

**1974-2011 Customary Trade of Subsistence Caught Fish:  
Background, Chronology, and Current Options for Modification**

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# 1974–2011 Customary Trade of Subsistence Caught Fish Background, Chronology, and Current Options for Modification

## ABSTRACT

This publication documents and summarizes the development of customary trade of fish for cash in Alaska from 1974 through December 2011. Customary trade of subsistence caught fish is legally allowed under both federal and state law. Under both sets of laws, customary trade for cash is considered a legally defined customary and traditional subsistence use. “Trade for cash” is allowed in all regions of Alaska within federal subsistence regulations and only where approved by the Alaska Board of Fisheries under state regulation. With the development of the Federal Subsistence Board approved federal subsistence regulations and ensuing enactment of federal subsistence fisheries management beginning in 2000, the largely unmonitored customary trade of subsistence caught fish for cash has developed into an accountability challenge for resource managers and has become a complex enforcement issue in high value fully allocated and exploited fisheries. This document provides background to assist with future regulatory decisions regarding customary trade in the federal and state regulatory arenas.

This publication contains all information available on file within the Alaska Department of Fish and Game’s Federal Subsistence Liaison Team’s Anchorage office location. This living document will require periodic updates as developments occur or historical documents are located. This publication is incomplete and gaps in information are identified.

**Key Words:** customary trade, barter, fish, sale of subsistence fish, trade for cash, federal subsistence customary trade, Chinook salmon *Oncorhynchus tshawytscha*, sockeye salmon *Oncorhynchus nerka*, chum salmon *Oncorhynchus keta*, Pacific herring, *Clupea pallasii*.

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## **INTRODUCTION**

This publication attempts to document and summarize the development of customary trade of fish for cash in Alaska and provides guidance for navigating different options for making changes to state and federal regulations if warranted. Customary trade of subsistence caught fish for cash is legally allowed under both federal and state law (Appendix A and B). Under both sets of laws, customary trade of fish for cash is considered a legally defined customary and traditional subsistence use. “Trade for cash” is allowed in all regions of Alaska within federal regulations (Appendix B) and only where approved by the Alaska Board of Fisheries (State Board) under state regulation (Appendix A). With the development of the Federal Subsistence Board (Federal Board) approved federal subsistence regulations and ensuing enactment of federal subsistence fisheries management beginning in 2000, the largely unmonitored customary trade of subsistence caught fish for cash has developed into an accountability challenge for resource managers and a complex enforcement issue in certain fisheries. Though customary trade has been in practice long before contact with Europeans in the 18<sup>th</sup> century, the relatively recent development of trading subsistence harvested fish for cash may incentivize additional harvest which adds a layer of complexities to the management of high use, high value, fully allocated or fully exploited fisheries. This document provides background to assist with future regulatory decisions regarding customary trade with the goal of continuing sound, precautionary, and conservation based management of Alaska’s fisheries. This document focuses on the fisheries of Alaska executed in fresh waters above mean high tide.

## **BACKGROUND**

Three government agencies regulate customary trade of subsistence harvested fish in Alaska: Federal Board, North Pacific Fishery Management Council (Council), and the State of Alaska (State) through the State Board and Alaska Department of Fish and Game (Department). Each agency has its own interpretation of, and rules for, implementing laws that authorize customary trade of fish harvested under subsistence laws.

The State regulates customary trade under state law Alaska Statute AS 6.05.940 (8) on a case-by-case basis. Currently, the Department issues customary trade permits to individuals for subsistence harvested herring roe on kelp in Southeast Alaska and finfish, including salmon, in the Norton Sound-Port Clarence Area (Appendix A). Individuals engaging in customary trade of herring roe on kelp in Southeast Alaska or finfish, including salmon, in the Norton Sound-Port Clarence Area under State regulations require permitting and reporting. The process for authorizing customary trade of subsistence harvested fish for cash through the State Board is described later in this document.

The Council regulates and manages subsistence use of halibut in Alaska and restricts customary trade to reimbursement of a fisherman’s expenses when fishing for others. Individual fishermen may receive cash for actual trip expenses of ice, bait, food, or fuel directly related to the harvest of halibut. Fishermen who qualify for subsistence halibut fishing based on residency in a rural coastal community may engage in customary trade only with members of the rural community in which they reside. Subsistence halibut fishermen qualifying under tribal eligibility may engage in customary trade only with members of another Alaska tribe, or with members of an eligible, rural community in which they reside. Subsistence halibut fishermen

are prohibited from soliciting cash exchanges. Regulations further prohibit fishermen "to cause subsistence halibut to be sold, bartered or otherwise to enter commerce<sup>1</sup>."

The Federal Board customary trade regulation allows limited exchange of cash for fish caught under federal subsistence fishing regulations so long as it does not constitute a significant commercial enterprise (Appendix B). To date, two of the ten federal subsistence regions across Alaska have defined customary trade limits, permitting, and reporting requirements as established by the Federal Board. The Bristol Bay Region has a customary trade annual cash sales limit of \$500 of which only \$400 can be from sales to non-rural residents. The Federal Board also approved customary trade regulations for the Upper Copper River District allowing for the annual cash sales of salmon to non-rural residents up to \$500 and up to 50% of the annual harvest of salmon by a household for sales between rural residents (Appendix B). The remaining 8 regions are not monitored or do not have specific federal subsistence regulations regarding customary trade.

In May 2010, a Federal Board sanctioned customary trade work group consisting of elected representatives of the Eastern, Western, and Yukon Kuskokwim Delta Regional Advisory Councils met and developed draft recommendations to define customary trade, permitting, and reporting requirements for the sale for cash of federal subsistence harvested Yukon River Chinook salmon. The customary trade work group will submit proposals to the respective Regional Advisory Councils for forwarding to the Federal Board for deliberation at the January 2013 regulatory meeting. The process for addressing regulatory changes and restrictions on customary trade are described later in this document.

Considered in this paper is the issue of limiting customary trade within fisheries with potential for detrimental impacts to subsistence users attempting to meet their consumptive needs from stocks with low levels of available harvestable surplus or from stocks which require conservation management measures. The avenues for identifying and restricting customary trade of subsistence harvested fish are outlined at the conclusion of this document. Although the Federal Board has historically treated all subsistence uses as equal, with a few exceptions, the mechanism for prioritizing federal subsistence uses exists through building a supportive record. Prioritizing the subsistence user consumptive needs over customary trade of fish for cash may be defensible if the legal record is carefully constructed through the federal subsistence regulatory process.

The following chronology contains references to customary trade related materials on file with the Department or located on the World Wide Web. The inclusion of the following events, documents, lawsuits, regulatory proposals, and reports, is intended to educate the reader on the development of customary trade in Alaska. This document will include examples of what has been attempted with customary trade in Alaska's subsistence fisheries. A review of past events may assist in the development of solutions to the complex issue of customary trade.

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<sup>1</sup> Title 50: Wildlife and Fisheries Subpart E-Pacific Halibut Fisheries §300.66 (j) Prohibitions.

## **CHRONOLOGY OF ISSUES RELATED TO DEVELOPMENT OF FEDERAL BOARD AND STATE REGULATION OF CUSTOMARY TRADE OF FISH**

### **1973-75: Authorization of Sales of Salmon Roe from the Yukon and Kuskokwim Region Subsistence Fisheries**

Beginning with the 1973 season, nearly all commercial salmon buyers on the Kuskokwim area and a few buyers in the upper Yukon area augmented their roe production to some extent from subsistence channels. It was estimated, for example, that illegal sales of subsistence roe in 1973 represented 10–15% of the reported commercial roe production on the Kuskokwim area. In spring 1974 it was apparent that several buyers were gearing up to purchase even larger amounts of subsistence roe.

Three bills were unsuccessfully introduced to the Alaska legislature in 1973 to authorize sale of roe from subsistence caught salmon in the Yukon and Kuskokwim drainages. The purpose of the legislation was to allow fishermen to sell the roe normally discarded from traditional harvest levels. Commissioner James Brooks legalized unrestricted sale of subsistence harvested salmon in the Arctic-Yukon-Kuskokwim region with an emergency regulation effective on June 15, 1974.

Senator George Hohman of Bethel introduced a bill that was adopted by the legislature authorizing such sales in 1975 through SB 451 am Chapter No. 99, signed by the Governor on May 29, 1975 and effective on May 30, 1975. The enactment modified 5AAC 03.805 and .810 under authority of AS 16.05.827 and 16.05.831. This was the second bill introduced in 1975 authorizing the sale of roe from subsistence caught salmon and was identical to SB 96 introduced earlier that year. SB 96 inadvertently contained an effective date of August which required a second bill (SB 451) to be passed in order to effectively be in place for the 1975 fishing season.

1. Expiration date of January 1, 1977
  - a. The expiration date was extended to encompass the 1977 fishing season through Ch. 56 SLA 1977 (SB 197 am H) extending the expiration date for sections 1(a) and 2 of ch. 99 SLA 1975 from January 1, 1977 to January 1, 1978. The Effective date of SB 197 am H was May 25, 1977.
2. All sellers required permits issued by the Commissioner.
3. The Commissioner could close any or all areas due to carcass wastage, damage to stocks, or circumvention of management programs.
4. If subsistence catch in an area exceeded or was likely to exceed 10% of the 1974 subsistence catch for the area, the Commissioner shall close the area to the sale of subsistence salmon roe. This was based upon the 1970-1974 average harvests.
5. The State Board may adopt regulations necessary to allow the sale of roe based on traditional subsistence needs coupled with maintenance of salmon stocks on a sustained yield basis.

In order to administer the legislation, the Department Commissioner issued an emergency regulation in June, 1975 which controlled the purchase and sales of subsistence roe in portions of the region. The key elements of the emergency regulation were:

1. Permits are required of all persons or companies purchasing or processing subsistence-caught roe.
2. Revocation of permits upon violation of permit terms, regulations, or laws.
3. Strict reporting requirements in regards to amounts of subsistence-caught roe in order that estimates of subsistence harvests can be made.
4. Prohibition of subsistence-caught roe sales when subsistence harvests are likely to exceed traditional personal needs.
5. Prohibition of subsistence-caught roe sales in districts and subdistricts where salmon runs are especially vulnerable to overharvest or where subsistence catches in the past have been negligible.

**1975, December: Alaska Board of Fish Promulgated Regulations for the 1976 and 1977 Yukon River Fishing Seasons Similar to the 1975 Emergency Regulations.**

The Board regulations contained an import provision which provided that roe sales could be prohibited by emergency order when subsistence salmon catches exceeded or were likely to exceed the 1970–1974 average annual harvest in any district, subdistrict or portion thereof.

**1975-1977, Summer: Management of Yukon River Sale of Roe from Subsistence Fisheries.**

The Department established subdistrict quotas for king and chum salmon based on average roe weight per female and sex ratios by subdistrict beginning with the 1975 season. The Department further refined this quota system in Subdistrict 4 by allocating quotas among village clusters and between the fall and summer chum runs based upon historical subsistence catches from each run. The allocations were developed because during the 1975 and 1976 seasons, nearly all of the subdistrict 4 quotas were taken in the lower portion of the 350 mile long subdistrict and to prevent all of harvest from one run. The sale of roe from subsistence-caught salmon was allowed only along the Yukon River and portions of the Tanana River to prevent the inception of “roe fisheries” in areas which no appreciably subsistence fisheries previously were sustained and to prevent over fishing in areas if an increased harvest were occur.

Multiple emergency order actions were issued to prohibit the sale of Yukon River subsistence harvested roe during the 1977 season as roe quotas were exceeded by district and species.

Harvests were monitored by requiring processors to complete roe tickets (modified fish tickets) on each purchase of eggs to submit production reports twice weekly. The management strategy required that in-season estimates of catches be obtained by translating pounds of roe sold to numbers of fish using sex ratios and average roe weight information from catch samples.

### **1977, February: Sale of Subsistence Caught Salmon Roe from Arctic Yukon Kuskokwim Region Report to the Alaska Legislature**

The Department produced A-Y-K Region Special Report #11 for thorough review by the Legislature of the sale of roe from subsistence caught salmon allowed in the Arctic-Yukon-Kuskokwim region beginning in 1974. The report was intended to assist the Legislature with deciding if the sale of roe should continue beyond the 1976 season. The following December 1977 report to the State Board captures the content of the February 1977 report.

### **1977, December: Sale of Subsistence Caught Salmon Roe from Arctic Yukon Kuskokwim Region Report**

Prior to the 1978 enactment of the State's subsistence laws, the Department submitted a report to the State Board, titled *Sale of roe from subsistence caught salmon in the Arctic-Yukon-Kuskokwim Region 1974-1977*. The Department report identified a wide range of problems with implementing the statute. For example, inspection of landing records and post season subsistence interviews indicated subsistence users were under-reporting chum salmon harvest by up to 40%. Notes collected from smoke house inspections speculated smoke houses contained surplus dried fish which would likely spoil. Inseason management was very difficult, and the quotas were exceeded prior to the Department's knowledge of harvest levels. Of most concern was an indication of changes in successful fishing effort to satisfy intensely competitive buyers of subsistence roe. Fishing effort significantly increased during the subsistence roe season closure announcements as fishermen expended additional harvest effort up to the announced closure time. Harvest efforts significantly declined during fishing periods when the sales of roe was prohibited. Such changes in effort timing indicated the fishery exhibited profit motivation. Data indicates subsistence fishermen synchronized their fishing activities with the openings providing for the sale of roe and fishing was reduced when sale of roe was prohibited. Abuses associated with the subsistence roe fishery were difficult to detect by conventional fishery surveillance methods, such as aerial surveys and boat travel, and were not possible to monitor in short duration. Wastage, misuse, illegal sales during closures, and overfishing of the salmon resource were documented for specific times and locations during the four years summarized in the report. Prohibition of roe sales was predicted to result in stabilization of the fisheries at risk, or reduction of subsistence salmon catches, especially for chum salmon.

### **1977, Fall: Alaska Board of Fisheries Prohibits Sale of Subsistence Caught Salmon Roe in the Yukon and Kuskokwim Districts.**

The State Board's action reflected their concern that the policy of affording subsistence fishing the highest priority use was threatened by over-fishing, wastage and other abuses associated with subsistence roe sales. Continuation of such sales would require additional restrictions to be placed on existing subsistence and commercial fisheries, and might even impact maintenance of salmon stocks which were being harvested at or near the maximum allowable rate.

**1978: State Subsistence Law Enacted by Alaska Legislature, House Journal 1154-55 (1978).**

The Legislature of the State of Alaska enacted amended statute Sec. 2 AS 16.05 to address the need to develop a statewide policy on the utilization, development and conservation of fish and game resources, and to recognize that those resources are not inexhaustible and that preference must be established among beneficial users of the resources. The Legislature also determined that it was in the public interest to clearly establish subsistence use as a priority use of Alaska's fish and game resources and to recognize the needs, customs, and traditions of Alaskan residents.

As a part of the enacted law, Sec. 15 AS 16.05.940 was amended by adding a new paragraph which read:

(26) "subsistence uses" means the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of non-edible byproducts of fish and wildlife resources taken for personal or family consumption, and for the use of customary trade, barter or sharing for personal or family consumption...

**1979: Legislative History of Alaska National Interest Lands Conservation Act Recognizing Customary Trade as a Subsistence Use:**

The Committee does not intend that "that customary trade" be construed to permit the establishment of significant commercial enterprises under the guise of "subsistence uses." The Committee expects the Secretary and State to closely monitor the "customary trade" component of the definition and promulgate regulations consistent with the intent of the subsistence title (U.S. Senate 1979:234).

§803. As used in this Act, the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade. For the purposes of this section, the term--

(1) "family" means all persons related by blood, marriage, or adoption, or any person living within the household on a permanent basis; and

(2) "barter" means the exchange of fish or wildlife or their parts, taken for subsistence uses--

(A) for other fish or game or their parts; or

(B) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature

**1980, December 2: Alaska National Interest Lands Conservation Act was Enacted into Law.**

**1981: Department of Law Memo to Governor Jay Hammond from Attorney General Wilson Condon:**

Alaska Attorney General Wilson Condon wrote a memo to Governor Jay Hammond titled “Ability of Alaska Fish and Game Statutes, Regulations, and Programs to Satisfy Title VIII Subsistence Standards in ANILCA Department of Law File No. A66-120-82.”

The memo was a response from the Alaska Department of Law to a question posed through Department Commissioner Ronald Skoog. The memo suggested that Yukon River commercial fishing “may be consistent with the federally mandated priority for customary trade”...“it is evident that the link between rural characteristics and subsistence uses is part of Alaska Law. Therefore, it is our (Department of Law) opinion that existing State laws and procedures... virtually guarantee the result required by the standards outlined in Title VIII of ANILCA.” Attorney General Condon was suggesting that in a time of shortage, “the Board may decide it is in the public interest to protect these subsistence users totally, by allowing them to participate in a somewhat restricted extent in both the commercial and subsistence systems (page 33 of memo).”

Additional comment of interest: “Importantly, neither the State nor the federal definition of subsistence prohibit customary trade in furs, even for cash, therefore, there do not no appear to be any major inconsistencies with State and federal law.”

**1982: State Law brought into consistency with ANILCA.**

The joint Boards of Fisheries and Game adopted a regulations specifying that customary and traditional uses are rural uses (5AAC 99.101), and the Department of Interior certified the state’s consistence with ANILCA.

**1982: State Law subsistence repeal initiative.**

A statewide ballot initiative to repeal the state subsistence law passes with 59% of the votes in favor or repealing 5AAC 99.101.

**1986, April 4: Response letter from Office of the Solicitor for the United States Department of the Interior Associate Solicitor Gale A. Norton to State of Alaska Attorney General Harold Brown.**

Attorney General Harold Brown sent a letter to the Department of Interior concerning the Department of Interior’s interpretation of certain provisions of Title VIII of ANICLA on February 6, 1986. The response letter from Department of Interior contains various clarifications of specific interpretations of ANILCA Title VIII. The interpretation of interest as it applies to customary trade can be found on page 6 of the document which indicates all subsistence uses are equally important and no uses are unimportant. The intent of this statement was used as

justification by the Federal Board to deny prioritizing amongst subsistence uses of Chinook salmon in the Yukon River.

**1988, April 1: Fish and Wildlife Protection Memorandum:**

Colonel Jack W. Jordan, Director Alaska Fish and Wildlife Protection (FWP), to the Alaska State Legislature urging the Legislature to review the 1977 Legislative Report on the sale of subsistence salmon roe as the report still accurately represents the current FWP concerns. Allowing customary trade of subsistence harvested salmon roe on the Yukon River will reintroduce the same enforcement problems summarized in the 1977 Legislative Report.

**1988, November 28–December 17: State Board Proposal 2:**

Proposal number 2 was submitted to the State Board by the Attorney for the Tanana Fish and Game Association requesting the establishment of a program for the sale of subsistence salmon roe in Yukon River Subdistricts 5A and 5 B for fall chum. The State Board did not vote on the original proposal or the amendment to expand this proposal into 4B and 4C areas. Rather, deliberations focused entirely on the issue of whether the cash sale of fall chum salmon roe was a customary and traditional subsistence activity. The State Board found that it was not, and voted 1-6 to defeat motion. The State Board declined to authorize the sale of roe as a type of customary trade under State subsistence law.

**1990, July 1: Federal Subsistence Fish Regulations**

Federal subsistence fish regulations §\_\_\_\_.26(d)(1): applied only to non navigable waters within conservation system units; contained language for customary trade as follows:

(§\_\_\_\_.26(d)(1)): no person may buy or sell fish, their parts, or their eggs which have been taken for subsistence uses, unless, prior to the sale, the prospective buyer or seller obtains a determination from the Federal Board that the sale constitutes customary trade.

**1990, August 14: United States of America, Plaintiff-Appellee, v. Byron v. Skinna, Defendant-Allelliant, 915F.2d 1250 (9<sup>th</sup> Cir 1990) – Klawock. Federal Circuits Docket Number 88-3268:**

An appeal was filed by Skinna who “unlawfully transported in interstate commerce of illegally taken herring spawn on kelp.” The defendant contended that Alaska fishing regulations underlying his Lacey Act conviction are invalid because they conflict with ANILCA. Skinna in a group effort sent 580 pails (estimated 32,000 pounds) of herring spawn on kelp packed in brine solution from Klawock to Seattle. Skinna arranged sale for \$91,000 to a Canadian who was planning on repacking for shipping and sale in Japan. The load was seized and was auctioned for \$274,000.

Skinna's contention on the failed appeal, however, was that these Alaska laws are invalid based on conflict with protections of subsistence fishing provided by federal law, specifically the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. Secs. 3113, 3114.

Skinna's argument on this appeal is based on the alleged inconsistency of Alaska's laws with the provision of ANILCA that defines subsistence use to include "customary trade." 16 U.S.C. Sec. 3113. The final judgment denying Skinna's appeal follows:

1. Skinna makes no argument that herring spawn on kelp do not fall within the prohibition of section 01.010(d) because they are not eggs of subsistence-taken fish. Indeed, his argument on appeal is that the prohibition on sale, like other provisions of Alaska law, is inconsistent with ANILCA. For the resolution of Skinna's appeal, it is not necessary that section 01.010(d) apply, because Skinna's conduct violated the other provisions of Alaska law cited above governing subsistence taking of herring spawn on kelp, and specifying permissible subsistence uses
2. After the events in issue here, the Supreme Court of Alaska invalidated the exclusion of urban residents from subsistence hunting and fishing. *McDowell v. Alaska*, 785 P.2d 1 (Alaska 1989). We do not interpret this decision as affecting the Alaska regulations as applied to Skinna, a rural resident, at the time of the events in issue here
3. Skinna also argues that the limitations that Alaska places on subsistence uses violates the priority that ANILCA confers on such uses. See 16 U.S.C. Sec. 3114. This argument fails along with his primary contention; he has failed to show that he was engaged in a subsistence use
4. Skinna asserts that if his ANILCA claim is rejected for failure properly to present it in district court, then ineffective assistance of counsel will become an issue. He elaborates no further, and the record is clearly insufficient to determine any questions of ineffective assistance on this record on direct appeal. We therefore do not address the question

**1991, July 5: Unites States of America vs. George J. Alexander and Harry Peele. Nos. 89-30253, 89-30259**

Defendants Alexander and Peele were convicted of trafficking herring roe on kelp.

Defendants Peele harvested over half a ton of herring roe on kelp in Southeastern Alaska and enlisted Alexander's help in selling it. However, they had permits for only 444 pounds. Their plan to sell the harvest in Canada began to when they were unable to a buyer and the herring roe began to rot. They then attempted to enter the United States, hoping to unload their harvest in the state of Washington. Alerted by Canadian officials, United States Customs agents cited the Defendants. Defendants were charged with violating the Lacey Act, which makes it illegal to transport in interstate or foreign commerce any fish or wildlife taken or sold in violation of state law. 16 U.S.C. Sec. 3372(a)(2)(A). The jury convicted and the defendants appeal failed.

## **1992, July 10: Bill review letter to Governor Hickel from Attorney General Cole**

The letter discusses customary trade on pages 4–5: Outlines changes in subsistence regulations between 1986 and 1992. CCS House Bill 601 represents a significant step forward in resolving the legal issues facing this state concerning subsistence and for the first time defines “customary and traditional” and “customary trade.” The definition of customary trade clarifies that the boards may restrict sale of subsistence-taken fish and game for cash. Such sales would be subject to board regulation and would place an affirmative duty on the boards to identify customary and traditional sales of subsistence-taken fish or game that do not raise above the level of regular commercial activities.

### **Letter of intent number 2 for CCS HB601:**

The letter of intent<sup>2</sup> defined customary trade and was adopted by the conference committee and passed by both the House and the Senate states: (no copy on file, only referenced)

The term “limited noncommercial exchange” in the definitions of “customary trade” in Section 5 of CCS HB 601 is intended in particular hunts or fisheries, such as the sales of salmon strips in village stores.

### **The 1992 Senate Journal at 3679; 1992 House Journal at 4525:**

We believe the bill does not require the boards allow some customary trade of fish or game taken in every hunt or fishery. Also, we believe that sales of fish to commercial processors would not be authorized by this definition, but would fall squarely within the meaning of “commercial fishing” found in AS 16.05.940(5).

### **1992, September 30: Department of Law Memo by Rob Nauheim and Bonny Harris:**

This memo was written to Department Commissioner Rosier and was an analysis of 1992 subsistence statute and discusses customary trade on pages 18-19:

- a. Customary trade is addressed in AS16.05.940(37) (later moved to (8) as terms were alphabetized in 2003).
- b. The plain language of the provision suggests that all exchanges of fish and game (except for furs and furbearers) for cash are excluded from the definition of “customary trade” unless these exchanges are limited, noncommercial, and for minimal amounts of cash. In separate letters of intent from the House and Senate, the legislature expressed its view that the phrase “limited noncommercial exchange” was intended to provide “some limited traditional commercial exchanges in particular hunts or fisheries such as the sale of salmon strips in village stores.” See 1992 House J. 4524; 1992 Senate J. 3679. During the Conference Committee meetings, the legislature discussed certain existing limited traditional commercial exchanges, such as the sale of salmon strips in village stores. The legislature indicated that it did not

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<sup>2</sup> On file in State of Alaska Archives.

intend to provide for new or expanded commercial exchanges (see Conference Committee Meeting at 101-103). Limited commercial exchanges must be for minimal amounts of cash. This last sentence had following footnote:

“It is within the discretion of the boards to establish reasonable guidelines and limits by regulation, consistent with the statute, concerning the maximum amounts of cash or fish and game that may be exchanged as customary trade.”

**1993, February: Draft State Board report for Southeast Alaska herring:**

Draft State Board report on subsistence harvest and use of herring roe in Southeast Alaska constructed. In 1993 the State Board determined the sale of herring roe on kelp from Southeast Alaska was customary trade and provided for this in regulation 5AAC 01-717.

A coversheet was found in the records addressed to Department Rich Cannon listing the four 1992 documents above. In a single sentence, the coversheet indicated the four documents were being sent to follow up on discussions regarding customary trade component of the State subsistence law.

**Missing—any documents or Customary Trade related materials in the Department’s Anchorage office files between 1993 and 1999**

**1999, October 1: Federal Regulation for subsistence use of fish effective.**

The federal subsistence program began active management of the federal subsistence fisheries on federal public lands.

**2000, July 6: United States Department of Interior solicitor Ken Lord Memorandum**

Ken Lord produced a memorandum titled “Customary Trade Regulations and the Enforceability of Alaska’s Subsistence Scheme on State and Federal Lands.”

- Memo discusses lack of definition for “significant commercial enterprise.”
- Discusses difference between federal and State regulations and how State focuses on prohibiting the “receiving end” or transporting illegal harvest while federal regulations focus on the actions of the seller of subsistence taken fish.
- Discusses FWS enforcement officer concerns about confusion of the public and potential abuses of subsistence due to federal regulations.
- Concerns about State enforcement of state regulations on non federal lands and questions as to whether a federal subsistence user selling strips on state land be cited for illegal activity.
- Federal legal counsel conclusion – State enforcement officer cannot cite federal subsistence users who are trading subsistence harvested fish with processors on federal lands or claimed waters.

**2000, December: Federal Board established a Customary Trade Task Force.**

The Customary Trade Task Force (Task Force) was established to develop regulatory language to clearly define the intent of “customary trade” as specifically identified in title VIII of ANILCA. The Task Force membership consisted of one representative of each of the 10 Regional Advisory Councils, and federal agency staff (fisheries biologist, cultural anthropologists, a council coordinator, and enforcement personnel). The Department was invited to participate after a request was placed by the commissioner and a Department representative was invited to attend the May 30, 2000, meeting. The Task Force was asked to research the following questions:

- What limits should be placed on exchange for cash between rural and nonrural residents?
- Should there be a cash limit between rural residents?
- How will cash sales affect subsistence needs, traditions, and values of the subsistence life style?

The Task Force conclusion was: Regional Advisory Councils and rural residents emphasized that in most cases the traditional practices involving “customary trade” are self-limiting and this concept should be utilized as a corner stone in developing regulations.

**2001, August 27–October 31: Regional Advisory Council meeting materials published with Customary Trade briefing document and draft regulatory language.**

A briefing document and draft regulatory language included in the Regional Advisory Council book for review and comment during the September and October 2001 Regional Advisory Council meetings. Also, during this time frame, the consultation with Tribal Governments took place.

**2001, November 2: Customary Trade Task Force evaluates received comments.**

The Task Force met to consider comments received from the Councils, Tribal Governments, and general public.

**2001, December 12: The Federal Board considered six options for a proposed rule regarding customary trade:**

After hearing the report of the Task Force, the six options, and comments from Regional Advisory Council Chairs, Department, Alaska Department of Environmental Conservation, and members of the public, the Federal Board decided to implement Option 5 and initiate a formal rulemaking process with this proposed rule, as follows:

Options 5: Publish the proposed rule for public comment with the draft regulatory language, as recommended by the Customary Trade Task Force, except maintain status quo for transactions between rural residents and others. Through development and review of draft regulatory language for customary trade by the Task Force and Regional Advisory Councils, there was

general support and consensus for unlimited transactions between rural residents and for the prohibition of transactions with fisheries businesses. Many of the concerns raised have been directed at the transactions between a rural resident and others. Option 5 would maintain the status quo for transactions between a rural resident and others, allowing further discussions and analyses to occur before proposing further restrictions on the transactions between a rural resident and others in a proposed rule. The discussion can be found in the meeting transcripts.

**2001, March 7: State Board chair John White, representing the State Board subsistence committee, letter to Federal Board chair Mitch Demientieff:**

The letter summarized points regarding proposed federal customary trade language:

- State Board supports regulations which will “prevent abuses.”
- To prevent abuses, significant cash sales of subsistence caught salmon must be prohibited.
- Request for strict limits of number of pounds that can be traded for cash.
- Trade should be customary and traditional between rural residents only.
- The subsistence trade of other species of fish, plants and wildlife should be allowed only if the Federal Board has found such practices are customary and traditional.
- The issue of food safety is a concern to the State Board.
- The State Board believes good record keeping is a necessity of good salmon management.

**2001, August 1 and 2: Customary Trade Task Force Meetings:**

The Task Force, charged with developing language to preserve traditional customary trade practices and prevent abuse recognizing regional differences in customary trade between regions, met three times. Its draft regulatory language included:

- Allowing cash exchanges of subsistence-caught fish between residents defined as “rural” under federal law,
- Allowing cash exchanges between rural subsistence users and others, with an annual limit of \$1,000 for each family member for salmon; and,
- Prohibiting fisheries businesses from receiving subsistence-caught fish.
- The \$1,000 limit would apply to salmon only. (Regional advisory councils, asked to comment on the task force proposal in the fall of 2001, were free to recommend regional modifications to the \$1,000 limit proposed by the Task Force).
- For other species, the Task Force recommended no annual cap be established unless regional advisory councils recommend specific annual dollar amounts for fisheries, such as eulachon, sheefish, and whitefish.
- The Task Force also recommended a record-keeping requirement.

Representatives of Bristol Bay and Kodiak/Aleutians Regional Councils favored more restrictive limits than the Task Force proposed \$1,000 limit. Western Interior and Seward Peninsula, however, characterized the \$1,000 cap between rural and non-rural residents as possibly too restrictive. Noting that the cash value of salmon fluctuates, some subsistence users said the cap on cash exchange should be based on numbers of fish or percentage of catch, rather than a dollar amount. The Department recommended the percentage model. Commercial fishermen at the meeting expressed fears that establishing limits would create an incentive to take more subsistence fish, putting additional pressure on smaller salmon runs used for subsistence. Many at the meeting, including the Department, said more time was needed to develop the proposal. Some villagers said additional comments and information on trade have yet to be gleaned from village councils and Native elders. Several said limits of cash exchanges should be set specific to customs of each region, an approach favored by the Department. Southcentral Regional Advisory Council chair Ralph Lohse, who served on the task force that drew up the proposed rule, said toward the end of the recent meeting, “We’re not ready for a blanket yet (on the amount of cash rural residents could receive from others), although it would be nice, and it would be handy.” He was referring to the amount of cash rural residents could receive from others. Carl Jack, Office of Subsistence Management Native Liaison, reported a need to further develop a tribal consultation process.

The Task Force reviewed draft language as it might apply statewide and regionally, addressed the following issues, among others:

- **Use the term “rural residents.”** The Task Force considered using the term “federally qualified subsistence users”; however, that term refers to customary and traditional use determinations. “Rural residents” is less limiting.
- **Whether to include a limit.** The Task Force clearly did not want to limit exchange at this level; however, concluded not to include the word “unlimited.” since it is implied. There was discussion about protection of the resource. The federal agencies have in-season management authority and can quickly take action to protect if necessary; also the Special Action process can be used.
- **Definition of “processed.”** The intent of the Task Force is to allow the sale of whole fish and concluded with the decision to add the word “unprocessed” in the second line.
- **Use of “receive.”** The Task Force concluded that if a commercial entity may not receive subsistence fish, they cannot get them in any way – not by barter or purchase or as a gift – for commercial purposes.
- **Cash cap.** Establish maximum sales limits by setting a maximum cap on amount of cash received for sales of federal subsistence salmon.
- **Salmon only.** Since salmon is the primary species of concern, the Task Force decided to recommend limiting exchange for cash for salmon only. If necessary for conservation, the limit can be expanded to include other species.
- **Value.** The value is determined by the buyer.

- **Record keeping.** Without record keeping there is no way to know when the limit has been exceeded. In addition, there are no data for Councils to use when making future decisions.
- **Cash Limit.** Original language suggested a limit of \$500. The Task Force considered setting a limit between \$1,500 and \$500, or leaving this task completely to the Regional Councils. The Task Force also considered recommending that no limit be set; however, realized that unlimited trade would not satisfy the articulated need for a clear, enforceable regulation. It was noted that it is easier to adjust a limit than to initiate one later. The Task Force also expressed concern that setting a cash limit may be interpreted by future users as a goal or a right. The Task Force initially left limits undetermined the issue was later revisited and it was noted that the Federal Board's charge included recommendation of a cash limit. It was recognized that unless some measure was set, the new regulation would mirror current failings by providing no definition of "significant commercial enterprise." If no limit was set, enforcement may consider the trade to be a significant commercial enterprise. The Task Force recommended the limit be set at \$1,000 as a compromise. They stated this was low enough to avoid being considered commercial or to hurt the species but enough to meet cash needs. They also considered current situations at different salmon fisheries.

**2001, October 29: Department Commissioner Frank Rue Letter to Federal Board:**

Commissioner Frank Rue wrote a letter to the Federal Board chair Mitch Demientieff in opposition to the direction of the Federal Board regarding customary trade. The letter described the State's experience through the State Board legal procedures to establish customary trade regulations. The letter included the importance of the State Board's process in the determinations of the amounts of resources that are necessary for subsistence. The letter emphasized the need for acting on proposals that are species and site specific regulations instead of using a blanket approach. The letter also explained the evolution of customary trade within the State's legal framework, and that the current procedure works well for the State. The letter stated that passage of a one-size-fits-all type of regulation cannot possibly work, and that customary trade should be addressed on a case by case basis without ignoring the tremendous diversity of trade that occurs in Alaska. The letter also points out concerns that the results of adopting the current federal version will invite abuse, rather than prevent it, and would likely prove detrimental to subsistence users. The letter also seeks clarification on several topics including: 1) questioning the lack of definition for "substantial commercial enterprise;" 2) potential for a \$1,000 limit per family to exceed commercial fisheries income in certain area; 3) suggestion to establish limits by pounds or numbers of fish rather than cash value; and 4) a request to defer the issue until more documentation about practices becomes available.

**2001, November 1: Task Force meeting:**

The Task Force met to review and consider public comments and Regional Advisory Council recommendations and to develop further recommendations to the Federal Board on the draft regulatory language.

**2001, December 12: Federal Board adopts customary trade regulations:**

The Federal Board adopted Customary Trade regulations. No dollar amount was set on exchanges for cash of subsistence harvested fish, their eggs, or their parts to support personal and family needs. The regulations restricted individuals, businesses, or organizations from purchasing, bartering, or re-selling subsistence-taken fish and fish products as a significant enterprise. The term “significant commercial enterprise,” determined by federal agency staff to be unenforceable and hamper effective law enforcement, remained undefined. The three-part language of the proposed rule was:

- **Transactions Between Rural Residents** – The exchange between rural residents in customary trade of subsistence-harvested fish, their parts, or their eggs, legally taken under the regulations in this part, unprocessed or processed using customary and traditional methods, is permitted.
- **Transactions Between A Rural Resident and Others** – Customary trade for fish, their parts, or their eggs, legally taken under the regulations in this part from a rural resident to commercial entities other than fisheries businesses or from a rural resident to individuals other than rural residents is permitted, as long as the customary trade does not constitute a significant commercial enterprise.
- **No Purchase By Fisheries Businesses** – If you are required to be licensed as a fisheries business under Alaska Statute AS 43.75.011, you may not purchase or receive for commercial purposes or barter or solicit to barter for, subsistence-taken fish, their parts, or their eggs.

**2002, April 1: The Federal Board set the deadline for written public comments on the customary trade proposed rule.**

**2002, On April 30: State Board chair Ed Dersham sent a letter to Federal Board chair Demientieff. The letter addressed the following issues:**

- The State Board agrees with Federal Board’s goal to prevent abuses of customary trade.
- The State Board wants a strict limit set in the number of pounds or fish per season exchanged for cash.
- Without a limit, trade it could be expected to increase substantially and be detrimental to subsistence users who harvest fish for personal and family consumption.
- The State Board wants Federal Board to allow customary trade only where Federal Board has found such use is customary and traditional between rural residents.
- Necessity for food safety including, water source, food preparation surfaces, disinfecting procedures, and location of the preparation area relative to other facilities such as dog lots etc.

- Concerns for recordkeeping by engaged users for the purposes of good salmon management through accountability of biomass removed.
- Support for development of federal regulations addressing customary trade.
- State Board support for allowing only a limited, noncommercial level of customary trade in salmon, based on documented abuse in 1973-1977 customary trade in subsistence caught salmon and roe.

**2002, April 25: Letter from Alaska State Legislature to Federal Board and the U.S. Fish and Wildlife Service:**

- The letter did not express support for the existing proposal and identified a list of problems.
- Recommends that the Federal Board examine the intent of Congress for the incorporation of Customary Trade in ANILCA and identifies the inclusion was intended to continue to allow for trapping.
- Expresses concerns regarding the development of a competing commercial fishery if the Federal Board approves unlimited customary trade or cash sales of federal subsistence harvested fish.
- Expresses serious concerns regarding “unlimited” sales between rural residents.
- Recommends ensuring a permit is required for sales between rural subsistence users and other cash buyers.
- Suggests the \$1,000 cash sales limit is too high and might create an open ended commercial fishing license and fishery for federal users.
- Expresses concerns about lack of any monitoring program for transactions such as permitting and reporting. Expansion of customary trade may well jeopardize existing fisheries including commercial fisheries that are critical to rural residents.
- Recognizes that state enforcement efforts may not be able to assist federal efforts.
- Expresses concern about the need for a fool proof system to prevent subsistence fish from entering commercial markets.
- States: “It is our hope the federal regulators would not continue on a mission of creating unnecessary conflicts with existing state fisheries.”
- Recognizes that the sales of any significant numbers of subsistence fish will place unreasonable pressure on the already over-allocated resources, including for subsistence.
- Concurs with the Department’s position to ensure customary trade practices are identified by species and area rejecting a statewide blanket regulation for all species.
- Expresses concerns about sales limit per person and a preference for limits by household.

- Notes that authorizing roadside and dock sales could create an unregulated commercial fishery.
- Raises concerns about the priority of subsistence fish sold compared to subsistence fish harvested for personal and family consumption.

**2002, May 13–14: Public comment to the Federal Board prompt deferral of Customary Trade proposals January 2003.**

Public comment during the May 2002 meeting prompted Federal Board to defer action until January 2003. Public testimony was extended from August to November 1, 2002.

**2002, June 12: Office of Subsistence Management news release deferring Customary Trade deliberations until January 2003.**

News release from OSM describing deferral of customary trade deliberations from May 2002 to January 14, 2003 to allow for more public input.

**2002, October 28: Letter from Alaska Department of Environmental Conservation to Federal Board urging changes to proposed Customary Trade regulations.**

Letter from Alaska Department of Environmental Conservation Director Janice Adair to Federal Board Chair Mitch Demientieff urging changes in the proposed Customary Trade regulations for the sake of public health protection. The author notes that proposed regulations will allow subsistence caught fish to be sold to anyone except a licensed fishery business, and that fish may be processed using customary and traditional methods. The letter also stated Alaska has the highest rate of food borne botulism in the United States and *all* cases have been associated with traditional Alaska Native foods. The letter urges the Federal Board to limit the sale of subsistence fish to only fresh or frozen fish and to make clear that these sales may be made to individuals only, not to businesses.

**2002, November 1: Association of Village Presidents provide comments on Customary Trade**

Comments released from the Association of Village Council Presidents (AVCP) regarding customary trade and the cash sales of subsistence caught fish, eggs, and their parts. The association represents villages ranging between the Yukon Kuskokwim Delta and Bethel.

- The AVCP opposed the sales between rural and non rural persons or sales to markets.
- The AVCP found that the cash sales of subsistence caught fish to non rural persons or businesses are inconsistent with customary and traditional practices of the people in that region.
- AVCP expressed concerns regarding historical documentation of customary trade to base regulatory decision upon because such documentation has never been recorded in much of

the region. They also noted that this could be restrictive to subsistence users in areas that have not been studied.

- The AVCP expressed concerns about how information on historic amounts of trade is interpreted considering most trade previously took place without cash.
- The AVCP expressed concerns about what time frame the Federal Board will use to determine historical use amounts. With the introduction of gas dependant machinery for subsistence activities, cash is needed to pay for gas to participate in the subsistence fisheries. It noted changes in subsistence hunting and fishing technologies, population increases, and other evolving factors. It expressed concern that historical use amounts could become a straight jacket for users who are evolving in response to social and economic changes.
- AVCP supported a ban on sales of subsistence caught fish to non-rural residents and business while keeping the significant commercial enterprise regulation in place.

### **2003, January 7: Interagency Staff Committee meeting regarding Customary Trade:**

Interagency Staff Committee (Staff Committee) met regarding Customary Trade. The Staff Committee formulated a recommendation to modify the proposed rule for 50CFR 100.26 (11) (12) (13) to restrict the use of fish sold under federal subsistence regulations. The proposed regulation as modified by the Staff Committee, would establish a regulations preventing the cash exchange of subsistence-harvested fish where the greatest potential for abuse could occur, i.e. commercial transactions. Other transactions would be permitted to occur, safeguarding traditional and customary practices. The staff committee recommended modifications follow:

(12)(a) restrict the use of subsistence harvested fish, their parts, or their eggs, purchased or acquired by individuals other than rural residents or commercial entities other than fisheries business must be used for personal or family consumption of the individual who purchased the fish and cannot be resold

(13) No Commercial Transactions (a) You may not sell subsistence harvested fish, their parts, or their eggs to any individual, business, or organization required to be licensed as a fisheries business under Alaska Statute 43.75.011. (b) If you are required to be licensed as a fisheries business under Alaska Statute 43.75.011, you may not purchase or receive with the intent to sell subsistence harvested fish, their parts, or their eggs.

Excerpts from Department comments in response to the Staff Committee Customary Trade recommendations to the Federal Board, “the position of the Interagency Staff Committee loosen up customary trade guidelines and create the potential for a massive reallocation of Alaskan fisheries never envisioned in the ANILCA passed by Congress.” The Department comments further describe the potential for abuses of Customary Trade without federal regulations which define Customary Trade, an allowable level of customary trade, or significant commercial enterprise.

**2003, January 9: Interagency Staff Committee meeting summary email by the Department liaison describing the majority and minority positions of the Staff Committee before the Federal Board meeting:**

Minority Position:

- Adopt language which would clearly prohibit customary trade exchanges with licensed fisheries and other businesses.
- Defer action on exchanges between rural and other persons, and in the future approach further definition of customary trade that occurs between rural-to-rural and rural-to-other persons. State's recommends deferral noting issues consistently raised by the State and some Regional Advisory Councils have not been adequately addressed but could be in an incremental approach.

Majority Position:

- Adopt the staff recommendation with modifications to prohibit customary trade with any business enterprise and simplify regulatory wording contained in January 14, 2003, Federal Board Book page13.

**2003, January 10: Email from Department of Law Attorney Lance Nelson to Department subsistence liaison team.**

Email from State of Alaska Department of Law Attorney Lance Nelson to Department subsistence liaison team touched upon issue of federal solicitors believing customary trade is not restricted to taking place on federal public lands, though the State disagrees.

**2003, January 10: Memo from Department Commissioner Duffy to Chief of Staff Office of the Governor James Clark.**

Memo from Acting Department Commissioner Duffy to James Clark, Chief of Staff Office of the Governor:

- Memo contains State comments in preparation for the Federal Board meeting.
  - Request Federal Board adopt clear and enforceable language that distinguishes customary trade from commercial or business-related activities.
  - Defer other proposed provisions until Department's requests for regulatory provisions have been addressed.
- Department supports provisions that define the scope of the customary trade practice and clearly distinguish it from commercial or business related activities.
  - Supports an incremental approach to addressing issues which may help the State to consider a more comparable approach in regulations.
- Resale of customary trade items should be prohibited.

- Other Key Provisions Needed:
  - Provide measurable ceiling or limit on the extent of trade, through a percent of total subsistence catch, a dollar amount, a limit to numbers of fish, or through other measures. Limitations should be defined to prevent expansion of potential new sources of increased harvest pressures on fish stocks allocated to subsistence users which could impact depressed stocks. Additional regulatory language should focus on the priority of personal consumption instead of trade.
  - Document the extent and regional nature of customary trade. All information presented lacked an accurate measure of the importance of this practice to subsistence users. A blanket rule should not be applied to all regions and areas where customary trade is not traditional. At least three distinct and potentially complimentary approaches should be considered:
    - Conduct OSM funded research to determine existing practices.
    - Use the annual subsistence salmon surveys by including a query about customary trade.
    - In some situations, permits may be warranted to aid resource management and enforcement.
- Recommends—adoption of language as proposed by Federal Board which distinguishes subsistence from commercial activities and inclusion of language to allow processors to process and hold subsistence users fish without sale. The State strongly recommends federal support and funding to develop case studies in collaboration with the Office of Subsistence Management to better understand and determine existing customary trade practices.

### **2003, January 14: Federal Board adopts final regulations defining Customary Trade**

The Federal Board adopted final regulations defining customary trade. The Federal Board expressed intent to take an incremental approach by adopting language to allow for Customary Trade statewide with the plan of fine tuning regulations over time. The Federal Board recognized regional differences in customary trade practices and noted differing customary trade practices for separate regions of the state.

Evaluation of the Federal Board customary trade modified proposal added ANILCA legislative intent to the record noting: 96<sup>th</sup> Congress 1<sup>st</sup> session (Senate) - Report No. 96-413, the intent of Congress to prohibit the unlimited exchange for cash is clear. The report states that the committee did not intend for customary trade to be construed to permit the establishment of significant commercial enterprise acknowledging it could be highly controversial, arduous, and divisive.

Federal enforcement officials were particularly concerned about record-keeping of customary trade exchanges. In a letter to the Federal Board, the federal Division of Law Enforcement said minimum requirements should include names and addresses of fishermen and fish recipients, origin of fish, and amount of fish and species stating, “Failure to require such documentation

and accountability would prevent effective enforcement, invite abuse and jeopardize legitimate subsistence use of fishery resources.”

The Department comments requested deferral on the first two provisions to:

- Allow more time to research the scope of customary trade statewide,
- Make federal regulations region specific as defined through the Regional Advisory Council process,
- Allow the new administration team to become more engaged (in transition).

The Department objected the lack of any established limits and no tracking mechanism was developed for the entire process. The Department’s comments to the Federal Board focused on the main goal of clearly describing the scope of Customary Trade of subsistence caught fish as a traditional and customary practice that is wholly distinct from commercial or business interests. The phrase “significant commercial enterprise” has never been defined and thus regulations are unenforceable. The Department wanted the Federal Board to provide a measurable ceiling or limitation on the extent of the trade (e.g. percentage of total harvest, dollar amount, number of fish, or other measure, and/or setting a cash value ceiling). The Department wanted the federal process to document the extent and regional nature of customary trade.

The meeting concluded with regulations which allowed federally qualified rural residents to sell fish, their parts, or eggs for cash or for trade. The Federal Board regulations indicated the recipient of the federal subsistence fish (one who paid cash or traded something for the fish) must be for personal or family consumption. Because of this action, the Federal Board basically folded in State of Alaska Department of Environmental Conservation (ADEC) regulations if the federal subsistence users wanted to sell or trade processed fish (strips, canned, etc.).

The regulation adopted by the Federal Board January 14, 2003:

*.27(c)(11) Transactions Between Rural Residents -- The exchange between rural residents in customary trade of subsistence-harvested fish, their parts, or their eggs, legally taken under the regulations in this part is permitted.*

*.27(c)(12) Transactions Between a Rural Resident and Others – (a) Customary trade of subsistence-harvested fish, their parts, or their eggs, legally taken under the regulations in this part, from a rural resident to individuals other than rural residents is permitted, provided that such fish, their parts, or their eggs, are used for personal or family consumption of the individual who purchases the fish. (b) If you are not a rural resident, you may not sell subsistence-harvested fish, their parts, or their eggs.*

*.27(c)(13) No Commercial Transactions -- (a) You may not sell subsistence-harvested fish, their parts, or their eggs to any individual, business or organization required to be licensed as a fisheries business under Alaska Statute 43.75.011 or to any other business as defined under Alaska Statute 43.70.110(1). (b) If you are required to be licensed as a fisheries business under Alaska Statute 43.75.011 or*

*are a business as defined under Alaska Statute 43.70.110(1), you may not purchase, receive, or sell subsistence-harvested fish, their parts or their eggs.*

### **2003, February: Department and Southeast Seiners Association file Fisheries Requests for Reconsideration**

The Department and Southeast Seiners Association filed Fisheries Requests for Reconsideration 03-02 (FRFR03-02) on the Federal Board's approval of Customary Trade regulations on January 14, 2003, for the following reasons:

- Proposed regulations authorize transactions that are not customary and traditional because §803 ANILCA authorizes only subsistence uses, including customary trade, that are customary and traditional.
- The Federal Board did not have any documentation before it established the past or current levels of customary trade of fish.
- No records showed unlimited amounts of cash exchanges were customary.
- The final ruling allowed for an activity that was not proven to be customary and traditional (e.g. selling strips through the mail to non rural individuals for cash etc.).
- The Federal Board decision rejected the Regional Advisory Council's position. 2 of 10 Regional Advisory Councils, Bristol Bay and Southcentral, approved Federal Board language as adopted. The Federal Board responded Customary Trade has nothing to do with harvest or take as justification to override Regional Advisory Council recommendations.

### **2003, July 15: The Federal Board met in executive session to address FRFR03-02, Customary Trade regulations.**

### **2003, August 18: Letter of Rejection sent to Department from Federal Board.**

A letter rejecting FRFR03-02 was sent to Department Commissioner Duffy from the Federal Board chair. The rejection was based upon the methods used by the Federal Board to make customary and traditional findings. The Federal Board makes findings by species for general local or regional areas: *"the Federal Subsistence Board has historically made customary and traditional use determinations on the overall harvest/use of a species in a local or regional area, rather than on whether or not specific uses are customary and traditional."* The Federal Board indicated that once a customary and traditional use finding is made for a species in an area, it has allowed, after harvest, all legal subsistence uses of that resource, including customary trade of fish. An additional point in the FRFR was the Regional Advisory Council positions were "effectively rejected" and such was in violation of ANILCA. The Federal Board dismissed this issue as Section §805(C) addresses taking fish and wildlife not customary trade issues. The Federal Board chair indicated neither claim warranted further investigation.

### **2003, August 19: Department Commissioner Duffy files a Freedom of Information Act**

Commissioner Duffy files a Freedom of Information Act request for a complete copy of the administrative record of the Federal Board's consideration of and January adoption of final rules

on Customary Trade of fish and their parts and eggs in Alaska as regulations. Additionally, the commissioner requests a complete copy of any record of the Federal Board's consideration of and actions upon the two rejected Requests for Reconsideration FRFR 03-02 and copies of all files involved with the Trade Task Force.

**2003, September 29-30: Bristol Bay Regional Advisory Council recommended adopting fisheries proposal FP04-16.**

Fisheries proposal FP04-16 was drafted by the Bristol Bay federal subsistence Regional Advisory Council. FP04-16 proposed limited cash exchanges between rural residents to \$500 per household annually and to \$400 per household for exchanges between rural and non-rural residents. The proposal also requested that a reporting requirement be established to assist in accounting and enforcement of regulations.

**2003, December 10: Federal Board Adopts Amended FP04-16**

The Federal Board adopted FP04-16 as amended by the Bristol Bay Regional Advisory Council authorizing customary trade of salmon and imposing a dollar limit of \$500 for the Bristol Bay Region between rural residents and a dollar limit of \$400 between rural and non rural resident.

**2004, March 1: The federal Customary Trade regulations for Bristol Bay effective**

The federal subsistence customary trade for Bristol Bay establishing a \$500 limit and reporting requirements became effective. The statewide regulations (§.27(c) (11-13)) adopted by the Federal Board in January 2003 allowed rural residents to exchange subsistence fish caught on federal waters for cash with non-rural residents, but prohibited subsistence fishermen from accepting cash from businesses. It also allowed Alaska's ten subsistence regions to develop differing regulations specifically tailored to fit customary trade practices in their regions. These Bristol Bay regulations marked the first regional modification of the statewide cash exchange regulation.

A separate federal permit will be required of those intending to exchange fish for cash, and reporting of exchanges with non-rural residents is required. Federal staff estimated only 20 percent of the Bristol Bay region's subsistence harvest comes from federal waters and are eligible for cash exchange under federal rules for customary trade. But this distinction – and other parts of the regulation that don't exempt users from meeting state health regulations for processed fish—could cause confusion among subsistence users, according to federal staff who wrote to the Federal Board:

There could easily be further confusion among users as to what is expected of them. Current customary trade regulation is challenging to effectively communicate. There will need to be a focused outreach effort associated with implementation of the additional regulations to avoid further confusing this complex area of regulation.

A federal enforcement agent in attendance said individuals, not households, should be accountable for sales, and immediate recording of sales should be required. The change will require coordination between the State of Alaska, which records subsistence catches, and the federal Office of Subsistence Management, which will keep figures on sales.

**2005, January 12:** Federal Board Approved Fisheries Proposal FP05-03 for Upper Copper River fishing district.

The Federal Board authorized new restrictions on cash exchange for subsistence-caught salmon in the upper Copper River fishing district. Responding to a regulatory proposal from the Ahtna, Inc. Regional Native Corporation, Copper River Native Association, and Chitina Native Corporation, the Federal Board limited the number of salmon per household taken in the district and exchanged for cash to 50 percent or less of a household's annual harvest. In addition, the Board limited the total cash value of exchanges between a household in the district and non-rural residents to \$500 annually. Furthermore, the Federal Board required that rural residents of the district record all cash exchanges of salmon. The new regulation tightens the statewide regulation governing exchange of salmon for cash specifically in the Upper Copper River district. It is also similar to fisheries proposal FP04-16 the Federal Board adopted in December 2003, at the request of rural Bristol Bay residents.

**2005-2007: Gap in documentation, reports, or other reference materials**

**2007, January: Regulation Changes for Norton Sound and Point Clarence Area Adopted by the State Board**

In January 2007, after review of the management action plan options addressing this stock of concern<sup>3</sup> the State Board adopted the following regulations:

- 1) expanded the subsistence fishing area with a hook-and-line to all areas where sport fishing was allowed;
- 2) reopened the first 100 yards of the Penny River upstream from the mouth and the first 200 yards of the Cripple River upstream from the mouth to subsistence salmon fishing, except for chum salmon;
- 3) eliminated subsistence permit catch limits and allowed the Department to continue setting catch limits based on expected returns;
- 4) reduced the subsistence area where nets could be fished in the Nome River; and
- 5) allowed for an annual cash sale of up to \$200 for customary trade of subsistence-caught finfish.

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<sup>3</sup> Menard, J. and D.J. Bergstrom. 2006. Norton Sound and Golovin and Moses Point Subdistricts chum salmon stock status and action plan, 2007; a report to the Alaska Board of Fisheries. Alaska Department of Fish and Game, Special Publication No. 06-32, Anchorage.

## **2007, January 8: Customary Trade of Fish Norton Sound- Port Clarence State Board Proposal Document**

Customary Trade of Fish in the Norton Sound-Port Clarence Area Proposal 148 Briefing Note by James Magdanz, Department Division of Subsistence. Jim Magdanz produced a briefing paper for the State Board pending meeting. The notes contain background, definitions, history, data, citations, current status

## **2007, January 31-February 4: State Board Meeting Proposal 148 for Norton Sound Port Clarence Area tabled.**

A staff report and public testimony related to Proposal 148 (was RC 4), which would provide for the customary trade of subsistence harvested finfish in the Norton Sound Port Clarence Area beginning in July 2007 was provided to the State Board. The Board tabled the proposal to allow Board member Art Nelson to work with stakeholders to address remaining issues and report back to the board at its March 2007 meeting.

## **2007, February 4: State Assistant Attorney General Lance Nelson told State Board members customary trade is non-commercial (State Board records time 12:33:46):**

*It is important that (customary trade) be considered non-commercial. The statute says non-commercial. Even more important than that is the fact that, since subsistence uses are limited to Alaska residents, any commercial activity related to subsistence would be prohibited by the USA Constitution's commerce clause, because it is going to be illegal. The commercial clause for the STATE to provide commercial opportunity and limit it to residents of the state. That's called "fiscal discrimination" of interstate commerce. So it is doubly important that any level you might consider allowing be non commercial...."*

*(Lance) "I happened to be involved in drafting this (State) legislation in 1992, and was present in the discussions of the legislative committees and the legislature itself... It was not intended to supplant commercial fishing. The intent of it was a means to provide for full distribution of subsistence products among subsistence users. That's the basic intent, and motivation for allowing customary trade.*

## **2007, March 9-13: State Board adopted proposal 148**

Proposal 148 authorized for the customary trade of subsistence harvested finfish in the Norton Sound-Port Clarence area beginning in July 2007. The Norton Sound Port Clarence customary trade of subsistence caught finfish is allowable but requires a permit, must not exceed \$200 per year, and must follow other various conditions. These actions were discussed in Committee C - Supplemental Issues Board committee members: Campbell (chair), Nelson, Morris.

**2007, July 17: Yukon River Drainage Fisheries Association report published by Catherine F Moncrieff, Traditional and Ecological Knowledge of Customary Trade of Subsistence Harvested Salmon on the Yukon River.**

Final report to the Office of Subsistence Management, Fisheries Information Services, Study 04-265. In January 2003, the Federal Board adopted new regulations clarifying statewide customary trade practices of subsistence-caught fish and identified the need for additional information, to enable it to further refine regulations. This study addresses that need by documenting customary trade practices of salmon in three villages on the Yukon River (Alakanuk, Holy Cross, and Tanana).

**2007, August: Department Division of Subsistence publishes Technical Paper 328 *Customary Trade and Barter in Fish in the Seward Peninsula Area, Alaska.***

The paper documented subsistence barter and cash trade of subsistence foods in six Norton Sound-Port Clarence Area communities: Brevig Mission, Elim, Nome, Saint Michael, Shaktoolik, and Stebbins. When trading subsistence foods for cash, small transactions were most commonly reported; 66% of the transactions involved \$100 or less, and the largest single transaction reported was \$400. Summing all reported cash trades for each household during the study year, 42% of the trading households reported annual trade totals of \$100 or less. Only 9% of households reported trade totals in excess of \$500 per year. Department staff was aware of cash trades but, citations were rarely issued. The report summarized the situation as “bureaucratic cognitive dissonance.”

**2008, December 8-12: Yukon River Panel Meeting contained discussions of prohibiting Customary Trade.**

Discussions at the December 2008 US/Canada Yukon River Panel meeting included Panel members and fisheries advisors requests for a review of Federal Subsistence Customary Trade regulations. Panel discussions included concerns about whether selling subsistence-taken salmon is appropriate if and when major restrictions to subsistence fishing become necessary. Discussions also generated questions which were summarized in a letter sent to the Federal Board on January 26, 2009.

**2009, January 14-16: Regional Advisory Council testimony to Federal Board in opposition of customary trade.**

Testimony at the Federal Board meeting from the Yukon Kuskokwim Delta and Eastern Interior, Regional Advisory Council Chairs Yukon River Panel member, and the public opposing the allowance of customary trade. The testimony is contained within the Federal Subsistence Program council meeting transcripts.

**2009, January 26: Yukon River Panelists Elizabeth Andrews and Frank Quinn sent a letter to Federal Board requesting a review of federal customary trade regulations.**

Yukon River Panelists Elizabeth Andrews and Frank Quinn letter to Federal Board Chair Mike Fleagle requesting a review of federal customary trade regulations. The letter requests review of the Federal customary trade regulations for salmon harvested from the Yukon River and clarification of the intent of federal customary trade regulations. At the US–Canada Yukon River Panel meeting in December 2008, Panel members requested this review to highlight conservation concerns associated with anticipated poor Chinook salmon return in 2009. Specifically, there were two points identified during Panel discussions:

1. Clarify whether Federal regulations allow for sale of processed salmon for human consumption or only fresh unprocessed fish; and
2. Monitor the sale of subsistence-taken salmon in the Yukon River.

“We look forward to hearing from you about the intent of the Federal rule. Further, we ask the Federal Board to consider a formal review of the customary trade regulation, particularly regarding Yukon River Chinook salmon in terms of enforceability of regulations and monitoring of sales. Finally, the Panel is interested in receiving a report on Federal enforcement activity conducted in the Yukon Management Area in 2007 and 2008.”

**2009, February 12: FSA08-03/FSA09-01 submitted to Federal Board requesting temporary suspension of all Customary Trade of Chinook salmon on the Yukon River.**

Fairbanks Department Advisory Committee submits FSA08-03/FSA09-01 requesting the a temporary special action to suspend all customary trade of Chinook salmon on the Yukon River from June 1, 2009 – April 1, 2010. FSA08-03 was relabeled as FSA09-01 on March 26, 2009.

**2009, February 20: Response letter from Federal Board Chair Fleagle to the Yukon River Panel.**

Response letter from Federal Board Chair Mike Fleagle responding to the Yukon River Panel’s January 26, 2009, letter requesting the review of customary trade regulations for salmon harvested from the Yukon River. The response letter includes:

1. definition of customary trade
2. describes the elements about transactions between rural residents, others, and businesses
3. states federal customary trade regulations do not preempt State of Alaska food safety and health laws and do not authorize the sale of processed fish by rural residents who do not meet these safety laws
4. discussed a three year study (#04-465) designed to gain perspective and understanding of contemporary Customary Trade practices involving subsistence caught fish.

**2009, March 10-11: The Eastern Interior Regional Advisory Council submits FSA09-02 requesting temporary suspension of customary trade of Chinook salmon on the Yukon River between rural and non rural parties.**

The Eastern Interior Regional Advisory Council submits FSA09-02 requested a Temporary Fisheries Special Action FSA09-02 to prohibit the customary trade of Chinook salmon harvested by federally qualified subsistence users with non-federally qualified users from June 1, 2009 – April 1, 2010. The intent of FSA09-02 mirrors FP09-01 and both were analyzed together. The proponents for this fisheries special action expressed approval of a temporary restriction of customary trade between rural residents and others (non-federally qualified) will result in more Chinook salmon being available to rural subsistence users and could result in improved escapement throughout the Yukon River drainage.

**2009, March 13: Written response from National Parks Service enforcement regarding customary trade.**

A written response from National Park Service enforcement ranger Gary Youngblood was sent to Federal Board Chair Mike Fleagle regarding customary trade federal enforcement activities on the Yukon River in the Yukon Charlie River National Preserve during 2007 and 2008. The letter states “there is little opportunity within our jurisdictional boundaries for much customary trade.” The letter does not answer any questions posed by the Federal Board related to enforcement of customary trade regulations.

**2009, March 18: Written response from US Fish and Wildlife Service enforcement personnel to Yukon River Panel**

US Fish and Wildlife Service enforcement agent Stanley F. Pruszenski submitted a written response to the Yukon River Panel as requested from Federal Board Chair regarding federal enforcement of customary trade regulations. The response does not address customary trade questions or illustrate active enforcement of those federal regulations. The response concludes with “Service Law enforcement programs have not prioritized monitoring this aspect of subsistence use.” The justification used is a quote from the Federal Board: “because most customary trade among rural subsistence user occurs between local users and involves only small amounts of fish, the Federal Board does not believe that this rule will create an incentive or additional harvest of the resources or result in additional fish being sold on the commercial markets.”

**2009, May 7: Public contact of Department subsistence liaison team member George Pappas requesting clarification and limits for trading federal subsistence harvested caribou and king salmon for halibut fillets caught on the south side of the Alaska Peninsula.**

The caller indicated the halibut would be harvested under State subsistence regulations. The inquiry was forwarded to the acting Department subsistence liaison Tina Cunning and Tina’s reply follows:

*There are no restrictions on quantities of subsistence halibut or caribou that could bartered under state law (assuming both the halibut and caribou were taken under subsistence regs), they could trade up to their possession limit of either so long as the trade is “limited and noncommercial in nature”. See AS16.05.940(2).*

*Likewise under the federal regs, 50 CFR 300.61, halibut could likely be traded for caribou up to the possession limits so long as the trade is non-commercial:*

*Customary **trade** means, for purposes of the **subsistence** fishery for Pacific **halibut** in waters in and off Alaska, the non-commercial exchange of **subsistence halibut** for anything other than items of significant value.*

*The term “items of significant value” is not defined in federal law, and neither “noncommercial” nor “non-commercial” is defined in either state or federal law, but unless cash sales are involved, I don’t think we would be able to argue that the trade is commercial.*

**2009, May 29: Federal Board Response to Fisheries Special Action 09-01 and Fisheries Special Action 09-02, request for temporary restriction of Customary Trade of Yukon River Chinook salmon.**

Federal Board Chair Mike Fleagle sent identical responses to Eastern Interior Regional Advisory Council and Fairbanks State Advisory Committee Chair Virgil Umphenour denying FSA09-01 and FSA09-02. The Federal Board Chair public letter of response to the FSA09-01 and 02 indicated the requests did not meet the threshold for analysis, because the ongoing Chinook salmon conservation concerns have been an ongoing issue in the Yukon River for many years and cannot be considered an unusual or significant change in resource abundance. Additionally, the Federal Board found no evidence to indicate that customary trade allowed under federal regulations has either led to or augmented the declines in Yukon River Chinook salmon runs. The Federal Board indicated they do not normally prioritize between subsistence uses as no federal regulations allow prioritization or provide a guideline for use. The Federal Board stated they do prioritize between subsistence users as outlined in ANILCA 804.

**2009, June 1: Phone Conversation with Department’s Nome Area Management Biologist Jim Menard and subsistence liaison team member George Pappas summarizing Customary Trade activities in Norton Sound Port Clarence area State fisheries:**

1. A total of 5 Norton Sound Pt Clarence permits were requested for the customary trade of finfish for both 2007 and 2008.
2. In 2007 one permit holder reported 8 chum salmon sold for \$90 and one permit holder reported 3 coho salmon sold for \$30. The other three reported that they made no sales.
3. In 2008 all 5 permit holders reported that they made no sales.

## **2010, March: Federal Subsistence Fisheries Proposals Submitted**

Stanislaus Sheppard of Mountain Village submitted proposal FP11-05 to the Federal Board requesting:

1. Rural residents may exchange in customary trade subsistence-harvested fish, their parts, or their eggs, legally taken under regulations of this part, for cash from other rural residents.
2. In Yukon River subdistricts 4 and 5, salmon may not be sold under customary trade.
3. No Chinook salmon except whole fish unfit for human consumption incidentally caught during a chum salmon fishery may be fed to dogs in Subdistrict 5D, upstream of Circle City.

The Yukon/Kuskokwim Delta Regional Advisory Council submitted fisheries proposals FP11-08 and FP11-09 to the Federal Board requesting:

FP11-08 - In any given year in the Yukon River Fisheries Management Area Chinook runs are insufficient to fully satisfy subsistence harvest needs and subsistence fisheries are restricted; customary trade will be prohibited.

The proposal referenced numerous reports of large numbers of Yukon River rural residents selling large numbers of Yukon Chinook salmon in urban areas. Concerns were expressed that some subsistence users were not meeting their basic food needs due to closures and fisheries restrictions while others were allowed to take and sell an unlimited amount for cash.

FP11-09 – Adding a new regulatory subsection which addressed limitations on customary trade of Chinook salmon within the Yukon River Management Area to include:

Obtain a customary trade record-keeping form from the USFWS before the person conducts customary trade, and accurately record the cash sale on the form immediately after the sale occurs; the form requires the reporting of:

1. date of sale
2. buyers name and address
3. the species and amount of finfish sold
4. the specific location where the finfish were harvested
5. the dollar amount of each sale
6. the form of processing used
7. and any other information the federal agency requires for management or enforcement purposes

Additional FP11-09 regulatory language proposed includes:

Return of customary trade record as prescribed on the permit

Display the customary trade record-keeping form upon request of identified federal employees.

Established a limit of “200 pounds of unprocessed, whole, or XX pounds of fillets, or XX pounds of strips, or XX XX-ounce jars of subsistence taken Chinook salmon per household per calendar year.”

A person who receives subsistence-taken finfish in exchange for cash in a customary trade may not resell the fish.

A person may not sell subsistence-taken fish to fishery business.

A sale or purchase of finfish authorized under this section, including the delivery of fish to a purchaser, may occur only in the Yukon River Fisheries Management Area.

### **2011, August 2010 – June: Department Yukon Chinook Disaster Study.**

In response to the federal disaster declaration of the 2009 Yukon River Chinook salmon returns, the Senate Finance Committee requested a project proposal to evaluate the socioeconomic impacts of the disaster. The project was funded through the legislature and the objectives include:

Project to conduct ethnographic research in 5 Yukon River communities representing the lower river, middle river, and upper river in order to:

- (1) evaluate the socio-economic impact of the 2009 Yukon Chinook salmon disaster,
- (2) gather more specific and systematic data on gear types used (including mesh size) for salmon fishing in different parts of the drainage,
- (3) document subsistence salmon fishing locations,
- (4) document patterns of commercial and customary trade activities, including trade within villages, between villages, and between villages and urban Alaska, and
- (5) document effects of the disaster on the social organization of fishing activities and reasonable opportunities for customary and traditional uses of Yukon Chinook salmon.

In short, Yukon Chinook Disaster Study will focus on Yukon subsistence salmon fisheries research and the role of the Yukon commercial salmon fisheries in supporting mixed cash-subsistence economies of Yukon River communities in light of the recent commercial fishery disaster declarations and the historic trend of declining.

Research methods will include conducting systematic household surveys of subsistence salmon fishing households and interviewing medium and heavy salmon harvesting fishers to document local and traditional knowledge regarding subsistence and commercial salmon fishing. The

resulting data will fill significant information gaps pertaining to conservation concerns associated with Yukon Chinook salmon management. This information will assist the State Board in addressing reasonable opportunities for customary and traditional subsistence uses.

**2010, October 18: Department subsistence liaison team member George Pappas received a request for clarification of federal subsistence customary trade of fish for cash regulations.**

George Pappas receives request for regulatory clarity from Department's ANILCA program research manager Brad Palach and Tongass National Forest Coordinator Kyle Mosel regarding SE Alaska sales of processed subsistence harvested fish at fund raisers.

George Pappas' response includes Palach and Mosel.

“Department comments for the Federal Subsistence process related to customary trade of fish in the Yukon River area include references to the following regulations when addressing the sales of processed federal subsistence harvested salmon. As I understand, this is not a subsistence harvest issue. I am not a food safety specialist, and this issue I believe is a food safety issue as specific State of Alaska regulations govern seafood, independent of how the fish were harvested, which is processed and sold for cash for human consumption. The following link (accessed January 2012) will lead you to the State of Alaska Department of Environmental Conservation regulations regarding the applicability of regulations for processing and selling of seafood for human consumption.”

[http://www.legis.state.ak.us/basis/folioproxy.asp?url=http://www.jnu01.legis.state.ak.us/cgi-bin/folioisa.dll/aac/query=%5bGroup+!2718+aac+34!2E005!27!3A%5d/doc/%7b@1%7d/hits\\_only?firsthit](http://www.legis.state.ak.us/basis/folioproxy.asp?url=http://www.jnu01.legis.state.ak.us/cgi-bin/folioisa.dll/aac/query=%5bGroup+!2718+aac+34!2E005!27!3A%5d/doc/%7b@1%7d/hits_only?firsthit)

More specifically, the below Department of Environmental Conservation regulations pertaining to the sales (trade for cash) of processed seafood (smoked salmon, pickled or dried fish etc.) intended for human consumption require adherence to specific food safety regulation.

**18 AAC 34.005. Purpose and applicability**

*(a) The purpose of this chapter is to provide for consumer protection and to protect public health by ensuring the processing, sale, and distribution of safe, wholesome, and properly labeled seafood products.*

*(b) The requirements of this chapter apply to*

*(1) persons who process seafood products to be sold as part of commerce and intended for human consumption;*

For further definition of the specific food safety regulations which govern foods sold for human consumption in Alaska, contact with Department of Environmental Conservation staff will be necessary.

**2010, November 9: Federal Board – USFWS Enforcement Testify Regarding Recent Ongoing Customary Trade Enforcement Efforts (Federal Board Transcripts 11/09/10 P 27-36)**

Mr. Stan Pruszenski, the Special Agent in Charge for the U.S. Fish and Wildlife Service in Alaska, testified on November 09, 2010, to the Federal Board at the work session meeting in Anchorage. Mr. Pruszenski testified that the US Fish and Wildlife Service have been investigating abuses of customary trade of subsistence harvested fish for cash in a covert and overt investigation. Information was presented in generic terms purposely omitting specifics as many of the 2-3 year investigations were ongoing and being reviewed by the U.S. Attorney's office. The ongoing investigation focused primarily on the Yukon area but included the Copper and Kenai river areas. Preliminary findings included 80% of the sold fish came from State waters. Investigations were targeting users who did not follow DEC processing requirements. The investigation was spurred by low returns in the Yukon when restrictions on all users occurred. No citations have been issued to date.

**2010, December 6: Fort Yukon refuses to cooperate with Department subsistence survey.**

An article appeared in the Fairbanks News Miner indicating the village of Fort Yukon, Gwichyaa Zhee Gwich'in Tribal Government, refused to cooperate with the Department for a study about declining numbers of Chinook salmon in the Yukon. It indicated such surveys are "a continued assault on traditional aboriginal hunting and fishing rights," and mentioned the noted resistance is partially based on recent federal enforcement investigations, citations, arrests, and forfeiture of property. The tribal government of Fort Yukon refused to participate in the survey for several reasons including a negative reaction to a recent undercover federal enforcement effort to track salmon customary trade and the sales of salmon strips on the Yukon. The department completed the study requirements in four of the five villages selected (one replaced Fort Yukon) but one community declined to participate in the customary trade portion of the research.

**2011, January 18-20: Federal Board deliberates three customary-trade fisheries proposals (FP11-05, 08, 09).**

The Federal Board met to deliberate fisheries proposals. Three of the aforementioned customary trade proposals were evaluated and deliberated upon. FP11-05 was withdrawn at the meeting by the proponent and FP11-09 was not acted upon because of actions taken by the board on FP11-08.

The Federal Board chose to defer action on FP11-08. The Federal Board approved a subcommittee of the Eastern Interior Alaska, Western Interior Alaska, and Yukon-Delta subsistence regional advisory councils. The Federal Board stated that the purpose of the subcommittee is to define "significant commercial enterprise" for sales of subsistence caught salmon to other rural residents and to others. The intent is to develop language that will be applied to the entire Yukon River drainage. The Federal Board stipulated that the subcommittee will be comprised of three members of each of the three councils, that the subcommittee should consider starting with a household limit of \$750 per year, that the Solicitor's Office and Law Enforcement will assist with the final language, and that the work will be completed as soon as

possible. The subcommittee was re-titled as a “work group” due to FACA concerns but later was again re-titled a subcommittee.

The Federal Board’s intent is to allow time for subcommittee work and subsequent council recommendations as noted in the current recommendations of the Eastern Interior Alaska, Western Interior Alaska, and Seward Peninsula subsistence regional advisory councils.

**2011, January 19: Federal Solicitor Keith Goltz States a Mechanism Exists to Restrict Among Subsistence Uses at the Federal Subsistence Board Meeting, Meeting Transcripts Pages 168-169.**

During discussion at the January 2011 Federal Board meeting, federal solicitor Keith Goltz indicates a mechanism for prioritizing federal substance uses exist through building a supportive record. The Federal Board has historically treated all subsistence uses equal with a few exceptions. To change this practice, Mr. Goltz indicates a supporting record could be built justifying prioritization of one subsistence use over another such as limiting customary trade of subsistence fish for cash when subsistence users cannot meet consumptive needs.

MR. GOLTZ: After listening to this discussion, I'd like to issue a couple reminders and I'd like them to go both to the Board and to the RACs. The statute lists a whole series of things that are called subsistence uses. Among those are domestic consumption, food, and customary trade, exchange of wild resources for money.

I believe the court is going to presume that since there's no mechanism for weighing those that they're all equal. Now I think we probably can overcome that presumption, but we have to do it on the record. It may seem obvious to us that food resources are the highest in that priority, but we have to explain that. I see Heather Kendall-Miller is in the courtroom and I think -- or in the room...

MR. GOLTZ: .....and I think she'll agree with me that the courts don't always get it and if we have to explain it as attorneys we can only do it based on the record. To fix that in your mind, my friend Gerald (Gerald Nicholai) and Beverly (no further identification) have expressed eloquently a point of view on this issue and I think as we address this we have to be sure to keep those speeches in mind and deal with them somehow. *Because where we are right now I believe is that all of those uses are going to be treated equally by the court.* The second thing I'd like to point out is the language. As Jack (Jack Reakoff) points out, *our language is very important as we build the record.*

**2011, May 18-19: Customary Trade Subcommittee Meets in Anchorage.**

The Federal Board developed Customary Trade Subcommittee met in Anchorage for two days and attendants included 2-3 representatives of the Yukon Kuskokwim Delta, Eastern Interior, and Western Interior Regional Advisory Councils, representatives from the Federal solicitor office, Federal enforcement officers, Department Liaison Team members, and Office of Subsistence Management staff. During the two day meetings, the subcommittee reached the following consensus to present to the Yukon River Regional Advisory Councils regarding establishing limits on customary trade of Yukon River Chinook Salmon.

1. Prohibit the sales for cash of federal subsistence harvested Yukon River Chinook salmon between federally qualified residents with a Customary and Traditional finding for Chinook salmon in the Yukon River and non-federally qualified users.
2. Establish a cash limit of \$750 per household for customary trade of Yukon River Chinook Salmon harvested under federal subsistence regulations between federally qualified subsistence users with a customary and traditional finding for Yukon River Chinook and other federal subsistence qualified users with the same finding.
3. Establish mandatory federal subsistence harvest recording calendars, customary trade of cash sales recording form, and transfer of possession form to track movement of harvest being transferred to recipients.

The workgroup's product was distributed to the federally qualified users in the Yukon River, members of the State Advisory Committees, all Tribal entities, and all Regional Advisory Council members. A deadline of August 15 was established for return of comments. The workgroup planned a following meeting scheduled for August 2011.

### **2011, August 23-24: Customary Trade Subcommittee Reconvenes in Fairbanks.**

The Customary Trade Subcommittee met in Fairbanks for two days and attendants included 2-3 representatives of the Yukon Kuskokwim Delta, Eastern Interior, and Western Interior Regional Advisory Councils, representatives from the Federal solicitor office, Federal enforcement officers, Department Liaison Team members, and Office of Subsistence Management staff. During the two day meetings the subcommittee reviewed the public comments received on the distributed consensus recommendations regarding establishing limits on customary trade of Yukon River Chinook Salmon developed at the May 2011 meeting. The subcommittee developed a recommendation, an alternative recommendation, and a record-keeping recommendation as follows:

Primary recommendation:

1. Customary trade of Yukon River Chinook Salmon may only occur between federally qualified rural residents with a current customary and traditional use determination.

Justification:

- By allowing customary trade only between federally qualified rural residents with a customary and traditional use determination for Yukon River Chinook salmon, the subcommittee hopes to curtail large customary trade exchanges involving Chinook salmon which are reported to occur in urban areas of Alaska and may rise to the level of a significant commercial enterprise.
- In times of low abundance, Yukon River Chinook salmon should remain within the Yukon River drainage for subsistence uses.
- Adoption of the intent of this proposal reduces overall Chinook salmon harvest, which may allow fisheries managers to minimize subsistence fishing restrictions.

- Provides fisheries managers additional fish to meet drainagewide escapement goals, which has the potential of improving future returns.
- Allows fishers to recover reasonable expenses for traditional subsistence activities, which was the original intent of customary trade.

Alternative recommendation: The following alternate proposal was developed for RAC discussion, but is not the subcommittee's preferred option.

2. Preclude customary trade of Yukon River Chinook salmon between rural residents and others.
  - a) Establish a \$750 limit per calendar year per qualified household;
  - b) Require customary trade recordkeeping and receipt form.

Justification:

- Establishes an enforceable dollar amount for customary trade of Yukon River Chinook salmon.
- Addresses problem by limiting potential for large volume sales.
- Curtails large customary trade exchanges involving Chinook salmon by allowing customary trade only between federally qualified rural residents, and not between rural residents and others (which are reported to occur in urban areas of Alaska and may rise to the level of a significant commercial enterprise).
- Reduces overall harvest, which may allow fisheries managers to minimize subsistence fishing restrictions. Provides fisheries managers additional fish to meet drainage-wide escapement goals, which has the potential of improving future returns.
- Provides law enforcement necessary information to curtail illegal cash sales by identifying harvest sources and quantities.

Recommended record-keeping requirement:

3. Because of declining Yukon River Chinook runs, the subcommittee also recommends that a required Chinook salmon harvest calendar be implemented for federally qualified subsistence users.

**2011, September – October: Distribution of Tri-RAC Customary Trade Subcommittee Status Report Fall 2011 meeting cycle.**

The Office of Subsistence Management included a three page status report of the Tri-RAC subcommittee in the meeting materials presented to the four Regional Advisory Councils with a customary and traditional finding for the use of Yukon River Chinook salmon. The status report was for informational purposes only and did not require action.

## **DISCUSSION AND OPTIONS FOR FUTURE POLICY DEVELOPMENT**

Customary trade of fish in Alaska has existed in some form for generations. Customary trade of subsistence harvested fish for cash was likely introduced some time after first contact and developed as miners and trappers bought fish and meat for dog food. With the introduction of commercial fisheries targeting high value stock in the 19<sup>th</sup> century, customary trade of fish for cash developed further. In certain fish stocks with high commercial or economic values, customary trade of subsistence harvested fish for cash may incentivize additional harvests intended for non-customary and traditional markets, potentially reallocating harvestable surpluses from commercial to subsistence uses. As both federal and state regulations allow the customary trade of fish for cash, the future management of certain fully allocated, high value fisheries could benefit from further regulatory development to address various management and allocative concerns when warranted.

The majority of customary trade of fish in Alaska is likely conducted on a small scale from stocks with low commercial or economic values and therefore not monitored or fully exploited. Examples of stocks with low commercial or economic values include whitefish, smelt, lamprey, sucker, grayling, northern pike, Sheefish, trout, char, burbot, lamprey, and blackfish. Though these species may be high value for subsistence users, the low levels of harvest and potential market for value from the customary trade of these fish for cash likely does not incentivize additional harvest from these fisheries significantly above the levels necessary for personal and family consumption of the subsistence user. In these cases, the levels of subsistence harvest negligibly contribute to the cumulative exploitation by all user groups on the fisheries stock and do not warrant active fisheries management for sustainability. In most of Alaska, where high value stocks comprised mainly of salmon species are common, the state and federal subsistence harvests are likely at low levels and the potential to generate significant cumulative financial income from customary trade of fish for cash is limited.

In most of Alaska, federal and state subsistence harvests are not monitored through permitting or reporting and the management of the subsistence fisheries is best described as passive. Fisheries managers use the best information available to determine if cumulative user group harvests pose the potential to meet or exceed the stock's critical and viability thresholds as determined by currently accepted scientific fisheries management principles. The determined thresholds are utilized to estimate if the sustainability of a fish stock or harvestable surplus from that stock is threatened. In fisheries where little or no historical data exists and the subsistence fisheries have occurred continuously for generations, fisheries managers assume the exploitation rate is sufficiently low enough to not threaten the sustainability of the stock over time and resort to passive management until information becomes available suggesting further investigation for management solutions is advisable.

From a fisheries management perspective, the benefits of monitoring and actively managing customary trade in subsistence fisheries where subsistence harvests have negligible effects on a fishery stock may not justify the commitment of finite agency resources. In fisheries where subsistence harvests are estimated to have negligible effects on the stocks, state and federal regulatory bodies have the option to set harvest, time and area, and gear restrictions at levels conservative enough to ensure the sustainability of the stock and harvestable surplus over time without requiring active management through inseason monitoring, permitting, reporting, and

prioritized or dedicated enforcement. The majority of the subsistence fisheries in Alaska are passively managed this way as most fisheries do not warrant additional agency resources for active management.

If managers determine the cumulative exploitation on a fishery stock has demonstrated or is estimated to have the potential to harvest all available surpluses, active management of the resource may be warranted. An example of new information necessitating changing from passive to active management would be a fishery which experiences an increase in user participation due to new access such as a bridge or road built next to a stream which allows subsistence users easy access. If active management is warranted, the state and federal regulatory bodies are called upon to promulgate regulations to limit harvest by user group and to provide recommendations to the respective agencies for prioritizing available resources for fisheries management. Though the subsistence users' contribution to the overall exploitation on a stock may be small in an actively managed fishery, generating accurate estimates for all components of exploitation on a stock is one of the foundational building blocks for sound fisheries management principles.

The policy recommendation for further development of state and federal regulation and management of customary trade of subsistence caught fish for cash is based upon exceeding thresholds of a series of criteria. The following sections were designed to assist both State and Federal agency navigation through future regulatory options. The tiered criteria below is applicable to high interest fisheries targeting both low and high value stocks which are fully exploited and the ability of the managers to maintain sustained yields when all sources of mortality are not fully understood or accounted for. Fisheries managers and regulators need to determine which fisheries and stocks may require temporary or permanent active management through additional regulatory oversight and commitment of agency resources. The following series of questions are examples of threshold criteria which logically recommend when further action might be warranted.

### **Tiered Criteria for Determining Need for Further Regulation of Customary Trade of Subsistence Harvested Fish for Cash.**

Is the stock fully exploited?

1. Have the combined current fisheries demonstrated the ability to harvest all available surpluses and inseason management monitoring is required to restrict user groups to prevent over exploitation?
2. Does the stock meet the definition of a stock of management, conservation, or yield concern?
3. Does the impact of the cumulative fisheries threaten the genetic or phenotypic characteristic of the stock or the sustainability of the stock as a whole? Will additional harvest through the authorization of customary trade of subsistence harvested fish for cash add to the potential threat?

Is the stock fully allocated?

1. Are all available harvestable surpluses allocated to different user groups?
2. Will authorizing customary trade of subsistence caught fish for cash by the Alaska Board of Fisheries reallocate harvest from other user groups resulting in modifications to the fisheries management plan or actions?

Which regulatory board should take action?

1. Does the fishery take place in water under claimed federal subsistence jurisdiction or in the remaining waters of Alaska or both?
2. Do subsistence users participate in fishery under federal and/or state subsistence regulations?

How is the subsistence fishery managed?

1. Is the stock or targeted species actively or passively monitored or managed?
2. Have management agencies dedicated funding to the management and monitoring of the fishery/species/area/region?

What is the history of the fisheries' customary trade by the users?

1. Does a long standing history of customary and traditional use of the stock for customary trade by subsistence users exist?
2. Can a customary and traditional finding be made for the stock by water body/by community?
3. Does the data required to meet the current state subsistence criteria for a customary and traditional finding, or establishment of a value for amounts necessary for subsistence, exist?
4. Can this data be generated through future studies?

Does the incentive exist to harvest more than necessary for the subsistence harvester and family's consumption?

1. Are the subsistence harvests from the stock of high value and in demand?
2. Is there an incentive to customarily trade large amounts of the subsistence harvest for cash due to a demand or market?
3. Does the market for subsistence harvest fish exceed the potential available surplus above and beyond subsistence users' consumptive needs?

Are resources available to actively manage or enforce regulations if adopted?

1. Do agencies have the resource to actively monitor, permit, and enforce regulations in remote areas?

2. Can conservative enough regulations be established to restrict the exploitation rates for the fishery of concern which will not require inseason monitoring?

The above series of question should assist managers with identifying which fisheries stocks may require further investigation to justify temporary or permanent active management plans through changes to state and federal regulation. Once fisheries managers identify fisheries of concern, the next step is to determine whether a short term data collection study of the subsistence user group's harvests and uses is warranted. Since this paper is focused on customary trade of subsistence harvested fish for cash, the presented options will focus on the investigations, regulatory changes, and management of this specific component of exploitation. Once it is determined a fishery should be further investigated, the appropriate management agency will be responsible for procuring funding and developing a study design. In the case of the federal subsistence program, such a study would qualify for funding under the Fisheries Resource Monitoring Program investigation series as implied in 50 CFR §100.812. In the case of state subsistence fisheries, AS §16.05.094 provides regulatory directives to the department's Subsistence Division defining the types and applications of the collected data.

### **Federal Law for Research and Reports**

#### ANILCA Title VIII Subsistence Management and Use Findings

##### §812. Research

The Secretary, in cooperation with the State and other appropriate Federal agencies, shall undertake research on fish and wildlife and subsistence uses on the public lands, seek data from, consult with and make use of, the special knowledge of local residents engaged in subsistence uses; and make the results of such research available to the State, the local and regional councils established by the Secretary or State pursuant to §805, and other appropriate persons and organizations.

##### §812. Reports

(6) a description of those actions taken, or which may need to be taken in the future, to permit the opportunity for continuation of activities relating to subsistence uses on the public lands;

### **State Law for Research**

AS 16.05.094. Duties of section of subsistence hunting and fishing.

- (1) Compile existing data and conduct studies to gather existing information, including data from subsistence users, on all aspects of the role of subsistence hunting and fishing in the lives of the residents of the state;
- (2) Quantify the amount, nutritional value, and extent of dependence on food acquired through subsistence hunting and fishing;
- (3) Make information gathered available to the public, appropriate agencies, and other organized bodies. Assist the department, the Board of Fisheries and the Board of

Game in determining which uses of fish and game, as well as what users and what methods, should be termed subsistence users, uses, and methods;

- (4) Evaluate the impact of state and federal laws and regulations on subsistence hunting and fishing and, when corrective action is indicated, make recommendations to the department;
- (5) Make recommendations to the boards of fisheries and game regarding adoption, amendment, and repeal of regulations affecting subsistence fishing and hunting;
- (6) Participate with other divisions in the preparation of statewide and regional management plans so that those plans recognize and incorporate the needs of subsistence users of fish and game.

### **Policy Recommendations for the State Regulatory Process**

Once the necessary data is collected and synthesized, respective agencies should determine if forwarding recommendations to the management and regulatory bodies are warranted. The state and federal regulatory bodies have different procedures and prerequisites for determining if restrictions to subsistence users and their uses are warranted. The series of prerequisites for promulgation of regulations restricting subsistence users and their uses for the subsistence fisheries managed by the State follows:

1. Identify the species, stock, and population targeted by subsistence users which may require harvest restrictions through AS Sec. 16.05.258. Subsistence use and allocation of fish and game.
  - (a) Except in nonsubsistence areas, the Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks or populations, that are customarily and traditionally taken or used for subsistence. The commissioner shall provide recommendations to the boards concerning the stock and population identifications. The boards shall make identifications required under this subsection after receipt of the commissioner's recommendations.
2. Establish a positive Customary and Traditional Use finding establishing a subsistence priority for the stock that are traditionally taken or used by Alaska Residents of concern using the criteria described in 5AAC 99.010 (b) (1-8).
  - (b) Each board will identify fish stocks or game populations, or portions of stocks or populations, that are customarily and traditionally taken or used by Alaska residents for subsistence uses by considering the following criteria:
    - (1) a long-term consistent pattern of noncommercial taking, use, and reliance on the fish stock or game population that has been established over a reasonable period of time of not less than one generation, excluding interruption by circumstances beyond the user's control, such as unavailability of the fish or game caused by migratory patterns;

- (2) a pattern of taking or use recurring in specific seasons of each year;
- (3) a pattern of taking or use consisting of methods and means of harvest that are characterized by efficiency and economy of effort and cost;
- (4) the area in which the noncommercial, long-term, and consistent pattern of taking, use, and reliance upon the fish stock or game population has been established;
- (5) a means of handling, preparing, preserving, and storing fish or game that has been traditionally used by past generations, but not excluding recent technological advances where appropriate;
- (6) a pattern of taking or use that includes the handing down of knowledge of fishing or hunting skills, values, and lore from generation to generation;
- (7) a pattern of taking, use, and reliance where the harvest effort or products of that harvest are distributed or shared, including customary trade, barter, and gift-giving; and
- (8) a pattern that includes taking, use, and reliance for subsistence purposes upon a wide diversity of fish and game resources and that provides substantial economic, cultural, social, and nutritional elements of the subsistence way of life.

3. Establish an Amounts Necessary for Subsistence for the subsistence users targeting the identified stock through AS Sec. 16.05.258.

(b) The appropriate board shall determine whether a portion of a fish stock or game population identified under (a) of this section can be harvested consistent with sustained yield. If a portion of a stock or population can be harvested consistent with sustained yield, the board shall determine the amount of the harvestable portion that is reasonably necessary for subsistence uses and

4. Once the stock is identified, a positive Customary and Traditional Use finding is made, and the Amounts Necessary for Subsistence is established, a proposal should be submitted to the Board of Fisheries to authorize customary trade of fish for cash and additional proposals can be submitted to establish limits, permitting and reporting if active management is warranted.
5. If the Board of Fisheries rejects the proposals or does not act on the first three items of this list, customary trade of subsistence harvested fish for cash will remain prohibited in the State's subsistence fisheries.

### **Policy Recommendations for the Federal Regulatory Process**

The series of prerequisites for promulgation of regulations restricting subsistence users and their uses for the subsistence fisheries managed by the federal government significantly differ from

the State's laws, regulations, and policies. The federal procedures for restricting customary trade of subsistence harvested fish for cash differ from the State's in practice and regulations. Federal law or regulation does not prohibit prioritization among subsistence uses though the Federal Board has historically treated all subsistence uses as equal. Federal law does provide an avenue to restrict other non-federally qualified users as to not impact federally qualified users under defined conditions and also provides an avenue to restrict among federally qualified users under defined conditions.

A specific monetary limit for customary trade of subsistence harvested fish for cash does not exist in federal law. Definitions under 50CFR §100.4 states customary trade does not include trade which constitutes a significant commercial enterprise. Lack of the definition of what constitutes a significant commercial enterprise, in theory, allows nearly unrestricted sales of subsistence harvested fish for cash in regions without defined monetary limits in federal regulation. Federal regulation allows definition of monetary limits by region be placed on the customary trade of subsistence caught fish for cash when requested by and Regional Advisory Council through 50 CFR§ \_\_. 27(c)(11) and (12).

Three viable approaches for limiting customary trade of federal subsistence harvested fish for cash exist through the federal regulatory process. One undefined approach for limiting customary trade for cash through prioritizing federal subsistence uses may exist through modifying the Federal Board's historical practice of treating all uses as equal. Prioritizing the subsistence user personal and family consumptive needs over customary trade of fish for cash may be defensible in court if the legal record is carefully constructed because ANILCA neither prohibit nor authorize prioritization among subsistence uses.

The first approach is to place harvest restrictions on competing federal subsistence users exploiting the stock. Federal law indicates this can only be done after non-federally qualified users are eliminated from the fishery within federal public lands. The second approach is to place monetary limits on the amount of harvested fish federally qualified users are permitted to sale for cash. The third approach is to develop an enforceable definition of what constitutes a significant commercial enterprise under 50CFR §100.4.

The series of questions from the above "Tiered Criteria" section to identify if a subsistence fishery should be studied to determine whether active management or restrictions are warranted should be reviewed and applied to the federal subsistence fishery of concern. If the best information available indicates federally qualified subsistence users cannot meet their needs for all uses, including customary trade of fish for cash, restrictions on the competing user groups may be warranted. If the conclusion of the investigative process recommends changes to the federal subsistence fishery, the following guidelines in federal law to restrict users follows:

1. Identify the species, stock, and population targeted by federally qualified subsistence users which may require restrictions to non-federally qualified users to allow for federally qualified users to meet all of their subsistence use needs including customary trade of fish for cash. If the stock cannot support the cumulative harvests by both federally qualified users and others, the Federal Subsistence Board has the option to close federal public lands to other user groups allocating all harvestable surplus to federally qualified users through CFR 50 §100.14 (b) through issuance of various special actions under 50 CFR 50 §100.19 or adoption of fishery proposal through 50 CFR §100.18 for permanent restriction under the following federal authority:

§100.14 Relationship to State procedures and regulations.

(b) The Board may close public lands to hunting, trapping, or fishing, or take actions to restrict the taking of fish and wildlife when necessary to conserve healthy populations of fish and wildlife, continue subsistence uses of such populations, or pursuant to other applicable Federal law. The Board may review and adopt State openings, closures, or restrictions which serve to achieve the objectives of the regulations in this part.

2. Identify the species, stock, and population targeted by federal subsistence users which may require allocating between subsistence uses among federally qualified users. If the stock cannot support the cumulative harvest from all federally qualified users and all other non-federally qualified user have been eliminated from the fishery, the Federal Subsistence Board is required to allocate among subsistence users through CFR 50 §100.17 as follows:

CFR 50 §100.17 Determining priorities for subsistence uses among rural Alaska residents.

(a) Whenever it is necessary to restrict the subsistence taking of fish and wildlife on public lands in order to protect the continued viability of such populations, or to continue subsistence uses, the Board shall establish a priority among the rural Alaska residents after considering any recommendation submitted by an appropriate Regional Council.

(b) The priority shall be implemented through appropriate limitations based on the application of the following criteria to each area, community, or individual determined to have customary and traditional use, as necessary:

(1) Customary and direct dependence upon the populations as the mainstay of livelihood;

(2) Local residency; and

(3) The availability of alternative resources.

(c) If allocation on an area or community basis is not achievable, then the Board shall allocate subsistence opportunity on an individual basis through application of the criteria in paragraphs (b)(1) through (3) of this section.

(d) In addressing a situation where prioritized allocation becomes necessary, the Board shall solicit recommendations from the Regional Council in the area affected.

If the above two options for placing restrictions on the user groups is not selected, the second method to restrict customary trade of subsistence harvested fish for cash is to establish a monetary limit through 50 CFR §\_\_\_\_. 27(c)(11) and (12). As referenced earlier, the customary trade subcommittee is in the process of defining monetary and restriction options for Yukon River Chinook salmon during 2011 and 2012 in preparation for submitting proposals to the Federal Subsistence Board for the 2013 regulatory meeting.

If the above three options are not selected, the final option of establishing a definition for what constitutes a significant commercial enterprise under 50CFR § 100.4 could be accomplished through submitting a proposal to the Federal Board. This has been done and rejected before at the January 2003 Federal Board meeting. At the meeting, the Federal Board established the current custom trade of fish for cash policy and resulting regulations. Follow up proposals should be considered as personnel and policies change over time.

### **Other Non-regulatory Recommendations**

One indirect option which warrants further investigation is to submit a proposal to the State Board to consider establishing a definition for the regulatory term “significant commercial enterprise.” If the State Board establishes a statewide definition or monetary limit which defines significant commercial enterprise, the federal subsistence system would automatically default to State regulations until a federal regulation was established to supersede the state regulation through 50 CFR §100.14. This alternative may be temporally effective and could be superseded by special action or through adoption of a proposal by the Federal Subsistence Board.

§100.14 Relationship to State procedures and regulations.

(a) State fish and game regulations apply to public lands and such laws are hereby adopted and made a part of the regulations in this part to the extent they are not inconsistent with, or superseded by, the regulations in this part.

A second non-regulatory option for placing restrictions on customary trade of subsistence harvested fish for cash recommends further investigations into changing the Federal Board’s practice of considering all subsistence uses as equal. The primary example of existing federal regulations which counters federal historical practice of not establishing use priorities is the prohibition of use of subsistence harvested Yukon River Chinook salmon for dog food and prioritizing the use of the harvest for human consumption as stated in §\_\_\_\_. 27(i)(3)(xxi). Conclusions from establishing the criteria the Federal Board utilized to establish priorities among subsistence uses in this case may lead to changes in this practice which could be applied to other federal subsistence fisheries when warranted.

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## **APPENDIX A: STATE LAWS AND REGULATIONS IN EFFECT AS OF DECEMBER 31, 2011**

### **State Law:**

#### **Sec. 16.05.920. Prohibited conduct generally.**

(a) Unless permitted by AS 16.05 - AS 16.40 or by regulation adopted under AS 16.05 - AS 16.40, a person may not take, possess, transport, sell, offer to sell, purchase, or offer to purchase fish, game, or marine aquatic plants, or any part of fish, game, or aquatic plants, or a nest or egg of fish or game.

#### **Sec. 16.05.940. Definitions.**

(8) Customary trade – means the limited noncommercial exchange, for minimal amounts of cash, as restricted by the appropriate board, of fish or game resources; the terms of this paragraph do not restrict money sales of furs and furbearers.

### **State Regulation:**

#### **5 AAC 01.010. Methods, means, and general provisions**

(d) unless otherwise specified in this chapter, it is unlawful to buy or sell subsistence-taken fish, their parts, or their eggs, except that it is lawful to buy or sell a handicraft made out of the skin or non-edible by-products of fish taken for personal or family consumption.

(j) – Persons licensed under AS43.75.011 to engage in a fisheries business may not receive for commercial purposes or barter or solicit to barter for subsistence taken salmon or their parts. Further restrictions on the bartering of subsistence taken salmon or their parts may be implemented by emergency order for a specific time or area if circumvention of management programs is occurring because of illegal bartering activities.

#### **5 AAC 01.030. Unlawful possession of subsistence finfish**

(a) No person may possess, transport or place into the possession of another person's subsistence-taken fish or their parts which the person has taken contrary to state law or regulation.

(b) No person may possess or transport raw or unprocessed subsistence-taken fish or their parts if the items have been received from a person who took, possessed or transported the items contrary to state law or regulation and if the person

receiving the items knows, has reason to know or should have reason to know that the items were taken, possessed or transported contrary to state law or regulation.

(c) No person may possess or transport raw or unprocessed subsistence-taken fish or their parts that the person knows were taken, possessed or transported contrary to state law or regulation.

**5AAC 01.717 Customary trade in herring roe on kelp.**

(a) The limited, noncommercial exchange for cash of subsistence-harvested herring roe on kelp, legally taken in Districts 1-16, under the terms of 5AAC 01.730, is permitted as customary trade. Persons licensed under AS 43.75.011 to exchange solicit to exchange, or receive for commercial purposes, subsistence-taken herring roe on kelp. Allowable possession limits for customary trade and other subsistence uses shall be those specified on the permits issued according to 5AAC 01.730(g). Permits must include the following information:

- (1) the intended purpose of the harvest and the estimated amount of herring roe on kelp dedicated to each purpose;
- (2) the name of the individual transporting the herring roe on kelp to the point of sales or transfer.

(b) The permit information provided in compliance with (a) of this section may be changed before herring roe on kelp is taken, by contacting a Department representative where the permit was issued.

**5 AAC 01.730. Subsistence fishing permits. (Herring roe on kelp)**

(g) When issuing a herring spawn on kelp subsistence fishing permit, the department may specify on the permit the times and locations for harvesting and the species of kelp that may be taken. The annual possession limit for herring spawn on kelp is 32 pounds for an individual or 158 pounds for a household of two or more persons. The department will, in its discretion, issue an additional permit for herring spawn on kelp above the annual possession limit if harvestable surpluses of herring spawn on kelp are available.

**5 AAC 01.188. Customary trade of subsistence-taken finfish. (Norton Sound and Port Clarence Area)**

(a) In the Norton Sound-Port Clarence Area, the customary trade of subsistence-taken finfish is permitted as specified in this section. A person who conducts a customary trade in subsistence-taken finfish under this section must

(1) obtain a customary trade record keeping form from the department before the person conducts the customary trade, and accurately record the cash sale on the form within the 24 hours after the sale occurs; the form requires the reporting of

(A) the date of each sale;

(B) the buyer's name and address;

(C) the species and amount of finfish sold;

(D) the location where the finfish were harvested;

(E) the dollar amount of each sale;

(F) the form of processing used; and

(G) any other information the department requires for management or enforcement purposes;

(2) return the customary trade record keeping form to the department as prescribed by the department on the form;

(3) display the customary trade record keeping form upon request by a local representative of the department or a peace officer of the state.

(b) A person may not sell subsistence-taken finfish under this section for more than \$200 total per household in a calendar year.

(c) A person who receives subsistence-taken finfish in exchange for cash in a customary trade may not resell the fish.

(d) A sale or purchase of finfish authorized under this section, including the delivery of fish to a purchaser, may occur only in the Norton Sound-Port Clarence Area.

## **APPENDIX B: EXISTING FEDERAL LAWS AND REGULATIONS IN EFFECT AS OF AUGUST 19, 2011**

### **Federal Law**

#### **Alaska National Land Interest Lands Conservation Act**

##### **Title VIII**

§803. As used in this Act, the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade. For the purposes of this section, the term--

(1) "family" means all persons related by blood, marriage, or adoption, or any person living within the household on a permanent basis; and

(2) "barter" means the exchange of fish or wildlife or their parts, taken for subsistence uses--

(A) for other fish or game or their parts; or

(B) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature

### **Federal Regulation**

#### **Title 50—Wildlife and Fisheries**

#### **Part 100—Subsistence Management Regulations for Public Lands in Alaska**

#### **Subpart A—General Provisions**

##### **§ 100.4 Definitions**

*Customary trade* means exchange for cash of fish and wildlife resources regulated in this part, not otherwise prohibited by Federal law or regulation, to support personal and family needs; and does not include trade which constitutes a significant commercial enterprise.

## **§ 100.7 Restriction on use.**

- (a) You may not use fish or wildlife or their parts, taken pursuant to the regulations in this part, unless provided for in this part.
- (b) You may not exchange in customary trade or sell fish or wildlife or their parts, taken pursuant to the regulations in this part, unless provided for in this part.
- (c) You may barter fish or wildlife or their parts, taken pursuant to the regulations in this part, unless restricted in §§ 100.25, 100.26, 100.27, or 100.28.

### **Subpart D—Subsistence taking of fish and wildlife**

#### **§100.27 Subsistence taking of fish**

(c)(11) Transactions between rural residents. Rural residents may exchange in customary trade subsistence-harvested fish, their parts, or their eggs, legally taken under the regulations in this part, for cash from other rural residents. The Board may recognize regional differences and regulate customary trade differently for separate regions of the State.

(c)(12) Transactions between a rural resident and others. In customary trade, a rural resident may trade fish, their parts, or their eggs, legally taken under the regulations in this part, for cash from individuals other than rural residents if the individual who purchases the fish, their parts, or their eggs uses them for personal or family consumption. If you are not a rural resident, you may not sell fish, their parts, or their eggs taken under the regulations in this part. The Board may recognize regional differences and regulate customary trade differently for separate regions of the State.

(i) Bristol Bay Fishery Management Area—The total cash value per household of salmon taken within Federal jurisdiction in the Bristol Bay Fishery Management Area and exchanged in customary trade between rural residents and individuals other than rural residents may not exceed \$400.00 annually. These customary trade sales must be immediately recorded on a customary trade recordkeeping form. The recording requirement and the responsibility to ensure the household limit is not exceeded rest with the seller.

(ii) Upper Copper River District—The total number of salmon per household taken within the Upper Copper River District and exchanged in customary trade between rural residents and individuals other than rural residents may not exceed \$500.00 annually. No more than 50% of the annual harvest of salmon by

the household. No more than 50% of the annual household limit may be sold under paragraphs\_\_\_\_. 27(c)(11) and (12) when taken together. These customary trade sales must be immediately recorded on a customary trade recordkeeping form. The recording requirement and the responsibility to ensure the household limit is not exceeded rests with the seller.

(c)(13) *No sale to, nor purchase by, fisheries businesses.*

(i) You may not sell fish, their parts, or their eggs taken under the regulations in this part to any individual, business, or organization required to be licensed as a fisheries business under Alaska Statute AS 43.75.011 (commercial limited-entry permit or crew license holders excluded) or to any other business as defined under Alaska Statute 43.70.110(1) as part of its business transactions.

(ii) If you are required to be licensed as a fisheries business under Alaska Statute AS 43.75.011 (commercial limited-entry permit or crew license holders excluded) or are a business as defined under Alaska Statute 43.70.110(1), you may not purchase, receive, or sell fish, their parts, or their eggs taken under the regulations in this part as part of your business transactions.

(e)(3)(xxi) In the Yukon River drainage, Chinook salmon must be used primarily for human consumption and may not be targeted for dog food. Dried Chinook salmon may not be used for dog food anywhere in the Yukon River drainage. Whole fish unfit for human consumption (due to disease, deterioration, deformities), scraps, and small fish (16 inches or less) may be fed to dogs. Also, whole Chinook salmon caught incidentally during a subsistence chum salmon fishery in the following time periods and locations may be fed to dogs:

(A) After July 10 in the Koyukuk River drainage;

(B) After August 10, in Subdistrict 5D, upstream of Circle City.