BSAI Crab Binding Arbitration

November 14, 2024[1]

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1 Introduction

In June 2024, the North Pacific Fishery Management Council (Council) tasked staff to prepare a discussion paper with information to help the Council consider whether potential changes to the Crab Rationalization Program (CR Program) arbitration system might be prudent to reduce industry costs, increase transparency, and predictably, and/or to respond to low crab Total Allowable Catches (TACs). The Council identified four issues of primary concern based on information presented in the 2024 CR Program Review, which the Council received in June, and the associated public comments on that agenda item.

The Council is anticipated to utilize the information presented in this paper and public comment on the issue to determine whether it wishes to initiate a more focused discussion paper or a regulatory package to modify current regulations. The specific issues the Council asked staff to consider are listed below.

1. Timing of joining an arbitration organization. Current regulations require annual membership by May 1 prior to the fishing year before any crab catch limits are set (including no TACs), which requires participants to incur costs to hire:
    a. Share-matching agent
    b. Contracted arbitrators
    c. Market analyst and non-binding price formula arbitrator
2. Requirements of the binding arbitration system

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For definition of acronyms and abbreviations, see online list: https://www.npfmc.org/library/acronyms

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a. Only harvesters (Class A Individual Fishing Quota [IFQ] holders) can initiate binding arbitration
b. The arbitrator must only select a remedy proposed by one side, they cannot select an independent or compromise remedy based on the facts provided in the arbitration
c. Ability for parties to receive the arbitrator's written report and rationale, as well as a publicly available report providing key rationale (without including confidential information).

3. Evaluate whether current regulations allow an individual processing quota (IPQ)/IFQ holder to withdraw their application for quota any time prior to the quota being issued.
4. Consider an alternate structure under low TAC levels in which binding arbitration would not apply, to remove the burden of the system in low TAC years while still providing stability and protection to both harvesters and processors.

2 Binding Arbitration System

As directed by the 108th Congress, the Council recommended and the Secretary approved the CR Program, which includes a binding arbitration system. Arbitration is a formal way to resolve disputes between parties without going to court and it is intended to be faster and less expensive than litigation. An arbitration system was developed for the CR Program to help resolve conflicts that may occur between harvesters and processors without slowing down or delaying the crab fisheries. The Council was granted the authority to modify the Arbitration System and other program provisions under Section 801(j)(3) of the Consolidated Appropriations Act of 2004.

> *''(1) By not later than January 1, 2005, the Secretary shall approve and hereafter implement by regulation the Voluntary Three-Pie Cooperative Program for crab fisheries of the Bering Sea and Aleutian Islands approved by the North Pacific Fishery Management Council between June 2002 and April 2003, and all trailing amendments including those reported to Congress on May 6, 2003. This section shall not preclude the Secretary from approving by January 1, 2005, and implementing any subsequent program amendments approved by the Council.*
>
> *(2) Notwithstanding any other provision of this Act, in carrying out paragraph (1), the Secretary shall approve all parts of the Program referred to in such paragraph. Further, no part of such a Program may be implemented if, as approved by the North Pacific Fishery Management Council, individual fishing quotas, processing quotas, community development quota allocation, voluntary cooperatives, binding arbitration, regional landing and processing requirements, community protections, economic data collection, or the loan program for crab fishing vessel captains and crew members, is invalidated subject to a judicial determination not subject to judicial appeal. If the Secretary determines that a processor has leveraged its Individual Processor Quota shares to acquire a harvesters open-delivery ''B shares'', the processor's Individual Processor Quota shares shall be forfeited.*
>
> ***(3) Subsequent to implementation pursuant to paragraph (1), the Council may submit and the Secretary may implement changes to or repeal of conservation and management measures, including measures authorized in this section, for crab fisheries of the Bering Sea and Aleutian Islands in accordance with applicable law, including this Act as amended by this subsection, to achieve on a continuing basis the purposes identified by the Council."***

The Binding Arbitration System includes the coordination of matching[2] Class A IFQ held by harvesters not affiliated with processors to IPQ held by processors, and a binding arbitration process to resolve price negotiations, delivery terms, performance standards, and other disputes when IFQ and IPQ holders cannot reach an agreement. Arbitration is only between the IFQ holders matched with a processor's IPQ holdings.

When the CR Program was implemented, both harvesters and processors expressed concern regarding how the changes in the fishery would impact market power between the sectors. Based on those concerns and directions from Congress, a binding arbitration system was designed to resolve disputes fairly and equitably if class A IFQ and IPQ holders cannot reach an agreement.

2.1 Arbitration System Structure and Summary of Regulations

The regulations for the CR Program Binding Arbitration System are defined at 50 CFR 680.20. The general headings in that section of the CR Program regulations include:

a) to whom the regulations apply,
b) eligibility for Arbitration System,
c) preseason requirements for joining an Arbitration Organization,
d) formation process for an Arbitration Organization,
e) role of Arbitration Organization(s) and annual requirements,
f) roles and standards for the Market Analyst and process for producing the Market Report,
g) roles and standards for the Formula Arbitrator,
h) roles and standards for the Contract Arbitrator(s), and
i) other procedures and administrative decisions.

Regulations in some of those broad sections apply to the issues the Council is considering based on its request for this paper. Under 50 CFR 680.20(i), participants in the program are given the authority to change certain Binding Arbitration System provisions if the changes are consistent with other provisions. Language in that section of the regulations states,

> *"the Arbitration Organizations, Market Analyst, Contract Arbitrator, Formula Arbitrator, and the Third Party Data Provider are authorized to adopt arbitration system procedures and make administrative decisions, including additional provisions in the various contracts, provided those actions are not inconsistent with any other provision in the regulations."*

Therefore, limited changes can be made to the Binding Arbitration System without a regulatory amendment. More substantial modifications to the program would require regulatory amendments.

The Council selected a "baseball" arbitration style[3] when the CR Program was implemented. Baseball arbitration requires that both parties provide evidence supporting the requested outcome. Along with that evidence, the Class A IFQ holders (also called Arbitration IFQ) and IPQ holders must each submit their proposed outcome. That outcome could be the ex-vessel price paid or other disputes (e.g., delivery terms). The arbitration procedure up to the presentation of evidence is virtually identical to standard arbitration. However, baseball arbitration limits the arbitrator's ability to select an outcome. The arbitrator is only empowered to take one of two actions: accept the IFQ holder's proposal or accept the IPQ holder's

[2] Stakeholders developed the sharematch.com web application to facilitate matching harvesting and processing shares.
[3] Also known as final offer arbitration or pendulum arbitration.

proposal. The arbitrator is not empowered to negotiate an agreement other than the outcome requested by the Arbitration IFQ holders or the IPQ holders. The decision of the arbitrator is final and issued without explanation.

Because the arbitrator may only select one of the two submitted proposals, it is assumed that the baseball arbitration structure incentivizes the two disputing parties to submit "reasonable" offers. Submitting reasonable offers to the arbitrator may result in more productive negotiations and provide faster outcomes that are less expensive than other forms of arbitration, where outcomes other than the two submitted could be considered and selected by the arbitrator. The arbitrator must only select a remedy proposed by one side; the arbitrator may not select an independent or compromise remedy based on the facts provided in the arbitration process.

Certain requirements are established for quota share holders who hold Class A QS/IFQ and processors that hold PQS/IPQ regardless of whether participants in the fishery initiate binding arbitration during a year. Because the required submission dates are set before determining whether the stocks will support a fishery that crab fishing year, the arbitration system process must be conducted, and the costs of collecting and submitting the required information must be incurred each year unless over half of the participants in both sectors agree not to prepare certain reports as discussed later in this document.

Four data collections are submitted annually:

1) Annual Arbitration Organization Report: (compiled by each of the two arbitration organizations representing the processors and the harvesters[4]),

2) Market Report[5] (analysis of the market for products of a specific crab fishery and reports on activities occurring within three months prior to its generation. The purpose of this report is to provide background information on each crab fishery, the products generated by each fishery, and position of those products in the marketplace; discuss the historical division of wholesale revenue; and provide the methods for predicting wholesale prices before the fishery occurs),

3) Non-binding Price Formula Report (a pre-season report designed to serve as a starting point for negotiations between fishermen and processors, or as a starting point for an arbitrator in evaluating offers in an arbitration process. This report documents how each formula was developed), and

4) Cost Allocation Agreement (provides combined shared arbitration accounting costs since the Federal regulations require that the crab arbitration costs are shared equally between IPQ holders and Class A IFQ holders).

In addition, a Contract Arbitrator Report is submitted to NMFS if any arbitration occurs within a fishery. A summary of the arbitrations that have been reported was provided in the CR Program review (NPFMC 2024). A table from that review is provided in the appendix to this paper and shows that Arbitration IFQ

[4] https://s3.amazonaws.com/media.fisheries.noaa.gov/2020-11/Crab-Arbitration-Organization-Annual-Report-Template-AKRO.pdf?null=

[5] As briefly discussed later in this document, the Council could eliminate this requirement if the costs of producing the report outweigh the benefits that the parties derive from using it.

holders have prevailed in most arbitrations in establishing contract terms. The report does not include the rationale for why the arbitrator selected the outcome that was chosen.

The shared arbitration system costs are outlined in an annual report submitted to NMFS and the Council by the Alaska Crab Processors Arbitration Organization (ACPAO) participants. Arbitration costs are divided equally between the harvesters and processors based on a landings fee structure. Because of when costs are incurred and the fees are collected, the processor pays the arbitration costs and is reimbursed through the fee. Both parties agree on the fee and structure, and the contract describes how shortfall and excess funds are addressed. The ACPAO report identified the following costs as shared arbitration system costs:

- The cost to produce the market report and non-binding pricing formula for each fishery (covers Numbers 2 and 3 of the required data submissions listed above).
- The third-party data provider (Sharematch.com) costs for each fishery.
- The contract arbitrators' costs for each fishery.
- General liability insurance, and directors' and officers' insurance for each arbitration organization.
- The fees and expenses necessary for participating in the Council's CR Program review process incurred by any authorized representative of the arbitration organization.
- Attorney's fees of the arbitration organizations to prepare, negotiate, and administer the contracts, obtain and review insurance policies, request as necessary Department of Justice antitrust review of the implementation of the arbitration system, contribute to and participate in the Council's CR Program review process, and otherwise implement the arbitration system, as amended from time-to-time by NOAA regulation. Attorney's fees associated with the formation and administration of each arbitration organization are borne by each arbitration organization.

The fee per pound varies annually and has ranged from $0.00 to $0.01 per pound depending on the estimated arbitration costs and the amount of carryover funds held in reserve (2005 through 2022 fishing years). Fishing year costs incurred ranged from about $325k early in the program to as low as about $80k in recent years. The average over the past 7 years, since the last program review, was about $110k.

Based on the requirements described above, the Arbitration System begins with disseminating information. The two sectors (harvesters and processors) jointly select a "market analyst," who produces a market report, and a "formula arbitrator," who develops a price formula specifying an ex-vessel price as a percentage of the first wholesale price. The sectors (i.e. the Arbitration Organizations) also choose a pool of "contract arbitrators," who will preside over any binding arbitration proceedings that are initiated.

The price formula is a pre-season report designed to inform negotiations. The market report is intended to provide baseline information concerning the current market and provide information to help establish a reasonable price. Neither the market report nor the formula price has any binding effect. Instead, they are intended to provide baseline information concerning the market and signal what may be considered a reasonable ex-vessel price. The market report and the price formula are intended to serve as the starting point for price negotiations by members of the Arbitration Organizations. A representative of the harvest

sector indicated that other published market reports (e.g., Urner Barry's report) have been used to provide timely market information for the negotiations.

The market report and formula price must be released at least 50 days before the season opening. The market analyst and formula arbitrator (who may be the same person) generate the market report and formula price based on relevant information, including information received from IFQ holders and IPQ holders.

In the program's first year, the price formula report for the Aleutian Islands Golden King crab fishery recommended a staged price-setting process, in part because of its longer season. Under this approach, harvesters receive an advance, guaranteed minimum price when landings are made based on prevailing market prices when the report is generated. At the end of the season, a price adjustment is made based on the average first wholesale price for the year. This formulation was suggested to put more market risk on processors. The report suggested that this starting price would present a risk of loss to processors only in years of very steeply declining market conditions. The approach has also not been part of any binding arbitration proceeding. Instead, harvesters have negotiated for a minimum price paid at landing before beginning fishing.

A "market analyst" and a "formula arbitrator," jointly selected by the harvesting and processing sectors, develop a market report and non-binding price formula, which specifies an ex-vessel price as a portion of the first wholesale price, to be used by participants to guide their negotiations. The market report and the formula price are non-binding. Still, they are intended to provide information concerning the market and a reasonable price that might be generated by the arbitration system based on the historical distribution of the first wholesale price and ex-vessel price.

Matching Class A IFQ with IPQ is facilitated through quota share commitments and disseminating information concerning available shares. The website Sharematch.com has been developed to facilitate this process. Once shares are matched, Arbitration IFQ holders unable to negotiate price and delivery terms may use the arbitration system to resolve those terms.

To ensure predictability and fairness, the arbitration system sets standards to be followed by formula arbitrators and contract arbitrators. Although different standards apply to the formula arbitrator and the contract arbitrator, the differences between the standards are very limited and do not substantively change the general approach to be applied. The regulations state that both the non-binding price formula and contract arbitrator's decision must "(A) be based on the historical distribution of first wholesale revenues between fishermen and processors in the aggregate based on arm's length first wholesale prices and ex-vessel prices, taking into consideration the size of the harvest in each year; and (B) establish a price that preserves the historical division of revenues in the fishery while considering" several factors.[6] While arbitrators have the latitude to consider these factors, discussions with industry members indicate they tend to rely most heavily on the established formula based on the historical division of first wholesale prices.

The system is also designed to minimize the potential for antitrust violations and includes a provision for open negotiations among IPQ and Arbitration IFQ holders. Various other negotiation approaches are also

[6] For example, delivering all the IFQ that was sharematched, meeting delivery schedules, price adjustments based on crab attributes that impact wholesale prices (dirty crab, small crab, low meat fill, etc.).

included, such as a share-matching approach and a lengthy season approach where parties may postpone binding arbitration until an agreed-upon point of the season.

There continues to be some disagreement between harvesters and processors regarding how well the Arbitration System has worked. Some concerns were described in a discussion paper presented to the Council (NPFMC, 2017). That paper provides greater detail regarding concerns about what should be considered when calculating revenue divisions.

2.1.1 Use of Binding Arbitration to Establish Contract Terms

Federal regulations at 50 CFR 680.20(h)(3)(ii)(B) state that if Arbitration IFQ holders and an IPQ holder do not reach an agreement on price, delivery terms, or other terms after matching shares, **only an Arbitration IFQ holder may initiate Binding Arbitration to resolve disputes over price, delivery terms, or other terms.** Current regulations do not allow PSQ or IPQ holders to initiate Binding Arbitration to establish contract terms. Regulations published at 50 CFR 680.20(b)(2) state that the only persons eligible to enter contracts with a Contract Arbitrator to use the negotiation and Binding Arbitration procedures to resolve price and delivery disputes or negotiate remaining contract terms not previously agreed to by IFQ and IPQ holders under other negotiation approaches (see Section 5.1) are the holders of Arbitration IFQ and holders of IPQ. So, while IPQ holders are part of the contract, they may not initiate binding arbitration to establish contract terms. Arbitration IFQ is defined as Class A catcher vessel owner IFQ held by a person who is not a holder of PQS or IPQ and is not affiliated with any holder of PQS or IPQ, and IFQ held by a Fishermen's Collective Marketing Act (FCMA) cooperative. An FCMA cooperative's anti-trust exemption provides all members of an FCMA cooperative (fishermen and/or processors) with collaborative benefits. (Kitts, 2003). The Inter-Cooperative Exchange (ICE) is currently the only crab harvesting cooperative organized and operated to qualify as an FCMA cooperative that can initiate arbitration.

2.1.2 Enforcing Performance Disputes

Federal regulations at 50 CFR 680.20(h)(10) addresses performance disputes arising after establishing a contract to define price, delivery, or other terms. **The holders of either Arbitration IFQ or the holders of IPQ may initiate Binding Arbitration procedures or other legal means to enforce contract performance disputes**. The extent to which performance clauses are included in private legal contracts is unknown by this paper's author. If an IPQ holder and an Arbitration IFQ holder cannot resolve disputes regarding the obligations to perform specific contract provisions after substantial negotiations or when time is of the essence, the disputed issues could be submitted for Binding Arbitration. Binding Arbitration resulting from a performance dispute can occur from the start of the crab fishing year until the start of the following crab fishing year.

Performance dispute arbitration follows the Binding Arbitration structure, except that the Contract Arbitrator will determine the time frame for the procedure applicable to a performance dispute once the dispute has been raised. Failure to comply with the arbitration decision could be enforced through any legal means, including actions taken in court.

2.1.3 Lengthy Season

Federal regulations at 50 CFR 680.20(h)(3)(iii) defines the lengthy season approach to contract negotiations. Before the fishing season for that crab QS fishery, a committed IPQ holder and one or more committed Arbitration IFQ holders may adopt a Lengthy Season approach. The Lengthy Season approach

is an alternative method to the Binding Arbitration proceedings. The Lengthy Season approach allows the IPQ holder and Arbitration IFQ holder to agree to postpone negotiating specific contract terms. The Lengthy Season approach allows the two parties involved in the negotiation to postpone binding arbitration, if necessary, until later during the crab fishing year. Binding arbitration is unnecessary later in the year if the two parties reach an agreement.

If the parties cannot agree on adopting a Lengthy Season approach,[7] they may use mediation to determine whether to adopt a Lengthy Season approach. The parties may request a Contract Arbitrator to act as a mediator. If the mediation proves unsuccessful or is not selected, the Arbitration IFQ holder may initiate binding arbitration to determine whether to adopt a lengthy season approach.

2.1.4 Discussion of the Impacts of Processors not Being Allowed to Initiate Arbitration

Arbitration allowing only one party to initiate arbitration is known as unilateral arbitration. This type of arbitration is typically implemented when one party is assumed to have a higher risk if there is an adverse outcome (the party allowed to initiate arbitration)[8]. In the CR Program, the overall issues of market power and risk borne by the participants are complex, and the allocation of IPQ and the current arbitration structure were initially included to balance those issues. Based on the structure selected, the previous Council assumed that the harvest sector had a higher risk if they had an adverse arbitration outcome.

CR Program arbitration may only be triggered by Arbitration IFQ holders that have joined a CR Program arbitration organization to establish contract terms.[9] IPQ holders are prohibited from initiating the arbitration process to establish contract terms. Therefore, IFQ holders have control over the years, fisheries, and processors subject to arbitration. It also means that Arbitration IFQ holders are most likely to initiate the arbitration process when they anticipate prevailing in the arbiter's ruling.

Regulations at 50 CFR 680.20(h)(3)(v) defines the rules for initiating binding arbitration. It states that binding arbitration must be initiated not later than 15 days after NMFS issues IFQ and IPQ. There will be only one Binding Arbitration Proceeding for an IPQ holder, but multiple Arbitration IFQ holders may participate in this proceeding. The limit of one arbitration per IPQ holder would mean that if the IPQ holder were allowed to initiate arbitration, the IFQ holder may not or would not have initiated arbitration.

Allowing IPQ holders to initiate arbitration could result in more arbitration proceedings. Each proceeding will require both Arbitration Organizations to incur additional costs. Depending on the resources available to each organization, the increased costs could have differential impacts on their ability to fund needed resources to effectively participate in the arbitration process.

During the June Council meeting, public comment from a processor representative indicated that:

> *"the arbitration system is costly; not equitable; and overly burdensome. It is time to take a further look at the regulations implementing the arbitration system to determine if changes can be made without damaging the CR Program or any of its participants. We believe that many of the*

[7] Program reviews have indicted that the parties tend to agree on the lengthy season approach.

[8] https://www.lexology.com/library/detail.aspx?g=3f7adc3b-59d5-447e-ab4a-23b2fccc05f6#:~:text=The%20unilateral%20option%20arbitration%20clauses,the%20other%20party%20in%20arbitration.

[9] 50 CFR 680.20(h)(10) states that if an IPQ holder and an Arbitration IFQ holder are unable to resolve disputes regarding the obligations to perform specific contract provisions after substantial negotiations or when time is of the essence, either party may initiate arbitration to resolve the issue.

requirements are no longer necessary and that a much more equitable system can be developed with further review and analysis."

During public comment at the June Council meeting, council member questions centered on whether processors could force arbitration by offering a low price that Arbitration IFQ holders would be unwilling to accept, forcing harvesters into arbitration. While this is a potential outcome, the processor representative noted that employing such tactics might further erode trust between the two sectors during economic times when cooperation is important. Such a tactic does not encourage making the program work in the longer term.

Because processors cannot initiate arbitration, it creates less certainty of the ex-vessel price processor will pay after share-matching than if the two sides were able to agree during the negotiation period. The share matching system requires the processors to process any matched IFQ that is delivered to them under the terms of the agreement (either both parties agreeing or a contract established by an arbitrator). If markets change such that the harvesters do not deliver all the share-matched crab to the processor because the ex-vessel price relative to the first wholesale price makes harvesting the crab not economically viable, the processor has no recourse unless there is a performance contract.

Not knowing whether arbitration will be triggered increases uncertainty. The increased uncertainty regarding whether a processor should apply for IPQ or request that their application be withdrawn could result in processors taking a more risk-averse strategy, especially when margins are also small in other fisheries and they cannot, or will not, be used to subsidize crab fisheries.

Past discussions have also noted that processors may be less willing to take market risks associated with developing new products it the costs of production do not change the profit margin. Concerns that have been expressed by processors were that under the price formula, harvesters may not be sharing evenly in the risk and reward for the development of new products and markets.

If more PQS/IPQ holders with processing capacity do not submit their IPQ allocations, or withdraw them after submission, it may negatively impact IPQ holders without processing capacity. These entities must find custom processors for a higher percentage of the available crab but may have fewer options if the first wholesale price is low and custom processing fees are high. Under low TACs, the cost of processing a crab unit is higher than in higher TAC years due to economies of scale. Higher costs are reflected in the custom processing fee charged to IPQ holders. So, IPQ holders may be required to pay a higher ex-vessel price under arbitration and have less revenue due to increasing custom processing costs. Such situations would negatively impact the benefits IPQ holders (often CDQ groups and community organizations) receive, and the value communities they represent derive from the quota.

2.2 Arbitrator Written Reports

The Council requested that this discussion paper review the possibility for the parties to the arbitration to receive a written report from the arbitrator outlining the rationale for the decision and a publicly available report providing key considerations that influenced the decision. Key considerations would only be provided to the public so that no confidential information would be released.

As discussed in a paper drafted for Congress by the Department of Justice Antitrust Division[10], requesting the release of information utilized in arbitrations, even by the arbitrator, should be carefully considered and if requested, ensure the information requested would not trigger antitrust concerns. The types of information requested should not include price and production information.

> *"we cautioned that sharing information in conjunction with arbitration, including information from other arbitrations, could violate the antitrust laws. An agreement among competitors to share information regarding price and output, even through the conduit of an arbitrator, can have the effect of dampening competition, and if so can be illegal under the Sherman Act even in the absence of a direct agreement on price. Although harvesters participating in an FCMA cooperative could share such information within their cooperative, they too would risk antitrust liability if they shared such information outside the cooperative."*

Regulations at 50 CFR 680.20(e)(2)(ii) defined the confidentiality of information used during the arbitration. A member that is a party to a Binding Arbitration proceeding must sign a confidentiality agreement with the party with whom it is arbitrating, stating they will not disclose at any time to any person any information received from the Contract Arbitrator or any other party during the arbitration. That confidentiality agreement must specify the potential sanctions for violating the agreement. This regulation applies to the defined parties during the arbitration.

Regulations at 50 CFR 680.20(e)(2)(iv) requires that the Arbitration Organization deliver to NMFS any data, information, and documents generated under the arbitration process. That section also prohibits disclosing information received under this provision to any person except those Arbitration QS/IFQ Arbitration Organizations, or their third-party data provider so that information may be provided to holders of uncommitted Arbitration IFQ. It also requires the PQS/IPQ Arbitration Organization to arrange for the delivery to all holders of uncommitted Arbitration IFQ through the Arbitration QS/IFQ Arbitration Organizations holders or their third-party data provider the terms of a decision of a Contract Arbitrator in a Binding Arbitration proceeding involving a member that holds uncommitted IPQ within 24 hours of notice of that decision. The regulation does not require that information on how the terms of the decision were determined by the arbitrator be provided. Arbitration QS/IFQ Organizations must provide information similar to that described for the PQS/IPQ holders.

Based on the concerns expressed by the Department of Justice Antitrust Division and the current regulations, the types of information that the arbitrator could release through a public written report include the prevailing side of the arbitration, the methodology (formula) used to make the determination (e.g., the historical percentage division of first wholesale price based on a set of years), and any other general considerations utilized by the arbitrator to make the determination so long as it did not disclose any information that can "have the effect of dampening competition" or release confidential information. The exact type and scope of information that could dampen competition may need to be determined on a case-by-case basis, depending on the number of active participants in the fishery to avoid antitrust violations.

Some stakeholders felt that requiring a written arbitration decision could save costs. Cost savings may occur since more information would be available for people hired to support the arbitration process, specifically the Contract Arbitrator and Formula Arbitrator. The information would be especially

[10] https://www.justice.gov/sites/default/files/atr/legacy/2015/05/05/202572.pdf

important when people are hired to fill those roles that do not have experience. The reports could be used as background information to help them better understand the process.

A written report would also inform participants why other stakeholders have not prevailed. The additional information may change how they approach arbitration for a better opportunity to succeed in future decisions.

3 Arbitration Program Timing

The complex CR Program regulations require active participants in the fishery to meet certain deadlines to ensure that IPQ and IFQ can be issued and that the fisheries can open on time. Part of that process is the required timing of steps in the binding Arbitration System. These steps were described in an April 2017 report to the Council[11] (NPFMC 2017).

- Determination of annual membership in the Arbitration Organization must be established by May 1. Arbitration Organizations jointly choose a formula arbitrator and a pool of contract arbitrators. This is before the fishing year, before any crab TACs are set (including no TACs), requiring participants to incur costs to hire a share-matching agent, contracted arbitrators, and a market analyst and non-binding price formula arbitrator before knowing whether binding arbitration will be needed.
- Crab IFQ and IPQ applications for the upcoming crab fishing year are due June 15. For the application to be considered complete, all fees required by NMFS must be paid, and EDRs must be submitted.
- At least 50 days (30 days for AI golden king crab) before the season opening a non-binding price formula is produced
- TAC is announced (less than 2 weeks before the fishing season opens)
- 7 days before the season opening a market report is produced
- NMFS issues IFQ/ IPQ (clock starts on share matching) (about a week before season opening)
- For 5 days after IFQ/IPQ issuance, share-matching is based on mutual agreement by the IPQ and IFQ holders
- After 5 days, harvesters unilaterally share-match with available IPQ holders
- For 15 days after IFQ/IPQ issuance, Arbitration IFQ holders may either initiate binding arbitration OR choose the “lengthy season approach”.

Other important decisions not discussed in detail in this paper must be agreed to by the sectors outside of binding arbitration. For example, the framework agreement for regional deliveries must be implemented by October 15th, and meeting that deadline was difficult given the unique challenges faced by stakeholders in 2024. That system was set up to address ice conditions that would limit deliveries to the North Region, not economic conditions, including the low TACs the industry is facing.

[11] https://meetings.npfmc.org/CommentReview/DownloadFile?p=88528180-9c2e-45bd-96db-97941beb16f8.pdf&fileName=PRESENTATION%20D1.pdf

Setting the catch limits is a process that involves stock assessment authors, the Crab Plan Team (CPT), the Council's Scientific and Statistical Committee (SSC), the Council, the National Marine Fisheries Service (NMFS), and the Alaska Department of Fish and Game (ADFG). The CPT reviews one assessment in January that is not included in the CR Program (Norton Sound red king crab). Two crab fishery assessments conducted in May are for CR Program species (Aleutian Islands golden king crab and Western Aleutian Islands red king crab) and one not included in the CR Program (Pribilof Islands golden king crab). The remaining assessments (Bristol Bay red king crab, EBS snow crab, EBS Tanner crab, Saint Matthew Island blue king crab, Pribilof Islands red king crab, and Pribilof Islands blue king crab) are conducted in September. Fisheries reviewed by the Council in June are opened to fishing under the CR Program on August 1 after ADFG establishes the total allowable catch TAC for each fishery. CR Program fisheries reviewed at the October Council meeting are opened on October 15 (Table 1), after ADFG sets the TAC for each fishery.

Table 1 Dates associated with the process of setting CR Program fishery TACs

Stock	CPT review and recommendations to SSC	SSC review and recommendations to Council	Assessment frequency	Year of next Assessment
AI golden king crab	May	June	Annual	2025
Western AI Red king crab	May	June	Triennial	2026
EBS snow crab	September	October	Annual	2025
Bristol Bay red king crab	September	October	Annual	2025
EBS Tanner crab	September	October	Annual	2025
Pribilof Is. red king crab	September	October	Triennial	2025
Pribilof Is. blue king crab	September	October	Biennial	2025
Saint Matthew blue king crab	September	October	Biennial	2026

Source: Crab SAFE

The rationale for the stock review timing is that stocks with summer fisheries and those established only using catch data have specifications set in June. The stocks whose review uses data from the Eastern Bering Sea NMFS trawl survey cannot be assessed until survey data are available in early September. The timing of this process does not allow for establishing TACs earlier for CR Program fisheries. Because TACs cannot be established any earlier under the current process, the issue is whether the steps in the arbitration process could be delayed until the survey information is available and TACs are established. Options to delay the start of fishing so that costs are not incurred prior to setting the TAC would impact historical fishing patterns, create market issues, and, in some fisheries, impact crab value. A summary of the fishing season timing and reasons for when fishing occurs was presented in the Crab Program Review (NPFMC, 2024) and summarized below.

The Bering Sea Snow crab fishery is typically open from October 15 until May 31. Most Bering Sea Snow crab harvests take place from January to March. However, some effort typically begins in December and often lasts until May. The timing of the Bering Sea Snow crab harvest is based on market constraints related to meat fill, the amount of crab meat relative to shell size, and shell hardness. This has historically been a high-volume fishery, thus the timing also depends on the size of the TAC.

The BBR fishery opens on October 15 and closes on January 15. Despite the extended season, most of the harvest in the fishery is completed within the first month based on market considerations.

The Bering Sea Tanner crab fishery is divided into Eastern and Western fisheries. Eastern Bering Sea Tanner is primarily harvested in October and November. Western Bering Sea Tanner crab is primarily harvested from January through March.

When open, the St. Matthew Blue King Crab fishery was set from October 15 until February 1. Fishing effort typically ended before December due to poor weather conditions.

The Eastern AI Golden King Crab fishery is primarily harvested between August and November, while the Western AI Golden King Crab is typically harvested throughout the entire season. Beginning in 2015/2016 the season dates for Eastern AI Golden King Crab and Western AI Golden King Crab changed from August 15 through May 15 to August 1 through April 30.

4 Allowing IPQ/IFQ Application Withdrawal

At the June Council meeting, there was a discussion of whether the current regulations allowed for the withdrawal of IPQ or IFQ applications and if they are allowed the terms of those withdrawals. The discussion at the June meeting indicated that NMFS has allowed IPQ applications to be withdrawn before the issuance of IFQ/IPQ. Still, the regulations do not define whether they are allowed or the conditions under which application withdrawals would be approved, resulting in the Council requesting further clarification of the issues. Regulations at 50 CFR 680.4(f)(1) state that a complete IPQ or IFQ application must be postmarked or received by NMFS no later than June 15 for the upcoming crab fishing year. These regulations are silent on whether an application may be withdrawn after NMFS accepts it as complete.

Sufficient information on whether economic conditions warrant processors or harvesters withdrawing an application is unavailable until ADF&G establishes the TACs. Thus, the few days between when the TACs are established and when the fishery is open is when people must decide if the fishery can be harvested/processed efficiently and make the withdrawal decision.

At the June meeting, NOAA GC noted for the Council that NMFS can review its regulations and clarify interpretations outside of the Council process. To the extent that NMFS can clarify its interpretation of existing regulations, this could provide clarity quicker than the Council recommending regulatory changes. Without that clarity, or if the Council's current intent differs from NMFS's interpretation of the existing regulations, the Council could direct staff to prepare an analysis and select an option requesting that the Secretary of Commerce modify the current regulations to expressly allow for the withdrawal of IPQ or IFQ applications as well as defining the terms and conditions for such a request.

NMFS has not issued a formal interpretation of the regulation but has noted that the regulation does not bar withdrawal and it has previously allowed withdrawals, considering requests on a case-by-case basis. NMFS has added a question to the Crab Rationalization Program Frequently Asked Questions and Small Entity Compliance Guide to clarify NMFS' interpretation of the existing regulations.[12] NMFS has received a small number of requests to withdraw an application for IPQ and has evaluated each on a case-by-case basis, considering the facts and circumstances of the request. NMFS has approved the few recent requests to withdraw an application for IPQ, which were submitted well in advance of annual IPQ issuance and had no other factors weighing against the requests. A regulatory change would be needed to

[12] https://www.fisheries.noaa.gov/resource/document/crab-rationalization-program-frequently-asked-questions-and-small-entity

provide fuller reliability so that everyone in the process can understand the options available, and any terms and conditions upon them.

Discussions at the October meeting also touched on the impacts of not allowing an application withdrawal. Public comment noted that anti-trust regulations limit the processor's ability to coordinate the processing of small TACs. Their inability to work together to determine how to process the fishery efficiently means that if a processor can withdraw its application for IPQ, its IPQ would be proportionally reallocated between the processors that are issued IPQ. The remaining active processors could be negatively impacted by other processors withdrawing their application for IPQ, depending on the economic conditions of the active processors. Because processors may not coordinate their actions, it means that if one active processor did not withdraw its application, it would need to process up to the processing limit, and custom processing contracts would need to be established to process IPQ above the processing cap.

It may be important to consider regulations limiting the amount of PQS and IPQ that may be held and used by a person or facility and the changes to those regulations that have occurred over the life of the CR Program. Regulations at 50 CFR 680.42(b)(1)(i) limits a person to hold a maximum of 30% of the PQS initially issued in the fishery unless they were initially issued more, and to use a maximum of 30% of the IPQ derived from the initially issued QS. Exceeding this cap is prohibited under §680.7(a)(7), which prohibits an IPQ holder from using more IPQ than the maximum amount of IPQ that that person may hold.

A custom processing arrangement exists when an IPQ holder has a contract with the owners of a processing facility to have their crab processed at that facility and the IPQ holder does not have an ownership interest in that processing facility or is otherwise affiliated with the owners of that processing facility. In custom processing arrangements, the IPQ holder contracts with a processing facility operator to have the IPQ crab processed according to that IPQ holder's specifications. Custom processing arrangements commonly occur when an IPQ holder has no ownership interest in a shoreside processing facility in that region or cannot economically operate a stationary floating crab processor. Custom processing ensures CR Program crab can be processed even when the IPQ holder is remote and unable to process their own IPQ. Through a series of amendments since implementation of the CR Program (i.e., Amendment 27, 47 and 55), custom processed IPQ processed at a shoreside facility or stationary floating crab processor within a community boundary no longer counts towards the IPQ use cap for the entity that owns the processing facility. These regulatory changes which increase flexibility for custom processing and essentially focuses the 30% use cap to the holdings of PQS and IPQ.

The custom processing exemptions were implemented to address unanticipated changes in the fisheries that have occurred. The original crab processing facility and IPQ use limits were designed and implemented when crab TACs in all crab fisheries were much higher than in recent years. Implementing regulations not to count custom-processed crab from the IPQ facility and use caps over time was essential to address those changes.

In the current regulations, there is no mechanism addressing a scenario where there are no processors capable of or willing to process crab. If this scenario were to occur, one potential avenue could be for the Council to request emergency regulatory action. Section 305(c) of the Magnuson-Stevens Act authorizes the Secretary of Commerce (Secretary) to promulgate regulations to address an emergency (16 U.S.C. 1855(c)). Under that section, a Council may request that the Secretary promulgate emergency regulations.

NMFS's Policy Guidelines for the Use of Emergency Rules require that an emergency must exist and that NMFS have an administrative record justifying emergency regulatory action and demonstrating compliance with the Magnuson-Stevens Act and the National Standards (see NMFS Procedure 01-101-07; 62 FR 44421, August 21, 1997). Emergency rulemaking is intended for circumstances that are "extremely urgent," where "substantial harm to or disruption of the . . . fishery . . . would be caused in the time it would take to follow standard rulemaking procedures (62 FR 44421, August 21, 1997)."

Under NMFS's Policy Guidelines for the Use of Emergency Rules, the phrase "an emergency exists involving any fishery" is defined as a situation that meets the following three criteria:

1. Results from recent, unforeseen events or recently discovered circumstances;
2. Presents serious conservation or management problems in the fishery; and
3. Can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process.

A scenario with no IPQ applications could have significant impacts on management responses and the ability of sector participants to profitably participate in any CR Program fisheries that are open in a crab fishing year. Even if multiple PQS holders do apply in a given year, as applicant numbers fall, the impacts would be increasingly similar to a no-applicants scenario. Alternatively, if this scenario of low or no IPQ applicants is likely to occur, or if economic conditions in the processing sector are expected to continue to be unstable in future years, regulatory changes should be developed and recommended by the Council to proactively address the issue before these conditions arise.

IPQ holders without a processing facility are subject to the PQS holding limit, so persons not applying for IPQ would not impact the percentage of PQS these entities hold. As described above changes to regulations have created exemptions so that custom processing is not subject to IPQ use limit and facility limits. So, if a PQS holder without a processing facility was the only person to apply, they could have all the class A IPQ processed by other processors. Being in this position could increase the risk of performing if taken to arbitration because of the relationship between ex-vessel price, custom processing fees, and first wholesale prices. Depending on those factors, the IPQ holder could benefit from holding more IPQ or be subject to more significant losses.

If IPQ holders who do not own an active plant apply, they would need to find custom processors to process their portion of the TAC. Depending on the custom processing fees charged and whether there is sufficient capacity, these IPQ holders may be forced into a situation where they cannot perform as required by the share-matching process. IPQ holders who do not own a processor have acquired those shares, in some cases, to help stabilize the economy of their fishing community. During years with limited options to partner with an active processor, it could negatively impact these IPQ holders and the communities they represent.

5 Alternatives to the Current Binding Arbitration Structure in Low TAC Years

The final point the Council requested consideration of in this discussion paper was an alternate structure under low TAC levels in which binding arbitration would not apply. The goal of an alternative structure would be to remove the burden of the system in low TAC years while still providing stability and

protection to both harvesters and processors. When describing the intent for this section, the maker of the motion noted that it was added to "keep the idea alive" and was not intended to require an in-depth analysis of the issues considered. The maker of the motion also noted that the issues discussed in this section may be addressed in more detail through a committee process or additional analysis should the Council move forward with specific concepts. The committee that could address these issues has not yet been identified, nor has its membership been defined.

This section provides a preliminary exploration of alternatives to the current arbitration system through negotiation methods other than binding arbitration, options for removing arbitration during low TAC years and larger changes to the CR Program structure.

5.1 Negotiations Other than Binding Arbitration

Arbitration is a legal structure to determine settlement outside the court system when two parties cannot agree to allow a third party to determine a binding decision. The Federal Arbitration Act of 1925 grants private arbitrators the legal authority to determine binding contractual agreements. Arbitrators have the authority to establish the terms of the contract. In the case of the CR Program fisheries, these terms include the ex-vessel price, delivery terms, or other contractual terms between independent harvesters that hold arbitration IFQ and processors that hold IPQ for a fishery. Binding arbitration requires that both parties agree to use this system and abide by its outcome. Processors agree to use the system when they apply for IPQ annually.

Other dispute resolution methods considered in this section are not binding for the two parties. Arbitration is the only dispute resolution structure considered in this paper that yields a binding third-party resolution to the disagreement. As a result, when the arbitrator decides the outcome, parties to the Arbitration Organization cannot seek alternative resolution methods. Members of the Arbitration Organization understand that by agreeing on the arbitration structure, they give up the right to appeal the decision.

Arbitrators can be granted wide latitude to determine outcomes depending on the arbitration program's structure. Under the CR Program's baseball arbitration structure, the arbitrator is limited to selecting an outcome offered by one of the two members of the Arbitration Organization.

Three other negotiation remedies that are used to settle contract disputes are discussed in this section. None of these remedies result in a binding decision that the two parties must accept. Because the outcome is non-binding, the harvesters or the processor could elect not to abide by the decision, making the use of these negotiation methods potentially less useful than arbitration. Also, these approaches were probably already used most years before the IFQ Arbitration holders initiated the arbitration process. None of the three options are anticipated to provide an acceptable solution to stalled negotiations. Since none of the options would preclude Arbitration IFQ holders from initiating binding arbitration later in the year, the costs associated with the Arbitration System will likely be incurred whether binding arbitration is initiated, or a successful negotiation is reached.

5.1.1 Mediation

Like arbitration, mediation involves a process managed by an independent third party (a mediator). Mediation is considered non-binding because it is more of a formal discussion between disputing parties than a judgment handed out by a third party. The parties determine themselves what the outcome should be. The role of the mediator is to encourage discussion, facilitate problem-solving, and provide an outside perspective. The parties typically choose mediators because of their experience and knowledge within the

industry concerning the contract, and mediation experts have critical training and education in brokering agreements. Both parties have equal opportunities during discussions, which supports goodwill and helps maintain relationships. Sometimes, there is a settlement; sometimes, the dispute must move to a binding settlement forum. Submitting to mediation does not waive a disputant's right to a binding arbitration process.

5.1.2 Negotiation

Negotiation is an approach used to establish contract agreements that was likely utilized but failed to achieve an agreement before the Arbitration IFQ holders invoke binding arbitration. Negotiation can involve an independent third party or only the parties to the contract. Opposing sides can enlist a lawyer to negotiate on their behalf. Negotiation allows each side to make its case for an outcome, and a negotiator (like a mediator) helps craft a resolution. Both sides must agree to and sign the proposed outcome before it becomes binding. If both sides do not agree, Arbitration IFQ holders could initiate the binding arbitration process.

5.1.3 Collaborative Law

Collaborative law has lawyers negotiate an agreement and is often used in divorce cases. This system is used when parties must maintain a relationship following the decision. This structure relies on both mediation and negotiations. The respective lawyers and the parties they represent engage in discussions to reach agreements on various aspects of the contract. Lawyers provide legal expertise and, depending on their affiliation, can help remove emotional confrontations.

Two issues that should be considered are that the two parties to the negotiation should be on good terms, and the lawyers should not be firmly entrenched in a specific position. Lawyers representing the stakeholders are expected to reflect their employer’s position and may have limited negotiating authority. Therefore, it is unlikely that this would be considered an option that would lead to outcomes substantially different from those under the current structure before IFQ Arbitration holders select arbitration.

5.2 No Arbitration During Low TAC Years

The Council requested that this paper consider options to remove the option for arbitration during low TAC years. Three methods are considered to address that request. This first is currently in regulation and it allows the majority of IFQ/IPQ to agree not to develop a market report or non-binding price formula; the second option is agreement through a civil contract not to arbitrate; and the third is to remove arbitration and share matching during years the TAC is below a specified amount.

5.2.1 Regulations to not Develop a Market Report or Price Formula

A preferred alternative from the analysis to modify the arbitration system (NPFMC 2011) stated that if the Arbitration Organizations representing more than 50% of the PQS holders, and more than 50% of the unaffiliated QS holders agree that a fishery is unlikely to open, neither a market report nor a non-binding formula will be required for the fishery. The agreement must include a provision for producing the market report and a non-binding formula if a fishery's opening is announced later, specifying a timeline for producing those reports not later than the end of the fishing season. Determining whether the fishery is unlikely to open is at the discretion of the Arbitration Organizations. Based on knowledge of the fisheries and discussions with fishery managers, arbitration organizations and their members may be able to make reasonable decisions concerning the potential for a fishery to open and whether a market report and non-binding formula are unnecessary. This option has been implemented often by the two arbitration

organizations in some fisheries (e.g., St. Matthew blue crab) and in recent years for others (Bering Sea snow crab). The regulation as included at 50 CFR 680.20(f)(1)(ii).

> *The Arbitration QS/IFQ Arbitration Organizations and the PQS/IPQ Arbitration Organizations may, by mutual agreement, include a provision in the contract with the Market Analyst to forgo production of a Market Report for a crab QS fishery if the Arbitration QS/IFQ Arbitration Organizations and the PQS/IPQ Arbitration Organizations anticipate that the crab QS fishery will not open for fishing during a crab fishing year. If such a provision is included in the contract with the Market Analyst, the Arbitration QS/IFQ Arbitration Organizations and the PQS/IPQ Arbitration Organizations must include a provision in the contract with the Market Analyst to produce a Market Report not later than the June 30 for the crab QS fishery that was expected to remain closed but subsequently opens for fishing during the crab fishing year.*

Based on the provision, if the arbitration organizations disagree concerning whether a fishery is likely to open, a market report and non-binding formula will be required for the fishery under the standard timeline. The arbitration organizations must also agree to terms for producing the market report and the non-binding formula if the fishery unexpectedly opens.

This agreement must specify the timeline for producing the report and formula. Given that a contingency plan for developing the market report and non-binding formula are required for the arbitration organizations to use this provision, the risk of fishery participants being left without adequate information to guide their negotiations is reduced.

It was noted in the analysis that included the quote above that the most significant concern arising from the provision exempting production of the reports is that fisheries in which the provision is most likely to be used are fisheries for which a market report and non-binding formula have not been produced or have not been produced recently. These documents are often a derivative of the prior year's report for fisheries that have been open in recent years. So, an unexpected opening of a fishery that has had prior reports and formulas will have less time pressure on the market analyst and formula arbitrator contracted to produce the market report and non-binding formula, respectively. Conditions in the fisheries and the markets for these products have dramatically changed since that analysis was generated and the above statements may no longer be accurate.

Although the cost savings from this provision to avoid producing unnecessary reports and formulas could be considered minor in most years, the provision could benefit participants by avoiding those costs when economic conditions are poor. The provision does pose some risk that participants in a fishery will have less information to guide their negotiations of A share deliveries in low TAC years. However, a representative of the harvest sector noted that the cost of these reports might outweigh the benefits harvesters derive from their production since they are often not used by the sector. If this view is widely held, the Council could consider modifying regulations so that these reports would not be required in regulation.

5.2.2 Civil Contract Agreement not to Arbitrate

Persons eligible to join an Arbitration Organization could agree before the season that they would not use binding arbitration that fishing year. This approach may be most helpful in years when both harvesters and processors assume there will not be a fishery or the TAC will be very low. The general concept is like the current regulations allowing the Arbitration Organizations representing more than 50% of the PQS

holders and more than 50% of the unaffiliated QS holders to agree that a fishery is unlikely to open and not generate a market report or a non-binding formula for the fishery. In conjunction with not producing a market report or non-binding price formula, this approach could result in cost savings and create certainty that arbitration will not be used. If there is a small fishery, it could result in price disputes that would need to be addressed by means other than arbitration. IPQ would still be issued under this option and share matching between IFQ and PQS holders for class A shares would be required without additional regulatory changes. Harvesters would have less bargaining power under this scenario than the current arbitration system. Given the uncertainty of the TAC, forgoing the option to arbitrate may make harvesters less willing to agree to this option.

Knowing ahead of the potential fishery that arbitration would not be used could eliminate the need for certain costs to be incurred to inform and set up the arbitration process. These agreements must be established for each QS fishery and with each processor and implemented relatively early in the year before the Arbitration Organization formation deadline on May 1. A blanket agreement with all processors could result in antitrust concerns.

5.2.3 Remove Arbitration and Share Matching in Low TAC Years

Discussions at the October Council meeting mentioned implementing regulations that would remove the option of initiating binding arbitration for a fishery to establish contract terms during years when a TAC is low. The general concept would be to create more certainty regarding whether Arbitration IFQ holders would initiate binding arbitration during a year and the impact that may have on the PQS holder's decision to apply for IPQ. Regulations would need to be modified through the normal regulatory process to eliminate the option to initiate binding arbitration during low TAC years. This option could be structured somewhat like the regulations at 50 CFR 680.20(f)(1)(ii) by allowing the Arbitration Organizations, by mutual agreement, to forgo arbitration for a crab fishery when the Arbitration Organizations anticipate that the crab fishery will have a TAC below a certain threshold or not open for fishing during a crab fishing year. In this case, the Arbitration Organizations would agree that the Arbitration IFQ holders would not initiate binding arbitration to establish contract terms during years when the TAC is expected to be small enough that the costs of arbitration are anticipated to outweigh the benefits derived from its implementation. The option under consideration would eliminate the need for an agreement not to arbitrate, a higher TAC amount would trigger the arbitration option for harvesters.

Removing the option to initiate arbitration may not result in cost savings associated with preparing for arbitration because the TACs would not be known until after those costs were incurred unless both parties agreed that the fishery was unlikely to open and the requirement to produce certain reports was removed. The recent program review showed that those costs were about $110k on average in recent years (NPFMC 2024).

The fisheries to which that option applies and the TAC levels that trigger the removal of the arbitration system would need to be identified by the Council. The option could only be applied to one fishery, e.g., snow crab or it could cover several fisheries. For example, the Bering Sea snow crab fishery would not be eligible for arbitration if the TAC is less than X lbs. The TAC level selection determining when a fishery is not subject to arbitration could be controversial. It could increase lobbying of the State of Alaska to implement slightly higher or lower TAC for economic reasons during years when the TAC is close to the threshold.

Table 2 lists the TACs established by the State of Alaska for the fishing years 2005/2006 through 2024/2025. TACs excluding CDQ apportionments are reported for the Bristol Bay red king crab, Bering Sea snow crab, and AI golden king crab[13] fisheries. The rows at the bottom of the table show the fishery's maximum TAC, minimum TAC, and lowest quartile amount for the twenty fishing years since the CR Program was implemented. If the Council were to further consider establishing a minimum TAC it would need to clearly state whether the limit is based on the entire TAC or only the non-CDQ portion of the TAC that is subject to arbitration.

Table 2 Selected BSAI Crab Fishery IFQ TAC (million lbs.), 2000 through 2024

Fishing Year	Bristol Bay Red king crab	Bering Sea Snow Crab	AI Golden king crab
2005/2006	16.5	33.5	5.1
2006/2007	13.9	32.9	5.1
2007/2008	18.3	56.7	5.1
2008/2009	18.4	52.7	5.4
2009/2010	14.4	43.2	5.4
2010/2011	13.4	48.9	5.4
2011/2012	7.1	80.0	5.4
2012/2013	7.1	59.7	5.7
2013/2014	7.7	48.6	5.7
2014/2015	9.0	61.2	5.7
2015/2016	9.0	36.6	5.7
2016/2017	7.6	19.4	5.0
2017/2018	5.9	17.1	5.0
2018/2019	3.9	24.8	5.7
2019/2020	3.4	30.6	6.5
2020/2021	2.4	40.5	5.9
2021/2022	0	5.0	5.3
2022/2023	0	0	4.5
2023/2024	1.9	0	5.0
2024/2025	2. 1	4.2	4.4
Maximum	18.4	80.0	6.5
Minimum	0	0	4.5
Lowest Quartile	3.2	18.8	5.1

The lowest quartile means that 25% of the TACs, over the period considered, are below the amount shown for that fishery. That amount may provide a good starting point for considering when arbitration would not be implemented. Using the Bering Sea snow crab data as an example, amounts above the lowest quartile level, 20 million lbs. for example, or less than the lowest quartile, below 15 million lbs., could also be considered. When the TAC was set for the 2016/2017 fishing year it was 19.4 million lbs. If the TAC was set at 20 million lbs. the option for arbitration would have been removed. Arbitration would still be allowed if it had been set at the lowest quartile amount or lower. The 2017/2018 Bering Sea snow crab TAC was 17.1 million lbs. Arbitration would have been allowed that year if the lowest quartile amount was selected for the trigger. If the limit was set at 20 million lbs., arbitration would not be

[13] AI golden king crab TAC includes both the Eastern and Western fisheries.

allowed. These data indicate that the trigger amount may have substantially impacted price negotiations during some years if future TACs are representative of those from past years.

The Council could also consider whether IPQ and/or /IFQ should be issued for fishing years without the option for binding arbitration. The impact of that decision would require additional analysis, but it would allow harvesters to negotiate with any processor within the delivery region. Processors could choose whether it was economically efficient to participate in the fishery. If TACs were too low or ex-vessel prices were too high to operate efficiently, they could opt not to buy crab.

If no IPQ was issued, it could potentially have the greatest negative impact on PQS holders who do not have processing capacity since they would lose any review associated with having crab custom processed. Increasingly, IPQ shares held by entities without processing capacity are CDQ groups or other community entities.

5.3 Changing the Crab Rationalization Program Structure

As discussed in Section 2, the Council has the authority to recommend changes to the CR Program to the Secretary of Commerce (Secretary), and the Secretary may approve those changes. This section discusses various options the Council may consider in addressing concerns presented by some stakeholders. This is not intended to be an exhaustive list or even represent concepts preferred by stakeholders.

Council deliberations at its June meeting discussed minor changes to the program rather than making wholesale changes to the system. This section's options reflect minor and major changes to the arbitration system’s structure. None of the options listed should be considered as recommendations from staff and are not fully fleshed out in this discussion paper. If the Council determines any concepts are viable for further consideration, those options will require a more thorough review.

Discussions with harvest and processor participants/representatives have yielded different opinions on whether changes are necessary to address how the arbitration program has functioned. Harvesters strongly support the idea that no changes to regulations defining the arbitration program structure are necessary. Those stakeholders have indicated that the program has functioned as intended, balancing market power between harvesters and processors. Stakeholders in the processing sector have indicated that changes to the arbitration structure should be considered based on previous arbitration outcomes and changes that have taken place in the fishery since the program was implemented. These changes included world markets for crab species harvested under the CR Program and market substitutes. Processors have also noted differential changes in the costs incurred by harvesters and processors to participate in the CR Program fisheries are a concern to their sector.

5.3.1 Different Arbitration Structures

Alternatives to the current baseball arbitration structure could be considered. Any changes to the structure considered in this section would be major changes to the CR Program and, depending on how they are structured, could influence future negotiations and bargaining outcomes relative to the status quo.

The Council mentioned some options at the June and October meetings. For example, a person representing the harvest sector at the June Council meeting suggested implementing an arbitration panel like the one used in some Canadian snow crab fisheries. The Council has not endorsed substantial changes to the CR Program but has received public comment that recent fishery changes in the crab

fisheries were not foreseen before the October Council meeting and are dramatically impacting the stakeholders to the point where some significant changes may be worth considering.

Baseball-style arbitration was initially selected as an efficient arbitration system, by incentivizing members of Arbitration Organizations to submit reasonable offers. The general rationale was that harvesters and processors would submit reasonable offers because the arbitrator would not select an unreasonable offer and was not given the latitude to select a compromise position. If those offers were close to the same, selecting either would have fewer negative impacts on the side that did not prevail.

When the current arbitration structure was implemented, it included certain standards to help ensure predictability and fairness for the parties involved. The regulations state that both the non-binding price formula and the contract arbitrator's decision must be based on the historical distribution of first wholesale revenues using arm's length first wholesale prices and ex-vessel prices. The language also states that the price should preserve the historical division of revenues in the fishery while considering several factors. Without the written reports from the arbitrators, it is difficult to ascertain what other factors were considered when making the decision. However, discussions with industry members indicate that the arbitrators have relied heavily on the historical division of first wholesale prices without considering changes in the cost structures of the two sectors. Changes in input costs, primarily labor, and energy, have been expressed as concerns by the processing sector regarding how they affect the profitability of the two sectors. Both sectors have noted that their costs have increased substantially in recent years. Verifying all the relevant costs incurred by both sectors was noted as a concern if the price formula were changed to consider cost changes.

Granting the arbitrators greater discretion to select a specific outcome could make the selection of arbitrators more contentious and place more pressure on the arbitrator to select outcomes. It may also make providing written reports on why the outcome was selected even more important than under the current system.

The authority to select an intermediate position could result in the requested outcomes by the two parties being more divergent. Class A IFQ and IPQ holders may decide that if they submit an offer that is more advantageous to their side, the arbitrator may select an outcome closer to that offer when finding a middle ground. Whether arbitrators are willing to consider factors other than the current formula based on the division of first wholesale revenue will remain an important determinant of their ultimate decisions.

Baseball arbitration was selected, in part, because it was thought to be less costly than other forms of arbitration. If that is true, moving to another arbitration structure could increase costs. Increased costs and shifting the likelihood of one side prevailing in arbitration would have the greatest negative impact on the sector that realizes less adventitious outcomes than they would have under the status quo.

5.3.2 Implement a Price Determination Panel

At the June 2024 Council meeting, a representative of the harvest sector identified a panel-based structure the Council could consider for replacing the current baseball arbitration system. A similar system is used in the Newfoundland and Labrador snow crab fishery and is authorized under the *Fishing Industry Collective Bargaining Act* (Act).

The Canadian Fish Price-Setting Panel (Panel) is comprised of a processor representative, a harvester representative, and an independent representative who serves as the Chairperson. The Lieutenant-

Governor selects the three members after consulting with the parties' representatives. The independent member serving as the panel chair likely holds the deciding vote, because the parties representing the harvesters and processors could not reach an agreement before convening the panel. As such, that person would serve a role with powers like those of the current contract arbitrator.

The determination by the Panel is binding on all processors in the province(s) that process snow crab. Therefore, the Canadian model sets a price for the entire fishery. Some modifications to that program would be required to address US antitrust regulations. Under the Canadian Panel structure and law, the processors represent three or more processors. US antitrust law would prohibit a person from representing multiple processors during price negotiations, which could dampen competition. So, it is likely that the structure for the CR Program would only set a price for harvesters bargaining with one processor. If harvesters have price disputes with multiple processors or more than one fishery is involved with different participants, then more than one panel or more than one hearing would be required.

Until the 2024 fishing year, the Act required that the Panel's decision be based on one of the offers presented by the two parties on ex-vessel price and terms of sale. Like the CR Program binding arbitration structure, the Panel could not consider other positions. For the 2024 fishing year, the Government of Newfoundland and Labrador amended the program to require each party to propose a formula to determine the price for crab, and the panel must select one party's proposal. Issues associated with price changes to reflect crab condition (i.e., small-sized crab, old shell crab, or crab with low meat fill) would utilize arbitration to modify the established price.

Under this model, the panel had been allowed to set a pre-season price and then a post-season adjustment to account for changes within the year. A price formula may allow for in-season adjustments to changes in market conditions. However, it would ultimately depend on what the formula is designed to account for during the year.

The cost of such a panel could be shared equally between IPQ and IFQ holders. The funding could be based on a landing fee, like the current arbitration system.

The Panel prepared a document for the snow crab fishery in 2024. The report included a procedural history section, background information presented to the Panel, the formulas presented, the formula selected, a discussion of why that formula was selected, and some analysis of the arbitration on the conditions of sale.[14] There was also a minority report describing the dissenting position.

5.3.3 Allocate Processors QS instead of PQS

Other Limited Access Privilege Programs on the West Coast and Alaska have allocated processors a percentage of the harvest shares to address market power issues associated with the allocation of IFQ or cooperative quota. That model does not require the share matching or arbitration system used in the CR Program to address contract negotiations. Increasing TACs would benefit both sectors, but price negotiations and market power division would depend on the amount allocated and how processors would leverage their harvest quota. Retaining the regional designations to protect communities in the North region would help continue security, and if active processors held harvest shares that must be delivered to a processor in the North region, it could provide an incentive for processing capacity in the region.

[14] https://www.gov.nl.ca/fishpanel/pricingdecisions/2024/Crab_Fishery_Decision_April_1.pdf

Reallocating QS would likely be controversial because it would transfer some of the underlying asset value from the harvesters to processors. It would also be expected to alter current bargaining power. Changes in bargaining power would depend on the amount of quota allocated to processors but cannot be predicted with certainty. Determining the percentage of harvest QS allocated to the processors would be controversial.

5.3.3.1 West Coast Trawl Groundfish

Quota allocation under this catch share program treated the whiting and non-whiting allocations differently. Limited entry trawl permit owners were given an initial allocation of 90% of the QS for non-whiting species. After the first two years of the program, 10% of the QS for non-whiting species was set aside for an adaptive management program, which is intended to be used to facilitate new entry into the West Coast groundfish trawl fishery and to address community stability, processor stability, conservation, and unintended or unforeseen consequences of the catch share program. To date, that quota has been proportionally distributed to QS holders. The Pacific whiting quota was allocated with 80% of the QS to harvesters and 20% to eligible shore-based processors. The allocation to eligible shorebased processors was intended to address market power issues resulting from implementing the catch share program.

5.3.3.2 BSAI Pacific Cod Trawl Cooperative (PCTC) Program

The PCTC Program allocates 77.5% of the QS pool to harvesters and 22.5% to processors based on historical participation in the BSAI Pacific cod trawl fishery. The use of the cooperative quota (CQ) resulting from the QS allocation requires the formation of annual harvester cooperatives in association with an eligible processor (50 CFR 679.131(a)(1)(i)). The combined QS of cooperative members and associated processors yields an exclusive harvest privilege for PCTC Program cooperatives, which NMFS issues as CQ each year (50 CFR 679.131(a)(1)(ii)). The PCTC Program requires at least three LLP licenses with PCTC Program QS and at least one licensed processor with a PCTC Program QS permit in each cooperative (50 CFR 679.131(j)(3)). There are no limitations on the number of LLP licenses that may join a single cooperative, the number of processors a cooperative can associate with, or the amount of QS a single cooperative can control.

5.3.4 Create a Central Gulf of Alaska Rockfish Style Cooperative Program

The Rockfish Program is a cooperative structure limited access privilege program that was developed to enhance resource conservation and improve economic efficiency in the CGOA rockfish fisheries. The Rockfish Program assigns QS and cooperative quota (CQ) to participants for primary and secondary species. It also allows a catcher vessel participant holding an LLP license with rockfish QS to form a rockfish cooperative in association with a shorebased processor within the city limits of Kodiak.

The requirement to form a cooperative with a processor in the city of Kodiak protects both processors and the community of Kodiak. If this cooperative structure were used in the BSAI crab fisheries, implementing regulations that protect communities and processors may be more complicated, especially for processors and communities in the South Region.

Northern designated quota has primarily been landed in St. Paul or on a floater within the city's boundary. So, it is possible that when developing regulations, the Council could consider a requirement that Northern designated shares must be landed in St. Paul. Those landings could continue to benefit other communities in the Northern region, like St. George, by St. Paul, providing halibut markets and other fish markets and support as agreed to by the communities (NPFMC 2024). The quota that may be landed in

the South has been landed in several communities, and the Council does not have the authority to limit processors that may be active in a community. Similar protection levels may naturally occur through traditional market relationships between harvesters and processors. Still, it would require additional analysis and stakeholder input beyond what this paper includes.

6 Persons Consulted

Dr. Michael Downs, Wislow Research
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8 Appendix: Arbitration Outcomes

Season	Number of Proceedings	Fishery	Issue	Outcome
2005/06	2	BSS, BST	Crab costs/ delivery terms	Contract arbitrators selected harvesters' offers.
2006/07	5	BBR, BSS, WBT, WBT	Crab costs/ delivery terms	Contract arbitrators selected harvesters' offers.
2007/08	2	All fisheries	Procedural: clarify specific timing of price dispute resolutions	Lengthy season approach selected; no further arbitration to resolve price, quality, or other disputes.
2008/09	1	BBR	Procedural: Crab costs/ delivery terms	An issue of a processor's use of a two-tier price structure was settled and a price issue was resolved in favor of the harvester.
2009/10	3 (1 dispute)	AIG, BSS	Procedural (golden king crab); Crab costs/ delivery terms	For the golden king crab fishery, arbitrators selected a later lengthy season arbitration filing date. For the snow crab fishery, contract arbitrators selected the processor's offer.
		AIG	Crab costs/ delivery terms	Two post-season crab costs and terms of delivery disputes: one settled outside of arbitration, and arbitrators resolved issues in favor of harvester.
2010/11	1 (2 disputes)	AIG	Crab costs/ delivery terms	Arbitrators selected the processor's offer for WAG crab.
		AIG	Crab costs/ delivery terms	WAG price and terms of delivery dispute settled outside of arbitration.
2011/12	2 disputes (number of proceedings unknown)	AIG	Crab costs/ delivery terms	Outcome unknown
2012/13	0 (reported)			
2013/14	1	AIG	Crab costs/ delivery terms	Arbitrators selected the harvester's offer for WAG.
2014/15	0 (reported)			
2015/16	0 (reported)			
2016/17	0 (reported)			
2017/18	0 (reported)			
2018/19	0 (reported)			
2019/20	0 (reported)			
2020/21	0 (reported)			
2021/22	2	BSS & BST	Crab cost/delivery terms	Arbitrators selected the harvester's offer
2022/23	0 (reported)			
2023/24	0 (reported) through 4/18/2024)			

Source: RAM 2012 report, Arbitration reports, personal communication with Jake Jacobsen (April 19, 2024), personal communication Malcom McLellan (April 2024)