleutians East Borough; and

WHEREAS, Aleutia was designated the ECCO on April 18, 2005 by unanimous vote of the Aleutians East Borough Assembly representing all local fishing communities and residents within borough boundaries; and

WHEREAS, Community Rights of First Refusal (ROFR) form the foundation of protections for communities and the ECCOs designated to represent them; and

WHEREAS, the North Pacific Fishery Management Council (NPFMC) is scheduled to discuss the draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis (RIR/IRFA) to modify the community provisions, at the Council's October 2012 meeting.

WHEREAS, Current ROFR rules have failed to protect Aleutia, the fishing communities and families it represents as promised, and


WHEREAS, Aleutia supports the strongest possible protections for the Bering Sea and Aleutian Islands (BSAI) Crab Rationalization program, through a regulatory amendment to the fishery management plan (FMP); and,

NOW THEREFORE BE IT RESOLVED the Aleutia Board of Directors supports the following alternatives be adopted for an amendment to the BSAI King and Tanner Crabs FMP, as described in the Initial Review draft of the RIR/IRFA for Modifications to Community Provisions:

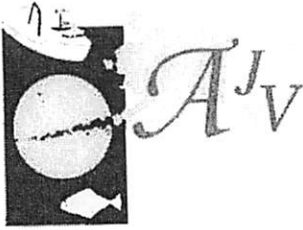
-
- Action 1, Alternative 2 - Increase an entity's time to exercise the right and perform as required.
 - Action 2, Provision 1, Alternative 2 - Remove provision under which ROFR lapses if IPQ are used outside the community.
 - Action 3, Alternative 2 - Apply the right to only the PQS.
 - Action 4, Alternative 2 - Require Community consent to move IPQ outside the community.
 - Action 5 - Require additional notices to right holders and NMFS.

BE IT FURTHER RESOLVED the Aleutia Board of Directors supports any additional modifications that strengthen protections for communities.

PASSED AND APPROVED by the Aleutia Board of Directors on this 1st day of October, 2012.



Duane Kapp, President



APICDA Joint Ventures, Inc.

234 Gold Street • Juneau, Alaska 99801 • (907) 586-0161 • Fax (907) 586-0165
509 West 3rd Avenue, Suite 101 • Anchorage, AK. 99501 • (907) 929-5273 • Fax (907) 929-5275

APICDA Acquires Crab Processor Quota Shares
Tuesday - October 7, 2008

The Aleutian Pribilof Island Community Development Association (APICDA) announced today that its' wholly owned for-profit subsidiary, APICDA Joint Ventures, Inc., (AJV), has reached agreement with Snopac Products., Inc. to purchase all of Snopac's crab processor quota shares (PQS) and their crab processing line and equipment.

AJV will acquire from Snopac approximately 5.7% of the Bering Sea opilio PQS, 1.6% of Bristol Bay red king crab PQS, 3.6% of Bering Sea bairdi PQS, 2.5% of the Pribilof Islands red and blue king crab PQS, and 4.3% of the St. Matthew's king crab PQS. At today's crab quotas, the PQS represents approximately 3 million pounds of opilio, 290,000 pounds of Bristol Bay red king crab, and 141,000 pounds of bairdi.

The PQS held by Snopac was earned during their many years of processing crab in St. George. "All of this crab should be viewed as a St. George community asset," said APICDA CEO Larry Cotter. "This acquisition serves as a foundation upon which the City of St. George and its residents can begin to develop a stable and reliable economy based upon resources located adjacent to the island."

Max Malavansky, St. George City Administrator, said, "We have prayed for this day for many years. St. George has suffered through a severe economic slump since crab processing ended on the island in the year 2000. Now we have the chance to bring it home and rebuild our economy. This is truly a great day for our community."

For more information contact Larry Cotter at 907-586-0161 or lcotter@apicda.com

MICHAEL A. D. STANLEY

P.O. BOX 020449, JUNEAU, ALASKA 99802

TELEPHONE: (907) 586-6077

ATTORNEY AT LAW

FACSIMILE: (907) 463-2511

March 12, 2012

Jessica Gharrett, Program Administrator
Restricted Access Management Division
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
P.O. Box 21668
Juneau, Alaska 99802-1668

Re: Aleutia, Inc. – Right of First Refusal

Dear Ms. ~~Gharrett~~ ^{JESSIE}

I am writing on behalf of Aleutia, Inc., an eligible crab community organization (ECCO) for the eligible crab community (ECC) of Port Moller.

In December 2008, the Restricted Access Management Division (RAM) approved the transfer of various blocks of crab processor quota share (PQS) from Snopac Products, Inc., to APICDA Joint Ventures, Inc. (AJV). At the time, the common understanding in the industry was that this transfer involved crab PQS that was earned based on processing that had taken place at St. George. Aleutia has recently learned, however, that the transfer also included PQS for Bristol Bay red king crab that were issued on the basis of processing that was done in Port Moller. As reflected on RAM's website, APICDA received 2,147,761 units of PQS for Bristol Bay red king crab (PRO-BBR-S-500929692 through 503077452) that were earned due to processing in Port Moller.

As you know from prior communications you have had with Karen Montoya, Executive Director of Aleutia, Aleutia claims that as the ECCO for Port Moller, it should have had the right of first refusal (ROFR) for this PQS earned from processing at Port Moller. Because this PQS is being processed outside the EEC of Port Moller – Aleutia understands the crab is now being processed in Akutan – the application to transfer the PQS should have contained an affidavit stating that notice of the transfer had been provided to Aleutia as the ECCO. See 50 C.F.R. § 680.41(h)(2)(C). In reviewing the redacted version of that application provided to Aleutia by the National Marine Fisheries Service (obtained pursuant to a FOIA request), it does not appear that the application contained such an affidavit. Had Aleutia been notified of the impending transfer of this Port Moller-derived PQS, as it should have been, it very likely would have taken steps to assert its ROFR rights to this PQS.

Jessica Gharrett, RAM
March 12, 2012
Page Two

Aleutia has corresponded with AJV, requesting that AJV offer this Port Moller-derived PQS to Aleutia. AJV responded by offering to enter into a ROFR agreement with Aleutia that would apply to future transfers – *i.e.*, if AJV were to seek to transfer the PQS outside the Aleutians East Borough – but it is not willing to offer Aleutia the opportunity to purchase this PQS, as it could have through the exercise of a ROFR when the PQS was initially transferred to AJV. This is unacceptable. In Aleutia's view, the transfer of this PQS to APICDA has harmed Aleutia and was improper. Accordingly, Aleutia requests that RAM rescind its approval of this block of PQS from Snopac to AJV, so that Aleutia can exercise its ROFR and thereby protect the interests of the ECC which it represents.

Thank you for considering this request. Should you need any additional information from Aleutia regarding this matter, please let me know.

Sincerely,



Michael A. D. Stanley

cc: Aleutia, Inc.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668

July 20, 2012

Snopac Products, Inc.
6118 12th Avenue South
Seattle, WA 98108-2768
Attn: Mr. Greg Blakey

Dear Mr. Blakey:

On December 3, 2008, the National Marine Fisheries Service, Alaska Region, Restricted Access Management Program (RAM) approved the transfer of 2,147,761 units of Processor Quota Shares (PQS) for Bristol Bay red king crab (PRO-BBR-S-500929692 through 503077452) from Snopac Products, Inc., (Snopac) to APICDA Joint Ventures, Inc. (AJV). Under the Crab Rationalization Program, this PQS was issued with a Right of First Refusal (ROFR) held by the Aleutians East Borough (AEB), within which Port Moller is located. The Eligible Crab Community Entity (ECCE) with the right to exercise ROFR for the AEB is Aleutia, Inc. (Aleutia).

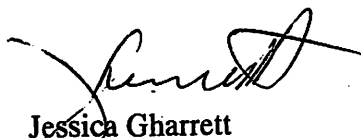
Snopac's original application for this PQS included affidavits affirming completion of a contract for ROFR, including the terms enacted under section 313(j) of the Magnuson Stevens Act. These affidavits were signed by representatives of Snopac and Aleutia on October 19, 2005. Aleutia has brought it to our attention that Snopac's application to transfer this PQS to AJV did not include an affidavit stating that Snopac had provided notice of the desired transfer to Aleutia. A regulation at the time of transfer, 50 C.F.R. § 680.41(h)(2)(i)(C)(2008), provided as follows:

If requesting transfer of PQS/IPQ for use outside an ECC that has designated an entity to represent it in exercise of ROFR under paragraph (f), the application must include an affidavit signed by the applicant stating that notice of the desired transfer has been provided to the ECC entity under civil contract terms referenced under § 680.40(f)(3) for the transfer of any PQS or IPQ subject to ROFR.



Since Snopac should have provided an affidavit at the time of the transfer, I request that, by August 20, 2012, Snopac provide an affidavit for our records that meets the terms of the above regulation. If you have any questions, please contact me at (907) 586-7461.

Sincerely,



Jessica Gharrett
Program Administrator
Restricted Access Management

cc: APICDA Joint Ventures, Inc.
234 Gold Street
Juneau, AK 99801

Aleutia, Inc.
408 Main Street
Sand Point, AK 99661

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rationalization\correspondence\2012\Aleutia_BBR_ROFR_Transfer_Aleutia.docx

Prep: KyleM, McKeen,M: 7/16/12

Rev: MMcKeen: 7/18/12

Rev: jgharrett 7/17/12, 7/19/12

Bcc: Crab file: Snopac Products, Inc.
Crab file: APICDA Joint Ventures, Inc.
Crab file: Aleutia, Inc.
GCAK: Mary Alice McKeen
RAM reading file



Quality Seafood Since 1983

6118 - 12th Ave. S., Seattle, WA 98108-2768
Phone 206.764.9230 ~ Fax 206.764.5540
www.snopac.net

August 15, 2012

Ms. Jessica Gharrett
National Marine Fisheries Service
Alaska Region
Restricted Access Management
PO Box 21668
Juneau, AK 99802-1668

Re: Your letter dated July 20, 2012

Dear Ms. Gharrett:

We are in receipt of your letter as referenced above, regarding the 2008 sale of our Crab Processor Quota Shares (PQS) to APICDA Joint Ventures Inc. That entity did in fact purchase all of our PQS.

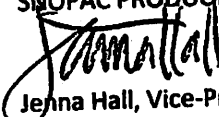
We are in the final stages of a sale of our assets to another seafood company and Snopac Products will no longer exist once the sale is complete. As of the end of September, we will no longer be occupying office space and have already destroyed many files in the process of shutting down the company.

It is our firm understanding that all rules pertaining to the transfer of PQS from Snopac to APICDA were followed, including those rules involving ROFR and providing proper notices of such a transfer to Aleutia Inc. We firmly believe such documentation existed and was destroyed in the process of our shutting down the company.

Please accept this response as an affidavit in lieu of the original document.

Best regards,

SNOPAC PRODUCTS INC.


Jenna Hall, Vice-President





UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668

July 20, 2012

Certified Return Receipt: 7007 0710 0003 2979 2244

Michael A. D. Stanley
Attorney at Law
P.O. Box 020449
Juneau, Alaska 99802

Dear Mr. Stanley:

On March 13, 2012, the Restricted Access Management Program of the National Marine Fisheries Service, Alaska Region (RAM) received your letter dated March 12, 2012. In your letter, you stated that the transfer of 2,147,761 units of Processor Quota Shares (PQS) for Bristol Bay red king crab (PRO-BBR-S-500929692 through 503077452) from Snopac Products, Inc., (Snopac) to APICDA Joint Ventures, Inc. (AJV) was improper. RAM approved the transfer in December 2008.

On behalf of your client, you claim that the transfer should not have been approved because Snopac did not submit an affidavit stating that notice of the transfer had been provided to Aleutia, Inc., (Aleutia). Aleutia is the Eligible Crab Community Entity (ECCE) for Port Moller and held the Right of First Refusal (ROFR) for Port Moller.

A regulation at the time of transfer, 50 C.F.R. § 680.41(h)(2)(i)(C)(2008), provided:

~~If requesting transfer of PQS/IPQ for use outside an ECC that has designated an entity to represent it in exercise of ROFR under paragraph (1), the application must include an affidavit signed by the applicant stating that notice of the desired transfer has been provided to the ECC entity *under civil contract terms referenced under §680.40(f)(3)* for the transfer of any PQS or IPQ subject to ROFR.~~
[emphasis added]

NMFS revised its regulations governing transfers of crab PQS, and eliminated this provision, in November 2009.¹

RAM will not rescind its approval of this transfer. If Snopac violated the terms of its civil contract with Aleutia, Aleutia's remedy lies with Snopac. Snopac entered into a contract with Aleutia and agreed to provide Aleutia with notice of the transfer of the PQS that was subject

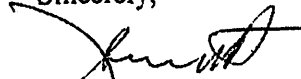
¹ Final Rule, 74 FR 51515, 51520 (Oct. 7, 2009) revising 50 C.F.R. § 680.41(h). This regulation became effective on Nov. 6, 2009.



to Port Moller's ROFR. As required by 50 C.F.R. § 680.40(f)(3), when Snopac initially applied for PQS, Snopac submitted affidavits affirming completion of a contract for ROFR with the terms required by section 303(j) of the Magnuson-Stevens Act.² These terms include a provision that "[a]ll terms of any right of first refusal and contract entered into related to the right of first refusal will be enforced through civil contract law."³ The statute and regulations contemplate that an aggrieved signatory to a ROFR contract who claims its terms were unfulfilled will pursue a civil remedy. *See, e.g.*, NMFS Response to Comment 123, 70 FR 10174, 10206 (March 2, 2005) ("NMFS will not be involved in the completion of these civil contracts.")⁴

Since Snopac should have provided an affidavit of notification with its application for transfer in 2008, by separate letter, I am asking that Snopac provide this affidavit now. If you have any questions regarding this letter, please contact me at (907) 586-7461.

Sincerely,



Jessica Gharrett
Program Administrator
Restricted Access Management

² Application by Snopac for Crab Processor Quota Share (received by RAM May 25, 2005); Affidavits Concerning Execution of ROFR Agreement by George Blakey on behalf of Snopac and by Bob Barnett on behalf of Aleutia (signed Oct. 19, 2005, received by RAM, Oct. 21, 2005).

³ Paragraph E, Contract Terms for Right of first Refusal based on Public Law 108-199, available at NMFS Alaska Region website: <http://www.fakr.noaa.gov/sustainablefisheries/crab/rat/posters/firstrefusal.pdf>.

⁴ NMFS's Response to Comment 119 also states that a community would seek fulfillment of the ROFR contract terms through civil court proceedings. Final Rule, 70 FR at 10206.

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rationalization\correspondence\2012\Aleutia_BBR_ROFR_Transfer_Stanley.docx

Prep: KyleM, McKeen,M: 7/16/12

Rev: MMcKeen: 7/18/12

Rev: jgharrett 7/17/12, 7/19

bcc: Crab file: Snopac Products, Inc.
Crab file: APICDA Joint Ventures, Inc.
Crab file: Aleutia, Inc.
GCAK: Mary Alice McKeen
RAM reading file

PUBLIC TESTIMONY SIGN-UP SHEET

Agenda Item: C-6(a) BSAI CRAB ROFR

	NAME (PLEASE PRINT)	TESTIFYING ON BEHALF OF:
1	Frank Kelly	City of Umanak
2	Steve Minor	NPCA
3	Ernie Weiss	Aleutians East Borough
4	Hector McPartly, Makolay Solder	CBSEA
5	Eric Weber, Karen Montoya	Aleutia
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NOTE to persons providing oral or written testimony to the Council: Section 307(1)(I) of the Magnuson-Stevens Fishery Conservation and Management Act prohibits any person "to knowingly and willfully submit to a Council, the Secretary, or the Governor of a State false information (including, but not limited to, false information regarding the capacity and extent to which a United State fish processor, on an annual basis, will process a portion of the optimum yield of a fishery that will be harvested by fishing vessels of the United States) regarding any matter that the Council, Secretary, or Governor is considering in the course of carrying out this Act.