

MEMORANDUM

TO: Council, SSC and AP Members
FROM: Chris Oliver *DOJ*
Executive Director *for*
DATE: March 22, 2012
SUBJECT: Miscellaneous Issues

ESTIMATED TIME 6 HOURS (all D-1 items)
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ACTION REQUIRED

(d) Report from BSAI Crab ROFR Workgroup.

BACKGROUND

(d) Report from BSAI Crab ROFR Workgroup

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 February 2011 meeting, the Council elected to delay further action on the amendment package to allow stakeholders to continue to develop solutions to issues with the rights of first refusal. At this meeting, the Council intends consider stakeholder suggestions that could improve the effectiveness of the rights of first refusal. A voluntary workgroup of stakeholders met on March 19th to discuss these issues. A report of that group, including suggested revisions to the Council's motion developed by the group are attached (Item D-1(d)).

Bering Sea and Aleutian Island crab fisheries
Community conference call
March 19, 2012

Participants: Pat Pletnikoff, Ernie Weiss, Larry Cotter, Karen Montoya, Dale Schwartzmiller, Edward Poulsen, Heather McCarty, Mark Fina, Brad Robbins, Frank Kelty, Dwayne Capp, Steve Minor, Mark Gleason

The group discussed the attached proposed revisions to the Council's motion. The group elected to discuss the provision in general and no attempt was made to reach agreement on preferred alternatives. The inclusion of any suggested revision, therefore, should be interpreted only as a suggestion by one or more members of the group that the revisions should be included in the Council motion for consideration (not as group support for the provision).

The group asked that the letter to Congress concerning the development of a loan program to aid ROFR holders in acquiring PQS be revisited (a copy is attached).

This item is on the Council's March/April agenda. At that time staff will present the Council with these meeting notes, after which participants in this workgroup may testify as to their positions and perspectives on how the Council should move forward.

DRAFT

Bering Sea and Aleutian Islands crab fisheries
Workgroup modifications to the Council motion from December 2011
North Pacific Fishery Management Council
March 19, 2012

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.

DRAFT

Action 2: Increase community protections by removing or modifying the (two) ROFR lapse provisions.

Provision 1

Alternative 1 – Status quo

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.

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

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

Provision 2

Alternative 1 – Status quo

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.

If the right is triggered by a sale subject to the right, and a community chooses not to exercise the right, the right is perpetuated in the community of origin.

Alternative 3

If the right is triggered by a sale subject to the right, a new ROFR contract would be signed at the time of transfer in which the PQS buyer names the community that gets the ROFR:

Option 1: which may be the community that chose not to exercise the right.

Option 2: which may not be the community that chose not to exercise the right.

The right holder must be an existing entity that was eligible to hold a ROFR at the time of the implementation of the program in the region in which the IPQ must be landed.

Action 3: Apply the right to only POS.

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 POS.

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.

Alternative 3: Apply the right to only PQS and assets in the subject community.

Require parties to rights of first refusal contracts to provide that the right shall apply only to the PQS and other assets physically present in the community benefiting from the right of first refusal. In the event other assets are included in the proposed sale, the price of the PQS to which the price 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, or c) if the parties are unable to agree, an arbitrator jointly selected by the PQS holder and the entity holding the right of first refusal.

The appraiser will be selected by:

- 1) mutual agreement of the parties or
- 2) the PQS holder and the community representative each selecting an appraiser and by those appraisers selecting a third appraiser. This panel of appraisers will then perform the duties of the appraiser.

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

Within 10 days of receipt of a contract that includes PQS subject to the right, the community entity may request that an appraiser identify community based assets in the transaction and establish a price for the PQS and community based assets. 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. If the community entity fails to request that an appraiser establish the price, the price in the contract will apply and the right will apply to all assets in the transaction.

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For any transaction that includes assets in addition to PQS, the appraiser shall determine which assets are community based.

If an appraiser is requested by the community entity, the parties shall select the appraiser (or each shall select an appraiser) within 20 days of the community entity receiving the contract to which the right applies.

In the event that a single appraiser is not selected by agreement of the parties, the two selected appraisers shall select a third appraiser within 30 days of the community representative receiving the contract.

The appraisers shall establish the price for the PQS and community based assets within 60 days of the community representative receiving the contract.

The community representative must notify the PQS holder of its intent to exercise the right within 90 days of receipt of the contract.

The community representative must perform, as required by the contract or the appraiser, within 120 days of receipt of the contract.

The cost of a mutually selected appraiser shall be paid equally by the PQS holder and the community representative. If the parties do not agree on a single appraiser, each party shall pay the costs of the appraiser it chooses, and the parties shall pay equally for the third appraiser.

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 prior 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**

North Pacific Fishery Management Council

Eric A. Olson, Chairman
Chris Oliver, Executive Director



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July 15, 2009

Honorable Gary Locke
United States Secretary of Commerce
1401 Constitution Avenue NW
Washington, DC 20230

Dear Mr. Secretary:

As part of its program to rationalize the crab fisheries in the Bering Sea and Aleutian Islands, the North Pacific Fishery Management Council included provisions to protect crab fishery dependent communities from changes that could arise under the new management. Under one provision, rights of first refusal on transfers of processing privileges created by the program are granted to entities representing communities that supported historic processing in the fisheries. Communities qualifying for these rights are represented either by their Community Development Quota (CDQ) groups or, in communities that do not participate in the CDQ program, by an entity identified by the community. In most communities that do not participate in the CDQ program, the community has elected to create a new entity to represent its interests.

The right of first refusal is generally viewed as a successful measure. Four community entities have acquired interests in processing shares since the program was implemented due, in part, to the leverage provided by the rights of first refusal. Despite this success, community entities believe that the availability of funds to acquire shares has been an impediment to completely achieving its purpose. To that end, it has been suggested that a loan program to fund community purchases of processing privileges could address this shortcoming. Such a program could be patterned after the loan programs authorized under the Magnuson Steven Act to support entry level and small boat acquisition of limited access privileges. In the long run, it may be possible that the program could be funded by the cost recovery program, removing that cost from the public. Under the cost recovery program, up to 3 percent of the ex vessel value of landings may be charged against landings to support program administration, including the entry level loan program, which may use up to 25 percent of the cost recovery funds collected. Since program administration costs (including the entry level loan program) are currently less than the 3 percent of ex vessel value of landings, a portion of those fees could be used to support a community loan program.

At our most recent Council meeting, the Council requested that I write to the Department of Commerce to inquire as to the possibility of establishing such a loan program. As I understand the situation, the Magnuson-Stevens Act provides no direct authority for the community loan program proposed here, but it is unclear whether such a program would be precluded. We ask that the Department of Commerce provide us with advice concerning specific actions (including possible Congressional Action) that must be undertaken to establish such a loan program. Thank you in advance for consideration of this request.

Sincerely,

A handwritten signature in black ink that reads "Chris Oliver". The signature is fluid and cursive.

Chris Oliver
Executive Director

CC: Senator Lisa Murkowski
Senator Mark Begich
Congressman Don Young
Mr. Leo Erwin, NMFS Financial Services Division
Dr. James Balsiger, Acting Assistant Administrator for Fisheries

PUBLIC TESTIMONY SIGN-UP SHEET

Agenda Item: D-1(d) Crab ROFR WKgrp

	NAME (PLEASE PRINT)	TESTIFYING ON BEHALF OF:
1	PAT Pletokoff	City of St. George
2	Heather Melony, Ernie Weiss, Frank Kelly	CBSEA, AEB, City of Annapolis
3	Paul Gronholdt	AEB
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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.

Bering Sea and Aleutian Islands crab fisheries
Workgroup modifications to the Council motion from December 2011
North Pacific Fishery Management Council
March 19, 2012

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):

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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 or modifying the (two) ROFR lapse provisions.

Provision 1

Alternative 1 – Sstatus quo

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.

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

Provision 2

1) Alternative 1 – Status quo

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.

~~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:

If the right is triggered by a sale subject to the right, and a community chooses not to exercise the right, the right is perpetuated in the community of origin.

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

Alternative 3

If the right is triggered by a sale subject to the right, and a community (community A) chooses not to exercise the right, the right is transferred to the new community associated with the PQS (community B.) a new ROFR contract would be signed at the time of transfer in which the PQS buyer names the community that gets the ROFR:

Option 1: which may be the community that chose not to exercise the right.

Option 2: which may not be the community that chose not to exercise the right.

The right holder must be an existing entity that was eligible to hold a ROFR at the time of the implementation of the program in the region in which the IPQ must be landed.

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.

Alternative 3: Apply the right to only PQS and assets in the subject community.

Require parties to rights of first refusal contracts to provide that the right shall apply only to the PQS and other assets physically present in the community benefiting from the right of first refusal. In the event other assets are included in the proposed sale, the price of the PQS to which the price 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, or c) if the parties are unable to agree, an arbitrator jointly selected by the PQS holder and the entity holding the right of first refusal.

The appraiser will be selected by:

- 1) mutual agreement of the parties or
- 2) the PQS holder and the community representative each selecting an appraiser and by those appraisers selecting a third appraiser. This panel of appraisers will then perform the duties of the appraiser.

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

Within 10 days of receipt of a contract that includes PQS subject to the right, the community entity may request that an appraiser identify community based assets in the transaction and establish a price for the PQS and community based assets. 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. If the community entity fails to request that an appraiser establish the price, the price in the contract will apply and the right will apply to all assets in the transaction.

For any transaction that includes assets in addition to PQS, the appraiser shall determine which assets are community based.

If an appraiser is requested by the community entity, the parties shall select the appraiser (or each shall select an appraiser) within 20 days of the community entity receiving the contract to which the right applies.

In the event that a single appraiser is not selected by agreement of the parties, the two selected appraisers shall select a third appraiser within 30 days of the community representative receiving the contract.

The appraisers shall establish the price for the PQS and community based assets within 60 days of the community representative receiving the contract.

The community representative must notify the PQS holder of its intent to exercise the right within 90 days of receipt of the contract.

The community representative must perform, as required by the contract or the appraiser, within 120 days of receipt of the contract.

The cost of a mutually selected appraiser shall be paid equally by the PQS holder and the community representative. If the parties do not agree on a single appraiser, each party shall pay the costs of the appraiser it chooses, and the parties shall pay equally for the third appraiser.

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 prior 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*).