Subsistence: A Position Paper
Alaska Department of Fish and Game
Division of Subsistence

Technical Paper #66

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Abstract

This paper presents recommendations from the Alaska Department of Fish and Game to the Boards of Fisheries and Game for the implementation of the subsistence law. Recommendations include:

1. The examination of existing subsistence use and regulations (p. 2)
2. The characterization of subsistence use in Alaska (p. 3)
3. The implementation of statutory language (p. 6)
4. The inclusion of subsistence concerns in management plans (p. 12)
5. The use of specific procedures to analyze subsistence (p. 13)

The paper suggests that the Boards have the authority to determine what is customary and traditional use on an area-by-area, case-by-case basis and to adopt appropriate regulations accordingly. The paper also suggests methods by which the Boards may make these determinations on a routine, evidence-supported basis.
Introduction

This paper is the product of discussions between and within the Departments of Fish and Game and Law, following a series of court decisions in 1980. The positions presented in this paper are consistent with, and intended to complement, the findings presented by the Department of Law to the joint meeting of the Boards of Fisheries and Game.

Underlying the recommendations in this paper is the opinion that the subsistence law can be successfully implemented by the Boards using existing regulatory authority if the Boards:

1.) are presented with information about the customary and traditional use of resources in question
2.) describe what they conclude to be customary and traditional use of the resources in question
3.) determine how the regulatory action they adopt provides a priority for the customary and traditional use
4.) place their evidence, findings, and decision rationales on the official record.

The Department of Fish and Game recognizes that it is the role of the Department and the public to provide sufficient information to the Boards to draw reasonable conclusions to both social and biological situations. It is also understood that, while the Department and the public provide regulatory options and supporting justifications, the Boards must rely on their own expertise to analyze situations and adopt regulations to resolve problems. This paper, then, will
present recommendations for the Boards to:

1.) examine existing subsistence use and regulations by area and species
2.) characterize subsistence use in Alaska
3.) implement statutory language
4.) include subsistence concerns in management plans
5.) use a specific procedure to analyze subsistence

Examination of Existing Regulations

The Department has concluded from recent court decisions that a systematic re-evaluation of existing regulations by area and species may be required.

The Game Division, for example, is surveying subsistence take of game by area and species to determine whether the harvestable surplus exceeds, meets, or is insufficient to actual subsistence use levels. Similar analyses of fish and game use are being prepared by the Subsistence Section.

In those instances where existing regulations do not appear to appropriately reflect actual subsistence use, changes in regulations should be considered. Depending on the Board's characterization of subsistence use for each area and species and the sufficiency of evidence presented, different management plans and regulatory solutions may be adopted.

It is clear that this process may take some time to complete but should begin as soon as possible. This process is intended to complement, not replace, the public proposal consideration process.
Characterization of Subsistence Use

The Department encourages the Boards to recognize that while subsistence is characterized as the direct uses or barter of Alaska wild resources, customary and traditional uses actually vary greatly area-by-area, species-by-species, and over time. Subsistence uses may be analyzed along a continuum whose extreme ends, based on current examples, are displayed below.

<table>
<thead>
<tr>
<th>Long</th>
<th>TIME DEPTH</th>
<th>Short</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rural</td>
<td>COMMUNITY BASE</td>
<td>Urban</td>
</tr>
<tr>
<td>Kinship</td>
<td>SOCIAL ROLE</td>
<td>Individual/Family</td>
</tr>
<tr>
<td>Community</td>
<td>ECONOMIC ROLE</td>
<td>Personal Use and regional economic and nutritional self-sufficiency</td>
</tr>
<tr>
<td>Food, clothing,</td>
<td>ACTUAL USES</td>
<td>Primarily food fuel, tools, shelter, handicraft barter, etc.</td>
</tr>
<tr>
<td>Many resources</td>
<td>RANGE OF USES</td>
<td>Few species (fish, game, fowl, vegetation, etc.)</td>
</tr>
<tr>
<td>More stable</td>
<td>PATTERN OF USES</td>
<td>Less stable, patterns (area, time, species opportunistic gear, efficiency, productivity, use level, sharing/bartering, division of labor, effort level, etc.)</td>
</tr>
<tr>
<td>Due to changing</td>
<td>VARIATION IN USE LEVEL</td>
<td>Due to high economic and AND PATTERN resource conditions, and local population growth urban immigration</td>
</tr>
</tbody>
</table>
A number of conclusions are suggested by the continuum:

A. The ability to separately deal with use, uses, and users is limited. 
"Use", for example, may be best considered as a customary and traditional form of economic life. "Uses" may be considered either as the individual harvesting of wild resources or utilization of resources for the purposes of food, clothing, shelter, etc. "Users" may be either individual harvesters or those persons who directly, customarily, and traditionally depend upon resource harvest, bartering, and sharing for basic social and economic purposes.

It is suggested that customary and traditional use, uses, and users are inseparable from one another; that is, if one attempts to describe the use or the uses (what, where, how, and how much), a significant part of the description includes an analysis of who is using and for what purposes. For additional discussion, see Implementation of Statutory Language, below.

B. In many instances, allocation questions fall somewhere between the two extremes shown on the continuum. It appears to be within the Board's powers to determine where along the continuum a particular use falls and to provide an appropriate priority as well as governing regulations. If the Boards determine that a particular use is an established customary and traditional use at any point along the continuum, the Boards should note how this use is accorded a priority among or over other uses.
When restrictions for conservation or subsistence purposes are required, with consequent restrictions on the ability to harvest (e.g., lower bag limits, reduced efficiency), the subsistence law requires a priority for subsistence. Priority may be expressed as longer seasons, earlier seasons, staggered seasons, greater harvest limits, protected areas, particular stocks, methods and means, decreased competition, specific allocations, local permitting, and so on.

C. In many instances, a particular resource may be used by groups at different points along the continuum. In fact, there may be two or more established customary and traditional uses of the same resource. To the degree that the differences between uses are based on different patterns (bag limits, seasons, areas, gear, and so on,) different regulations may be applied as appropriate (see Copper River Salmon Management Plan).

D. For sake of convenience, the Departments of Fish and Game and Law have divided specific portions of the subsistence law into "Tier I" and "Tier II". Tier I refers to the priority for subsistence when allocations must be made among beneficial uses. Tier II refers to the factors the Boards must, at a minimum, consider when the allowable harvest is insufficient for all the users along the continuum, providing a priority for those most directly dependent on a resource. Whether Tier II factors should or could be applied to Tier I allocations depends on the nature of the resource situation (e.g., is the resource scarce or abundant in relation to human de-
mands (?) and the quality of the information available to the Boards.

**Implementation of Statutory Language**

The Department encourages the Boards to select the criteria and measures by which the Boards will implement statutory language:

1. "Customary and Traditional Use"

**Custom:** A usage or practice common to many or to a particular place or class or habitual with an individual; long established practice considered as unwritten law; repeated practice. (Webster's Seventh New Collegiate Dictionary 1976.)

**Tradition:** The handing down of information, beliefs, and customs by word of mouth or by example from one generation to another without written instruction; an inherited pattern of thought or action (as a religious doctrine or practice or a social custom.) (Webster's Seventh New Collegiate Dictionary 1976.)

It is suggested that the Boards consider customary and traditional uses to be those noncommercial and nonwasteful uses (as defined in AS 16.05.940 [26,27] which have been pursued by a community or group of persons for a significant period of time. The Department and the public are responsible for providing to the Boards information on the nature of the use while the Boards must assess this information, and make findings on customary and traditional aspects.

It is suggested that it is the historic use pattern of the community or group which is to be accorded a priority in regulation. The use pattern for Tier I is made up of a number of elements.
needing consideration (e.g., areas, times, methods and means, species, stocks, productivity, efficiency, and so on). Evidence on these elements should be considered by the Boards.

The range of elements useful for consideration by the Boards in Tier I and Tier II decisions may be applied on a statewide basis. However, the criteria and measures within each element may vary on an area-by-area, case-by-case basis.

For example, in Tier II decisions, "direct dependence" is a statutory element for consideration. The Board may conclude that one criterion within "dependence" is the role of the resource in meeting nutritional needs. The measure within the criterion may be, for example, the number of meals per week in which the resource is normally used. Other measures could be the timing of consumption (e.g., first fresh meat in spring) or nutritional significance (e.g., source of particular fats or oils, foods that preserve well for winter.) It is suggested that the Boards begin their analysis of customary and traditional use with an assessment of user profiles and use patterns on a case-by-case basis. This would give the Department an opportunity to uncover the elements which appear naturally in real-life situations. After consideration of a number of cases, the Boards could then identify those elements, criteria, and measures which they have found most useful in their analyses. This process will, in turn, make the Department research and Boards' decisionmaking more routine. While there may be great variability within the criteria and measures used by the Boards on an area-by
area, case-by-case basis, the Boards should note their justifications and procedures for establishing the criteria and measures. To the degree that it is possible, it is desirable to apply the same standards (for example, for the sufficiency of information) and procedures to the Boards' decisionmaking.

The Boards should also consider the degree to which the customary and traditional uses include the historic tendency and necessity to harvest those resources which are available. The Boards should consider what part of the unreported and/or unpermitted harvest they believe to reflect necessary customary and traditional uses. For example, much subsistence use of and reliance on migratory waterfowl occurs outside of legal systems. Many other patterns of subsistence use may be within the conservation purposes of the Boards but, for a variety of reasons, not permitted or accounted for in regulation. Where possible, such patterns should be considered for inclusion in regulations.

2. "Priority"

Priority: Superiority in rank, position, or privilege; legal precedence in exercise of rights over the same subject matter; a preferential rating, especially one that allocates rights to goods and services usually in limited supply. (Webster's Seventh New Collegiate Dictionary 1976.)

A priority for subsistence use is often necessary "to assure the continuation of subsistence uses" [AS 16 05.251 (b)] in situations both of resource scarcity and abundance. The priority may be met, we suggest, by the regulatory provisions of a reasonable opportunity to continue the customary and traditional use(s) rather than as exclusive use, guaranteed
harvest, or unlimited new growth. Priority does not mean that each individual user must individually receive a priority but that the customary and traditional use(s) in an area receive(s) a priority.

As noted earlier, the priority may be accomplished through a number of methods, many of which are commonly used by the Boards to accomplish specific allocation or conservation purposes. The methods used depend on the Boards' analysis of the elements within each social and resource situation. If the methods appear to accomplish the priority, restriction or termination of other beneficial uses may not be required. For example, the resource may be sufficiently abundant to allow the Boards to provide a specific allocation without reducing or eliminating allocations to other uses.

If the Boards intend that commercial or recreational regulations or permit conditions are intended to accomplish the priority, the evidence and findings supporting this intention should be placed on the record. This is particularly important if, at a later date, the Boards may wish to alter those regulations but not damage the customary and traditional use. As noted earlier, there may be more than one customary and traditional use of a specific resource. It is suggested that Boards may have to curtail the growth of the less customary or dependent use if such growth threatens the continuance of the more customary or dependent use.
There is little evident justification for disallowing all new growth of subsistence uses. Historically, such uses fluctuate based on economic, human population, and resource conditions. On the other hand, the unlimited growth of such use need not be considered "customary and traditional" nor sufficient reason to restrict other beneficial uses. Such rapid growth may be restricted by the use of normal regulatory tools. However, some normal rate of growth and replacement should be possible under all management systems, to provide for normal population growth and in-migration. If the Boards must severely restrict participation in a Tier II situation to meet conservation and subsistence priority purposes, they should provide mechanisms so that the class of persons allowed access to the resource is not permanently closed (e.g., Copper River appeal procedure, Tyonek residency requirement).

Finally, if the Boards determine, based on evidence, that a particular use is not a customary and traditional use, the use is not a subsistence use and does not require a priority.

3. "Stocks".

The Department suggest that, for the purpose of implementation of the subsistence law, "stocks" not be determined by biological definitions. Human harvest is not generally limited to a specific stock. Human harvest normally occurs on those species which regularly appear and are taken in specific locales and times.

This harvest may, in fact, occur on an aggregate of different
biological stocks. Thus, for implementation purposes, "stocks" is determined by the customary and traditional use pattern on those species on which the Department declares a harvestable surplus. If there is not a harvestable surplus of the "stocks," the Boards may provide opportunity to harvest other species, in other places or times, in order to avoid unnecessary human hardship. When there is a substitution of species or stocks, due to depletion of customary species or stocks, the Boards may determine if a customary use is established by their action. Given the normal substitutions which occurred in customary and traditional use, such substitutions should not be unnecessarily constrained. Conversely, if the substitute species or stocks are scarce by comparison with demand, appropriate conservation methods must also be adopted.

4. "Customary and Direct Dependence."

Criteria within this element may include age, income, employment, gear type, number of dependents, barter and sharing patterns, length of dependence, culture, and so on. Information on the criteria should be provided by the Department and the public.

5. "Local Residency."

In Tier I situations, the Boards may provide reasonable opportunity for local residents through a variety of regulatory tools and without disallowing any Alaska resident an opportunity to participate. In Tier II situations, the Boards may, based on evidence, determine
that only some Alaska residents may participate (e.g., residents of a subsistence hunting area). The Boards should clearly state why and how such a criterion is implemented. If not all significant dependency is accounted for in the residency criterion, the Boards should provide a method for inclusion by directly dependent, but less local, residents (see Copper River Salmon Management Plan).


This element includes criteria ranging from real availability of wage employment to the presence of wild resources of equivalent value as perceived by users. Resources should not be substituted by regulation if there is an established customary and traditional use of a particular species or stock, except for a significant biological purpose. Information on the criteria should be provided by the Department and the public.

Inclusion of Subsistence in Management Plans

The Department encourages the Boards to include subsistence provisions in all management plans, especially those adopted as regulation (e.g., Copper River Salmon Management Plan). The Boards are encouraged to use their normal regulatory tools as well as those provided in statute (e.g., subsistence hunting area) to manage the one or more customary and traditional uses or user groups of a particular resource.
Decision-Making Procedure

The following analytic procedure is intended to assist the Boards in making decisions about proposed regulations dealing with subsistence. The procedure begins with the question of conservation of resources, the Department's basic priority, and then addresses the stages of decisionmaking explicit in both statute (e.g., Tiers I and II) and the policies of the Boards. For sake of simplicity, the text deals with fish; however, the same or similar procedure may apply to game.

A. Conservation of Resources

If the adoption of regulations which permit the taking of fish for subsistence uses would jeopardize or interfere with the maintenance of fish stock on a sustained-yield basis

1. Have harvests of the fish stock by other user groups also been precluded?

2. What biological reasons support the decision to reject regulations which permit the taking fish for subsistence uses?

3. Is the biological condition considered to be short-term or long-term?

B. Continuation of Subsistence Uses

If fish stocks can support some level of harvest without jeopardizing or interfering with maintenance of fish stocks on a sustained-yield basis,
1. Can the fish stock satisfy the demands of all potential users?
   a. If yes, have regulations been adopted which permit the taking of fish for subsistence uses?
   b. If no, is it necessary to restrict the taking of fish to assure maintenance of fish stocks on a sustained-yield basis?

2. Whether or not the fish stock can satisfy the demands of all potential takers without declining below the sustained-yield level, is it necessary to restrict the taking of fish to assure continuation of subsistence uses of such resources?

3. Is there evidence that the subsistence use being met through sport or commercial regulations?

4. Is the level of subsistence use accounted for in an allocation plan?

5. If the restriction on harvest is supported by a nonbiological justification, what regulatory measures have been taken to accommodate the subsistence priority?

C. Regulating for Subsistence

If it is necessary to restrict the taking fish either to assure maintenance of the fish stock on a sustained-yield basis or to assure continuation of subsistence uses of the stock,
1. Is a documented or alleged subsistence use or opportunity to take for such use affected directly or indirectly by this proposed regulation?

   a. In what ways is (are) the use(s) customary and traditional?

   b. Is there more than one customary and traditional use of the resource in question?

   c. What elements, criteria, and measures are most relevant in this situation?

   d. What basic elements of each use cannot or should not be altered?

   e. If there is more than one use, how is a priority accomplished for each?

   f. If there is more than one use, should they be separately regulated?

   g. Is this a Tier I or Tier II situation (or a combination of both, as in the Copper River Salmon Management Plan)?

2. Is an affected subsistence use or opportunity to take for such use enhanced—either directly or indirectly—by this proposed regulation?

3. Is an affected subsistence use or opportunity to take for such uses impeded or restricted—either directly or indirectly—by
a. What are the reasons supporting this particular restriction?

b. Can the purpose of the proposed regulation be accomplished in other ways having fewer negative impacts on subsistence use or taking for such use?

c. Have reasonable measures been taken to implement the subsistence priority with respect to other potential users?

   (1) Do these measures allow the opportunity to provide for all documented or alleged subsistence uses?

   (2) If these measures do not allow the opportunity to provide for all documented or alleged subsistence uses, are other users permitted to harvest the stock while such restrictions continue?

D. Regulating within Subsistence Uses

If further restriction is necessary—beyond the general priority favoring subsistence over other uses—either to assure maintenance of the fish stock on a sustained-yield basis or to assure continuation of subsistence uses of such stock,

1. Does the proposed regulation establish restrictions and limitations on the priorities for these consumptive uses on the basis of the following criteria:
a. Customary and direct dependence upon the resource as the mainstay of one's livelihood,

b. Local residency, and

c. Availability of alternative resources?