
From: Peterson, Aaron C (LAW)
Sent: Wednesday, November 24, 2021 11:42 AM
To: John Wood
Cc: Haight, Glenn E (DFG)
Subject: RE: 2 requests for legal analysis/advice

John,

“Customary and traditional” is defined as “the noncommercial, long-term, and consistent taking of, use of, and reliance upon fish or game in a specific area and the use patterns of that fish or game that have been established over a reasonable period of time taking into consideration the availability of the fish or game.” AS 16.05.940(7)

It is notable, and relevant to your question, that the legislature did not include any reference to methods in the definition.

The Alaska Supreme Court has interpreted this statute, holding the following:

We agree with the State's analysis of this issue and with its position that clearly the boards *may* adopt regulations that recognize the needs, customs, and traditions of Alaska residents. Our holding is not to be taken as a direction to the boards that they should not consider traditional patterns and methods of taking fish and game for subsistence purposes in their formulation of appropriate subsistence regulations. Analysis of the applicable statutory provisions leads us to the conclusion that the boards have the discretion, but are not mandated, to take into consideration the traditional and customary methods of subsistence takings in their formulation of subsistence regulations. Of controlling significance here is the fact that under [the statutory definition] the terms “customary and traditional” define how fish and game are used, not how they are harvested, for subsistence purposes.
State v. Morry, 836 P.2d 358, 371 (Alaska 1992) (internal citations omitted)

Given this, it is clear that the Board should focus on the *uses* of the fish when making a C&T

finding, but following the codified criteria at 5 AAC 99.010 is appropriate when making customary and traditional use determinations. In applying these criteria, the board is not necessarily required to determine that every single criterion is satisfied, but should make a decision based upon the totality of the evidence. The regulation reads as follows:

(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.

I would also note that the Alaska Supreme Court has specifically rejected the argument that the boards must take into consideration customary and traditional patterns and methods of harvesting game and fish for subsistence purposes in formulating subsistence regulations. *State v. Morry*; see also *State v. Kluti Kaah Native Vill. of Copper Ctr.*, 831 P.2d 1270 (Alaska 1992).

Directly to your question, I suspect there was take of these fish prior to 1984, and the use of those fish should be analyzed. Put another way, there was likely a customary and traditional use, though perhaps through differing methods and means. Analyzing the proposal through the listed regulatory criteria is the best way to assure uniform application of C&T findings.

As to your second question, the 9 subsections are as follows:

- (1) fish stocks in the state shall be managed consistent with sustained yield of wild fish stocks
- (2) hatchery programs shall be operated without adversely affecting natural stocks of fish in the state

Both 1 and 2 are addressed by AS 16.05.730, which states in pertinent part that:

- (a) Fish stocks in the state shall be managed consistent with sustained yield of wild

fish stocks and may be managed consistent with sustained yield of enhanced fish stocks.

(b) In allocating enhanced fish stocks, the board shall consider the need of fish enhancement projects to obtain brood stock. The board may direct the department to manage fisheries in the state to achieve an adequate return of fish from enhanced stocks to enhancement projects for brood stock; **however, management to achieve an adequate return of fish to enhancement projects for brood stock shall be consistent with sustained yield of wild fish stocks...** (emphasis added)

- (3) hatchery programs shall be operated under a policy of management which allows reasonable segregation of returning hatchery-reared salmon from naturally occurring stocks;

I am not sure what the petitioner is asking for here. Certainly there are THAs and SHAs for returning hatchery fish. *See e.g.* 16.10.455 (a) A hatchery permit holder may harvest salmon for a facility in (1) a special harvest area through agents, or employees of or persons under contract with the permit holder as provided under a permit from the department or regulations of the Board of Fisheries; or (2) a terminal harvest area through the common property fishery under this section. Though many hatchery programs exist to supplement existing wild runs to provide increased fishing opportunities (such as the Kasilof and Ninilchik chinook programs).

- (4) Hatchery program remote release sites shall be located in an area where a reasonable segregation from natural stocks occurs

This is codified in AS 16.10.420(9): “a hatchery be located in an area where a reasonable segregation from natural stocks occurs, but, when feasible, in an area where returning hatchery fish will pass through traditional salmon fisheries.”

- (5) hatchery operations and specifications must be consistent with the comprehensive regional salmon plan approved under

This is codified in AS 16.10.480(f): “The **operation of a hatchery under a contract authorized by this section shall be conducted in accordance with the fisheries management and production goals of the department, and must be consistent with the comprehensive regional salmon plan approved under AS 16.10.375.**

During the term of the contract, the department may order changes in the operation of the hatchery that are necessary to ensure consistency with the production goals of the comprehensive regional salmon plan. The contract must specify the species to be raised and the production goals for each species, and these specifications must comply with the comprehensive regional salmon plan. The department may terminate a contract if the contractor fails to operate the hatchery in accordance with the requirements established by and under this subsection.” (emphasis added)

- (6) the department and board shall define and validate straying proportions “based on the best available scientific information” to sustain productivity, without adversely affecting, or jeopardizing sustained yield of wild naturally occurring salmon

This is largely codified in 5 AAC 39.222(c)(1)(D): “effects and interactions of introduced or enhanced salmon stocks on wild salmon stocks should be assessed; wild

salmon stocks and fisheries on those stocks should be protected from adverse impacts from artificial propagation and enhancement efforts;”

- (7) validated proportions of benign hatchery salmon straying are defined as: chinook xxx%; sockeye xxx%; coho xxx%; chum xxx%, pink xxx%;

I am not sure if this has been addressed. I presume the petitioner is seeking straying percentages for each species in each fishery, and that certainly has not been done. I will research this further and follow up before or at the meeting.

- (8) Until the department and board have a policy of management that justifies and validates this reasonable segregation of straying proportions without jeopardizing wild stock sustained yield, the CSP and genetics policy, the 2% rule will be adhered to within wild naturally occurring streams
- (9) when proportions of hatchery salmon straying are documented to exceed validated percentages, jeopardizing sustained yield of wild fish stocks, production shall be ramped down the following spring, from each Remote Release Site, hatchery or THA source incrementally until adverse affects cease.

I don't believe either 8 or 9 are currently codified in regulation. I would caution that the Board should probe whether these regulations would effectively revoke or prevent issuance of a permit. The legislature has specified that “[e]xcept as expressly provided in AS 16.40.120(e) and 16.40.130, the Board of Fisheries may not adopt regulations or take action regarding the issuance, denial, or conditioning of a permit under AS 16.40.100 or AS 16.40.120, the construction or operation of a farm or hatchery required to have a permit under AS 16.40.100, or a harvest with a permit issued under AS 16.40.120.” AS 16.05.251(f). Law has consistently advised that the Board is not authorized to take action that effectively revokes or prevents issuance of a permit. See 1997 Inf. Op. Att’y Gen. (Nov. 6).

Please let me know if this raises any other questions. I can also be reached at 907-269-5165 if you would like to discuss further.

Aaron,

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From: John Wood <jmkwood@mtaonline.net>

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To: Peterson, Aaron C (LAW) <aaron.peterson@alaska.gov>

Cc: Haight, Glenn E (DFG) <glenn.haight@alaska.gov>

Subject: 2 requests for legal analysis/advice

Aaron, tried to reach you via telephone but left on hold forever. I need some feedback from you on two issues that will be on the table in Cordova.

1. What is the legal definition of “customary or traditional” in the context of subsistence? There are numerous proposals dealing with subsistence harvests from boats. Apparently, this practice has been going on since 1984. If this information is correct and there was no such practice until then, does that then mean that prior to 1984, there was no such customary or traditional use? And if so, does the creation of this new harvest tool somehow cure that and establish it as such?
2. On proposals, 49-54, the proposer has 9 subsections and if I understand them correctly, each is required by statute or regulation. Please review them and let me know which of these are so required and the citation to the particular law/regulation. Also, please advise whether anything in these proposals are inconsistent with or contra to existing law/regulation.

Thanks much and I am available telephonically if needed at 354 0775.