



C1 Crab Binding Arbitration

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Action Memo

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Action Required: 1. Review Final Action Regulatory Impact Review (RIR) analysis
2. Recommend a Preferred Alternative

BACKGROUND

At this meeting, the Council may provide final recommendations on proposed amendments to the Bering Sea/Aleutian Islands (BSAI) Crab Rationalization (CR) Program arbitration system, as well as clarify regulations about withdrawing Individual Processing Quota (IPQ) and Individual Fishing Quota (IFQ) applications in the CR Program. The Council will review a Final Action draft of the analysis, in which two action alternatives are analyzed. These actions are being considered to increase transparency, provide flexibility, and reduce program costs and burdens for participants without changing the overall program structure and objectives.

The first action alternative (**Alternative 2**) would change certain regulations governing the arbitration process. Under this alternative there are five options that may be selected independently or in combination with one another, including:

Option 1. Remove the requirement that the arbitrator can only select a remedy proposed by one side. Allow the arbitrator to select an independent or compromise remedy based on the facts provided in the arbitration.

Option 2. Require a written report and rationale from the arbitrator to the parties to the arbitration. The report should largely mirror the written report submitted by the Contract Arbitrator to NMFS to avoid external costs.

Option 3. Remove the requirement for a market report.

Option 4. Remove the arbitration option for non-performance after a contract has been established to define BSAI crab price, delivery, or other terms, and

Option 5. Streamline the information submitted to NMFS in the Annual Arbitration Organization Report and notifications by removing requirements for information NMFS already has, information that has not changed, and any other information that is no longer necessary.

Alternative 3 would clarify that crab IFQ and IPQ applications can be withdrawn after being accepted by NMFS. This alternative looks at defining one of two proposed timeframes after the total allowable catch is announced (**Option 1:** 24 hours or **Option 2:** 48 hours), after which withdrawals would no longer be permitted. Alternative 3 is not mutually exclusive from Alternative 2.

The Council has identified **Alternative 2, Option 1 and 3** as well as **Alternative 3, Option 2** as its preliminary preferred alternative.

Extra Context

Given the complexity of the CR Program some additional history and context from the analysis is provided here to help the reader understand the existing arbitration system. Additionally, the analysis provides a description of relevant terms (page 7) and a table summarizing the advantages and disadvantages of the proposed options (page 13).

Prior to the CR Program, BSAI crab fisheries had a history of contentious price negotiations. Harvesters often acted collectively to negotiate an ex-vessel price with processors, sometimes resulting in the failure to fish at the start of the fishing season to raise pressure for price concessions. During the development of the CR Program, participants in both the harvesting and processing sectors were interested in ending that practice, particularly due to concerns that market power could be unbalanced by the rationalization of the fisheries.

However, during the development of the CR Program, both harvesters and processors also expressed concern regarding how changes to management of the fishery would impact market power between the sectors. The proposed system included one-to-one share matching between Class A harvesting IFQ and IPQ (as illustrated below). In this share matching system, the concern of market power imbalance is heightened because the CR Program limits the pool of persons to whom a Class A IFQ holder may sell their catch. The concern is most acute for the last Class A IFQ/IPQ holders from each sector to commit their harvesting or processing shares. This “last person standing” problem, where the last harvesting Class A IFQ holder to contract deliveries would have a single IPQ holder to contract with, could effectively limit any ability to use other processor markets for negotiating leverage.

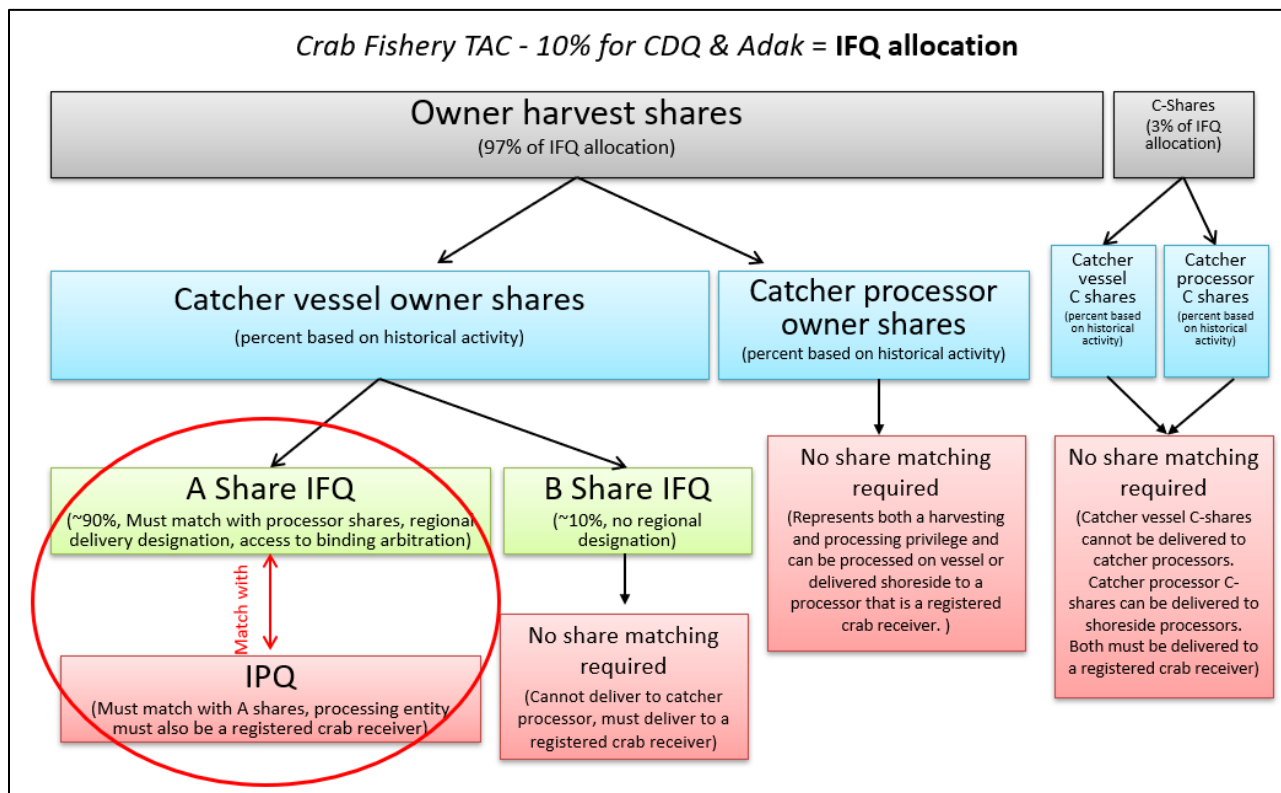


Figure 1. Individual fishing quota (IFQ) and processing quota (IPQ) shares in the CR Program

Based on those concerns and directions from Congress, a binding arbitration system was designed to resolve contract terms fairly and equitably if Class A IFQ holders and IPQ holders cannot agree regarding contract terms and the enforcement of those terms. Only Arbitration IFQ holders (i.e., harvesters) can initiate contract arbitration to establish the terms of a contract; however, either Arbitration IFQ holders or an IPQ holder can initiate binding arbitration to settle performance or quality disputes. The current system of binding arbitration relies on a ‘Last Best Offer’ approach, which requires that both parties submit their proposed outcome and provide evidence supporting the requested outcome. The arbitrator is then required to accept the proposal of one party and is not empowered to negotiate an agreement or apply terms outside one party’s offer.

The Arbitration System as a whole includes dissemination of market information to facilitate negotiations, production of a non-binding price formula, the coordination of matching Class A IFQ held by harvesters to IPQ held by processors, and the opportunity to use the binding arbitration process if necessary. Most of the Arbitration System is regulated through private contracts among QS/IFQ holders and PQS/IPQ holders through mandatory Arbitration Organizations.

The binding arbitration system continues to be a source of dispute between BSAI crab harvesters and processors. A request to look into potential changes to the system arose from the 17-year Program Review in June 2024. Arbitration IFQ holders have generally supported the current binding arbitration structure; while PQS holders have supported modifying it. Recent declines in BSAI crab stocks, increased operational costs, and market conditions have likely challenged viability for both harvesting and processing sectors, exacerbating tensions over this component of the program. Binding arbitrations was used more often at the beginning of the CR Program but has occurred more infrequently in recent years; three arbitrations to establish contract terms have been reported since the 2012/2013 fishing year (see Section 3.2.3 of the analysis).