

**LOWER COPPER RIVER AREA SALMON FISHERY
THRESHOLD ANALYSIS
REQUEST FOR RECONSIDERATION FRFR22-01**

ISSUE

In response to Fisheries Proposal FP21-10, submitted by Jesse Carter and Robert Jewell of Cordova, Alaska, and supported by the Southcentral Alaska Subsistence Regional Advisory Council (Southcentral Council) recommendation in Fall 2020, the Federal Subsistence Board (Board) approved a dipnet and rod and reel salmon fishery one half mile above and below the highway bridge on the lower Copper River. Subsequently, the Board received a request for reconsideration from Ahtna Incorporated. A total of eight substantive claims from the request are assessed below and summarized in **Appendix 1**.

Background

In 2020, Proposal FP21-10 was submitted by two residents of Cordova requesting the Board implement a Federal subsistence salmon fishery in the lower Copper River adjacent to the Copper River Highway. The proponents requested that this new Federal subsistence fishery have the same harvest methods and limits as the Federal fishery in the Chugach National Forest portion of the Prince William Sound Area plus the addition of a limit of five Chinook Salmon per household. The harvest limit was not to be additive to the currently existing Federal subsistence permit FFPW01 or the State subsistence fishing permit in the Copper River District. At their October 2020 meeting, the Southcentral Council provided a recommendation in support of the proposal, while the Eastern Interior Alaska Regional Advisory Council (Eastern Interior Council) provided a comment in opposition.

The Board deferred action on FP21-10 at its January 2021 meeting and, since there was disagreement between the two Councils, requested that the Eastern Interior and Southcentral Councils meet to further discuss the proposal and explore a compromise that could be supported by those affected. The Councils met in joint session in March 2022, and the Eastern Interior Council upheld its comments in opposition to the fishery while the Southcentral Council members provided input in both support and opposition for this opportunity. At its April 2022 meeting, the Board adopted FP21-10 with the OSM modification to require 48-hour reporting and with further modification to limit the methods to dip net and rod and reel, delay the start of the fishery until June 1, prohibit dip netting from a boat. These additional Board modifications were based on comments provided during the joint meeting of the Councils. The Board took this action to provide additional opportunity for salmon harvest by federally qualified subsistence users.

Existing Federal Regulations

§ ____.27(e) *Subsistence taking of fish*

(11) Prince William Sound Area. The Prince William Sound Area includes all waters and drainages of Alaska between the longitude of Cape Fairfield and the longitude of Cape Suckling. The Lower Copper River Area includes that portion of the Copper River, from a boundary one-half mile upstream of the Copper River Highway to a boundary extending one-half mile downstream of the Copper River Highway, from the West bank of the river near highway mile 27 to the East bank of the river near highway mile 38.

(iv) In the Copper River drainage, you may take salmon only in the waters of the Upper Copper River District or in the vicinity of the Native Village of Batzulnetas and in the Lower Copper River Area.

(v) In the Upper Copper River District, you may take salmon only by fish wheels, rod and reel, or dip nets. In the Lower Copper River Area, you may take salmon only by dip nets and rod and reel. All salmon retained from the Lower Copper River Area must be reported to area managers within 48 hours of harvest.

(A) In the Lower Copper River Area, you may not dip net from a boat.

(B) In the Lower Copper River Area, the salmon fishery opens on June 1 and closes on September 30.

(xvii) In the Chugach National Forest portion of the Prince William Sound Area, and the Lower Copper River Area, you must possess a Federal subsistence fishing permit to take salmon, trout, whitefish, grayling, Dolly Varden, or char. Permits are available from the Cordova Ranger District.

(A) Salmon harvest is not allowed in Eyak Lake and its tributaries, the remainder of the Copper River and its tributaries outside of the Lower Copper River Area, and Eyak River upstream from the Copper River Highway Bridge.

(B) You must record on your subsistence permit the number of subsistence fish taken. You must record all harvested fish prior to leaving the fishing site, and return the permit by the due date marked on the permit.

(C) You must remove both lobes of the caudal (tail) fin from subsistence-caught salmon before leaving the fishing site.

(D) Excluding the areas described above in (A), You may take salmon by rod and reel, dip net, spear, and gaff year-round.

(E) For a household with 1 person, 15 salmon (other than pink) may be taken, and 5 cutthroat trout, with only 2 over 20 inches, may be taken; no more than 5 Chinook salmon per household; for pink salmon, see the conditions of the permit

(F) For a household with 2 persons, 30 salmon (other than pink) may be taken, plus an additional 10 salmon for each additional person in a household over 2 persons, and 5 cutthroat trout, with only 2 over 20 inches per each household member with a maximum household limit of 30 cutthroat trout may be taken; no more than 5 Chinook salmon per household; for pink salmon, see the conditions of the permit.

(G) You may take Dolly Varden, Arctic char, whitefish, and grayling with rod and reel and spear year round and with a gillnet from January 1-April 1. The maximum incidental gillnet harvest of trout is 10.

(H) You may take cutthroat trout with rod and reel and spear from June 15th to April 14th and with a gillnet from January 1 to April 1.

(I) You may not retain rainbow/steelhead trout for subsistence unless taken incidentally in a subsistence gillnet fishery. Rainbow/steelhead trout must be immediately released from a dip net without harm.

Existing State Regulations

5 AAC 01.005. Subsistence fishing permitted

Finfish other than salmon, rainbow trout, and steelhead trout may be taken for subsistence purposes at any time in any area of the state by any method unless restricted by the subsistence fishing regulations in this chapter. Salmon may be taken for subsistence purposes only as provided in this chapter.

5 AAC 01.600. Description of the Prince William Sound Area

The Prince William Sound Area includes all waters of Alaska between the longitude of Cape Fairfield and the longitude of Caper Suckling south of the Yukon Area described in 5 AAC 05.100, and all waters of the Upper Susitna River drainage upstream of the Susitna River's confluence with the Oshetna River.

5 AAC 01.605. Description of districts and subdistricts

(a) The Upper River Copper District consists of all waters of the mainstem Copper River from the mouth of the Slana River downstream to an east-west line crossing of the Copper River approximately 200 yards upstream of Haley Creek as designated by ADF&G regulatory markers.

(1) The Chitina Subdistrict consists of all waters of the Upper Copper River District downstream of the downstream edge of the Chitina-McCarthy Road Bridge.

(2) The Glennallen Subdistrict consists of all remaining waters of the Upper Copper River District.

(b) Except as specified in (a) of this section, districts are as described in 5 AAC 24.200.

5 AAC 01.625. Waters closed to subsistence fishing

(a) All tributaries of the Copper River and waters of the Copper River that are not in the Upper Copper River District are closed to the taking of salmon.

(b) Salmon may not be taken in any area closed to commercial salmon fishing unless permitted in 5 AAC 01.610 – 5 AAC 01.645.

Federal Public Lands and Waters affected by FP21-10

For purposes of this discussion, the phrase “Federal public waters” is those waters described under 36 CFR 242.3 and 50 CFR 100.3 and defined in 36 CFR 242.4 and 50 CFR 100.4 (see public lands). Federal public waters include that portion of the Copper River from a boundary one-half mile upstream of the Copper River Highway to a boundary one-half mile downstream of the Copper River Highway and from the west bank of the river near highway mile 27 to the east bank of the river near highway mile 38 (**Figure 1**). These waters are within and adjacent to the external boundaries of the Chugach National Forest.

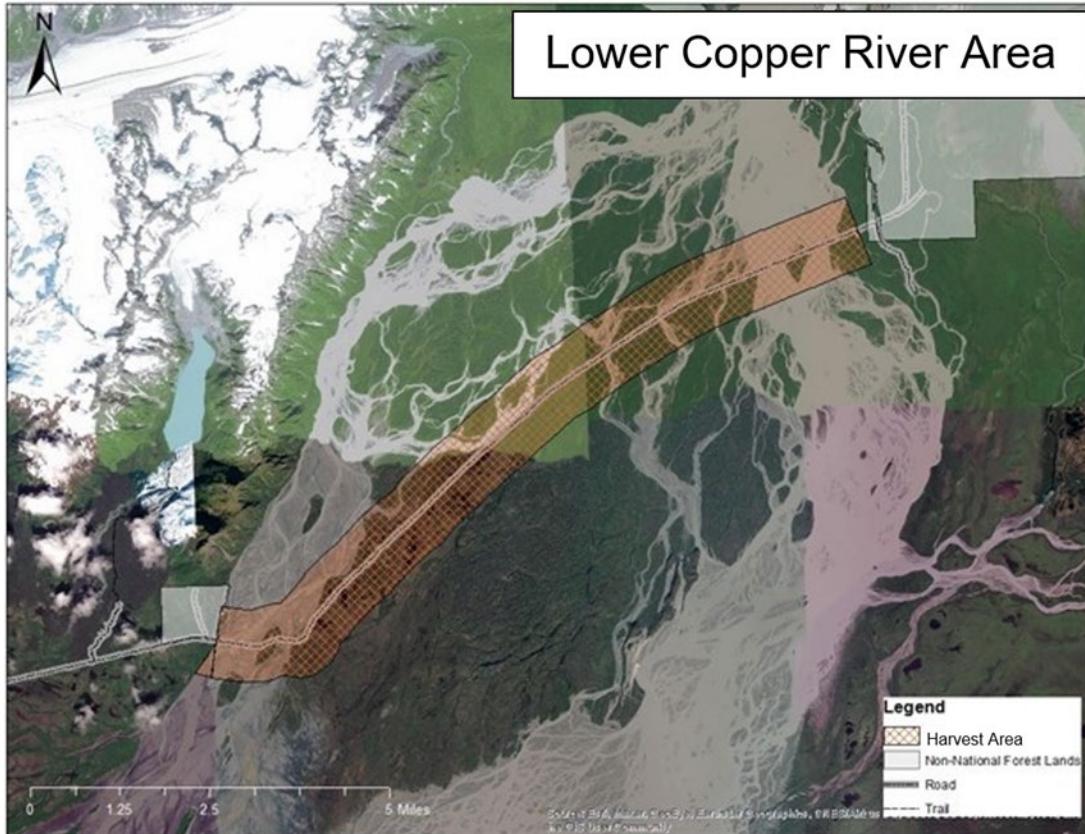


Figure 1. The Lower Copper River Area defined as the area from a boundary one-half mile upstream of the Copper River Highway to a boundary extending one-half mile downstream of the Copper River Highway, from the west riverbank near highway mile 27 to the east riverbank near highway mile 38.

Customary and Traditional Use Determinations

Residents of the Prince William Sound Area have a customary and traditional use determination for salmon in the remainder of the Prince William Sound Area, which includes the area under consideration.

Southcentral Alaska Subsistence Regional Advisory Council Actions on FP21-10

At its fall 2020 meeting, the Southcentral Council provided a recommendation to **Support FP21-10 as modified by Office of Subsistence Management (OSM)** to add a 48-hour reporting requirement to the take of salmon. Later, at a joint meeting with the Eastern Interior Council in March 2022, the Southcentral Council provided a comment in opposition to the proposal.

Eastern Interior Alaska Subsistence Regional Advisory Council Actions on FP21-10

At its fall 2020 meeting, the Eastern Interior Council provided a comment to **Oppose FP21-10**. At the March 2022 joint meeting with the Southcentral Council, the Eastern Interior Council provided another comment in opposition to the proposal.

Federal Subsistence Board Actions on FP21-10

The Board voted to **adopt FP21-10 with OSM modification** to include a requirement to report take of salmon to Area managers within 48 hours of harvest and with **additional Board modifications** to delay the season start date to June 1, allow dip net and rod and reel only, and prohibit dip netting from a boat. The Board took this action to provide additional opportunity for salmon harvest by federally qualified subsistence users.

PRELIMINARY ASSESSMENT OF REQUESTOR'S CLAIMS

The Board will accept a RFR only if the request meets one or more of the following criteria from 36 CFR 242.20(d) and 50 CFR 100.20(d) (**Appendix 2**):

1. Provides information not previously considered by the Board;
2. Demonstrates that existing information used by the Board is incorrect; or
3. Demonstrates that the Board's interpretation of information, applicable law, or regulation is in error or contrary to existing law.

Claims are organized below by criterion and in **Appendix 1** by their order of appearance in the request from Ahtna, Incorporated. The first digit indicates in which section of the request the claim was expressed, and the second digit is the chronological order within that section.

Criterion 1: Information previously not considered by the Board.

A total of four substantive claims were categorized under Criterion 1 in relation to the Lower Copper River Area salmon fishery.

Claim 2.1

The Board failed to consider information demonstrating that federally qualified subsistence users who participate in Upper Copper River subsistence fisheries are failing to catch enough salmon to meet their subsistence needs (as demonstrated by Amount Necessary for Subsistence or ANS).

“The Board failed to consider information demonstrating that federally qualified users who participate in Upper Copper River subsistence fisheries are failing to catch enough salmon – and enough sockeye, in particular – to meet their subsistence needs. ADF&G has established an ANS range of 61,000-82,500 sockeye for Upper Copper River subsistence uses. ... In contrast to the harvest of sockeye in excess of applicable ANS ranges on the Lower Copper River (ANS ranges which apply to all species of salmon, not just sockeye), ADF&G reports documenting the harvest of all salmon in Upper Copper River state and federal subsistence fisheries show that since 2002, participants in the state subsistence fishery in the Glennallen subdistrict have failed to meet the lower bound of the combined ANS eight times, including two of the last five years (2018 and 2020) These reports also demonstrate that for this same period,

the average harvest from federal subsistence fisheries did not come close to meeting the lower bounds of the applicable ANS range – by tens of thousands of fish.”

Preliminary assessment of Claim 2.1

Claim 2.1 implies that the Board must consider an allocative process among federally qualified subsistence users before providing a subsistence opportunity under Federal regulation.

The Federal Subsistence Management Program does not use a quantified allocation measurement like the State’s ANS calculations when providing or restricting Federal subsistence opportunities. State ANS calculations for State managed resources and lands are not used to determine Federal subsistence regulations for federally managed resources and lands, which focus on subsistence opportunity rather than amounts of harvest. Rather, the Board relies on information including the biological background of the resource, harvest history, patterns of subsistence use and practice, and potential effects of a new fishery. The OSM analysis of FP21-10 provided a thorough examination of salmon harvest history and use patterns in the entire Copper River watershed including up to date information on 5 and 10 year averages of salmon spawning and total in-river escapement; 5 and 10 year averages of upper river subsistence harvests in the Glennallen and Chitina Subdistricts; and a 10 year average of Chinook and Sockeye salmon harvest by user group (commercial, personal use, State subsistence, and Federal subsistence). The OSM analysis also contained an estimate of the potential impact of adding a Lower Copper River subsistence salmon fishery to the continued viability of other subsistence salmon fisheries in the watershed.

The Board’s deliberations of FP21-10 were based upon the information provided in the OSM analysis of this proposal, the deliberations and recommendations of the Southcentral Council, the comment of the Eastern Interior Council, the comments developed at the joint meeting of the Councils, comments provided in Tribal consultations, written public testimony, and oral public testimony provided at the Board meeting. Together, this information provided an effective record to the Board that Upper Copper River users were not meeting their subsistence salmon needs. However, prioritizing salmon use between Upper Copper River communities and Lower Copper River communities was not the purpose of FP21-10 or the Board’s deliberations on this proposal.

The Board’s deliberations on FP21-10 were made strictly in reference to the request to implement a Federal subsistence salmon fishery in the Lower Copper River adjacent to the Copper River Highway. Therefore, making a priority determination between Upper and Lower Copper River federally qualified subsistence users was outside the scope of FP21-10 deliberations, as this was not requested in the proposal.

Conclusion: There does not appear to be merit to this claim.

Claim 2.2

The Board did not consider the competition faced by Upper Copper River federally qualified subsistence users from non-federally qualified users who participate in the State subsistence and personal use fisheries.

“Significant existing pressures currently prevent federally qualified subsistence users on the Upper Copper River from meeting their subsistence needs...when state subsistence and personal use fisheries are open, the opportunity provided to federally qualified users is not meaningful, as they are required to compete with other Alaskans from outside of the region, similar to the levels of competition faced by federally qualified users of moose and caribou within Game Management Unit 13 with respect to hunters from other regions. The Board did not consider...the competition presented by non-federally qualified users who participate in the state subsistence and personal use fisheries, when it deliberated and approved FP21-10. This information clearly demonstrates the potentially negative consequences of FP21-10 on Upper Copper River federally qualified users and warrants reconsideration of that determination.”

Preliminary assessment of Claim 2.2

Claim 2.2 suggests that non-subsistence use of a resource be assessed before providing for additional subsistence uses and implies the Board should prioritize among Federal subsistence users *before* closing Federal public waters to other consumptive uses. Such an action does not adhere to the subsistence priority mandated in ANILCA Title VIII and is beyond the scope of the request made in FP21-10.

The Board was fully aware of all uses of Copper River salmon as outlined under Claim 2.1. Further, ANILCA Title VIII established a Federal subsistence priority for take of fish and wildlife on Federal public lands and waters. The Board legally cannot consider allocating resources among federally qualified subsistence users without first eliminating non-subsistence uses of those resources. Section 804 of Title VIII allows for allocation of fish and wildlife populations among federally qualified subsistence users only when it is necessary to restrict the taking of populations to protect the continued viability of such populations or to continue subsistence uses. To uphold the Federal rural subsistence priority, Section 804 allocation among subsistence users cannot take place without first limiting nonsubsistence uses. When federally qualified subsistence users are unable to continue subsistence uses, a request should be submitted to close to nonsubsistence uses before requesting resources be allocated among federally qualified subsistence users.

Conclusion: There does not appear to be merit to this claim.

Claim 2.3

The Board failed to consider that, unlike federally qualified subsistence users along the Lower Copper River who have ample opportunities, there are significantly fewer opportunities to harvest salmon for federally qualified subsistence users along the Upper Copper River.

“Further, the Board failed to consider that, unlike federally qualified users along the Lower Copper River, there are significantly fewer opportunities to harvest salmon for federally qualified users along the Upper Copper River. As outlined above, in the Upper Copper River there are state and federal subsistence fisheries, state sport fisheries, and state personal use fisheries, all of which are accessible by road, and all of which are available to any and all Alaskan residents regardless of where they live. There are no commercial fisheries – and no opportunities for using homepack to supplement subsistence needs – on the Upper Copper River. There are also heftier potential restrictions on federally qualified users who turn to state subsistence fisheries or the state personal use fishery to meet their ANS in years with a weak salmon run (e.g., Upper Copper River subsistence and personal use closures in 2018 and 2020) because of the federal subsistence fishery locations up-river.”

Preliminary assessment of Claim 2.3

Claim 2.3 suggests that the Board should have considered the availability of alternative resources before supporting an opportunity for lower Copper River subsistence salmon harvest under Federal regulation. As stated under Claim 2.2, prioritizing among federally qualified subsistence users without first closing to other uses is not supported by the law.

In the case of a conservation concern or increasing competition among uses and users, the Board may close Federal public lands and waters to all but federally qualified subsistence users. If the closure to other uses is not enough to provide a meaningful priority or if a conservation concern continues to exist, the Board may then prioritize among federally qualified subsistence users. Prioritization is determined through an ANILCA Section 804 analysis.

Through the Section 804 analysis process, the Board prioritizes users according to the following criteria: (1) customary and direct dependence upon the population as the mainstay of livelihood, (2) local residency, and (3) the availability of alternative resources. Given the scope of FP21-10 and the fact that Federal public waters of the Copper River remain open to non-federally qualified users, it would not have been appropriate for the Board to prioritize among users by rejecting FP21-10.

Conclusion: There does not appear to be merit to this claim.

Claim 3.1

The Board failed to consider information demonstrating that federally qualified subsistence users in the Lower Copper River are meeting their subsistence needs without the addition of another road-accessible Federal subsistence fishery.

“The Board did not consider information demonstrating that federally qualified users in Cordova are meeting subsistence needs with existing subsistence and commercial fisheries. The proponents’ rationale for submitting this proposal was to improve access to Copper River salmon by providing Cordova residents a road accessible harvest area in addition to the three road accessible federal subsistence dipnet fisheries currently open in the Copper River Delta. The Board failed to consider information that clearly demonstrates that, through their participation in the subsistence drift gillnet fishery in the Copper River District and commercial homepack, Lower Copper River federally qualified users are exceeding their ANS and do not require a new federal subsistence fishery to access sufficient fish or to meet their subsistence needs.”

Preliminary assessment of Claim 3.1

Claim 3.1 suggests that the Board did not consider subsistence information for lower Copper River users and further assumes that if rural residents already have fishing opportunities under State subsistence or commercial regulations, no Federal opportunities are warranted.

Providing subsistence opportunity under Federal regulations is not needs-based. A meaningful opportunity to continue subsistence uses on Federal public lands and waters is mandated by law. As stated earlier, the Federal Subsistence Management Program does not use the concept of ANS when providing Federal harvest opportunity. Even if ANS is met, it doesn’t mean all users’ needs are met. The fact that proposal FP21-10 was submitted by residents of Cordova is evidence that there is an underserved portion of the community that was not able to participate in or meet its subsistence needs from the subsistence fisheries available at the time. ANILCA protects the continuation of the opportunity for subsistence uses and providing diverse opportunity helps more users meet their needs. The Board would only consider existing opportunities when prioritizing among federally qualified subsistence users. However, that is made through Section 804 prioritization, which would only occur if there had already been a closure to non-federally qualified users.

Conclusion: There does not appear to be merit to this claim.

Criterion 2: Existing information used by the Board is incorrect.

There were no substantive claims categorized under Criterion 2 in relation to the Lower Copper River Area salmon fishery.

Criterion 3: The Board’s interpretation of information, applicable law, or regulation is in error or contrary to existing law.

A total of four substantive claims were categorized under Criterion 3 in relation to the Lower Copper River Area salmon fishery.

Claim 1.1

The Board failed to acknowledge and use its authority to consider taking action to address the allocation crisis as well as the cause of the diminished Copper River salmon runs, such as considering a recommendation to the Secretaries to exert extraterritorial jurisdiction over the State commercial fisheries.

“While deliberating FP21-10, the Board failed to acknowledge and use its authority to help alleviate the allocation crisis on the Copper River. When it originally considered FP21-10 in 2020, the Board acknowledged that both the Eastern Interior and Southcentral regions and communities within those regions were already faced with a greatly diminished fisheries resource from which to meet their subsistence needs. When the Board again considered FP21-10 in 2022, the Board identified state commercial fisheries as the cause of in-river abundance concerns and suggested that it lacked the authority to address the negative effects of those commercial fisheries on federal subsistence fisheries. But it failed to even consider taking action to address the cause of the diminished resource. Instead, the Board established another subsistence fishery in the Lower Copper River.

This is an egregious failure to acknowledge and understand the Board’s scope of authority under applicable regulations to protect the subsistence priority. The Board is fully authorized to “evaluate whether ...fishing...which occurs on lands or waters in Alaska other than public lands interfere[s] with subsistence fishing on the public lands to such an extent as to result in a failure to provide the subsistence priority, and after appropriate consultation with the State, the RACs, and other federal agencies, may make a recommendation to the Secretaries for action.” The Board had both the authority and the opportunity to take action to address the negative effects of the state commercial fishery on Upper Copper River subsistence users when it considered FP21-10, such as considering a recommendation to the Secretaries to exert extraterritorial jurisdiction over the state commercial fisheries at the mouth of the Copper River that available information obviously confirms as the primary source of the lack of fish in the Upper Copper River. The Board failed to do so. Instead, the Board created a new Lower Copper River subsistence fishery without any meaningful mechanism for protecting existing Upper Copper River subsistence uses. Thus, federally qualified users located in the Upper Copper River will bear the weight of the Board’s failure to act. This warrants reconsideration.”

Preliminary assessment of Claim 1.1

Claim 1.1 asserts the Board was legally authorized to recommend the Secretaries of the Interior and Agriculture (Secretaries) extend Federal jurisdiction to State commercial fisheries before expanding Federal subsistence fishing opportunities in the lower Copper River.

Historically, the Board’s authority to “evaluate whether activities on non-Federal lands may interfere with subsistence activities on Federal public lands and waters...” has been responsive to those petitions sent to the Secretaries requesting an extension of jurisdiction. That means the Board does not initiate extraterritorial jurisdiction petitions to the Secretaries. The Board will make a recommendation on a

petition once it is submitted, usually at the request of the Secretaries. This follows the procedures outlined on our website under “Federal Subsistence Board Procedures Addressing Petitions for Secretarial Extension of Jurisdiction” (**Appendix 3**).

While making a recommendation to the Secretaries to exert extraterritorial jurisdiction to maintain the viability of a Federal subsistence fishery is within the purview of the Board, the Board is not legally obligated to petition the Secretaries prior to allowing opportunities for other federally qualified subsistence users. This type of action is also well outside the scope of what was requested by FP21-10. The Board did not misinterpret or misapply the authority granted to them regarding extraterritorial jurisdiction recommendations.

Conclusion: There does not appear to be merit to this claim.

Claim 4.1

The Board based its approval of FP21-10 on an erroneous interpretation of information regarding the estimated impact and popularity of/participation in a new Federal subsistence fishery.

“The Board based its approval of FP21-10 on an erroneous interpretation of information regarding the estimated impact and popularity of a new federal subsistence fishery. OSM’s Staff Analysis projected that participation in the fishery would be minimal and that the harvest of sockeye and Chinook salmon from the Lower Copper River dipnet fishery created by FP21-10 would also be minimal – no more than 2,000 fish. These projections are based upon faulty assumptions that limited participation in and access to a subsistence fishery (that participation in nonetheless met subsistence needs) would translate into a similarly limited participation in – and limited harvest of sockeye and Chinook salmon from – a new subsistence fishery.”

Preliminary assessment of Claim 4.1

Claim 4.1 suggests that the Board misinterpreted information on the projected impacts of a new Federal subsistence fishery in the lower Copper River on federally qualified subsistence users in the upriver Glenallen and Upper Copper River subdistricts.

The Board listed three items in its justification of the action to create the Federal subsistence fishery. First, the current Federal fisheries in the Lower Copper River Area did not constitute a reasonable Federal subsistence priority for those living there. At the Board meeting, member Dave Schmid stated, “[the current Federal subsistence fishery] leaves a significant portion of the Cordova community without a means to obtain Federal subsistence salmon” (FSB 2022: 83). Second, the new Federal subsistence fishery provided opportunity for a subset of federally qualified subsistence users who lacked access to other Federal subsistence fisheries. Board member Schmid explained, “the subsistence fishery would provide a first opportunity for federally qualified rural users that don’t have access to marine waters to obtain Copper River salmon coming out of winter when the need for salmon subsistence fish is greatest” (FSB 2022:83). Third, the Board stated that the impacts of harvest from the new Federal subsistence fishery on upstream users would be negligible.

On this final point, the Board based its decision on U.S. Forest Service data and projects regarding Copper River salmon populations and harvesting. The Board explained that the projected harvest from the new Federal subsistence fishery would not have significant impacts on the abundance of fish available to upstream users. Board member Schmid said:

The proposed subsistence dipnet fishery on the Lower Copper is very low and anticipated to be at a maximum of 2,000 sockeye salmon annually. This is less than one-tenth of one percent, .08 percent, of the total average annual Copper River sockeye salmon run and less than one percent, .63 percent, of the total annual Copper River chinook salmon run. Such low harvest levels are not likely to have a significant impact on the overall in-river salmon abundance relative to other existing fisheries (FSB 2022: 84).

U.S. Forest Service staff developed the harvest estimate of 2,000 Sockeye Salmon and 300 Chinook Salmon based on a model that accounted for other harvesting success, harvesting methods of the new Federal subsistence fishery, and population size in the affected area. The analysis (OSM 2021: 25) states:

This estimate is based on the annual State subsistence gillnet harvest in the Copper River District; taking into account the smaller pool of qualified users, and reduced efficiency of allowable gear type (dipnet compared to drift gillnet).

The Board concluded that the projected harvest from the lower Copper River Federal subsistence fishery would be “the smallest of any user group in the Copper River system”. The harvest estimates produced by the U.S. Forest Service have not been contested with other sources of data. Therefore, this component of the Board’s justification is based on sound judgement of valid information.

Conclusion: There does not appear to be merit to this claim.

Claim 5.1

The Board failed to accord sufficient deference to Regional Advisory Councils recommendations.

“In March, 2022, the South Central and Eastern Interior RACs met and recommended that the Board not approve FP21-10 because the proposal would be detrimental to the satisfaction of the subsistence needs of federally qualified users within the Upper Copper River region. The Board failed to accord sufficient deference to these recommendations.”

Preliminary assessment of Claim 5.1

Claim 5.1 asserts the Board did not give appropriate consideration to the reports and recommendations of the Southcentral Council and the Eastern Interior Council.

The Board is required by the Federal subsistence regulations at § ____.10 to consider the reports and recommendations of the Regional Councils concerning the take of fish and wildlife on public lands within their regions for subsistence uses. The Board may choose not to follow any Regional Council

recommendation which it determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, would be detrimental to the satisfaction of subsistence needs, or in closure situations, for reasons of public safety or administration or to assure the continued viability of a particular fish or wildlife population. If a recommendation is not adopted, the Board shall set forth the factual basis and the reasons for the decision, in writing, in a timely fashion.

Only residents of the Prince William Sound Area have a customary and traditional use determination for salmon in the Prince William Sound Area (remainder), which includes the Lower Copper River Area. This is within the Southcentral Council's region, and they formally recommended to support FP21-10 at their fall 2021 meeting. However, some of these same salmon migrate to the Upper Copper River where communities from the Eastern Interior Council's area also have a customary and traditional use determination. As such, the Eastern Interior voted in opposition to this fishery and provided information for the Board's consideration at their fall 2020 meeting, which their Chair reiterated at the January 2021 Board meeting.

The Board deferred action on FP21-10 at its January 2021 fisheries regulatory meeting, seeking additional information from both the Eastern Interior and Southcentral Councils, requesting the Councils work to develop or explore a compromise that can be supported by those affected. The Councils met jointly in March 2022 to further discuss FP21-10; however, the meeting did not produce Council recommendations. The Board took the information and views shared during this joint Council meeting into consideration and used that input to add several conditions to the fishery when it adopted FP21-10 at its April 2022 wildlife regulatory meeting.

The Board considered the input from both Councils, as well as other interested parties, in their deliberation on FP21-10. They followed their own charge to review the substantial evidence provided, review whether there were violations of recognized principles of fish and wildlife conservation, review how this would affect the satisfaction of subsistence needs, and review what effects this would have on the continued viability of the particular fish population. After which, they made a decision to adopt the proposal with modification in support of the recommendation of the Council whose region this fishery would take place. This is all within the scope of process and their authority.

Conclusion: There does not appear to be merit to this claim.

Claim 5.2

The Board failed to correctly interpret and apply relevant facts to its decision when it acknowledged extraordinary pressure on Copper River Sockeye Salmon, acknowledged the changes in availability of the resource, but then took action that applied additional pressure on that resource.

“The Board also failed to correctly interpret and apply relevant facts to its decision when it acknowledged extraordinary pressure on Copper River sockeye, acknowledged the diminution of the resource, but then took action that applied additional pressure on that resource. As discussed above, the Board failed to consider relevant information demonstrating that federally qualified users in Cordova have ample opportunity to meet

subsistence needs, and also failed to consider the failure of Upper Copper River subsistence users to meet their subsistence needs. The Board should not have established a new federal dipnet fishery for people who have no documented inability to harvest enough salmon to meet their subsistence needs, a fishery which would be accessible by road and located below sonar critical for counting in-river run strength of salmon.”

Preliminary assessment of Claim 5.2

Claim 5.2 suggests that the Board’s interpretation of information was incorrect because it took actions that applied additional pressure on Copper River salmon.

The Board relied upon predicted harvest rates for the new fishery in the deliberation of the merits of the proposal. Harvest rates were predicted to be less than 2% of overall harvest and were not considered to be additive to the current rate of harvest in the Prince William Sound area. This amount of potential harvest is insignificant when compared to harvest under the State personal use and commercial seasons, which account for 96% of salmon harvested from the Copper River (FSB 2022).

If Copper River salmon were under extraordinary pressure from harvests to the extent that federally qualified subsistence users were unable to meet their harvest needs, it would be expected that a fisheries proposal or special action request be submitted to the Board to restrict harvest by non-federally qualified users. Currently, there have been no requests or proposals submitted to limit any use of this resource. For the Board to have enacted a restriction upon any user group would have been outside of the scope of this proposal.

Conclusion: There does not appear to be merit to this claim.

ADDITIONAL REQUESTOR’S CLAIMS OUTSIDE THE SCOPE OF THE RFR CRITERIA

Two additional claims were received that did not meet one or more of the criteria from 36 CFR 242.20(d) and 50 CFR 100.20(d) as they do not provide information not previously considered by the Board, do not demonstrate that existing information used by the Board is incorrect, or do not demonstrate that the Board’s interpretation of information, applicable law, or regulation is in error or contrary to existing law. However, it was determined that these claims provided an opportunity to deliver additional relevant information about the subject matter, and so they were included as an additional part of this process.

Claim 2.4

The Board failed to articulate how any information received through reporting will be used to ensure that FP21-10 has as minimal an impact as possible upon federally qualified subsistence users in the Upper Copper Region.

“The Lower Copper River state commercial and subsistence fisheries occur pre-sonar where there is little to no information about the health or strength of the sockeye and Chinook runs.

...While the Board amended FP21-10 to include a 48-hour reporting requirement...the Board failed to articulate how any information received through reporting will be used to ensure that FP21-10 has as minimal an impact as possible upon federally qualified users in the Upper Copper River region. The expedited reporting requirement is meaningless.”

Response to Claim 2.4

Claim 2.4 implies reporting details must be addressed by the Board during decision making, rather than by the Federal fisheries manager.

The Superintendent of Wrangell-St. Elias National Park (WRST) is the Board-delegated Federal in-season manager for subsistence fisheries within the Federal public waters of the Copper River drainage, while the Cordova District Ranger of the Chugach National Forest is the Board delegated in-season manager for subsistence fisheries within Federal public waters of all other non-Copper River waters within the Prince William Sound Area. For management of this lower Copper River fishery, the Board adopted regulations that required a permit (available from the Cordova Ranger District) and also required that salmon harvest be reported within 48 hours.

On Federal public waters in the Copper River drainage, the Federal manager is authorized to “issue emergency special actions when necessary to ensure the conservation of a healthy fish population, to continue subsistence uses of fish, for the continued viability of a fish population, and for public safety reasons” (FSB 2017). When contemplating in-season actions, the WRST Superintendent considers data from area fisheries (e.g., the commercial fishery) and area assessments (e.g., Miles Lake Sonar), and coordinates with Regional Advisory Council representatives, OSM, and the Alaska Department of Fish and Game, to the extent possible. Data collected from reporting in this lower Copper River fishery would provide further information for the manager to consider when determining whether management actions are necessary for Federal subsistence users or the resource.

Claim 2.5

The Board failed to consult with all the impacted Tribes prior to approving FP21-10.

“Finally, the Board failed to consult with all the impacted Tribes prior to approving FP21-10. We feel that the Upper Copper River Tribes have not been heard on the impact this fishery may have on their customary and traditional practices.”

Response to Claim 2.5

Claim 2.5 suggests that no opportunity for Tribal consultation was offered relative to this proposal.

The Federal Subsistence Management Program (Program) directly seeks input from Tribes and Alaska Native Claims Settlement Act (ANCSA) Corporations annually, as part of each (fish and wildlife) regulatory cycle. The Office of Subsistence Management Native Liaison communicates with Tribes and Tribal leaders across the State to notify them of submitted regulatory proposals and to inform them of scheduled opportunities for their input on these proposals. For the fisheries 2021-2023 regulatory

cycle in question in this RFR, these consultations were held on June 10 and June 11, 2020 (**Appendix 4**). Opportunity was again provided for Tribes to speak to FP21-10 during the Board's January 2021 fisheries regulatory meeting and during the Board's April 2022 wildlife regulatory meeting.

The Program takes seriously its trust responsibilities to Tribes in Alaska. The Program has both proactive and reactive consultations in order to facilitate communications between federally recognized Tribes or ANCSA Corporations and the Board. Board policy provides for Tribal input during Board action on fish and wildlife regulatory matters. This is a process step for each proposal that the Board takes under consideration. Also, any Tribe or ANCSA Corporation may contact the Program to request consultation with the Board at any time.

The Board welcomes Tribal consultation opportunities and strives to provide ample opportunity for Tribal consultation on all Federal subsistence matters.

SUMMARY

In response to the Board's adoption of FP21-10, it received a request for reconsideration from Ahtna, Inc. A total of eight substantive claims were identified and summarized in relation to the Lower Copper River Area fishery for salmon (**Appendix 1**). None of those claims appear to reach the threshold to warrant reconsideration of FP21-10, as required by the Subsistence Management Regulations for Public Lands in Alaska (36 CFR 242.20(d) and 50 CFR 100.20(d)).

OSM PRELIMINARY CONCLUSION

Oppose the request to reconsider FP21-10.

Justification

Upon review of the eight substantive claims submitted in the request for the Board to reconsider their action on FP21-10, none were found to have merit based on this threshold process.

The requestor's primary concerns involve allocation of resources in times of conservation need.

Most claims expressed by the requestor were outside the scope of FP21-10, which only asked the Board to approve a salmon fishery on the Lower Copper River. The requestor's primary concerns are that the Lower Copper River salmon fishery will impact federally qualified subsistence users in the Upper Copper River and that federally qualified subsistence users in the Upper Copper River are failing to meet their subsistence needs. The Board's purview is to provide opportunity for federally qualified subsistence users to harvest fish and wildlife, to conserve those populations when necessary, and to uphold the Federal rural subsistence priority. The Board cannot allocate among federally qualified subsistence users without first limiting use by non-federally qualified users under ANILCA Title VIII, Section 804. Non-federally qualified users harvest the vast majority of Copper River salmon and no proposals have been submitted to curtail that use. federally qualified subsistence users who are unable to continue their subsistence uses should first submit special action requests or fisheries

proposals to curtail nonsubsistence uses of the resource. Extra-territorial jurisdiction is a last resort, and it should be requested only when requests to limit nonsubsistence uses prove ineffective.

The requestor also claimed that the Board failed to give deference to Council recommendations. The Board must consider the reports and recommendations of the Regional Councils concerning the take of fish and wildlife on public lands within their regions for subsistence uses. Only residents of the Prince William Sound Area have a customary and traditional use determination for salmon in the Prince William Sound Area (remainder), which includes the Lower Copper River Area. The Board deferred to the Southcentral Council in whose region the fishery would take place, and who formally recommended to support FP21-10 at their fall 2020 meeting.

The analysis for FP21-10 used best available information to estimate the maximum possible harvest from this fishery. Board adoption of the proposal was not based solely on the estimated future harvest from this fishery. The primary reason for the Board approving this fishery was the underserved Cordova residents that do not have adequate access to or a meaningful Federal priority for Copper River salmon.

FP21-10 asked only to establish a new subsistence fishery in the Prince William Sound area. Through this proposal process and analysis, the Board determined there is a need for additional subsistence fishing opportunities in the Prince William Sound area. The Board used peer reviewed information from the analysis, as well as input from the Councils and public, to extend that opportunity to federally qualified subsistence users.

LITERATURE CITED

FSB. 2017. Fisheries delegation of authority letter to the Superintendent of Wrangell-St. Elias National Park. October 23, 2017. Office of Subsistence Management, USFWS. Anchorage, AK.

FSB. 2022. Transcripts of Federal Subsistence Board proceedings. April 15, 2022. Office of Subsistence Management, USFWS. Anchorage, AK.

OSM. 2021. Staff analysis FP21-10. Supplemental material to the Federal Subsistence Board wildlife regulatory meeting, April 12-15, 2022. Office of Subsistence Management, USFWS. Anchorage, AK.

INTERAGENCY STAFF COMMITTEE COMMENTS

The Interagency Staff Committee found the threshold analysis to be a thorough and accurate evaluation of the request for reconsideration and that it provides sufficient basis for the Federal Subsistence Board action on the proposal.

APPENDIX 1: Summarized claims relevant to FRFR22-01, Lower Copper River Area Fishery organized in order of appearance in the request. The first number indicates in which section of the request the claim was expressed and the second number is the chronological appearance of the claim in that section.

Criterion 1 – Information not previously considered by the Board

Criterion 2 – Demonstrates that information used by the Board was incorrect

Criterion 3 – The Board’s interpretation of information, applicable law, or regulation is in error or contrary to existing law

Request Claim Number	Claim Description	Criterion
1.1	The Board failed to acknowledge and use its authority to consider taking action to address the allocation crisis as well as the cause of the diminished Copper River salmon runs, such as considering a recommendation to the Secretaries to exert extraterritorial jurisdiction over the state commercial fisheries.	3
2.1	The Board failed to consider information demonstrating that federally qualified subsistence users who participate in Upper Copper River subsistence fisheries are failing to catch enough salmon to meet their subsistence needs (as demonstrated by Amount Necessary for Subsistence or ANS).	1
2.2	The Board did not consider the competition faced by Upper Copper River federally Qualified Subsistence Users from non-federally qualified users who participate in the state subsistence and personal use fisheries.	1
2.3	The Board failed to consider that, unlike federally qualified subsistence users along the Lower Copper River who have ample opportunities, there are significantly fewer opportunities to harvest salmon for federally qualified subsistence users along the Upper Copper River.	1
2.4	The Board failed to articulate how any information received through reporting will be used to ensure that FP21-10 has as minimal an impact as possible upon federally qualified subsistence users in the Upper Copper River region.	N/A
2.5	The Board failed to consult with all the impacted Tribes prior to approving FP21-10.	N/A

Request Claim Number	Claim Description	Criterion
3.1	The Board failed to consider information demonstrating that federally qualified subsistence users in the Lower Copper River are meeting their subsistence needs without the addition of another road-accessible Federal subsistence fishery.	1
4.1	The Board based its approval of FP21-10 on an erroneous interpretation of information regarding the estimated impact and popularity of/participation in a new Federal subsistence fishery.	3
5.1	The Board failed to accord sufficient deference to Regional Advisory Council recommendations.	3
5.2	The Board failed to correctly interpret and apply relevant facts to its decision when it acknowledged extraordinary pressure on Copper River Sockeye Salmon, acknowledged the diminution of the resource, but then took action that applied additional pressure on that resource.	3

APPENDIX 2: 36 CFR 242.20(d) and 50 CFR 100.20(d)

§ 242.20 Request for reconsideration.

- (a) Regulations in [subparts C](#) and [D of this part](#) published in the Federal Register are subject to requests for reconsideration.
- (b) Any aggrieved person may file a request for reconsideration with the Board.
- (c) To file a request for reconsideration, you must notify the Board in writing within sixty (60) days of the effective date or date of publication of the notice, whichever is earlier, for which reconsideration is requested.
- (d) It is your responsibility to provide the Board with sufficient narrative evidence and argument to show why the action by the Board should be reconsidered. The Board will accept a request for reconsideration only if it is based upon information not previously considered by the Board, demonstrates that the existing information used by the Board is incorrect, or demonstrates that the Board's interpretation of information, applicable law, or regulation is in error or contrary to existing law. You must include the following information in your request for reconsideration:
 - (1) Your name, and mailing address;
 - (2) The action which you request be reconsidered and the date of Federal Register publication of that action;
 - (3) A detailed statement of how you are adversely affected by the action;
 - (4) A detailed statement of the facts of the dispute, the issues raised by the request, and specific references to any law, regulation, or policy that you believe to be violated and your reason for such allegation;
 - (5) A statement of how you would like the action changed.
- (e) Upon receipt of a request for reconsideration, the Board shall transmit a copy of such request to any appropriate Regional Council and the Alaska Department of Fish and Game (ADFG) for review and recommendation. The Board shall consider any Regional Council and ADFG recommendations in making a final decision.
- (f) If the request is justified, the Board shall implement a final decision on a request for reconsideration after compliance with [5 U.S.C. 551-559](#) (APA).
- (g) If the request is denied, the decision of the Board represents the final administrative action.

APPENDIX 3: Procedures for addressing petitions for extraterritorial jurisdiction.

**FEDERAL SUBSISTENCE BOARD PROCEDURES ADDRESSING
PETITIONS FOR SECRETARIAL EXTENSION OF JURISDICTION
FOR THE IMPLEMENTATION
OF A FEDERAL SUBSISTENCE PRIORITY**

The US Code Title 5 Section 553(e); 7 CFR 1.28; and 43 CFR 14 allow citizens to petition the Secretaries of the Interior and Agriculture (Secretaries). The Secretaries will accept for consideration petitions to exert authority over hunting, fishing, or trapping activities occurring on non-Federal lands when such petitions indicate that those activities may be interfering with subsistence hunting, fishing, or trapping on the Federal public lands and waters to such an extent as to result in a failure to provide the subsistence priority as specified in Title VIII of the Alaska National Interest Lands Conservation Act.

The Secretaries carefully review each case and use a very high threshold when making their decision whether to extend Federal jurisdiction. Petitioners should submit sufficient facts and/or analytic standards to document both the failure to maintain a subsistence priority and how the failure relates to activities occurring off of Federal lands.

The Federal Subsistence Management Regulations for Public Lands in Alaska (36 CFR Part 242 and 50 CFR Part 100, §___.10) clarify that the Secretaries have not delegated the authority to restrict or eliminate activities occurring on non-Federal lands to the Federal Subsistence Board (Board). However, §___.10 (d)(4)(xvii) of those regulations gives the Board the authority to evaluate whether activities on non-Federal lands may interfere with subsistence activities on Federal public lands or waters, to consult with the State of Alaska, the Regional Councils, and other Federal agencies, and to make recommendations to the Secretaries.

The Board will utilize the following procedures and any additional directions provided by the Secretaries when developing recommendations on a request for extension of Federal jurisdiction.

PROCEDURES

1. Petitions should be addressed to the Secretaries of the Interior and Agriculture as follows:

Secretary of the Interior and Secretary of Agriculture
c/o Chair, Federal Subsistence Board
U.S. Fish and Wildlife Service, Office of Subsistence Management
1101 East Tudor Road, MS 121
Anchorage, AK 99503-6199

2. Each petition must clearly identify the affected subsistence activity, the Federal public lands or waters where that activity occurs, and how the subsistence priority has been harmed so as to result in a failure. Each petition should present substantial evidence demonstrating that the failure of the subsistence priority is specifically due to a hunting, fishing, or trapping activity that is occurring off of Federal public lands or waters. The information should describe what the interfering activity is, where and when it is taking place, and how it is causing the failure of the subsistence priority on the Federal public lands and waters.

3. Each petition should describe the desired result from Secretarial extension of jurisdiction and propose Federal regulations which would accommodate the subsistence priority.
4. The Board, upon receipt of such a petition, will forward the petition to the Secretaries, notify the State of Alaska and affected Regional Council(s), and may issue a notice to the general public of the request for extension of Federal jurisdiction.
5. If the Secretaries believe that public comment on the issue or extensive analysis will aid in consideration of the petition, they may request the Federal Subsistence Board to hold public meetings to solicit comments and to develop a more detailed analysis of the issue.
6. If directed to do so by the Secretaries, the Board and staff may conduct additional research and assemble information that assists in a thorough analysis. In developing their recommendation to the Secretaries, the Board may meet in public session and accept testimony on the petition.
7. Following review of all information, staff analyses, and public comments, the Board will forward their confidential recommendation to the Secretaries.

Following receipt of a recommendation from the Board, the Secretaries will promptly notify the petitioners of their final decision relative to the petition. A Secretarial decision constitutes the final administrative remedy for any petition.

Approved by the Federal Subsistence Board on July 18, 2005.

APPENDIX 4:2021-2023 fisheries regulatory cycle Tribal consultation invite and agenda for the Southcentral Council and Eastern Interior Council areas.



FISH and WILDLIFE SERVICE
BUREAU of LAND MANAGEMENT
NATIONAL PARK SERVICE
BUREAU of INDIAN AFFAIRS

Federal Subsistence Board

1011 East Tudor Road, MS 121
Anchorage, Alaska 99503-6199



FOREST SERVICE

OSM 20036.OL

JUN 02 2020

Dear Tribal Leader:

This notice is to inform you of the upcoming opportunity to have Government-to-Government consultation with the Federal Subsistence Board on June 11, 2020, from 10:00 a.m. to 12:00 p.m.

Participation is only available by teleconference via the toll-free number listed below. You are also invited to participate in the consultation with Alaska Native Claims Settlement Act (ANCSA) Corporations which will occur from 1:30 p.m. to 3:30 p.m. on the same day using the same toll-free number. The topic of consultation is:

- 2021-2023 Fisheries Proposals

If you plan to participate in this teleconference consultation or have any questions, please contact Orville Lind, Native Liaison, at 1-800-478-1456 or 1-907-786-3953, or by email at orville_lind@fws.gov and at subsistence@fws.gov. For more information about our program please visit the Federal Subsistence Management Program website: www.doi.gov/subsistence.

Thank you for your time and attention to this important matter. You are invited to distribute this message to those you feel would benefit from the information.

An agenda is enclosed.

Teleconference information: call the toll free number: **1-888-566-1030** then when prompted enter the passcode: **3344290**

Enclosure

Federal Subsistence Board
Consultation Session
via Teleconference from
Office of Subsistence Management
U.S. Fish and Wildlife Service
Anchorage Alaska

June 11, 2020
10:00 a.m. to 12:00 p.m.

TRIBAL CONSULTATION: The purpose of this session is to provide for the opportunity for Tribal leaders and/or delegates to consult with the representatives of the Federal Subsistence Board consistent with the Federal Subsistence Board's Consultation Policy.

Regions

Eastern Interior
North Slope
Northwest Arctic
Seward Peninsula
Southcentral

Agenda

1. Welcome and Introductions (*6 to mute, same to unmute)
2. Introduction of 2021-2023 Fisheries Proposals
3. Tribal Comments
4. Closing Comments
5. Adjourn

Teleconference information: call the toll free number: **1 (888) 566-1030**, then when prompted enter the passcode: **3344290**.

If you have any questions regarding this agenda or need additional information, please contact Orville Lind at the Office of Subsistence Management at 1 (800) 478-1456 or (907) 786-3953.

The Federal Subsistence Board is committed to providing access to this session for all participants. Please direct all requests for closed captioning or other accommodation needs to the Office of Subsistence Management by calling 1 (800) 478-1456, by emailing subsistence@fws.gov, or by contacting 1 (800) 877-8339 (TTY), as soon as possible prior to the session.