

Crab Binding Arbitration RIR



December 2025

This RIR analyzes potential changes to the CR Program's binding arbitration system and clarifies regulations regarding the withdrawal of IFQ/IPQ after NMFS has accepted the application.



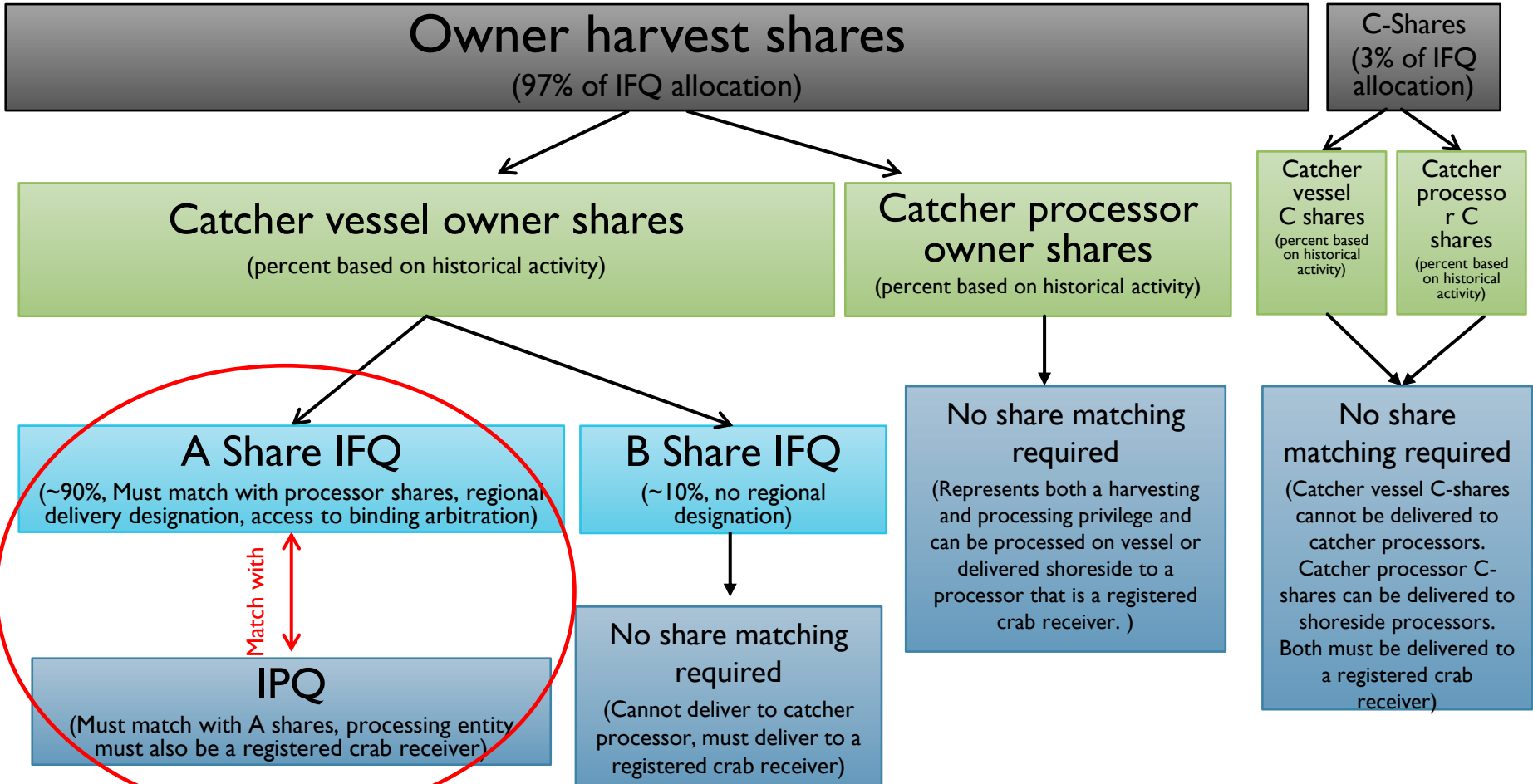
Background

- 🦀 CR Program was implemented in 2005 due to a variety of concerns, including shortened seasons, excessive effort, hazardous fishing conditions, and inefficient prosecution of the fishery
- 🦀 Allocation of both harvesting and processing shares to limit shifts in market power



Share-matching Background

Crab Fishery TAC - 10% for CDQ & Adak = **IFQ allocation**



Arbitration System Background

- 🦀 Because of share-matching, the Arbitration System was included in the CR Program to resolve contract terms efficiently and equitably, and settle price, quality, or performance disputes between harvesters and processors.
- 🦀 The system includes the dissemination of information, a non-binding price formula, coordination of share-matching, and the opportunity to use binding arbitration.
- 🦀 The share-matching process must be conducted in a short time period, and once matched, the contract terms must be established or both parties must agree to the lengthy season approach



Last Best Offer Background

 'Last Best Offer' (LBO) is a style of binding arbitration used to settle disputes

- LBO arbitration requires that the IFQ and IPQ holders submit their best proposal
- The contract arbitrator must select one of the submitted proposals.

 LBO arbitration was initially selected as:

- an efficient arbitration system that incentivizes members of the Arbitration Organizations to submit reasonable offers
- eliminate strikes by harvesters to establish ex-vessel prices
- reduces economic losses from not fishing when scheduled
- help ensure predictability and fairness for the parties involved
- has lower costs than other arbitration models or civil courts.

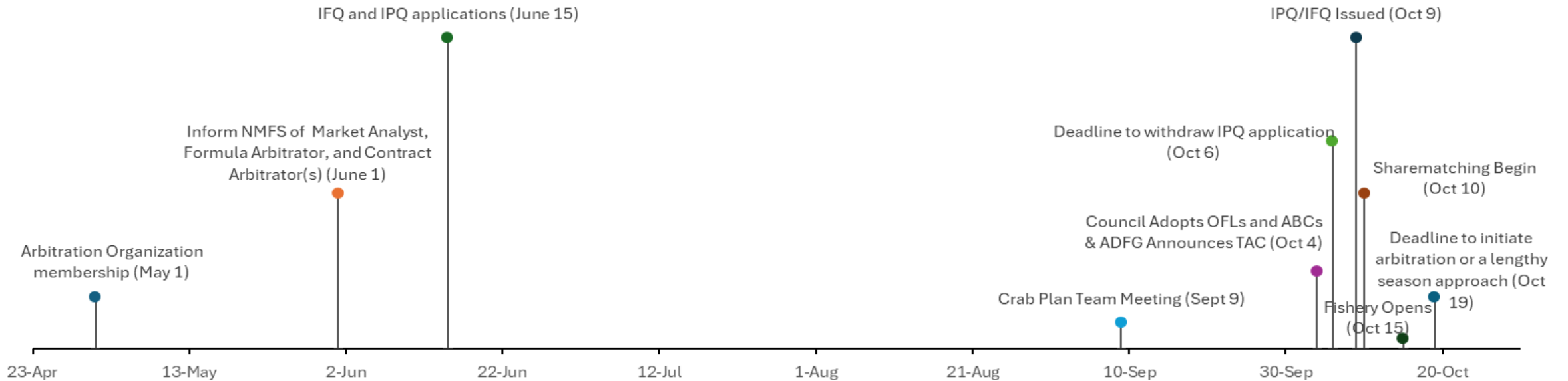


Last Best Offer Background

- 🦀 May be initiated by the harvesters in an FCMA cooperative when an agreement cannot be reached in the terms of a contract (relevant for Alt 2, option 1 and 2)
- 🦀 May be initiated by the harvesters or processors when there is a dispute over performance or quality (relevant for Alt 2, option 4)
- 🦀 The use of LBO arbitration has expanded in recent years and is currently used to settle disputes in several public and private negotiations.
 - Some states resolve public sector salary disputes, especially when strikes are not permitted (police, fire, state hospital, and other essential state employees)
 - NY State uses to resolve out-of-network medical billing
 - Construction uses LBO but not well suited for disputes with more than two parties



Current Binding Arbitration Program Timing: Using 2024/25 BSS as an example



Alternative 2: Potential Arbitration Changes

- 🦀 **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.
- 🦀 Option 5: Streamline the information submitted to NMFS in the Annual Arbitration Organization Report and notifications by removing information NMFS already has, is unchanged, or is no longer necessary.



Alternative 3: Clarify IFQ and IPQ application withdrawal regulations

IFQ and IPQ application withdrawal: IFQ and IPQ applications can be withdrawn after being accepted by NMFS any time before BSAI crab rationalization species TACs are announced and within:

- 1) Option 1: 24 hours
- 2) **Option 2: 48 hours**

after the BSAI CR Program species TACs are announced.



Changes to the document	Location
Perspective of arbitrators regarding Last Best Offer (LBO) Arbitration, producing a written report, and how arbitration costs might change.	Section 3.10.2.1 Discussions with Arbitrators Option 1: Remove the Regulations for LBO Arbitration
LBO arbitration lessons learned.	Section 3.2.3
Added Alternative 2, Option 5	This option was added to various sections of the document, but the primary analysis of the option is presented in Section 3.12
Added information on what happens if no processors apply for IPQ	Section 3.10.3.3
Added information on what happens if a person cannot withdraw their IFQ/IPQ application	Section 3.10.3
Added additional discussion regarding processors and harvesters facing challenging economic conditions	Various places
Added discussion of unforeseen impacts of enforcing a contract. For example, what if a group does not have sufficient funds to pursue enforcing a contract in court	Section 3.10.2.4
Tables were added to describe the costs of various components of the proposed changes	Section 3.11
The net benefits section was incorporated	Section 3.14
The Affected Small Entities section was incorporated	Section 3.13
The preliminary preferred alternative was considered relative to the National Standards, Fishery Impact Statement and Council's Ecosystem Vision Statement	Section 4

PRIMARY DOCUMENT CHANGES SINCE INITIAL REVIEW

See Executive Summary Table on Page 6

Alt 2, Option 1: Remove Last Best Offer Requirement

- 🦀 Selecting Option 1 would remove the requirement that the Contract Arbitrator select one of the offers submitted, eliminating regulations that require the use of the LBO arbitration structure.
- 🦀 Arbitrators could use available facts and arguments from each side to select an outcome within the range of proposed offers, independent of the proposed offers, or matching a proposed offer.



ChatGPT image



Alt 2, Option 1: Last Best Offer

- 🕷 Discussion with Contract Arbitrators
 - 🕷 LBO arbitration was thought to be a more economical system
 - 🕷 The two parties are incentivized to submit their best offer, which are likely to be closer than when the arbitrator is granted the authority to select a settlement other than one of the two proposals.
 - 🕷 LBO makes it incumbent on the parties to do more work to ensure their request is supportable.
 - 🕷 Under LBO, less time may be required to reach a decision after offers are presented to the arbitrator and other party as a final written proposal (laydown of offers), especially when they are relatively close offers.



Discussion with Contract Arbitrators: Last Best Offer

- 🦀 The structure moves people towards a middle ground to increase the likelihood of their offer being accepted by the arbitrator.
- 🦀 Information provided by the parties to the arbitration does not give the arbitrator perfect information to calibrate a decision within a small range.
- 🦀 Increased effort by the arbitrator would be needed to determine the “right decision” when more divergent starting points are offered, to choose and verify a decision.
- 🦀 Costs would increase, but the “quality” of the outcome may not.
- 🦀 Arbitrators generally do not like to grant summary judgments.



Alt 2, Option 1: Last Best Offer, Potential Impacts

Change in the Number of Arbitrations

- 🦀 The current system has led to a limited number of arbitrations. There have been 3 reported arbitrations since the 2012/13 fishing year. (Section 3.2.3). No Contract Arbitrations in the 2024/2025 fishing year.
- 🦀 Allowing the Contract Arbitrator to select from a broader range of outcomes could result in IFQ holders seeking more favorable outcomes than in the past.
- 🦀 The cost of arbitration is expected to limit its use.



Alt 2, Option 1: Last Best Offer, Potential Impacts

Change in Arbitration Cost

- 🦀 The cost of arbitration would increase if more arbitrations were initiated.
- 🦀 More information could be submitted and considered by the arbitrator.
 - Submission and verification costs could increase
- 🦀 The duration of arbitrations could increase to review and consider the additional information presented.
- 🦀 Attorney's fees may increase as more time is required to compile information and prepare for an arbitration.



Alt 2, Option 1: Last Best Offer, Potential Impacts

Impact on Harvest Crew

- 🦀 Any impacts to crew will be related to whether and how a different arbitration style will impact ex-vessel prices.
- 🦀 Crew are typically paid on shares of the ex-vessel value after certain deductions (lease fees, food, etc.)
- 🦀 Increases in ex-vessel value would increase crew compensation (all else being equal – decreasing ex-vessel prices would decrease crew compensation)



Alt 2, Option 1: Last Best Offer, Potential Impacts

Impact on Communities

- 🦀 Section 3.5 Shorebased processing of CR Program crab has been centered in Dutch Harbor/Unalaska and Akutan.
- 🦀 Some CR Program crab was delivered to Kodiak.
- 🦀 Other communities that had shorebased processors do not currently have active processors of CR Program
- 🦀 Changes in ex-vessel price would impact community tax revenue. Tax revenue changes and the distribution of those taxes would depend on several factors
 - Agreements to address regional delivery requirements
 - Changes in landings patterns among active communities



Alt 2, Option 2: Binding Arbitration Report

Written Report to Contract Arbitration Parties

- 🕸 The Contract Arbitrator currently provides a written report to NMFS (50 CFR 680.20(h)(6)).
- 🕸 **Analysts assume that Option 2 (the requirement for a written report) only applies to Contract Arbitrations.**
- 🕸 Contract Arbitrator must ensure the information provided was within anti-trust boundaries.
- 🕸 The current information reported to NMFS includes:
 1. minutes from any meeting attended by that Contract Arbitrator between or among any PQS or IPQ holders;
 2. the last-best offers made during the Binding Arbitration process with all contract details;
 3. the names of other participants in the arbitration, and whether the Contract Arbitrator accepted the bid; and
 4. any information, data, or documents the Contract Arbitrator gave to any person who was not a party to that arbitration, and the person provided the data or documents.



Alt 2, Option 2: Binding Arbitration Report

Rationale

May not include information that triggers anti-trust concerns. Information that may be included as part of the rationale consists of:

1. **Factual background:**A clear, concise summary of the events and circumstances leading to the dispute.
2. **Statement of claims and counterclaims:**A breakdown of what each party is seeking and why
3. **Application of law and contract:**An explanation of how relevant laws and the terms of the CR Program were applied to the facts.
4. **Credibility determinations:**An assessment of witness credibility and expert testimony, which can be a crucial part of the decision-making process.
5. **Reasoning and conclusion**



Alt 2, Option 2: Binding Arbitration Report

- 🦀 The Contract Arbitrator would be responsible for limiting information provided in the rationale to the two parties that would trigger anti-trust concerns.
- 🦀 The contract could define the types of information that would be provided.



Alt 2, Option 2: Binding Arbitration Report

Anti-trust Concerns

- 🦀 Limiting the distribution of the written report to the parties to the arbitration and structuring the report like that currently submitted to NMFS reduces the anti-trust concern.
- 🦀 However, the rationale must still be limited to information that would not trigger anti-trust issues.
 - Not include prices paid by other processors
 - Other information that could impact processor offers in future price negotiations



Discussion with Arbitrators: Written Report

- 🦀 Producing report requires additional time
- 🦀 Documenting that a reasoned and fair outcome was reached, based on the facts provided by the parties, and that the information included in the report is accurate and logical.



Alt 2, Option 3: Market Report

Remove Market Report Requirement

- 🦀 Other sources of information are available and have been used by the parties to collect the information.
- 🦀 Would not create data gaps in the contract arbitration process
- 🦀 Both harvesters and processors supported removal
- 🦀 Cost for Market Report and Non-Binding Price Formula was reported to be \$49,000 in 2023/2024. (However, this action would not remove the requirement to produce a non-binding price formula.)



Alt 2, Option 4: Non-performance

Remove requirement to use arbitration for non-performance

- 🦀 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, the issues of that dispute **shall** be submitted for Binding Arbitration before a Contract Arbitrator for that fishery.
- 🦀 The proposed action would allow performance disputes to be settled through binding arbitration agreed to by the parties or a civil court.
- 🦀 Use of civil courts is expected to be more costly.
- 🦀 Arbitration has never been used to settle performance disputes, but has been used in negotiations



Alt 2, Option 4: Non-performance

- 🦀 The use of civil courts is expected to be considerably more costly
- 🦀 NMFS/Council does not have the authority to establish the division of costs for civil trials
- 🦀 Judges making the decision may be less knowledgeable of the CR Program and the fishery than the arbitrators who have been selected by the two parties.
- 🦀 Regulations for quality disputes would be unchanged.



Alt 2, Option 5: Removal of Unnecessary Regulations

Regulation	Purpose
§680.20(c)(3)	Date QS and PQS holders must have joined an Arbitration Organization in 2005
§680.20(e)(4)(iii)	Same person may be chosen for the positions of Market Analyst and Formula Arbitrator for a fishery. If only a formula arbitrator is selected annually
§680.20(f)	Addresses the roles and standards for the Market Analyst, as well as the process for producing the Market Report.
§680.20(e)(6)	Addressed a first-year implementation issue. It states that during 2005, the selection of and establishment of the contractual obligations of the Market Analyst, Formula Arbitrator, and Contract Arbitrator(s) as required under this section shall occur not later than September 1, 2005
§680.20(g)(2)(iii)(B)	§680.20(g)(2)(iii) states that the Non-Binding Price Formula may rely on any relevant information available to the Formula Arbitrator, including, but not limited to (B) information in the market report.
§680.20(h)(4)(ii)(B)	§680.20(h)(4)(ii) states that the Contract Arbitrator's decision may rely on any relevant information available to the Contract Arbitrator, including, but not limited to: (B) the Market Report for that fishery.



Alt 3: Withdrawing IPQ/IFQ Applications

- 🦀 Regulations require application by June 15.
- 🦀 NMFS has allowed IPQ application withdrawals before IFQ/IPQ was issued on a case-by-case basis
- 🦀 Previous application withdrawals were well in advance of IPQ issuance.
- 🦀 Council selected **48** hours after TAC is announced as PPA
- 🦀 No option to not allow withdrawals unless NMFS determines they would not be allowed under the Status Quo



Alt 3: Withdrawing IPQ/IFQ Applications

- 🦀 Impacts of *not allowing* applications to be withdrawn under status quo
 - may increase the uncertainty of who will be issued IFQ/IPQ
 - potential changes in tax revenue to communities
 - distributional impacts on processing workers depend on custom processing arrangements and processors that remain active
 - may reduce the potential for net losses for some firms.



Alt 3: Withdrawing IPQ/IFQ Applications

- 🦀 Impacts of *allowing* applications to be withdrawn under Alternative 3
 - 🦀 Would establish clear expectations for the timeline of possible withdrawals
 - 🦀 Would lower the risk for PQS holders to apply for IPQ in June:
 - This could increase the number of active IPQ holders if the fishery is determined to be economically viable after TAC is announced, and these companies otherwise would not have applied in the first place.
 - This could also decrease the number of active IPQ holders if the fishery is determined not to be economically viable after TAC is announced, and IPQ are withdrawn.
 - 🦀 Impacts to IFQ holders could vary.
 - Harvesters generally benefit from greater competition in IPQ holders to share-match with.
 - IFQ holders are unlikely to withdraw their applications.



Alt 3: Withdrawing IPQ/IFQ Applications

- 🦀 What if no IPQ is issued?
 - Share matching of Class A IFQ and IPQ is required
 - Share matching could not occur if no IPQ was issued
 - NMFS would not issue Class A IFQ
- 🦀 Council may wish to consider how this potential problem could be addressed as part of a future action.



Thank you!

Next Steps:

- Potentially identify a Preferred Alternative to recommend for Final Action

For Further Questions

Contact:

smarrinan@npfmc.org



Source: NPFMC



Extra slides



Alt 2, Option 1: Last Best Offer, Potential Impacts

Impacts on Distribution of First Wholesale Revenue

- This is highly dependent on whether the Contract Arbitrators would be more willing to consider additional information to reach a decision based on the facts presented
- Factors that may be considered (50 CFR 680.20(g)(2)(ii)(B))
 - Current ex-vessel, consumer, and wholesale product prices
 - Innovations and developments of the harvesting and processing sectors
 - Efficiency and productivity
 - Quality
 - Financially healthy and stable harvesting and processing sectors
 - Safety and expenditures for ensuring adequate safety
 - Timing and location of deliveries
 - Cost to avoid penalties for overharvesting and accounting for deadloss



Alt 2, Option 1: Last Best Offer, Background

Division of First Wholesale Revenue

- contract arbitrators have chosen not to diverge from the historical division of first wholesale revenue.
- Potential reasons are that doing so:
 - could create a precedent,
 - be more controversial, and/or
 - increase the complexity of weighing all factors involved in adjusting the ex-vessel price in terms of all the other (perhaps countervailing) factors that could be considered.
- Allowed an intermediate position, weighing, and perhaps justifying an outcome would be more complex.



Alt 2, Option 2: Binding Arbitration Report

Anti-trust Concerns

- The main concerns focus on provisions regarding the exchange of information that would not be permitted in an unregulated and competitive environment.
 - Giving both harvesters and processors access to all information provided to their arbitrators
 - Permitting processors to engage in discussions regarding pricing
 - The unlimited publication of the arbitration results.
- The legal opinion recommended that the harvesters' and processors' access to information during an arbitration be limited to materials submitted directly by the parties.
- The opinion also concluded that access to the results of other arbitration sessions should be limited to arbitrators and non-affiliated harvesters that have not committed shares to a processor. Limiting the information provided was an important consideration in the program's development to avoid antitrust issues.



Background

- 🦀 Regulations require the matching of Class A harvest shares with processing shares.
- 🦀 The share matching process must be conducted in a short time period, and once matched, the contract terms must be established or both parties must agree to the lengthy season approach
- 🦀 LBO Arbitration to establish contracts may be initiated by the harvesters in an FCMA cooperative when an agreement cannot be reached

