

FP09-06 Executive Summary	
General Description	Proposal FP09-06 seeks to 1) clarify existing Federal regulatory language and ensure consistency with State regulations in the Cook Inlet Area concerning harvesting rainbow/steelhead trout (20 inches or longer), Arctic grayling, and burbot, and 2) ensure rainbow/steelhead trout 20 inches or longer are not incidentally harvested in the combined Kasilof River salmon dip net and rod and reel fishery. <i>Submitted by the Alaska Department of Fish and Game</i>
Proposed Regulation	See the analysis for the proposed regulatory language.
Southcentral Regional Council Recommendation	Oppose
Interagency Staff Committee Comments	The Interagency Staff Committee found the staff analysis to be a complete and accurate evaluation of the proposal, and the recommendation of the Regional Advisory Council to be supported by substantial evidence, consistent with recognized principles of conservation and appropriately allows for the continuation of subsistence uses.
ADF&G Comments	See comments following the analysis.
Written Public Comments	1 Support

**REGIONAL ADVISORY COUNCIL RECOMMENDATION
FP09-06**

SOUTHCENTRAL ADVISORY COUNCIL

Oppose. None of the proposed modifications appear to be necessary. Harvest restrictions are already contained within existing Federal fishery regulations. No rainbow/steelhead trout were harvested in the Kasilof River during the 2007 dipnet fishery. Therefore, there is no need to adopt a maximum size limit for retention to protect adult steelhead trout. If harvest restrictions are necessary, in-season action may be taken by the Federal in-season manager.

STAFF ANALYSIS FP09-06

ISSUES

Proposal FP09-06, submitted by the Alaska Department of Fish and Game (ADF&G), seeks to 1) clarify existing Federal regulatory language and ensure consistency with State regulations in the Cook Inlet Area concerning harvesting rainbow/steelhead trout (20 inches or longer), Arctic grayling, and burbot, and 2) ensure rainbow/steelhead trout 20 inches or longer are not incidentally harvested in the combined Kasilof River salmon dip net and rod and reel fishery.

DISCUSSION

The proponent states that current Federal regulatory language concerning the harvest of rainbow/steelhead trout 20 inches or longer in the Cook Inlet Area could be misinterpreted by Federally qualified subsistence users as allowing accumulation of Federal and State annual harvest limits. The proponent is also concerned that Federally qualified subsistence users could mistakenly think they were allowed to harvest Arctic grayling and burbot. The proponent also requested that to ensure protection of Kasilof River steelhead trout, all rainbow/steelhead trout 20 inches or longer incidentally caught in the Kasilof River salmon dip net fishery be released. However, the proponent no longer feels there is a need to place size restrictions on rainbow/steelhead trout that may be incidentally harvested during the Kasilof River dip net salmon fishery (ADF&G 2008a). This decision was reached after discussion of preliminary results with the investigators of Fisheries Monitoring projects 08-503, Spawning and seasonal distribution of steelhead trout in the Kasilof River watershed, and 08-504, Run-timing, abundance, and genetic composition of adult steelhead trout in Crooked and Nikolai Creeks.

Existing Federal Regulations

§ __.25(c) Harvest limits. (1) Harvest limits authorized by this section and harvest limits established in State regulations may not be accumulated.

§ __.25 (c)(3) A harvest limit applies to the number of fish, wildlife, or shellfish that can be taken during a regulatory year; however, harvest limits for grouse, ptarmigan, and caribou (in some Units) are regulated by the number that may be taken per day. Harvest limits of grouse and ptarmigan are also regulated by the number that can be held in possession.

§ __.27(a)(2) You may take fish for subsistence uses at any time by any method unless you are restricted by the subsistence fishing regulations found in this section. The harvest limit specified in this section for a subsistence season for a species and the State harvest limit set for a State season for the same species are not cumulative, except as modified by regulations in §11.27(i). This means that if you have taken the harvest limit for a particular species under a subsistence season specified in this section, you may not, after that, take any additional fish of that species under any other harvest limit specified for a State season.

§ __.27(i)(10)(i) Unless restricted in this section, or unless restricted under the terms of a subsistence fishing permit, you may take fish at any time in the Cook Inlet Area. If you take rainbow/steelhead trout incidentally in subsistence net fisheries, you may retain them for subsistence purposes, unless otherwise prohibited or provided for in this section. With jigging

gear through the ice or rod and reel gear in open waters there is an annual limit of 2 rainbow/steelhead trout 20 inches or longer, taken from Kenai Peninsula fresh waters.

§ __.27(i)(10)(iii) *You may not take grayling or burbot for subsistence purposes.*

§ __.27(i)(10)(iv) *You may only take salmon, trout, Dolly Varden, and other char under the authority of a Federal subsistence fishing permit. Seasons, harvest and possession limits, and methods and means for take are the same as for the taking of those species under Alaska sport fishing regulations (5 AAC 56) unless modified herein. Additionally for Federally managed waters of the Kasilof and Kenai River drainages:*

(A) Residents of Ninilchik may take sockeye, Chinook, coho, and pink salmon through a dip net and a rod and reel fishery on the upper mainstem of the Kasilof River from a Federal regulatory marker on the river below the outlet of Tustumena Lake downstream to a marker on the river at Silver Salmon Rapids. Residents using rod and reel gear may fish with up to 2 baited single or treble hooks. Other species incidentally caught during the dip net and rod and reel fishery may be retained for subsistence uses, including up to 200 rainbow/steelhead trout taken through August 15. After 200 rainbow/ steelhead trout have been taken in this fishery or after August 15, all rainbow/steelhead trout must be released unless otherwise provided for in this section. Before leaving the fishing site, all retained fish must be recorded on the permit and marked by removing the dorsal fin. Harvests must be reported within 72 hours to the Federal fisheries manager upon leaving the fishing location.

(C) Resident fish species including lake trout, rainbow/steelhead trout, and Dolly Varden/Arctic char may be harvested in Federally managed waters of the Kasilof River drainage. Resident fish species harvested in the Kasilof River drainage under the conditions of a Federal subsistence permit must be marked by removing the dorsal fin immediately after harvest and recorded on the permit prior to leaving the fishing site.

Proposed Federal Regulations

§ __.27(i)(10)(i) *Unless restricted in this section, or unless restricted under the terms of a subsistence fishing permit, you may take fish at any time **on Federal public lands** in the Cook Inlet Area. If you take rainbow/steelhead trout incidentally in subsistence net fisheries, you may retain them for subsistence purposes, unless **and except as** otherwise prohibited or provided for in this section. With jigging gear through the ice or rod and reel gear in open waters there is **an combined** annual limit of 2 rainbow/steelhead trout 20 inches or longer, taken from Kenai Peninsula fresh waters **under a subsistence fishing permit and/or State of Alaska sport fishing regulations, except that rainbow/steelhead trout 20 inches or longer may not be taken from the Kasilof River or the Kasilof River drainage by rod and reel or dip net, incidentally or otherwise under a Federal subsistence permit and must be immediately released to the water instead.***

§ __.27(i)(10)(iii) *You may not take grayling or burbot for subsistence purposes.*

§ __.27(i)(10)(iv) *You may only take salmon, trout, Dolly Varden, and other char under the authority of a Federal subsistence fishing permit. Seasons, harvest and possession limits, and methods and means for take are the same as for the taking of those species under Alaska sport fishing regulations (5 AAC 56 and 5 AAC 57) unless modified herein. Additionally for Federally managed waters of the Kasilof and Kenai River drainages, **the seasons, harvest and possession limits, and methods and means for take are modified to permit only the following (except that***

the annual limit of 2 rainbow/steelhead trout 20 inches or longer where not otherwise limited and the prohibition against taking grayling or burbot also apply):

(A) Residents of Ninilchik may take sockeye, Chinook, coho, and pink salmon through a dip net and a rod and reel fishery on the upper mainstem of the Kasilof River from Federal regulatory markers on both sides of the river below the outlet of Tustumena Lake downstream to markers on both sides of the river at Silver Salmon Rapids. Residents using rod and reel gear may fish with up to 2 baited single or treble hooks. Other species incidentally caught during the dip net and rod and reel fishery may be retained for subsistence uses, including up to 200 rainbow/steelhead trout less than 20 inches long taken through August 15. After 200 rainbow/ steelhead trout have been taken in this fishery or after August 15, all rainbow/steelhead trout must be released unless otherwise provided for in this section. Before leaving the fishing site, all retained fish must be recorded on the permit and marked by removing the dorsal fin. Harvests must be reported within 72 hours to the Federal fisheries manager upon leaving the fishing location.

(C) Resident fish species including lake trout, rainbow/steelhead trout, and Dolly Varden/ Arctic char may be harvested in Federally managed waters of the Kasilof River drainage except as otherwise provided. Resident fish species harvested in the Kasilof River drainage under the conditions of a Federal subsistence permit must be marked by removing the dorsal fin immediately after harvest and recorded on the permit prior to leaving the fishing site.

Existing State Regulations

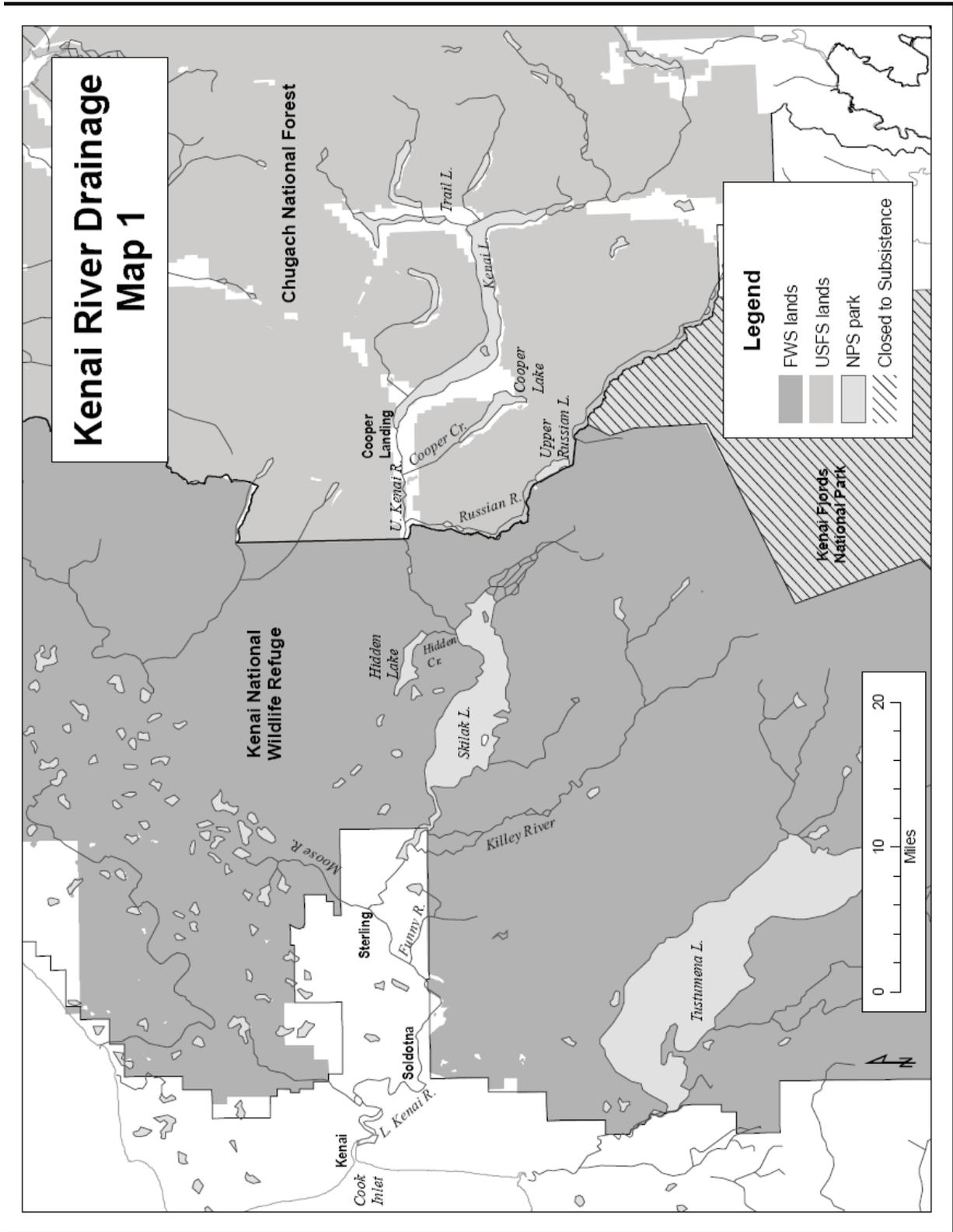
General State of Alaska sport fishing seasons and harvest limits for the Kenai Peninsula freshwater allow for an annual harvest of 2 rainbow/steelhead trout 20 inches or longer. State of Alaska sport fishing regulations for the Kasilof River downstream of the Sterling Highway Bridge and in Crooked Creek prohibit retention of steelhead trout and removing steelhead trout from the water. In the Kasilof River drainage, in flowing waters above the Sterling Highway Bridge, rainbow/steelhead trout harvest is open year round and harvest is limited to 2 per day/2 in possession in flowing waters and 5 per day/ 5 in possession in lakes and ponds. Additionally, general regulations for rainbow trout and steelhead trout apply above the Sterling Highway Bridge, where harvest of one fish greater than 20 inches is allowed per day. This 20-inch length limit effectively addresses steelhead trout. The open fishing season for Crooked Creek is August 1 through December 31 but only one unbaited, single-hook, artificial lure is allowed September 1 through December 31.

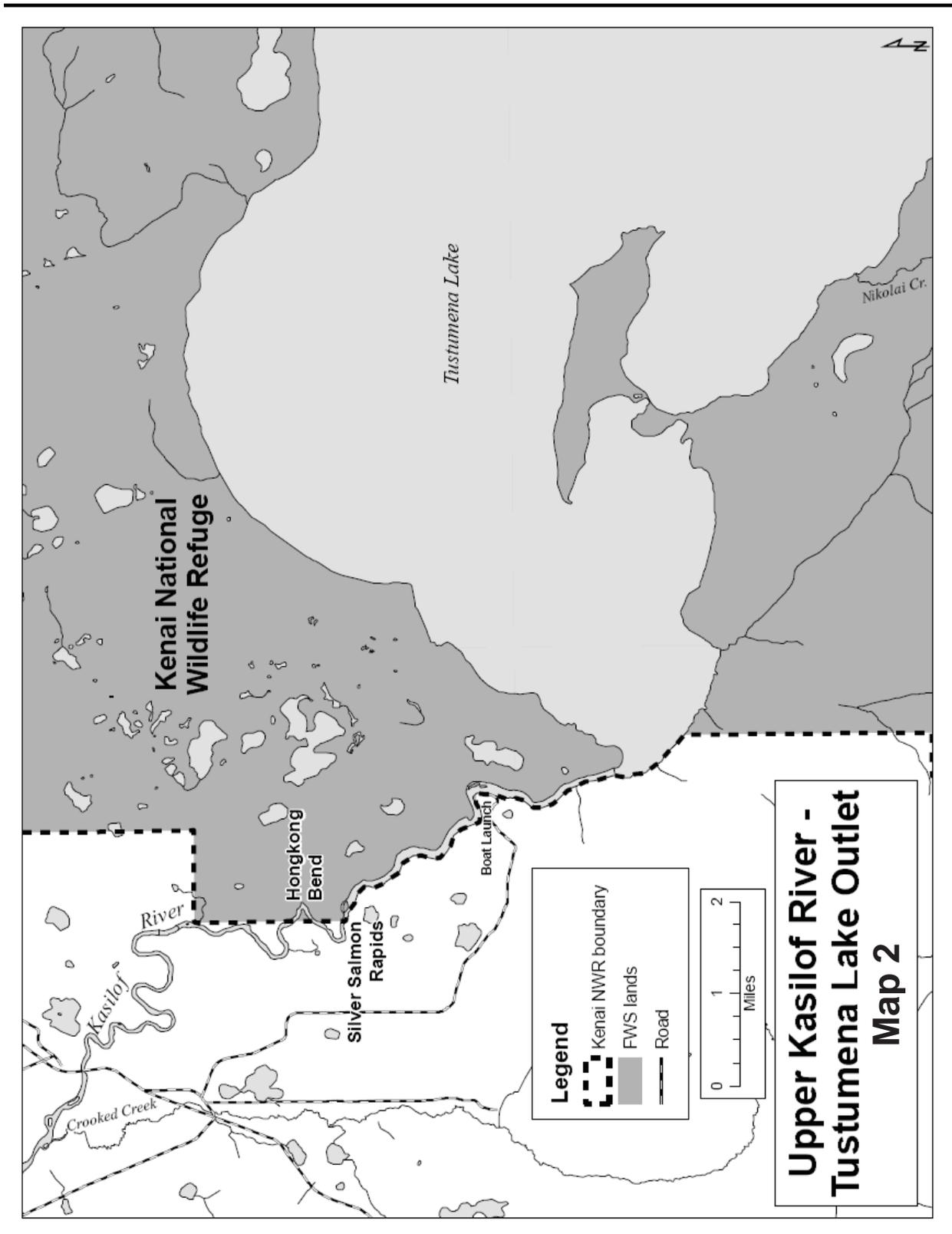
Extent of Federal Public Waters

For purposes of this discussion, the phrase “Federal public waters” is defined as those waters described under 50 CFR 100.3. In the Cook Inlet Area, Federal subsistence fishing regulations apply on waters within or adjacent to Denali National Park and Preserve, Lake Clark National Park, Kenai National Wildlife Refuge, Chugach National Forest, and non-navigable waters within general domain lands managed by the Bureau of Land Management. For the Kenai Peninsula District, this includes waters north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest (**Map 1**), and waters within the Kasilof River drainage within the Kenai National Wildlife Refuge (**Map 2**).

Customary and Traditional Use Determinations

In the Kenai Peninsula District for waters north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest, residents of Cooper Landing and





Hope have a positive customary and traditional use determination for all fish and residents of Ninilchik have a positive customary and traditional use determination for salmon. For waters within the Kasilof River drainage within the Kenai National Wildlife Refuge, residents of the community of Ninilchik have positive customary and traditional use determinations for all fish. For the remainder of the Cook Inlet Area, all Federally qualified rural residents of the Cook Inlet Area have a positive and traditional use determination for fish other than salmon, trout, Dolly Varden/char, grayling, and burbot.

Regulatory History

Pre- and Early Statehood Fisheries

Until 1952, freshwater streams in the Kenai Peninsula were open to subsistence fishing, but poorly regulated commercial fisheries decimated salmon runs. In 1952, as part of efforts to rebuild salmon runs, all streams and lakes of the Kenai Peninsula were closed to subsistence fishing under Territory of Alaska regulations. Only rod and reel was allowed for “personal use” (Fall et al. 2004:25–26).

State Fisheries

In 1992, the State classified most of the Cook Inlet Area, including the Kasilof River drainage, as a nonsubsistence area (5 AAC 99.015(3)). Only State sport fisheries are available for the harvest of resident species including steelhead trout in this area. In that portion of the Kasilof River drainage downstream of the Sterling Highway Bridge, rainbow/steelhead trout may not be possessed or retained. If a steelhead trout is caught it must be released immediately, and a person may not remove a rainbow/steelhead trout from the water. Current fishery regulations limit fishing in Crooked Creek, a major tributary of the Kasilof River, from August 1 through December 31, and only unbaited, single hook, artificial lures may be used between September 15 and December 31. In addition, no retention of rainbow or steelhead trout is allowed from Crooked Creek.

The State enhanced (stocked) the steelhead trout run in Crooked Creek in the 1980s to provide additional angling opportunity. Enhancement efforts created a harvest opportunity for steelhead trout unique from other steelhead trout fisheries on the Kenai Peninsula. Sport catches (total harvested and released fish) of steelhead trout in the Kasilof River and Crooked Creek peaked during the mid-1990s and averaged 5,836 fish annually between 1993 and 1995 (Mills 1994, Howe et al. 1995, 1996). During the same period, harvest of steelhead trout averaged 1,397 fish annually. Higher catches during this period were a direct result of the enhancement program.

The enhancement program was terminated in 1993 after concerns were raised about straying of hatchery steelhead trout into the Kenai River. Since termination of the enhancement program, catch has declined and has averaged 579 fish annually between 1997 and 2004. Anticipating a decline in the number of steelhead trout available to anglers, the Alaska Board of Fisheries restricted the fishery within Crooked Creek and the Kasilof River below the Sterling Highway Bridge to catch-and-release beginning in 1996 (Gamblin et al. 2004, Gates and Palmer 2006).

Recent estimated sport fish harvests of steelhead trout above the Sterling Highway Bridge ranged from 0 to 65 fish annually during 2000–2006 (**Table 1**).

Most steelhead trout are caught and released alive by sport anglers. A 1978 creel census conducted by ADF&G revealed that about 65% of steelhead trout were retained; however, fishing practices by 1988 encouraged catch and release, and the retention rate for steelhead trout had declined to about 25% (ADF&G 2006).

Table 1. Estimated annual sport fishing harvest of steelhead trout in the Kasilof River above the Sterling Highway Bridge, 2000-2006 (ADF&G 2008b).

Year	Estimated harvest
2000	65
2001	26
2002	21
2003	26
2004	0
2005	38
2006	7

Federal Subsistence Fisheries

Federal regulations for subsistence fisheries were first established in 1999. For salmon, trout, and Dolly Varden and other char in Cook Inlet no customary and traditional use determinations were made; therefore, all rural residents of Alaska qualified under the Federal program as eligible subsistence users. In 2002, regulations for take in Cook Inlet were established for salmon, trout, and Dolly Varden and other char. This subsistence fishery required a permit, and seasons, harvest and possession limits, and methods and means for take were identical to State of Alaska sport fishing regulations. The Federal Subsistence Board (Board) established this fishery as an interim measure to provide some subsistence opportunity in Cook Inlet for rural residents, pending collection of additional information on community and area-specific harvest patterns to refine customary and traditional use determinations as well as regulations for take. The Board concluded that this information was necessary because of the unique circumstances of the Kenai Peninsula, where rural communities are interspersed among much larger nonrural communities, and where no subsistence fisheries in the freshwaters of the Kenai Peninsula were allowed for over 50 years.

The Board did not consider any further regulatory proposals for Cook Inlet until 2005. With new information available (Fall et al. 2004), the Board took up consideration of customary and traditional use determinations, and continued to defer proposals for take until completion of those deliberations. During this time, no proposals for harvest were under consideration, and regulations for subsistence harvest were identical to State of Alaska sport fishing regulations with one exception. In November 2006, the Board adopted FSA06-01b which provided a temporary 2006–2007 winter subsistence fishery for resident species in Tustumena Lake. The Board considered fishery regulatory proposals for Cook Inlet in both 2007 and 2008, and adopted several proposals addressing subsistence fisheries for salmon and resident fish species in the Kenai and Kasilof River drainages. These include dip net salmon fisheries at designated sites in the Kenai, Russian, and Kasilof Rivers; rod and reel salmon and resident species fisheries in the Kenai and Kasilof River drainages; an under-the-ice gillnet and jig fishery for resident species in Tustumena Lake, and a temporary fish wheel fishery for salmon in the Kasilof River. The Board did not adopt proposal FP07-10 that would have provided specific Federal subsistence fishing regulations for the harvest of steelhead trout. Therefore, current Federal subsistence regulations for harvest of steelhead trout in the Cook Inlet Area continue to be the same as Alaska sport fishing regulations. There is no open Federal season for Arctic grayling or burbot in the Cook Inlet Area, and no proposals have ever been submitted that seek to alter this.

Biological Background and Harvest History

Steelhead Trout

Steelhead trout undertake the greatest migratory movements of any form of rainbow trout. After one to four years (usually two) of stream life, steelhead trout migrate downstream in the spring and summer and enter the marine environment. Steelhead trout may rear in the ocean for only a few months or for as many as four years before returning to their natal streams to spawn. Steelhead trout exhibit two general patterns of migration into freshwater to spawn. In Alaska, spring steelhead trout typically enter freshwater during April to June, and complete spawning by early summer that same year. Fall steelhead trout typically enter freshwater during August to December, remain in freshwater throughout the winter, and complete spawning during the following spring or early summer. They then migrate back to marine waters and may return to spawn more than once if environmental conditions are favorable. Steelhead trout in lower Cook Inlet drainages are fall fish and are at or near the northern extent of their range (Morrow 1980).

Begich (1999) developed a life history model to evaluate long-term sustainability of steelhead trout returns to the Karluk River. His analysis suggested that steelhead trout populations can sustain mortality rates up to 29%, recruitment is likely to decrease at harvest rates over 37%, and an optimal harvest rate should not exceed 30%. However, sustainable exploitation rates are likely much lower for small coastal populations of steelhead trout at the most northern limits of their range. It is not known whether past enhancement, and the resulting high harvests, affected productivity of these populations. Issues associated with enhancement and mixed-stock (wild and enhanced) harvests elsewhere include straying of hatchery fish into other spawning populations and overharvest of wild fish.

Only a limited amount of information regarding the distribution of steelhead trout populations in the Kasilof River has been available. Kasilof steelhead trout enter freshwater in the fall, spend the winter in either the Kasilof River or Tustumena Lake, and then migrate to tributaries to spawn in the spring. Until this year, Crooked and Nikolai Creeks were the only two streams in the Kasilof River watershed known to support steelhead trout populations (Johnson et al. 2004). Crooked Creek is the major spawning location, and the run used to be enhanced by the stocking of hatchery-produced smolt. Harvest and catch information collected by ADF&G indicate that the adult steelhead trout overwintering in the Kasilof River do not enter Crooked Creek until late April or early May (Gamblin et al. 2004). Resource Monitoring Program projects 07-509 and 08-503 are using radio telemetry to obtain information on the spawning and seasonal distribution of steelhead trout in the Kasilof River. During early October 2007, 79 steelhead trout were fitted with radio transmitters, and their movements were tracked from fixed, shore-based locations as well as from boats and airplanes (Gates 2008, pers. comm.). Most of the tagged steelhead trout were captured in the middle to upper Kasilof River and remained in Federal public waters during late fall, winter, and spring prior to spawning. Tagged steelhead trout were detected at the Tustumena Lake outlet as early as mid October. During the winter tagged steelhead trout remained relatively active, and about half were found in the lake while the remainder occurred in the river between the lake outlet and river km 14. During the spring spawning migration, 36 tagged steelhead trout were detected in Crooked Creek, 6 in Nikolai Creek, 2 in Indian Creek, and 3 in Cole Creek.

Abundance information for Kasilof River steelhead trout populations has also been lacking. Adult steelhead trout were enumerated during May 2004 at the Crooked Creek Hatchery and concurrently at a weir equipped with an underwater video system 219 yards upstream of the hatchery. A total of 206 steelhead trout were enumerated during 2004; however, this was likely a conservative estimate of abundance because weir and video counts were not initiated until May 4 (Gates and Palmer 2006). During 2005, 2006, 2007, and 2008, the USFWS installed and operated underwater video systems in both

Crooked and Nikolai Creeks (Gates and Palmer 2008a, b and c; Gates 2008, pers. comm.). Estimates of spawning adult steelhead trout for Crooked Creek were 379 in 2005, 604 in 2006, 766 in 2007, and 877 in 2008; while estimates for Nikolai Creek were 84 in 2005 (an incomplete count), 373 in 2006, 569 in 2007, and 588 in 2008. Age, sex, and length measurements were also obtained for steelhead trout in Crooked Creek. Females averaged 24.3 inches and males averaged 23.9 inches in length. Only 11 of 246 (4.5%) of the steelhead trout measured were less than 20 inches in length. Male and female sex ratios were nearly equal in late April but shifted to a dominant female component during May. Sex ratios of steelhead trout in both Crooked and Nikolai Creeks favored females during both 2006 and 2007. The female to male ratios for Crooked Creek were 1.3:1 in 2006 1.1:1 in 2007; and for Nikolai Creek were 1.5:1 during both 2006 and 2007.

Most coastal populations of steelhead trout are of limited abundance and are easily over exploited. Steelhead trout are not harvested in personal use or educational fisheries. Sport harvests in the mainstem Kasilof River have ranged from 0 to 65 adult steelhead trout annually, and no harvests have been reported from Tustumena Lake. Juvenile steelhead trout are incidentally hooked and released in the Kasilof River salmon sport fishery, but the impact of hooking mortality on the steelhead trout population is not known. Given the potential of fluctuating stock size and limited historic data for these small coastal stocks, a conservative exploitation is likely no greater than about 10%. Current productivity of these stocks may have been affected by past enhancement efforts and relatively high harvests.

No rainbow/steelhead trout were reported to have been harvested from the Kasilof or Kenai Rivers by Federally qualified subsistence fishers in 2007 or 2008 (Palmer 2008 pers. comm.).

Arctic Grayling

Arctic grayling do not occur naturally on the Kenai Peninsula and were first stocked in the late 1950s in Crescent Lake. Arctic grayling can now be found in lakes within both the Kenai National Wildlife Refuge and Chugach National Forest. They were stocked into Twin Lakes in 1965 and into Lower Fuller Lake in 1967 by ADF&G. Arctic grayling in Twin Lakes came from Crescent Lake, on the Chugach National Forest, while those in Lower Fuller Lake came from Tonsino Lake near Glennallen. Arctic grayling provide limited sport fishing opportunity on the Kenai National Wildlife Refuge because Lower Fuller Lake is only 12 acres (5 hectares) in size and Twin Lakes are accessible only by float-equipped aircraft. Both populations are now maintained through natural reproduction. Within Chugach National Forest, Arctic grayling occur in Grayling Lake (trail access, Seward Highway mile 13.3) and Crescent Lake (trail access, Seward Highway miles 33.1). State regulations for Arctic grayling in Kenai Peninsula freshwaters allow fishing all year with daily limits of 5 per day and 5 in possession and no size limits. There is no open Federal season for Arctic grayling in the Cook Inlet Area.

Burbot

Burbot occur in Skilak and Kenai Lakes, and State regulations provide no closed season or bag and possession limits. Annual State harvest summaries rarely include any reported burbot harvest for the Kenai Peninsula. There is no open Federal season for burbot in the Cook Inlet Area.

Effects of the Proposal

Most of the proposed regulatory language requested by the proponent would duplicate existing Federal regulations and so would have no effect on Federal subsistence fisheries or users. Only the requested modification to the Kasilof River salmon dip net fishery, which would prohibit retention of any rainbow/steelhead trout 20 inches or longer, would change existing Federal regulations. However, existing

Federal regulations for the Kasilof River salmon dip net fishery protect adult steelhead trout through time restrictions. Based on available information, adult steelhead trout are not thought to be present in Federal public waters of the Kasilof River until after August 15. Existing Federal regulations allow harvest of up to 200 rainbow/steelhead trout from June 16 through August 15, but prohibit retention of all rainbow/steelhead trout after August 15. Adopting size restrictions on harvests made prior to August 16 would likely have no effect on either the fishery or the resource. In fact, even the proponent no longer thinks it is necessary to adopt size restrictions since new information indicates steelhead trout spawning populations in the Kasilof River drainage are somewhat more abundant and widely distributed than previously documented (ADF&G 2008a).

OSM CONCLUSION

Oppose Proposal FP09-06.

Justification

None of the proposed modifications to existing Federal regulations appear to be necessary. Four of the five proposed modifications are already contained within existing Federal regulations: 1) Federal subsistence fishing regulations already apply to Federal public waters; 2) the annual limit for rainbow/steelhead trout 20 inches or longer is two fish for all Kenai Peninsula waters; 3) no accumulation of Federal and State steelhead trout harvests is allowed in the Cook Inlet Area; and 4) there is no open Federal subsistence season for Arctic grayling or burbot within the Cook Inlet Area. While existing harvest restrictions could be further emphasized and clarified in the booklet of fisheries regulations provided to Federal subsistence users, there is no need to duplicate language in the Codified Federal Regulations. The fifth proposed change to existing Federal regulations would prohibit retention of rainbow/steelhead trout 20 inches or longer in the Kasilof River salmon dip net fishery from June 16 through August 15. However, the Council recommended and the Board approved these dates to allow Federally qualified subsistence users the opportunity to harvest up to 200 incidentally caught rainbow trout in the dip net fishery while still protecting adult steelhead, which are not usually present in Federal public waters of the Kasilof River until after August 15. No rainbow/steelhead trout were harvested in the Kasilof River salmon dip net fishery during 2007 and, to date, during 2008. Therefore, there appears to be no need to adopt a maximum size limit for retention of rainbow/steelhead trout prior to August 16 to protect adult steelhead trout, and even proponent now agrees that this regulatory change is not needed (ADF&G 2008a).

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**INTERAGENCY STAFF COMMITTEE COMMENTS
FP09-06**

The Interagency Staff Committee found the staff analysis to be a complete and accurate evaluation of the proposal, and the recommendation of the Regional Advisory Council to be supported by substantial evidence, consistent with recognized principles of conservation and appropriately allows for the continuation of subsistence uses.

ADF&G Comments FP09-06
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Alaska Department of Fish and Game
Comments to the Federal Subsistence Board

FP09-06 Cook Inlet Rainbow/Steelhead Trout, Grayling, and Burbot

Introduction: Proposal FP09-06 requests clarifications in federal subsistence regulations to ensure conservation of rainbow/steelhead trout, grayling, and burbot in Kenai Peninsula freshwaters. OSM’s draft Staff Analysis to the Southcentral Regional Advisory Council dated August 25, 2008 (and, later, to the Interagency Staff Committee dated October 20, 2008) incorrectly characterized the proposal as duplicative of existing regulatory language and thus unnecessary. That federal analysis likely contributed to the Council’s misunderstanding of the intent and justification for the proposal. The following information responds to that federal analysis (and subsequent Analysis to the ISC) and explains the proposal, as well as a possible modification to that proposal, submitted by the Alaska Department of Fish and Game (Department).

Response to OSM Staff Analysis: The OSM staff analysis to the Council (and later to the ISC) regarding FP09-06 concluded the Proposal 1) “duplicates” existing Federal regulations, and is therefore unnecessary, because “. . . 2) the annual limit for rainbow/steelhead trout 20 inches or longer is two fish for all Kenai Peninsula waters; 3) no accumulation of Federal and State steelhead trout annual harvests is allowed in the Cook Inlet Area; and 4) there is no open Federal subsistence season for Arctic grayling or burbot within the Cook Inlet Area.” See OSM Preliminary Conclusion opposing FP09-06.

Those conclusions overlook the actual impact of the regulations for fish for the Cook Inlet Area as modified by the Board at its May 2007 meeting, effective June 11, 2007, and as published on December 27, 2007 (Vol. 72, No. 247, Federal Register pp. 73480-82).

First, OSM Staff relies on § ____.25(c)(1) of the existing federal regulations, which generally provides that “Harvest limits authorized by this section and harvest limits established in State regulations may not be accumulated.” However, section _____.25 ((c) and (a)) contains no specific harvest limits. It provides general definitions of “harvest limits” intended to apply to whatever limitation number is provided elsewhere in the federal regulations for the “Unit or portion of a Unit in which the taking occurs.”

Section _____.27 is supposed to provide those limitation numbers for the subsistence taking of fish. In its initial draft Analysis to the Council, OSM Staff cited “§ _____.27(c)(ii)(16)” for the representation that section _____.27 provides “You may not accumulate harvest limits authorized in this section or § 100.28 with harvest limits authorized under State regulations.” However, such a provision does not exist in the current federal regulations, nor has it, apparently, for several years. Instead, § _____.27(c)(16)(ii) currently provides [as did § _____.27(c)(17)(ii) in previous recent years]:

*Except as otherwise provided for in this section [____.27], [and] if you are not required to obtain a subsistence fishing permit for an area, the harvest and possession limits for taking fish for subsistence uses **with a rod and reel** are the same as for taking fish under*

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State of Alaska subsistence fishing regulations in those same areas. If the State does not have a specific subsistence season and/or harvest limit for that particular species, the limit shall be the same as for taking fish under State of Alaska sport fishing regulations.

(Emphasis added)

In its subsequent Analysis to the ISC, OSM Staff deleted its reliance on §__.27(c)(ii)(16) and substituted §__.27(a)(2), but that general provision similarly provides:

The harvest limit specified in this section for a subsistence season for a species and the State harvest limit set for a State season for the same species are not cumulative, *except as modified by regulations in §__.27(i)*.

(Emphasis added)

Those are very different provisions than the OSM Staff representation that “no accumulation” of annual harvests is allowed in the Cook Inlet Area” by regulation, especially as applied to §__.27(i)(10) (the Cook Inlet Area), which the Department’s proposal seeks to address. Section __.27(i)(10), especially as *modified* in 2007, has other, much more specific provisions for harvest and possession limits, generally requires a subsistence fishing permit, and involves much more than just fishing with rod and reel. The OSM Staff Analysis of FP09-06 also overlooks that a particular purpose of both §§__.27(a)(2) and 27(c)(16) is to permit other, more specific Area-wide provisions in §__.27(especially §__.27(i)), providing for an accumulation of federal and state limits, such as in the Prince William Sound Area (§__.27(i)(11)). In some past analyses, OSM Staff has taken the position that those more specific provisions override any other, more general provision prohibiting an accumulation of federal and state harvest limits.

That is much of the situation FP09-06 is intended to address, specifically in relation to §__.27(i)(10). Section __.27(i)(10) applies specifically to the “Cook Inlet Area.” Although §§__.27(i)(10)(iii) and (iv) provide generally [1] that grayling or burbot may not be taken within the Area and [2] that the seasons, harvest and possession limits, and methods and means for take of salmon, trout, Dolly Varden, and other char “are the same as for the taking of those species under Alaska sport fishing regulations (5 AAC 56 and 5 AAC 57),” the 2007 regulatory revisions to that section added “*unless modified herein*.” They also added, immediately following that revision, “*Additionally* for Federally managed waters of the Kasilof and Kenai River drainages,” and then listed many different, additional methods and limits not contained within state regulations. The “unless modified herein” language was not part of the proposals approved by the Board at its May 2007 meeting. It was an OSM Staff add-on in the published version.

That language, combined with the term “Additionally,” creates the impression that the specific limitation provisions which follow in those federal regulations are *in addition to, modify*, and supersede all other provisions in those regulations including the limitations contained in the Alaska sport fishing regulations. Those “additional” limits, according to the new federal regulations as published, include any number of “Other species incidentally caught during the dip net and rod and reel fishery” (§__.27(i)(10)(iv)(A)) and “Resident fish species including lake trout, rainbow/steelhead trout, and Dolly Varden/Arctic char” (§__.27(i)(10)(iv)(C)) – without expressly excluding grayling or burbot. They also include, in another OSM Staff add-on

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to the regulations, “an annual limit of 2 rainbow/steelhead trout 20 inches or longer, taken from Kenai Peninsula freshwaters” using “rod and reel gear” (§___27(i)(10)(i)), including “in Federally managed waters of the Kasilof River drainage” (§___27(i)(10)(iv)(C)) – whereas the Board specifically *rejected* the proposal (FP07-10) for taking any rainbow/steelhead trout 20 inches or longer by rod and reel from the Kasilof River drainage as a federal subsistence fishery at its May 2007 meeting.

Thus, the real danger exists that these “additional,” “modified” provisions, as now written, could be understood to allow harvesting grayling and burbot, although not intended by the Federal Subsistence Board (Board). They could also be construed to use state harvest limits where not intended by the Board, such as to take rainbow/steelhead 20” or longer in the Kasilof rod and reel fishery, whereas the Board specifically rejected FP07-10 to do so, or to add to the state limits (as in all other cases, including taking salmon) – *thus effectively resulting in allowing the accumulation of state and “additional” federal limits. That also was not the Board’s intent*, according to the record of its May 2007 meeting, and also according to a federal agency Briefing Paper to the Board dated October 20, 2008, and a written directive from the Board to the OSM dated November 24, 2008, which are discussed below.

The purpose of FP09-06 is to undo these errors (as was the purpose of RFRs submitted to the Board on August 10, 2007, and February 25, 2008, not yet acted on to the State’s knowledge).

The federal agency Briefing Paper to the Board dated October 20, 2008, entitled “Accumulation of Fish Harvest Limits on the Kenai and Kasilof River” and the Board’s written directive to the OSM dated November 24, 2008, acknowledge the problem created by the Board’s own regulations. As is stated in the Board’s November 24 correspondence:

The Federal Subsistence Board received a briefing from the Office of Subsistence Management on November 3, 2008, concerning confusion in the interpretation of fisheries regulations for the Kasilof and Kenai river drainages and vicinity. Specifically, during the 2008 fishing season, there was confusion regarding what is allowed in terms of accumulation of harvest limits for fish in this area under Federal subsistence fishing regulations and State sport fishing regulations. Following the briefing, the Board made clear that the intent of the regulations [adopted by the Board] was to **not** allow accumulation of Federal subsistence and State sport harvest limits for fish.

(Emphasis in original)

That Briefing Paper also proposed that the confusion caused by the regulations be addressed by federal agency “informational material” for the 2009 season and, “if it is determined that a regulatory proposal needs to be developed by OSM, that would be brought before the Board for consideration for the 2010 season and beyond.” The Board’s November 24, 2008, letter takes a similar approach.

Surprisingly, neither the Briefing Paper nor the Board’s November 24 correspondence mentions this pending Proposal, FP09-06, and neither proposes to correct the problems in its regulations for the area by making corrections to the regulations, as FP09-06 proposes. The Board need not just rely on the agency development of interim, less reliable “informational material” or wait

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until 2010. The Board can use this Proposal, and also modify it as the Board determines appropriate, to correct the problem by correcting the regulations **now**.

In addition, FP09-06 seeks to clarify that the taking of fish in the Cook Inlet Area is restricted to Federal public lands (or, as stated in the OSM Preliminary Conclusion, "Federal public waters"). In its Preliminary Conclusion, OSM Staff concludes this specification is also unnecessary, because "1) Federal subsistence regulations already apply to Federal public waters." True, they do, but the intent of this part of FP09-06 is to prevent those regulations from being read as applying to *non*-Federal waters. The OSM Staff Analysis overlooks that § ____.27(i)(10) actually describes the Cook Inlet Area as including "*all* waters of Alaska" (not just "Federal waters") enclosed within boundary descriptions provided there which encompass the entire Kenai Peninsula (and more). Section ____.27(i)(10)(i) further states that "Unless restricted in this section, or unless restricted under the terms of a subsistence fishing permit, you may take fish at any time in the Cook Inlet Area," rather than only from "Federal waters" within that Area.

OSM Staff's add-on language to § ____.27(i)(10)(i) as re-written in 2007 that "there is an annual limit of 2 rainbow/steelhead trout 20 inches or longer, taken from Kenai Peninsula freshwaters" also does not limit itself to "Federal waters." Only a portion of § ____.27(i)(10)(iv) as it was re-written refers to "Federally managed waters," but that is only in the context of the "additional" limits and means specified for the "Kasilof and Kenai River drainages." The Board can also correct that problem now through this Proposal. The Federal Subsistence Program insists that its regulations only apply to Federal public lands, including waters. There is no harm, and much good, in making that point clear in connection with the Cook Inlet Area having the highest concentration of people and fishers, and probably non-federal land, in Alaska.

Therefore, contrary to the OSM Staff's analysis and conclusions for FP09-06, the Proposal's provisions are warranted and necessary. They correct, rather than "duplicate," existing Federal regulations. The existing federal regulations, as written by staff in 2007, could be construed to allow accumulation of state and federal bag limits, including those for mature, breeding age rainbow/steelhead trout 20 inches or longer, and to authorize harvest of grayling and burbot, contrary to the Board's actual intent. The Department's proposal will establish consistency between federal and state regulations, reduce user confusion, and reduce the likelihood of State enforcement actions against federal subsistence users who might mistakenly interpret those regulations to allow accumulation of federal and state bag limits or harvest of grayling and burbot.

Modification: Subsequent to submitting the proposal, additional information became available that indicates slightly higher numbers of distinct steelhead stocks exist within the Kasilof River drainage than previously known. Therefore, the Department believes this proposal might be modified, in the Board's discretion and preferably on a trial basis, to delete the clarification requested in the proposal against taking any rainbow/steelhead trout 20 inches or longer in the dip net and rod and reel subsistence fisheries, and instead allowing the combined take of two such fish per person, as long as the prohibition against accumulation is made clear. The latest information continues to identify relatively small numbers of mature, breeding steelhead stocks within the Kasilof River drainage, including steelhead tracked to Tustemena Lake, but, as noted, that information also indicates the existence of more of those fish than was previously thought.

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In addition, eligible federal subsistence users have demonstrated restraint in the reported numbers they have taken of these unique fish.

The State strongly supports continued studies, careful monitoring, and precise harvest reporting of these stocks in order to protect their sustainability. Similar concerns were expressed by federal managers at the Federal Subsistence Board fish proposal meeting in May 2007. This proposed modification results, in part, from the ongoing fisheries steelhead trout research project conducted by the Kenai National Refuge Field office biologist, which should continue, especially if this proposed modification is made.

The Department offers the following modified proposal language for Board consideration, based on those considerations and further consultation with OSM and ISC staff.

Modified Proposed Federal Regulations:

§___.27(i)(10)(i) *Unless restricted in this section, or unless restricted under the terms of a subsistence fishing permit, you may take fish at any time **on Federal public lands** in the Cook Inlet Area. If you take rainbow/steelhead trout incidentally in subsistence net fisheries, you may retain them for subsistence purposes, unless **and except as** otherwise prohibited or provided for in this section. With jigging gear through the ice or rod and reel gear in open waters there is a **combined** annual limit of 2 rainbow/steelhead trout 20 inches or longer, taken from Kenai Peninsula fresh waters **under a subsistence fishing permit and/or State of Alaska sport fishing regulations—except that rainbow/steelhead trout 20 inches or longer may not be taken from the Kasilof River or the Kasilof River drainage by rod and reel or dip net, incidentally or otherwise under a federal subsistence permit and must be immediately released to the water instead.***

§___.27(i)(10)(ii) *You may take fish by gear listed in this part unless restricted in this section or under the terms of a subsistence fishing permit (as may be modified by this section).*

§___.27(i)(10)(iii) ***You may not accumulate daily, possession, season, or annual harvest limits for a particular species under Federal subsistence regulations with any other harvest limit specified in State regulation for that species. You may not take grayling or burbot for subsistence purposes, including through incidental harvest.***

§___.27(i)(10)(iv) *You may only take salmon, trout, Dolly Varden, and other char under the authority of a Federal subsistence fishing permit. Seasons, harvest and possession limits, and methods and means for take are the same as for the taking of those species under Alaska sport fishing regulations (5 AAC 56 and 5 AAC 57) unless modified herein. **Additionally The following modifications apply to Federally managed waters of the Kasilof and Kenai River drainages: the seasons, harvest and possession limits, and methods and means for take are modified to permit only the following (except that the annual limit of 2 rainbow/steelhead trout 20 inches or longer where not otherwise limited and the prohibition against taking grayling or burbot also apply)***

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- (A) *Residents of Ninilchik may take sockeye, Chinook, coho, and pink salmon through a dip net and a rod and reel fishery on the upper mainstem of the Kasilof River from Federal regulatory markers on both sides of the river below the outlet of Tustumena Lake downstream to markers on both sides of the river at Silver Salmon Rapids. Residents using rod and reel gear may fish with up to 2 baited single or treble hooks. Other species incidentally caught during the dip net and rod and reel fishery may be retained for subsistence uses, including up to 200 rainbow/steelhead trout ~~less than 20 inches long~~ taken through August 15. After 200 rainbow/steelhead trout have been taken in this fishery or after August 15, all rainbow/steelhead trout must be released unless otherwise provided for in this section. Before leaving the fishing site, all retained fish must be recorded on the permit and marked by removing the dorsal fin. Harvests must be reported within 72 hours to the Federal fisheries manager upon leaving the fishing location.*
- (C) *Resident fish species including lake trout, rainbow/steelhead trout, and Dolly Varden/Arctic char may be harvested in Federally managed waters of the Kasilof River drainage **except as otherwise prohibited or provided for in these regulations**. Resident fish species harvested in the Kasilof River drainage under the conditions of a Federal subsistence permit must be marked by removing the dorsal fin immediately after harvest and recorded on the permit prior to leaving the fishing site.*

Impact on Subsistence Users: If proposal FP09-06 is adopted with the modifications suggested above, federal subsistence users will continue to be provided with subsistence opportunities at the levels intended by the Board in its May 2007 actions, as recently clarified by the Board's own correspondence, plus two rainbow/steelhead trout 20" or longer above what the Board intended, on a trial basis, presumably without harming conservation of rainbow/steelhead trout, grayling, or burbot. Adoption of the proposal to clarify unclear regulatory language will prevent taking more than 2 rainbow/steelhead trout 20" or longer per year by preventing accumulation of federal and state limits. If this proposal is adopted, it would also clarify the prohibition on taking of grayling or burbot for federal subsistence on the Kenai Peninsula.

Federal subsistence users could benefit from adoption of proposal FP09-06 because the proposal is aimed at preserving conservation of Kenai Peninsula rainbow/steelhead trout populations, while also allowing the harvest of some large rainbow/steelhead trout. It is also aimed at reducing the likelihood of enforcement actions against federal subsistence users who may not understand that the regulations prohibit federal subsistence harvest of grayling and burbot. Adoption of this modified proposal would not impact the Tustumena through-the-ice gill net fishery.

Enforcement Issues: Adoption of this proposal will reduce the likelihood of state enforcement actions being taken against federal subsistence users who might otherwise incorrectly believe that, after filling their federal limit, they can harvest additional fish in a state fishery that has an annual limit. It also reduces the likelihood of enforcement relating to taking grayling and burbot by making it clearer to federal subsistence users that they can only fish for grayling and burbot

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under State sport fishing regulations and must have their State fishing license to legally retain grayling and burbot.

Jurisdiction Issues: The Department requests detailed land status maps that distinctly illustrate land ownership, easements, and exact boundaries within which it is claimed federal regulations would apply and justification for claiming those boundaries. While standing on state and private lands (including state-owned submerged lands), persons must comply with state law and cannot harvest under conflicting federal regulations. Portions of both the upper and lower Kenai and Kasilof rivers are bordered by state or private lands within or adjacent to areas where federal jurisdiction is claimed. It is important that federal subsistence users know exactly where federal regulations are claimed to apply in both watersheds to keep from violating state regulations.

Dual harvest regulations for individual resident species can unintentionally lead to unsustainable harvests and dangerous depletions of discrete fish stocks. Although the State is responsible for sustainable management of all fish stocks in all fresh waters of Alaska, the federal subsistence fisheries target the same freshwater stocks as they cyclically transit in and out of federal public lands. Development of expansive federal harvest regulations targeting the same stocks harvested in State fisheries could lead to long-term damage to these stocks unless severe restrictions or closures of State fisheries are adopted. Such results violate ANILCA Sections 805 and 815. This issue specifically applies to Kenai Peninsula resident fish stocks targeted by both federal and state fisheries.

Opportunity Provided by State: The State has comprehensive and conservative sport fishing regulations that have proven to be successful at maintaining sustainable populations of rainbow/steelhead trout as well as grayling and burbot on the Kenai Peninsula. The Kenai and Kasilof rivers are located in the Anchorage-MatSu-Kenai Nonsubsistence area designation under state law. The State provides the opportunity to retain two rainbow/steelhead trout 20 inches or longer per year from the Kasilof River sport fishery, although the current predominant practice of sport fishers is to “catch-and-release” those fish. Retention of rainbow/steelhead trout in the personal use and educational fisheries of the Kasilof and Kenai rivers is prohibited. Due to the highly restrictive size limits for retaining rainbow trout in all Kenai River state and federal fisheries (less than 16 or 18 inches, depending on the area fished), retention of mature, breeding age rainbow/steelhead trout is prohibited by all Kenai River users.

Conservation Issues: Excessive harvest could occur if federal subsistence users accumulate daily and annual/seasonal harvests from federal subsistence and State fisheries. The existing federal subsistence regulations could be misinterpreted to allow accumulation of State and federal harvest limits, including those of mature, breeding age rainbow/steelhead trout 20” or longer, and to allow a federal subsistence harvest of grayling and burbot.

The small and discrete stocks of rainbow/steelhead trout within the Kasilof River drainage are an example of limited resident species stocks that could suffer from over-exploitation if cumulative harvest limits established by the Federal Board result in increased harvest of larger-sized resident species (20” or longer), which contain the greatest reproductive potential for such populations. The situation is further aggravated by the federal subsistence Tustumena Lake winter ice

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fisheries (net and jig fisheries), which may result in adding rainbow/steelhead trout 20" or longer to the take authorized in the Kasilof drainage rod and reel and dip net fisheries.

The Department is seriously concerned with potential over-exploitation of Kasilof River rainbow/steelhead trout stocks based on cumulative effects from all combined fisheries. Though long-standing commercial and personal use fisheries are likely indirect sources of some unknown level of mortality and the sport fishery is a small source of directed mortality on rainbow/steelhead trout stocks, all of these fisheries have been in existence for decades (spanning many rainbow/steelhead trout life cycles), and rainbow/steelhead trout stocks appear to have continued to exist at sustainable levels prior to the recent establishment of the federal subsistence fisheries. Adding multiple directed Federal subsistence harvest-oriented fisheries to currently sustainable, but limited, populations of these fish may require serious conservation measures in the future for all fisheries.

The Department, through the Alaska Board of Fisheries, has developed conservative fisheries management plans, sustainable exploitation rates, and time-proven fishery regulations which establish daily and annual limits and gear restrictions to provide for sustainable harvest of fish stocks. The evolution of each regulation is either based upon historic, hard scientific data or, where such data is not available, on the development of conservative fishing regulations based upon the best information available, including long-term average harvest information which indicates levels of harvest that have a high probability of being sustainable. The new federal fisheries, with less restrictive methods and means, may eventually reach levels of participation which could create conservation concerns even without accumulation of state and federal bag limits. Without a clear prohibition on accumulation of state and federal limits, even much lower levels of participation can be expected to create conservation issues.

Other Issues: Currently a Fishery Information Service project is mid-way through a multi-year study of Kasilof River rainbow/steelhead trout stocks. Even preliminary information from this study may assist with determining when, where, and what numbers of rainbow/steelhead trout pass through various fisheries and if the current absence of harvest size limits in federal subsistence Kasilof River rainbow/steelhead trout fisheries is a biologically sound management decision.

Recommendation: Support the Department's modified proposal.

WRITTEN PUBLIC COMMENTS

Support. Kenai River Sportfishing Association supports this important regulatory change based on its benefit to resource conservation and making consistent State and Federal Regulations. This regulation correction/update is being proposed as a means to ensure the conservation of rainbow/steelhead trout, grayling, and burbot in the Kenai Peninsula fresh waters. Additionally it removes confusing language in the current regulation that could be construed to permit accumulation of State and Federal bag limits. We believe this regulation will also establish consistency between Federal and State regulations and be consistent with the direction of the Federal Subsistence Board in May 2007. Furthermore, this proposal clarifies regulatory language and reduces the likelihood of State enforcement actions against Federal subsistence users who might mistakenly interpret the regulation to allow accumulation of Federal and State bag limits.

Kenai River Sportfishing Association