LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-2450
LAA.Legal@akleg.gov
120 4th Street, Room 3

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

M E M O R A N D U M March 25, 2024

SUBJECT: Subsistence preference based on race
(HJR 22; Work Order No. 33-LS1321\A)

TO: Representative Thomas Baker
Attn: Steve St. Clair

FROM: Noah Klein
Legislative Counsel

You requested an opinion evaluating whether the state could adopt an Alaska Native subsistence preference. Such a provision would likely violate the Alaska Constitution.

The Alaska Supreme Court has explained that under the Common Use and Uniform Applications provisions in art. VIII, secs. 3 and 17, of the Alaska Constitution, "exclusive or special privileges to take fish and wildlife are prohibited."[1] Under the Alaska Constitution's equal protection provision "all persons are equal and entitled to equal rights, opportunities, and protection under the law."[2] Race is a suspect classification and a law providing different subsistence rights based on race "will survive only if it is 'necessary' to achieve a 'compelling state interest.'"[3] It is unclear what state interest, if any, would justify an Alaska Native subsistence preference.

If the state amends the Alaska Constitution to expressly allow for race-based subsistence preferences, such a preference must also comply with the equal protection clause of the United States Constitution. A racial classification is "constitutionally suspect" under federal equal protection analysis.[4] But "'the unique legal status of Indian tribes under

---

[1] *State v. Kenaitze Indian Tribe*, 894 P.2d 632, 638 (Alaska 1995) (quoting *McDowell v. State*, 785 P.2d 1, 6 (Alaska 1989)).

[2] Alaska Const. art. I, sec. 1.

[3] *Squires v. Alaska Bd. of Architects, Eng'rs & Land Surveyors*, 205 P.3d 326, 341 (Alaska 2009) (quoting *Pub. Emps.' Ret. Sys. v. Gallant*, 153 P.3d 346, 350 (Alaska 2007)).

[4] *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive."[5] Because a state does not have the same relationship with tribes as the federal government, the state's ability to single out tribal members for different treatment is not as extensive as federal authority.[6] A state law classification of tribes that furthers or is "within the scope of the authorization" of a federal law is more likely to survive a federal equal protection challenge.[7] Providing a subsistence preference for Alaska Natives is probably not, however, within the scope of a federal authorization. In fact, such a preference likely violates Title VIII of the Alaska National Interest Lands Conservation Act, which provides for a rural, not race-based, subsistence preference.

Please call with any questions or concerns.

NIK:mis
24-169.mis

---

[5] *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500 - 01 (1979) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 - 52 (1974)).

[6] *Id.*

[7] *See id.* (subjecting a state classification to a lower level of scrutiny because state "was legislating under explicit authority granted by Congress in exercise of that federal power").