



NORTH PACIFIC FISHERY MANAGEMENT COUNCIL

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Action Memo

File Number:Crab 14-020

Agenda Date10/6/2014

Agenda Number:C10

John Henderschedt, Acting Chairman
Chris Oliver, Executive Director

SUBJECT:
ROFR Aleutia PQS - Final Action

ESTIMATED TIME:
2 hours

ACTION REQUIRED:

Final action on RIR/IRFA for proposed regulatory amendment to create and allocate PQS to Aleutia Corporation.

BACKGROUND:

Under the Bering Sea/Aleutian Islands (BSAI) crab rationalization program (crab program), a community that meets certain thresholds for historical processing received rights of first refusal on transfers of processing quota shares (PQS) based on processing that occurred in that community. This right of first refusal is a contractual agreement which gives the holder the right to acquire the PQS and all other assets included in a transaction from the holder of the PQS, by agreeing to perform all of the terms of the transaction that a third-party has offered. The right is triggered when a transaction is in motion that will take the PQS outside the community of the right of first refusal-holding entity.

Issue

On October 7, 2008, APICDA Joint Ventures (a wholly-owned subsidiary of Aleutian Pribilof Island Community Development Association) announced that it had entered a contract to acquire all of Snopac Product, Inc (SnoPac)'s PQS which included, among other PQS, the PQS subject to Aleutia Corporation (Aleutia)'s right of first refusal.¹ Under the right of first refusal terms, Aleutia, on behalf of Aleutians East Borough, should have either 1) been offered a right of first refusal on the transfer by Snopac, or 2) received a certification from APICDA Joint Ventures that the transferred shares would be used in the community and offered a right of first refusal on future transfers from APICDA Joint Ventures. At the time of the transaction, neither of these requirements appears to have been met. Contrary to the right of first refusal's provision that the right holding-entity must be notified and have at least 60 days to exercise their right, Aleutia asserts that it received no prior notice of the transfer or that the transfers would trigger its right.

In March of 2012, Aleutia requested that NOAA Fisheries rescind the transfer, since Snopac did not provide the required affidavit stating that the notice of transfer had been provided to Aleutia at the time of the transfer (See Appendix A.1 of the analysis for correspondence between Michael Stanley on behalf of Aleutia and Jessica Gharrett on behalf of NMFS). NOAA Fisheries denied this request, responding that Aleutia's remedy is

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to pursue Snopac for a violation of the terms of its right of first refusal contract. While Snopac asserts that this affidavit did exist, they began shutting down shortly after having sold the PSQ and were unable to provide the affidavit. Aleutia was unable to pursue Snopac for violation of term of its right of first refusal contract.

Aleutia has asserted that had it known of the transfer, it would have “taken steps to assert[] its [first refusal] rights to [the] PQS.” In addition, Aleutia has corresponded with APICDA Joint Ventures, offering to acquire the PQS. In response, APICDA Joint Ventures has offered to extend the right of first refusal to Aleutia on any future sale of the PQS for use outside of the Aleutians East Borough. However, even holding that right, Aleutia is unlikely to have an opportunity to exercise the right, as the current holder is a Community Development Quota group affiliate that is unlikely to transfer the shares in the foreseeable future.

To address this concern, the Council had requested the analysis of an action that would provide Aleutia with an allocation of processor shares approximately equal to the amount of shares included in the transfer. These shares would be allocated from newly-issued PQS and as a consequence, all other PQS holders in the fishery would experience a dilution of their PSQ interests. This amount of PQS in total is approximately equal to one large crab delivery or two medium-sized deliveries during a relatively high TAC year.

Action

In February 2013, at the Portland, Oregon Council meeting, the Council received an analysis and heard a staff presentation on a package of regulatory amendments to make the rights of first refusal more effective, including the topic of issuance of PQS to Aleutia in this package.

At this February meeting, the Council chose to bifurcate the issue, (called Action 6 in the analysis), from the rest of the right of first refusal package due to its nature as a specific case related to the right of first refusal rather than a change to a broad provision in the contacts.

The Council deliberated on the bifurcated action and made a motion to slightly modify the action alternative, Alternative 2, by including the bolded text:

*Alternative 2 - Bristol Bay red king crab PQS shall be allocated to Aleutia Corporation in an amount that would result in that corporation receiving **up to 0.55 percent** of the PQS in that fishery. This allocation would be made exclusively from newly issued PQS.*

After modifying the language of the action alternative, the Council chose not to take action on this issue in February of 2013, but encouraged private negotiations and indicated they were prepared to reconsider the issue should stakeholders return to the Council indicating that private resolution was unsuccessful. The Council voted against pre-establishing Alternative 2 as the preliminary preferred alternative if the issue were to be brought back to the Council.

Three actions were taken based on the remaining package presented in February of 2013. These three actions are related to the Aleutia case in that they address some of the right of first refusal shortcomings highlighted throughout the history of the crab program, and in particular, in this Aleutia case. Under the first action that was moved forward, time available for a community entity to exercise a right of first refusal changed from 60 days to 90 days, and the time for a community entity to perform under the contract from 120 days to 150 days. The second action included two provisions - the first removed a provision under which rights lapse,

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if a processor uses its share allocation outside the protected community for three consecutive years. The second provision provides for a new right of first refusal in the event a community fails to exercise the right, once it is triggered. Under this second provision, the processing share holder designates the community entity that will be the holder of the right. The third action provides for several notices from the PSQ holder to the right holder and NMFS regardless of whether the right has been triggered. These notices are intended to ensure the rights have their intended effect by providing better information concerning the use of the PSQ and the status of the right. These three actions are an effort to add transparency to the process, and in part, to prevent cases such as the unresolved Aleutia case, from arising in the future.²

Current Stage

In February 2014, the Council received a letter from a representative of Aleutia expressing their concern that private negotiations with APICDA had not been successful. In her letter, Ms. Karen Montoya asked the Council to reconsider and take final action on the analysis. Aleutia has fostered continued interest and effort towards this issue. She states that they have new information to present to the Council that they believe will affect the Council's understanding of the issue.

Moving Forward

Based on the current analysis, the Council could choose to take no action, or move the action alternative (Alternative 2) forward as a preferred alternative (PA).

If the Council accepts the action alternative as the PA, this element will *not* be added back into the "Modifications to Community Provisions" RIR/IRFA package that was approved by the Council in February 2013. Instead the RIR/IRFA to "Allocate Processor Quota Share to Aleutia Corporation" would progress separately as Final Action. This Aleutia portion of the analysis has been excerpted from the "Modifications to Community Provisions" document presented to the Council in February 2013 and is attached as a Public Review Draft. This analysis was pared down to include only relevant information, a "History of Action Section" was created, and minor edits made. This action would not include an amendment to a Fisheries Management Plan, but would result in regulatory changes. _____

¹ This PQS transfer from Snopac to APICDA occurred in lieu of Council action which considered extending the cooling-off period and extending the period of time the right of first refusal would lapse for this PQS historically processed in St. George. Storm damaged the St. George harbor rendering it unsafe for processing during the original cooling off years. NOAA granted an exemption for processing historical quota in St. George in 2006 and 2007. However, this would not preclude the PQS subject to St. George's PQS from lapsing under the status quo. Private negotiation occurred before the Council took final action. See [NPFMC (October 2008) RIR/IRFA of a Provision Defining Cooling off and Rights of First Refusal for the Protections for the Community of Saint George] for further information.

² In addition to these three actions, a trailing amendment was added to the "Modifications to Community Provisions" RIR/IRFA that would revise the FMP to provide the flexibility of a re-negotiation of the terms and conditions of the proposed sale transaction between PQS holders and right holders other than what has been stipulated in their right of first refusal contract. This addition to the amendment will be presented for Final Review to the Council in October 2014.