

Council Motion on Crab Rationalization

February 2, 2003

Binding Arbitration System

The Council adopts the following elements for a system of binding arbitration to resolve failed price negotiations.

1. The Standard for Arbitration

The primary role of the arbitrator shall be to establish a price that preserves the historical division of revenues in the fisheries while considering relevant factors including the following:

- a. Current ex vessel prices (including prices for Class A, Class B, and Class C shares recognizing the different nature of the different share classes)
- b. Consumer and wholesale product prices for the processing sector and the participants in the arbitration (recognizing the impact of sales to affiliates on wholesale pricing)
- c. Innovations and developments of the different sectors and the participants in the arbitration (including new product forms)
- d. Efficiency and productivity of the different sectors (recognizing the limitations on efficiency and productivity arising out of the management program structure)
- e. Quality (including quality standards of markets served by the fishery and recognizing the influence of harvest strategies on the quality of landings)
- f. The interest of maintaining financially healthy and stable harvesting and processing sectors
- g. Safety
- h. Timing and location of deliveries
- i. Reasonable underages to avoid penalties for overharvesting quota and reasonable deadloss

2. Market Report

An independent market analyst selected by the mutual agreement of the sectors will present to both sectors and all designated arbitrators an analysis of the market for products of that fishery.

3. Selection of the Arbitrator(s) and Market Analyst

The market analyst and arbitrator(s) will be selected by mutual agreement of the PQS holders and the QS holders. PQS holders collectively must agree and QS holders collectively must agree. Processors may participate collectively in the selection process. The details of the selection will be decided at a later time.

4. Shares subject to binding arbitration

This binding arbitration system shall address price disputes between holders of delivery restricted IFQ (including Class A IFQ and Class C IFQ when subject to delivery restrictions) and holders of IPQ. Binding arbitration does not apply to the negotiation of price for deliveries under the class B IFQ and Class C IFQ when not subject to delivery restrictions. C share holders, however, may elect to participate in the arbitration process prior to delivery restrictions taking effect.

5. Shares of processor affiliates

Participation of processor affiliates in binding arbitration as IFQ holders will be determined by any applicable rules governing anti-trust. Any parties eligible for collective bargaining under the Fishermen's Marketing Act of 1934 will be eligible to participate in binding arbitration. No antitrust exemption should be made to enable processor affiliated IFQ holders to participate in arbitration.

6. Payment of the arbitration and market analysis

The payment for the market analysis and the arbitrators will be shared by the two sectors. Cost shall be shared by all participants in all fisheries.

For shared costs, the payment of those costs shall be advanced by IPQ holders. The IPQ holders will collect the IFQ holders' portion of the shared costs by adding a pro rated surcharge to all deliveries of Class A crab.

7. Quality dispute resolution

In cases where the fisherman and the processor cannot come to agreement on quality and thus price for crab, two mechanisms are suggested for resolving the price dispute-after the processor has processed the crab (to avoid waste from dumping the load at sea): (1) In cases where fishermen and processors have agreed to a formula based price, the two parties would take their normal shares of the price, after the disputed load is sold. (2) This type of dispute would most likely apply in cases where fishermen desire to stay with fixed dockside prices and there is disagreement on quality and therefore price. These cases could be referred to an independent quality specialist firm. The two parties in dispute would decide which firm to hire.

8. Data used in arbitration

Under any arbitration structure, the arbitrator must have access to comprehensive product information from the fishery (including first wholesale prices and any information necessary to verify those prices).

Processors may participate in common discussions concerning historical prices in the fisheries.

Subject to limitations of antitrust laws and the need for proprietary confidentiality, all parties to an arbitration proceeding shall have access to all information provided to the arbitrator(s) in that proceeding.

Data collected in the data collection program may be used to verify the accuracy of data provided to the arbitrator(s) in an arbitration proceeding. Any data verification will be undertaken only if the confidentiality protections of the data collection program will not be compromised.

9. Enforcement of the Arbitration Decision

The decision of the arbitrator will be enforced by civil damages

10. Oversight and administration of the Binding Arbitration system.

Oversight and administration of the binding arbitration should be conducted in a manner similar to the AFA cooperative administration and oversight. System reporting requirements and administrative rules should be developed in conjunction with the Council and NOAA Fisheries after selection of the preferred program.

The structure for the system of Binding Arbitration system shall be as described below:

LAST BEST OFFER BINDING ARBITRATION

GENERAL

The Last Best Offer Model provides a mechanism to resolve failed price and delivery negotiations efficiently in a short period before the opening of the season. The Model includes the following specific characteristics:

1. **Processor-by-processor.** Processors will participate individually and not collectively, except in the choice of the market analyst and the arbitrator/arbitration panel.
2. **Processor-affiliated shares.** Participation of processor-affiliated shares will be limited by the current rules governing antitrust matters.
3. **Arbitration standard.** The standard for the arbitrator is the historic division of revenues between harvesters and processors in the aggregate (across the entire sectors), based on arm's-length first wholesale prices and ex-vessel prices (Option 4 under "Standard for Arbitration" in the staff analysis). The arbitrator shall consider several factors including those specified in the staff analysis, such as current ex vessel prices for both A, B and C Shares, innovations, efficiency, safety, delivery location and timing, etc.
4. **Opt-in.** An IFQ holder may opt in to any contract resulting from a completed arbitration for an IPQ holder with available IPQ by giving notice to the IPQ holder of the intent to opt in, specifying the amount of IFQ shares involved, and acceptance of all terms of the contract. Once exercised, an Opt-in is binding on both the IPQ holder and the IFQ holder.
5. **Performance Disputes.** Performance and enforcement disputes (e.g. quality, delivery time, etc.) initially will be settled through normal commercial contract dispute remedies. If those procedures are unsuccessful, the dispute will be submitted for arbitration before the arbitrator(s). If those procedures are unsuccessful and in cases where time is of the essence, the dispute will be submitted for arbitration before the arbitrator(s). The costs of arbitration shall be paid from the fees collected, although the arbitrator(s) will have the right to assign fees to any party for frivolous or strategic complaints.
6. **Lengthy Season Approach.** For a lengthy season, an IPQ holder and an IFQ holder (or group of IFQ holders) may agree to revise the entire time schedule below and could agree to arbitration(s) during the season. That approach may also be arbitrated pre-season if the holders cannot agree.

PROCESS

1. Negotiations and Voluntary Share Matching.

At any time prior to the season opening date, any IFQ holders may negotiate with any IPQ holder on price and delivery terms for that season (price/price formula; time of delivery; place of delivery, etc.). If agreement is reached, a binding contract will result for those IFQ and IPQ shares. IPQ holders will always act individually and never collectively, except in the choice of the market analyst (which may occur at any time pre-season) and the arbitrator/arbitration panel for which all IFQ and IPQ holders will consult and agree.

2. Required Share-Matching and Arbitration.

Beginning at the 25-day pre-season point, IFQ holders may match up IFQ shares not already subject to contracts with any IPQ shares not under contract, either as collective groups of IFQ holders or as individual IFQ holders (the offered IFQ Shares must be a substantial amount of the IFQ Holder(s)' uncontracted shares). The IPQ holder must accept all proposed matches up to its non-contracted IPQ share amount. All IFQ holders "matched" with an IPQ holder will jointly choose an arbitrator with that IPQ holder. The matched share holders are committed to the arbitration once the arbitrator is chosen (if the parties wish, the arbitrator may initially act as a mediator to reach an agreement quickly). Arbitration must begin no later than 15 days before the season opening date.

3. Data.

The Arbitrator will gather relevant data independently and from the parties to determine the historical distribution of first wholesale crab product revenues (at FOB point of production in Alaska) between harvesters and processors in the aggregate (across the entire sectors). For a vertically integrated IPQ holder (and in other situations in which a back-calculation is needed), the arbitrator will work with that IPQ holder and the IFQ holders to determine a method for back-calculating an accurate first wholesale price for that processor. The Arbitrator will receive a pre-season market report from the market analyst, and may gather additional data on the market and on completed arbitrations. The Arbitrator will also receive and consider all data submitted by the IFQ holders and the IPQ holder. The Arbitrator will not have subpoena power.

4. Arbitration Decisions.

Arbitration will be based on a "last best offer" system, with the Arbitrator choosing one of the last best offers made by the parties. The Arbitrator will work with the IPQ and IFQ holders to determine the matters that must be included in the offer (e.g. price, delivery time & place, etc.) and will set the date on which "last best offers" must be submitted. The last best offers may also include a price over a specified time period, a method for smoothing prices over a season, and an advance price paid at the time of delivery.

If several groups or individual IFQ Holders have "matched" with that IPQ Holder, each of them may make a last best offer. Prior to submission of the last-best offers, the Arbitrator may meet with parties, schedule joint meetings, or take any actions aimed at reaching agreement. The Arbitrator will notify the IPQ holder and the IFQ holders of the Arbitration Decision no later than 10 days before the season opening date. The Arbitration Decision may be on a formula or ex-vessel price basis. The Arbitration Decision will result in a contract for the IPQ holder and the IFQ holders who participated in arbitration with that IPQ holder.

5. Post-Arbitration Opt-In.

Any IFQ holder with shares not under contract may opt in to any contract resulting from an Arbitration Decision for an IPQ holder with IPQ that is not under contract, on all of the same contract conditions (price, time of delivery, etc.). If there is a dispute regarding whether the “opt in” offer is consistent with the contract, that dispute may be decided by the arbitrator who will decide only whether the Opt-in is consistent with the contract.

6. **Formula and Prices.**

Throughout the year, the market analyst will survey the crab product market and publish periodically a composite price. That price will be a single price per species, based on the weighted average of the arm’s length transactions in products from that species.

7. **Additional Modifications.**

The Committee is requested to consider the following modifications to this preferred alternative and to report back to the Council at the April meeting:

a. The arbitrator who makes the last pre-season arbitration decision will review all of the arbitration decisions for that season and select the highest arbitrated prices(s), which is representative of 7% of the market share of the PQ. That price shall become the price for all arbitrated prices of that season, inclusive of the opt-in provision, and, independent of delivery terms at the harvester option. If the arbitration decisions include both formula and straight price decisions, the arbitrator shall have the discretion to select and apply one of each type. The decision on which price is the ‘highest arbitrated price’ shall take into consideration terms of delivery that may have a significant impact on price, including time and place of delivery.

b. A single annual fleet-wide arbitration will be used to establish a non-binding formula under which a fraction of the weighted average first wholesale prices for the crab products from each fishery may be used to set an ex-vessel price. The formula is to be based on the historical (1990-2000) distribution of first wholesale revenues between fishermen and processors. The formula may be adjusted by the arbitrator(s) to take into account post-rationalization developments as the arbitrator(s) deem appropriate, subject to certain general guidelines.

Community Protection

Community Purchase and Right of First Refusal Options

The Council adopted the following provisions concerning community purchase of harvest and processing shares and granting crab dependent communities a right of first refusal on the sale of processing shares for transfer out of the community. The Council has requested the committee to develop provisions for implementing the right of first refusal that balances the need for community protection against the need to maintain and improve efficiencies in the fisheries. The Council requests that the committee examine the following specific issues:

1. To which processing shares should the right apply (PQS or IPQ or both)?
2. How should the right be exercised in the case of transactions that involve processing shares and other goods?
3. How are intra-company transactions treated under the provision?
4. How are community designations of processing shares made in the case of processing on floating processors?

1. First Right of Refusal

For communities with at least three percent of the initial PQS allocation in any BSAI crab fishery based on history in the community except for those communities that receive a direct allocation of any crab species (currently only Adak), allow CDQ groups, qualified communities, or community groups representing qualified communities a first right of refusal to purchase processing quota shares that are based on history from the community which are being proposed to be sold for processing outside the boundaries of the community of original processing history. Intra-company transfers within a region are exempt from this provision. To be exempt from the first right of refusal, the use of the PQS must be by the same company.

If an owner of IPQ decides to sell the IPQ, a first right of refusal shall go to:

1) in CDQ communities to the CDQ group

2) in non-CDQ communities the first right of refusal goes to the entity identified by the community. Under this paragraph the entity must exercise the right within 60 days of presentation.

Any right of first refusal must be on the same terms and conditions of the underlying agreement.

The right of first refusal applies only to the community within which the processing history was earned. If processing quota is transferred to another community (in a manner authorized by these provisions), it no longer is subject to a right of first refusal.

2. GOA First Right of Refusal

For communities with at least three percent of the initial PQS allocation of any BSAI crab fishery based on history in the community that are in the area on the Gulf of Alaska north of 56°20'N latitude, groups representing qualified communities will have a first right of refusal to purchase processing quota shares which are being proposed to be transferred from unqualified communities in the identified Gulf of Alaska area. Intra-company transfers within a region are exempt from this provision. To be exempt from the first right of refusal, the use of the PQS must be by the same company.

Any right of first refusal must be on the same terms and conditions of the underlying agreement.

3. Community Purchase Option

Allow for a community organization in those communities that have at least 3 percent of the initial PQS allocation of any BSAI crab fishery based on history in the community to be exempted from the restriction for the 150 days of sea time requirement under 1.6 Transferability and Restrictions on Ownership of QS.

4. Identification of Community Groups and Oversight

For CDQ communities, CDQ groups would be the entity eligible to exercise any right of first refusal or purchase shares on behalf of the community. Ownership and management of harvest and processing shares by CDQ groups will be subject to rules similar to CDQ regulations.

For non-CDQ communities, the entity eligible to exercise the right of first refusal or purchase shares on behalf of a community will be identified by the qualified city or borough, except if a qualified city is in a borough, in which case the qualified city and borough must agree on the entity. If no entity is identified and approved by the date of presentation of an offer over which the entity would have a right of first refusal, no community entity will have the right. Ownership and management of harvest and processing shares by community entities in non-CDQ communities will be subject to rules similar to those of the halibut and sablefish community purchase program.

IPQ Caps

The amount of IPQ in any year shall not exceed the percentage of the TAC for crab as follows:

For opilio, IPQ percentage times a TAC (after CDQ allocations) of 175 million pounds.

For Bristol Bay red king crab, IPQ percentage times a TAC (after CDQ allocations) of 20 million pounds.

IFQ (that would have been A shares but for the cap) issued in excess of IPQ limit shall be subject to regional landing requirements.

Cool Down Period

During the Cool Down Period the following elements will apply:

1. The method to determine the shares associated with a community will be the same method used for allocating processing quota as established by the Council.
2. Community shall be defined as the boundaries of the Borough or, if no Borough exists, the first class or second class city, as defined by applicable state statute. A community must have at least 3 percent of the initial PQS allocation in any fishery based on history in the community to require continued use of the IPQs in the community during the cool down period.
3. 10% of the IPQs, on a fishery by fishery basis, may leave a community on annual basis, or up to 500,000 pounds, whichever is less. The amount that can leave will be implemented on a pro rata basis to all PQS holders in a community.
4. Exempt the Bairdi, Adak red crab and Western Aleutian Islands brown crab fishery from the cool down provision.
5. There should be an exemption from the requirement to process in the community if an act of God prevents crab processing in the community. This provision will not exempt a processor from any regional processing requirements, if there is processing capacity in the region.

Regionalization of the Bairdi Fishery

If biological information indicates that the bairdi fishery is likely to become a directed fishery, the Council would consider the following management, along with other alternatives for management of that fishery:

If the bairdi fishery becomes a directed fishery, it shall be allocated according to the original distribution of the BBRKC and shall not be subject to the regionalization provisions of the Council Crab Rationalization program.

Mandatory Data Collection Program

The mandatory data collection program shall have the following elements:

- A. Purpose. The purpose of the data program is as set out in the June 2002 motion. The Council will require the production of data needed to assess the efficacy of the crab rationalization program and to determine its relative impact on fishery participants and communities.
- B. Type of data to be collected. The data collected shall be that needed to achieve the Council's purpose, with the following general guidelines:
 1. The information will be specific to the crab fisheries included in the crab rationalization plan.
 2. The data shall include information on costs of fishing and processing, revenues for harvesters and processors, and employment data
 3. The general guide for information requirements will be as set out in the draft surveys prepared by National Marine Fisheries Service dated 9/18/02, except
 - a) Non-variable costs shall be collected only as needed to explain and analyze variable cost data.
 - b) Collect a unique identifier for harvesting and processing crew members to explain changes in participation patterns as requested by the AP
 4. Historical information will be required as recommended by the Data Collection Committee.
- C. Method of Collection. Data shall be submitted to an independent third party agent such as the Pacific States Marine Fisheries Commission.
- D. Use of data. Data will be used following these general guidelines:
 1. Data shall be supplied to Agency users in a blind and unaggregated form.
 2. The agencies will develop a protocol for the use of data, including controls on access to the data, rules for aggregation of data for release to the public, penalties for release of confidential data, and penalties for unauthorized use.
 3. The agencies will revise the current Memorandum of Understanding governing the sharing of data between the State of Alaska and National Marine Fisheries Service, and will address in this MOU the role of the third party data collection agent.
 4. The Agency and Council will promote development of additional legislative and regulatory protection for these data as needed.
- E. Verification of Data. The third party collection agent shall verify the data in a manner that assures accuracy of the information supplied by private parties.
- F. Enforcement of the data requirements. The Council endorses the approach to enforcing the data requirements developed by the staff and the Data Collection Committee, as set out on page 3.17-20 in the February, 2003 document entitled "BSAI Crab Rationalization Program, Trailing Amendments", which provides:

Anticipated Enforcement of the Data Collection Program The analysts anticipate that enforcement of the data collection program will be different from enforcement programs used to ensure that accurate landings are reported. It is critical that landings data are reported in an accurate and timely manner, especially under an IFQ system, to properly monitor catch and remaining quota. However, because it is unlikely that the economic data will be used for in-season management, it is anticipated that persons submitting the data will have an opportunity to correct omissions and errors³⁷ before any enforcement action would be taken. Giving the person submitting data a chance to correct problems is considered important because of the complexities associated with generating these data. Only if the agency and the person submitting the data cannot reach a solution would the enforcement agency³⁸ be contacted. The intent of this program is to ensure that accurate data are collected without being overly burdensome on industry for unintended errors.

A discussion of four scenarios will be presented to reflect the analysts understanding of how the enforcement program would function. The four scenarios are 1) a case where no information is provided on a survey; 2) a case where partial information is provided; 3) a case where the agency has questions regarding the accuracy of the data that has been submitted; and 4) a case where a random “audit” to verify the data does not agree with data submitted in the survey.

In the first case, the person required to fill out the survey does not do so. In the second case, the person fills out some of the requested information, but the survey is incomplete. Under either case that person would be contacted by the agency collecting the data and asked to fulfill their obligation to provide the required information. If the problem is resolved and the requested data are provided, no other action would be taken. If that person does not comply with the request, the collecting agency would notify enforcement that the person is not complying with the requirement to provide the data. Enforcement would then use their discretion regarding the best method to achieve compliance. Those methods would likely include fines or loss of quota and could include criminal prosecution.

In the third case the person fills out all of the requested information, but the agency collecting the data, or the analysts using the data, have questions regarding some of the information provided. For example, this may occur when information provided by one company is much different than that provided by similar companies. These data would only be called into question when obvious differences are encountered. Should these cases arise, the agency collecting the data would request that the person providing the data double check the information. Any reporting errors could be corrected at that time. If the person submitting the data indicates that the data are accurate and the agency still has questions regarding the data, that firm’s data could be “audited”. It is anticipated that the review of data would be conducted by an accounting firm selected jointly by the agency and members of industry. Only when that firm refuses to comply with the collecting agencies attempts to verify the accuracy of the data would enforcement be contacted. Once contacted, enforcement would once again use their discretion on how to achieve compliance.

The fourth case would result when the “audit”³⁹ reports different information than the survey. The “audit” procedure being contemplated is a verification protocol similar to that which was envisioned for use in the pollock data collection program developed by NMFS and PSMFC. During the design of this process, input from certified public accountants was solicited in order to develop a verification process that is less costly and cumbersome than a typical “audit” procedure. That protocol involves using an accounting firm, agreed upon by the agency and industry, to conduct a random review of certain elements of the data provided⁴⁰.

³⁷The intent of the program is to have enforcement actions triggered by the willful and intentional submission of incorrect data or noncompliance with the requirements to submit data.

³⁸The term enforcement agency in this case may or may not include the RAM Division and the Office of Administrative Appeals (in addition to NMFS Enforcement). Those details are still under discussion within NOAA.

³⁹This “audit” could be the result of either the random review process that is contemplated or an “audit” triggered under scenario three.

⁴⁰However, in cases of non-compliance in which enforcement has to be notified, the data verification process is likely be more comprehensive.

Since some of the information requested in the surveys may not be maintained by companies and must be calculated, it is possible that differences between the “audited” data from financial statements and survey data may arise. In that case the person filling out the survey would be asked to show how their numbers were derived⁴¹. If their explanation resolves the problem, there would be no further action needed. If questions remained, the agency would continue to work with the providers of the data. Only when an impasse is reached would enforcement be called upon to resolve the issue. It is hoped that this system would help to prevent abuse of the verification and enforcement authority.

In summary, members of the crab industry will be contacted and given the opportunity to explain and/or correct any problems with the data, that are not willful and intentional attempts to mislead, before enforcement actions are taken. Agency staff does not view enforcement of this program as they would a quota monitoring program. Because these data are not being collected in “real” time, there is the opportunity to resolve occasional problems as part of the data collection system. Development of a program that collects the best information possible to conduct analyses of the crab rationalization program, minimizes the burden on industry, and minimizes the need for enforcement actions are the goals of the data collection initiative.

Harvest Share Ownership Caps for CDQ Groups

The following ownership caps shall apply to CDQ ownership of crab QS

Bristol Bay red king crab	5%
Bering Sea opilio crab	5%
Bering Sea bairdi crab	5%
Pribilof red and blue king crab	10%
St. Matthew blue king crab	10%
EAI brown king crab	20%
WAI red king crab	20%
WAI brown king crab	20%

In addition, the Council shall apply the individual and collective rule for calculation of the CDQ ownership caps, under which the holder of an interest in an entity will be credited with holdings in proportion to its interest in the entity.

Vertical Integration Caps

The Council clarified that the 5 percent cap on QS holdings by processors shall exempt only the primary corporate processing entity from more restrictive generally applicable caps on QS holdings. All individuals and subsidiaries will be subject to the general caps on QS holdings.

⁴¹Any time a number must be derived, the survey will provide direction on how to calculate the information requested. This direction should help minimize differences. However, when discrepancies do arise, the firm will be given an opportunity to show how they derived their figures, and correct the information if necessary.