



MEMORANDUM

TO: John Jensen, Chair
Alaska Board of Fisheries

DATE: April 12, 2018

SUBJECT: Petition to allow the harvest
of king salmon in the Upper
Yentna Subsistence Fishery

THRU: Hazel Nelson, Director
Division of Subsistence
Tom Brookover, Director
Division of Sport Fish

FROM: Lisa Olson, Deputy Director
Division of Subsistence
Tom Taube, Deputy Director
Division of Sport Fish

This letter provides Alaska Department of Fish and Game (department) staff assessment of a petition submitted by the Mt. Yenlo Fish and Game Advisory Committee dated March 26, 2018 to the Alaska Board of Fisheries (board) to consider an emergency action out of cycle.

Action Requested

This petition requests the board to allow harvest of king salmon in the Upper Yentna River Subsistence Fishery.

Background

Current subsistence regulations include a negative customary and traditional use determination for king salmon and a positive finding for other salmon in the Yentna River drainage in 5 AAC 01.566(a)(1)(C) and do not include king salmon in the amount of salmon reasonably necessary for subsistence uses in that drainage in 5 AAC 01.566(e). In 5 AAC 01.593(3)(C), permit holders in the Upper Yentna River subsistence salmon fishery shall be present to attend the fish wheel at all times while the fish wheel is in operation, and king salmon and rainbow trout must be returned alive to the water.

The board's actions and the regulations pertaining to this fishery have a complex history; a summary may be relevant for evaluating the Mt. Yenlo Fish and Game Advisory Committee's emergency petition.

1. In March 1988, the board considered Proposal 405, submitted by five residents of Skwentna, to adopt regulations for subsistence fishing for salmon in a portion of the Yentna River. As a first step, the board reviewed a customary and traditional (C&T) use worksheet with background on the eight criteria used by the board to identify fish stocks with C&T uses (5 AAC 99.010(b)), prepared by the department and supplemented by public testimony. The board made a negative C&T finding: that there were no customary and traditional uses of the salmon in this area.
2. A similar proposal (Proposal 7) was considered by the board in December 1988. The board affirmed its March 1988 decision and adopted written findings explaining its action (FB-124-88).
3. Subsequently, in 1989, Skwentna residents Tom and Diane Payton filed a lawsuit in Alaska Superior Court challenging the board's actions. The court ruled in favor of the board and the Paytons appealed. The Alaska Supreme Court then ruled in the appeal that its December 1989 decision in *McDowell* (overturning portions of the 1986 state subsistence law) rendered the Paytons' case moot.
4. In November 1992 (following passage of current state subsistence law), the board considered Proposal 362, submitted by the Paytons, again to establish a subsistence fishery in a portion of the Yentna River. The board rejected the proposal, citing its earlier decisions and stating that no new relevant information had been provided.
5. In response to the board's decision, in February 1994 the Paytons filed a new lawsuit. In October 1995, the Superior Court ruled against the Paytons' claims. The Paytons subsequently appealed to the Alaska Supreme Court.
6. At the February 1996 board meeting, there were three more proposals before the board (proposals 150, 521, and 522) to open a portion of Yentna River to subsistence salmon fishing. ADF&G updated the earlier 1988 C&T work sheet, resulting in a 1996 C&T worksheet. The board again declined to reverse the negative C&T finding and did not adopt subsistence fishing regulations. However, at this meeting the board did create personal use regulations (5 AAC 77.526. *Skwentna River Personal Use Salmon Fishery*) allowing the use of fish wheels in a portion of the Yentna River. This fishery focused on sockeye salmon and excluded any retention of king salmon. The season ran from July 15 to July 31 on Mondays, Wednesdays, and Fridays. The seasonal limits were 25 salmon (excluding king salmon) for the permit holder and 10 additional salmon (other than king salmon) for each additional household member. A personal use permit was required. The new regulations included specifications for fish wheels (including a live box) and attendance at the fish wheel whenever it was in operation. King salmon and rainbow trout were required to be returned to the water alive.
7. In response to the Payton's appeal, in June 1997, the Alaska Supreme Court reversed the lower court's October 1995 ruling and found in favor of the Paytons. The court ruled that "the board erroneously required a familial relationship between current and past generations of users of upper Yentna River area salmon" and "erred when it concluded that current users of salmon in the upper Yentna River areas do not handle, prepare, preserve, and store salmon based on traditional practices." The Supreme Court also concluded that new information had been

provided to the board by the department at the 1992 board meeting for Proposal 362 but that the board had not properly considered this new information.

8. As part of this 1997 ruling, the Supreme Court remanded an evaluation of Proposal 362 (first considered in 1992 by the board) back to the board “in a manner consistent with this opinion,” including consideration of the new information submitted by the department in 1992 plus any additional information made available since that time.
9. In February 1998, the board reviewed the 1996 meeting C&T worksheet and other documents provided by the department in light of the court’s direction, including the information provided as new information at the 1992 meeting. The board then made a positive C&T finding as follows (see record copy (RC) 149 from the 1998 meeting that includes the 1998 C&T language):

5 AAC 01.566. CUSTOMARY AND TRADITIONAL USES OF FISH STOCKS. The Alaska Board of Fisheries finds that the following stocks are customarily and traditionally taken or used for subsistence:

- (1) Salmon in the following waters :
 - (A) . . .
 - (B) . . .
 - (C) in the Yentna River drainage outside the Anchorage-Matsu-Kenai Nonsubsistence Area as defined in 5 AAC 99.015(3).

10. Note that the board did not explicitly exclude king salmon from this 1998 positive finding. The C&T worksheet provided by the department that was the basis for this positive finding references harvests and uses of king salmon under 5 AAC 99.010(b) Criterion 1 and Criterion 2. Under Criterion 1, findings from comprehensive household surveys conducted by the department in Skwentna in the 1980s were summarized in tables that documented harvests and uses of king salmon (and the other four species). Under Criterion 2, the worksheet noted that “Upper Yentna Area residents harvest each salmon species as it becomes available locally. King salmon are taken in early June into July, accompanied by sockeye salmon.” The worksheet was referring to harvests with rod and reel under sport fishing regulations, since the subsistence fishery had been closed in this area since the early 1960s.
11. At the 1998 meeting, the board adopted a harvest cap of 2,500 salmon for the subsistence fishery (this was the harvest cap in place for the personal use fishery), but did not adopt an “amount reasonably necessary for subsistence” (ANS) finding in regulation.
12. This C&T finding was in regulation, without any changes, from 1998 to 2011.
13. At the February 1998 meeting, following the positive C&T finding for salmon, the board adopted subsistence regulations virtually identical to those that had been in place for the personal use fishery (5 AAC 01.593. *Upper Yentna River Subsistence Salmon Fishery*). These subsistence regulations retained the prohibition against the retention of king salmon that was in place for the personal use fishery (5 AAC 01.593 stated: “In the Yentna River drainage outside the Anchorage-MatSu-Kenai nonsubsistence area described in 5 AAC 99.015(a), salmon, other than

king salmon, may be taken for subsistence purposes only as follows . . .”). The season for this fishery was later extended through August 7 when the board adopted Proposal 307 in February 2014.

14. In February 2011, the board considered Proposal 103, submitted by the United Cook Inlet Drift Association, which asked the board to “review/remove/repeal the [Yentna River salmon] customary and traditional (C&T) finding,” and/or reduce the harvest cap for the fishery from 2,500 salmon to “the first 500 salmon harvested.”
15. The Alaska Department of Law (DOL) comments on Proposal 103 stated that “the board should be careful in addressing the proposal and should first determine whether there was an error in its previous [1998 C&T] finding or whether significant new information is now available to support reconsideration of its earlier finding.”
16. In the 2011 meeting staff comments, the department recommended making an ANS finding for this fishery, and provided options in RC 20. The preface to the options stated: “Each option includes one suboption with a range for all salmon species [except the prohibited king salmon] combined and one suboption with a range for each allowable salmon species (retention of king salmon in this fishery is not allowed).” Each ANS option specifically excluded king salmon and stated that “king salmon [are] not included in [the] positive C&T determination.” However, as noted above, until modified at this February 2011 meeting, the C&T finding for this fishery was for “salmon” and did not overtly exclude king salmon. Staff evidently assumed, perhaps erroneously, that because the board had prohibited the retention of king salmon in regulation when it established this subsistence fishery in 1998, the board had also implied that there were no C&T uses for which it was required to provide harvest opportunities.
17. RC 95 from the February 2011 board meeting is the report from Committee A: Subsistence and Commercial Fishing. It included substitute language for Proposal 103 that added “except for king salmon” to the existing (1998) C&T finding. This was the basis for the board’s modification of the C&T regulation. Therefore, since 2011, the modified C&T finding has been:

5 AAC 01.566. CUSTOMARY AND TRADITIONAL USES OF FISH STOCKS. (a)
The Alaska Board of Fisheries finds that the following stocks are customarily and traditionally taken or used for subsistence:

(1) Salmon in the following waters :

(A) . . .

(B) . . .

(C) salmon, other than king salmon, in the Yentna River drainage outside the Anchorage-Matsu-Kenai Nonsubsistence Area as defined in 5 AAC 99.015(3).

18. The board adopted an amended version of Proposal 103 that established an ANS of 400–700 salmon, other than king salmon, for the Yentna River Subsistence salmon fishery (5 AAC 01.566(e)).

19. At the 2011 meeting, the Division of Subsistence submitted a staff report *Overview of Subsistence Salmon Fisheries in the Tyonek Subdistrict and Yentna River, Cook Inlet, Alaska* (Special Publication No. BOF 2011-01). Regarding the Upper Yentna River subsistence fish wheel fishery, the report (p. 4) stated that “Since 1998, the Division of Subsistence has conducted no new research that would update the information previously provided about the 8 criteria for consideration of C&T uses, as summarized in the 1996 worksheet and as supplemented by a synopsis of interviews and archival data.” The department included the information it provided to the board in 1998 (including the C&T worksheet from 1996 which contained information pertaining to the use of king salmon, and the synopsis of interviews) as Part Three of this 2011 board report.
20. During the February 2011 meeting, the department and the Department of Law stated they were uncertain regarding why the board prohibited retention of king salmon when it adopted the subsistence regulations for this fishery in 1998. Because the department stated it had no new information, the board did not review the C&T criteria for Yentna River king salmon, or any other Yentna River salmon. As just noted, staff provided a copy of the earlier C&T worksheet for Yentna River salmon, but the board did not ask staff to orally review uses of king salmon as summarized in the 1996 worksheet before the board modified the C&T finding to exclude king salmon in 2011.

To summarize:

21. C&T worksheets prepared by the department in 1988 and 1996 described harvests and uses of Yentna River king salmon stocks, along with other salmon stocks.
22. A C&T finding for Yentna River “salmon,” which did not exclude king salmon, was in place in regulation 1998–2011.
23. When the board created subsistence regulations for this fishery in 1998, it used the regulations for the personal use fishery already in place in the Yentna River, which prohibited the retention of king salmon.
24. The C&T finding was revised in 2011 to exclude king salmon; the record shows this decision was made based on the language in the 1998 regulations governing the fishery, not on an examination of information specifically about king salmon in the C&T worksheet provided by the department.

Estimates of sport harvest and catch in the Yentna River drainage (including Kahiltna, Yentna, Talachulitna rivers, and Lake Creek) from 2014–2016 (2017 currently not available) averaged 1,283 and 9,425 king salmon, respectively. Sport fishing regulations allow a bag of one king salmon, 20 inches or larger in length and possession limit of two king salmon, with an annual limit of five king salmon for the entire Cook Inlet area. The open season for king salmon is January 1–July 13. From May 15–July 13, in waters open to king salmon fishing, fishing is not allowed from 11 p.m. to 6 a.m. In addition, king salmon may not be removed from the water before releasing the fish.

Restrictive management actions have been implemented at the start of the season in each year since 2012. From 2013–2016, the department issued preseason emergency orders restricting harvest or closing the sport fishery to reduce mortality to achieve escapement goals in the Yentna River drainage. This preseason strategy reduced harvest by 60 percent among Yentna River drainage streams and resulted in the majority of goals being made through this time period. From 2013–2016, the Talachulitna River drainage was restricted to catch-and-release fishing for king salmon. In the Yentna River drainage only unbaited, single-hook artificial lures were allowed, harvest of king salmon was limited to four days per week, and there was an annual limit of two king salmon for the Susitna River drainage. In 2017, in the Susitna River drainage (including the Talachulitna River) harvest was limited to four days per week and there was an annual limit of two king salmon for the Susitna River drainage. The 2017 king salmon run was lower than anticipated. Effective July 4, 2017, sport fishing for king salmon was closed for the remainder of the season and no escapement goals were achieved on the Yentna River drainage.

In March 2018, the department issued Emergency Order 2-KS-2-10-18 restricting the Doshka and Yentna rivers to catch-and-release and closing the remainder of the Susitna River drainage to sport fishing for king salmon. The Northern District commercial set gillnet fishery was also closed for the 2018 directed king salmon fishery; no commercial fishery will occur until June 25. This action was taken due to a forecast for a weak run of king salmon in 2018 and the potential for returns in 2018 to be no better than 2017, a year when 13 of 15 king salmon escapement goals were not achieved in Northern Cook Inlet.

The petitioner states that an average of 17,676 king salmon swam past the fish wheel area from 2014–2017. In trying to recreate this number, the department has determined, based on radio-telemetry data from 2015–2017, that it likely includes a portion of king salmon that spawned below the fish wheel area and that the actual passage is approximately 3,000 fish fewer during that period. The Talachulitna River is the only tributary in the Yentna River drainage upstream of the fish wheel area that has an escapement goal (SEG 2,200–5,000 king salmon) and is assessed annually by aerial survey. The escapement goal was not achieved in 2017 and just exceeded the lower bound of the goal in 2013–2015, years in which the sport fishery was catch-and-release only. With the forecast for 2018 being worse than 2017, there is likely no harvestable surplus available in 2018 on the Talachulitna River or other areas of the Yentna River drainage.

Finding of Emergency

Under the criteria listed in the Joint Board Petition Policy used by the board in determining whether or not an emergency exists, paragraph (f) of 5 AAC 96.625 reads, in pertinent part:

...In this section, an emergency is an unforeseen, unexpected event that either threatens a fish or game resource, or an unforeseen, unexpected resource situation where a biologically allowable resource harvest would be precluded by delayed regulatory action and such delay would be significantly burdensome to the petitioners because the resource would be unavailable in the future.

At this time, the department does not believe there is an unforeseen or unexpected event that threatens a fish resource. The department also does not believe there is an unforeseen, unexpected resource situation where a biologically allowable resource harvest would be precluded by delayed regulatory action.

Summary

The department believes it is unlikely that a finding of emergency under 5 AAC 96.625(f) would be satisfied by this petition. The board last heard a request for a review of the C&T use determination for king salmon at the 2011 Upper Cook Inlet meeting. At that time the board was provided copies of existing C&T use information for Yentna River salmon from the 1998 board meeting and was informed that no new information was available, and then excluded king salmon from the positive finding for salmon and set an ANS of 400–700 salmon, other than king salmon. Although a proposal submitted in 2014 sought to extend the subsistence fishery season, no proposals asking for a C&T use determination for king salmon in the Upper Yentna River subsistence salmon fishery were submitted for the 2014 or 2017 Upper Cook Inlet meetings. Given this history, the department does not believe it is unforeseen or unexpected that king salmon in the Upper Yentna River subsistence salmon fishery are excluded from the C&T use determination (which has been true since 2011), nor that it is unforeseen or unexpected that king salmon are not permitted to be taken under subsistence fishing regulations in this fishery—king salmon have never been allowed to be taken in this subsistence fishery.

The department also does not believe it is unforeseen or unexpected that the king salmon run for the Susitna River drainage, including the Yentna River drainage, is expected to be poor, potentially worse than 2017. King salmon sport fishing restrictions have been implemented either preseason or inseason annually since 2012 to achieve escapement goals. In addition, the department does not believe a biologically allowable harvest of king salmon in this fishery would be precluded by delayed regulatory action. The department has already implemented restrictions or closures prohibiting any harvest of king salmon in the Susitna River sport fishery for 2018. These actions were taken given that the department believed there would be no harvestable surplus of king salmon in the Susitna River drainage in 2018.

cc: Sam Cotten, Commissioner
Glenn Haight, Executive Director, Boards Support Section
Forrest R. Bowers, Deputy Director, Division of Commercial Fisheries