

**C-3(a) Bering Sea and Aleutian Island crab program rights of first refusal
North Pacific Fisheries Management Council
February 13, 2010**

The Council recommends that the following alternatives move forward for additional review noting the following changes (bold and strikeout) to Action 2, Alternative 2 below:

Action 1: Increase a right holding entity's time to exercise the right and perform as required.

Alternative 1 – status quo

- 1) Maintain current period for exercising the right of first refusal at 60 days from receipt of the contract.
- 2) Maintain current period for performing under the right of first refusal contract at 120 days from receipt of the contract.

Alternative 2: Increase an entity's time to exercise the right and perform.

- 1) Require parties to rights of first refusal contracts to extend the period for exercising the right of first refusal from 60 days from receipt of the contract to 90 days from receipt of the contract.
- 2) Require parties to rights of first refusal contracts to extend the period for performing under the contract after exercising the right from 120 days from receipt of the contract to 150 days from receipt of the contract.

Action 2: Increase community protections by removing the ROFR lapse provisions.

Alternative 1 – status quo

- 1) Maintain current provision under which the right lapses, if IPQ are used outside the community of the entity holding the right for three consecutive years.
- 2) Maintain current provision, which allows rights to lapse, if the PQS is sold in a sale subject to the right (and the entity holding the right fails to exercise the right).

Alternative 2 – Strengthen community protections under circumstances where ROFR may lapse.

Increase community protections by removing the provisions under which the right lapses.

Option 1: Require parties to rights of first refusal contracts to remove the provision that rights lapse, if the IPQ are used outside the community for a period of three consecutive years

Option 2: If any entity with a right of first refusal chooses not to exercise its right, and the PQS is sold and used in another community, then the right of first refusal as to the original entity lapses and is acquired by the community entity where the IPQ is currently being used:

- Suboption 1: immediately**
- Suboption 2: after 3 years**
- Suboption 3: after 5 years.**

Option 3: Require that any person holding PQS that met landing thresholds qualifying a community entity for a right of first refusal on program implementation to maintain a contract providing that right at all times

Action 3: Apply the right to only PQS and assets in the subject community.

Alternative 1 – status quo

The right of first refusal applies to all assets included in a sale of PQS subject to the right, with the price determined by the sale contract.

Alternative 2: Apply the right to only PQS.

Require parties to rights of first refusal contracts to provide that the right shall apply only to the PQS subject to the right of first refusal. In the event other assets are included in the proposed sale, the price of the PQS to which the price applies shall be determined by a) agreement of the parties or b) if the parties are unable to agree, an appraiser jointly selected by the PQS holder and the entity holding the right of first refusal, **or c) if the parties are unable to agree, an appraiser.**

Alternative 3: Apply the right to only PQS and assets in the subject community.

Require parties to rights of first refusal contracts to provide that the right shall apply only to the PQS and other assets physically present in the community benefiting from the right of first refusal. In the event other assets are included in the proposed sale, the price of the PQS to which the price applies shall be determined by a) agreement of the parties or b) if the parties are unable to agree, an appraiser jointly selected by the PQS holder and the entity holding the right of first refusal, **or c) if the parties are unable to agree, an appraiser.**

In addition, the Council requested that staff include in the analysis a discussion of the following provisions:

Action 3, Alternative 2

The assessor will be selected by:

- 1) mutual agreement of the parties or
- 2) the PQS holder and the community representative each selecting an assessor and by those assessors selecting a third assessor. This panel of assessors will then perform the duties of the assessor.

For any transaction that includes only PQS, the community entity may request that an assessor value the PQS. If the assessor's valuation differs from that of the contract, the right of first refusal shall be at the price determined by the assessor.

The assessor shall establish a price that represents the fair market value of the PQS, but may adjust the price to address any diminishment in value of other assets included in the PQS transaction subject to the right.

Within 10 days of receipt of a contract that is for PQS only, the community entity may request that an assessor establish a price for the PQS. If the community entity fails to request an assessor establish the price, the price in the contract will apply.

The parties shall select the assessor (or each shall select an assessor) within 20 days of the community entity receiving the contract to which the right applies.

In the event that a single assessor is not selected by agreement of the parties, the two selected assessors shall select a third assessor within 30 days of the community representative receiving the contract.

The assessors shall establish the price for the PQS within 60 days of the community representative receiving the contract.

The community representative must notify the PQS holder of its intent to exercise the right within 90 days of receipt of the contract.

The community representative must perform, as required by the contract or the assessor, within 120 days of receipt of the contract.

The cost of a mutually selected assessor shall be paid equally by the PQS holder and the community representative. If the parties do not agree on a single assessor, each party shall pay the costs of the assessor it chooses, and the parties shall pay equally for the third assessor.

Action 3, Alternative 3

The assessor will be selected by:

- 3) mutual agreement of the parties or
- 4) the PQS holder and the community representative each selecting an assessor and by those assessors selecting a third assessor. This panel of assessors will then perform the duties of the assessor.

The assessor shall establish a price that represents the fair market value of the PQS and community based assets, but may adjust the price to address any diminishment in value of other assets included in the PQS transaction subject to the right.

Within 10 days of receipt of a contract that includes PQS subject to the right, the community entity may request that an assessor identify community based assets in the transaction and establish a price for the PQS and community based assets. If the assessor's valuation differs from that of the contract, the right of first refusal shall be at the price determined by the assessor. If the community entity fails to request that an assessor establish the price, the price in the contract will apply and the right will apply to all assets in the transaction.

For any transaction that includes assets in addition to PQS, the assessor shall determine which assets are community based.

If an assessor is requested by the community entity, the parties shall select the assessor (or each shall select an assessor) within 20 days of the community entity receiving the contract to which the right applies.

In the event that a single assessor is not selected by agreement of the parties, the two selected assessors shall select a third assessor within 30 days of the community representative receiving the contract.

The assessors shall establish the price for the PQS and community based assets within 60 days of the community representative receiving the contract.

The community representative must notify the PQS holder of its intent to exercise the right within 90 days of receipt of the contract.

The community representative must perform, as required by the contract or the assessor, within 120 days of receipt of the contract.

The cost of a mutually selected assessor shall be paid equally by the PQS holder and the community representative. If the parties do not agree on a single assessor, each party shall pay the costs of the assessor it chooses, and the parties shall pay equally for the third assessor.