

Damage control and assessment of the political impacts of the Sullivan-Campbell debate on Bering Sea fisheries rationalization at the Kodiak ComFish convention, March 2006:

Since none of us or our clients were present to witness this spontaneous discussion of the privatization of commercial fisheries rights by Congress and the North Pacific Fisheries Management Council (NPFMC) in the Bering Sea pollock and crab fisheries, we must rely solely upon the printed transcript provided to us by our clients, who implied that they obtained it from members of the Alaska Crab Coalition, a trade association of Bering Sea crab vessel owners headquartered in Seattle.

Our purpose is to assess the potential political damage that could accrue from comments made by Mr. Joe Sullivan of Mundt MacGregor, LLP, a Seattle maritime law firm, and Alaska Commissioner of Fish and Game (ADFG) McKie Campbell before a "ComFish convention workshop" of commercial fishermen and mostly residents of Kodiak, Alaska last month.

The following questions must be considered and fully understood in order to frame this analysis and lay a rational, realistic foundation for assessing the extent to which our clients' ownership of BSAI crab individual transferable quotas (ITQs) is politically jeopardized or opened to administrative reconsideration for reduction in scale by the NPFMC or the U.S. Secretary of Commerce (SOC) in February 2007.

1. Exactly what elements of the current BSAI crab rationalization system created by the NPFMC and the SOC in 2005 did Mr. Sullivan suggest may prove to be in conflict with the requirements of the Magnuson-Stevens Act of 1996 (MSA 96)?
2. What remedies did his remarks imply?
3. What impact might those remedies have upon our clients' commercial interest (ITQ ownership) in the BSAI crab fishing business?
4. What is the probability that a "political" readjustment of fishing privileges between owner and crew might be made by the NPFMC and the SOC in February 2007?
5. What strategy will best prevent any diminution of our clients' current crab ITQ ownership?

Our analysis and recommendations reflect imperfect knowledge of exactly what was said and, just as importantly, implied by Mr. Sullivan and Mr. Campbell last month in Kodiak. We remain open to superior knowledge of the facts surrounding this event and will adjust our analysis and conclusions as necessary.

Answer to Question One

The transcript shows that Mr. Sullivan publicly demonstrated "second thoughts" about the manner in which the NPFMC and the SOC allocated ITQs between vessel owners and their skippers and crewmen during the BSAI Crab Rationalization process.

Our research shows that Mr. Sullivan relied on solid evidence to reach that conclusion. The clearest example of his concern is the so-called "3% skipper share" which qualified vessel operators were assigned by the Council and the Secretary, as represented by the NOAA Fisheries Administrator headquartered in Silver Spring, MD.

The average "share" of the income earned, after variable per trip expenses, by such crab vessel operators during the ITQ-qualifying years ranged mostly between 10-percent and 17-percent of the ADFG fish ticket value of the delivered crab catch.

It is neither our mission nor our intention to justify or second-guess administrative decisions made by the NPFMC or the SOC in 2005. We do note, however, that there remains a substantial difference between the official "skipper ITQ share" awarded by the Council and the SOC and the prevailing, historical "employment share" agreed upon by the vessel owners and their vessel operators and crewmen.

On this basis alone Mr. Sullivan's and Mr. Campbell's concerns are vindicated since MSA 96 requires that allocation of federal fishing privileges in the EEZ be made by the SOC "fairly and equitably" among all U. S. citizens.

As between vessel owners and vessel operators, it is difficult to demonstrate this federally-required fairness and equity when relying on historical and conventional income sharing standards that prevailed in the BSAI crab industry during the ITQ-qualifying years.

However, since the leadership of an ad hoc BSAI crab vessel operators group called Skippers for Equitable Access, representing the best interests of the crab

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vessel operators during the rationalization process , testified in favor of the 3% skipper share, the Council and the Secretary adopted it with sufficient public record.

No such collaboration can be cited for the hundreds of BSAI crab vessel crewmen, who were awarded no ITQs whatsoever by the Council and the SOC.

Yet these crewmen each earned three to five percent after expenses, on average, of the ADFG fish ticket value accrued during the qualifying years. Mr. Sullivan specifically cites "over 700 crewmen" whom he implies were officially disenfranchised by the Council and the SOC without due process or fair and equitable treatment during the crab rationalization process.

Pending direction from our client, we will deliberately forego an analysis of the Administrative Procedures Act and the National Environmental Policy Act that may be relevant to certification of the crewmen's rightful claim to a portion of the total, BSAI crab ITQs.

If the issue is raised by the Council in February 2007, we stand ready to refute these new crewmen claims for ITQs, with the advisory that their legitimacy may prove difficult to dismiss under current law and regulation.

Question Two

Neither Mr. Sullivan nor Mr. Campbell suggested specific remedies to address their perceived ITQ-sharing imbalances. They appear to have implied remedies, though, by suggesting an official Council/SOC reconsideration in 2007 may be necessary to correct unintended and unforeseen consequences of the original BSAI Crab Rationalization.

Answer to Question Three

If historically-scaled "skipper and crewmen ITQs" are ever adopted by the Council and the SOC after February 2007, current ITQ-owners could forfeit between 35% and 45% of their initial ITQ allocation.

MSA 96 specified that an ITQ is a federally-granted fishing privilege, not a property right whose taking requires monetary or in kind compensation by the federal government.

The Council and the SOC may, therefore, reassign or recalibrate such privilege among competing and qualified citizens of the United States, at will and in accordance with MSA 96 and other relevant federal law.

Answer to Question Four

This answer requires integration of subjective opinions and imprecise estimation of political probabilities beyond the scope and expertise of this office.

We suggest, however, there are prerequisites to such a deleterious change of ITQ-allocation policy in the BSAI crab fisheries whose existence might predict the likelihood of a change in federal ITQ allocation policy during 2007 or 2008.

They are

1. Organization and funding of an ad hoc group of qualified crab skippers who renounce the deal originally made on their behalf by Skippers for Equitable Access on the basis that "3% skipper share" was neither fair nor equitable to their historic participation in the BSAI crab fisheries and their right to due process under administrative law as U.S. citizens.
2. Organization and funding of an ad hoc group of qualified crab crewmen who challenge their exclusion from any ITQ-allocation by the Council and the SOC on the basis that it was neither fair nor equitable to their historic participation in the BSAI crab fisheries and their right to due process under administrative law as U.S. citizens.
3. Organization and public funding of a local government campaign, on behalf of crab skippers and crews, to both enfranchise them with a greater share of initially allocated ITQs and to reinstate their employment aboard more competing crab vessels during future crab seasons by limiting the official "ITQ-stacking provisions" currently in law and regulation.
4. A voting member of the NPFMC who publicizes his willingness to move and arranges a Second for his or her February 2007 motion to fairly and equitably re-enfranchise crab skippers and crewmen of the portion of total ITQs that reflect the extent to which they helped earn and accrue the original BSAI crab fishing history in the qualifying years.

Answer to Question Five

The most effective way to maintain the status quo in ITQ-allocation of BSAI crab fishing privileges is to convince at least six voting members of the NPFMC to discourage and reject any motion for reconsideration or any new motion emanating from the subjective experience or undocumented claims submitted to the Council or the SOC in 2007 on behalf of skippers or crewmen that calls for a significant allocation change after just eighteen months of history with the BSAI crab ITQ program.

By insisting upon a minimum five-year trial run of the existing BSAI crab ITQ program before modification, current ITQ-owners can deflect any call for reallocation as premature, perhaps even reckless, given the magnitude of the investment currently at stake and not yet sufficiently documented under prevailing NEPA standards.

This “prudent delay and statistically-valid impact assessment” strategy will quiet the angry and impatient voices of those skippers and crewmen who wasted their chance in 2004 and 2005 to gain initial allocation of BSAI crab ITQs.

By the time a five year Council and SOC re-evaluation occurs, skippers and crewmen’s lives and concerns will have moved on to more promising areas of employments and their passion for what-might-have-been will have burned down and expired, thereby eliminating all threats and challenges to our clients’ crab ITQ ownership.

Summary and Conclusion

The odds of any X-factors released back into the NPFMC’s political arena by Mr. Sullivan’s and Mr. Campbell’s inadvertent opening of the Pandora’s Box of BSAI crab ratz resentment (thereby causing a future re-allocation of crab ITQs) are miniscule to negligible in our judgment.

Most skippers and crewmen effected by the initial ITQ allocation have found alternative employment and seem to bear no public grudge against current ITQ owners nor do they appear to harbor sufficient, discernible resentment and a subsequent thirst for political justice and reallocation of BSAI crab ITQs.

However, we do recommend an updated reassessment of this conclusion following the Council’s December 2006 meeting.

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Our final concern is that someday a newly-appointed NPFMC voting member from Alaska could mount a serious political crusade on behalf of Alaskan coastal communities and their resident local businessmen to "do the right thing" and "make things right" for crab skippers and crewmen "who actually risked their lives to earn the fishing histories" that the Council and the Secretary converted into ITQs and awarded "arbitrarily and capriciously" to crab vessel owners, who "sat at home in the warmth and luxury of their living-room recliners while the skippers and crewman did all the dirty work."

Such a grass-roots demagogue could stress the political system in Alaska sufficiently to prompt a reallocation by the NPFMC's Alaska majority of BSAI crab ITQs to the detriment of our clients' interest.

However, no such demagogue currently appears on the political radar of our analysts and colleagues.

Therefore he or she need not be feared or dealt with for the foreseeable future.

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