

# LEGAL SERVICES

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## MEMORANDUM

March 29, 2019

**SUBJECT:** Outstanding National Resource Water: Misc. Questions  
(CSSB 51(RES); Work Order No. 31-LS0375\R)

**TO:** Senator Chris Birch  
Attn: Trevor Fulton

**FROM:** Emily Nauman  
Deputy Director 

You asked for guidance on several questions related to CSSB 51(RES).

1. Is designation of a water as an outstanding national resource water an allocation or appropriation of resources for purposes of art. XI, sec. 7?

The short answer is, under the recent Alaska Supreme Court holding in *Mallott v. Stand for Salmon*,<sup>1</sup> an initiative probably could not be used to designate outstanding national resource water without violating art. XI, sec. 7 of the Constitution of the State of Alaska.

Under art. XI, sec. 7, Constitution of the State of Alaska, an initiative may not be used to "make or repeal appropriations." The "two core objectives of the constitutional prohibition on the use of initiative to make appropriations" are to "prevent an electoral majority from bestowing state assets on itself" and "preserve to the legislature the power to make decisions concerning the allocation of state assets."<sup>2</sup> Related to the second prong of inquiry, in *Mallott*, the Court ruled that "an initiative must leave to the legislature ultimate decision-making authority to use specific public assets for specific purposes."<sup>3</sup> The Court noted that "[t]he legislature does not truly retain control over public assets if the voters may forbid it from using those assets in a particular manner."<sup>4</sup>

The standard for water quality regulation of an outstanding national resource water is set out in federal regulation: "[w]here high quality waters constitute an outstanding National

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<sup>1</sup> 431 P.3d 159 (Alaska 2018).

<sup>2</sup> *Id.* at 165 (quoting *Pullen v. Ulmer*, 923 P.2d 54, 64 (Alaska 1996)).

<sup>3</sup> *Id.* at 170.

<sup>4</sup> *Id.*

resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected."<sup>5</sup> The department has described the standard; "if a water were to be designated by the state as a Tier 3 water, new or increased discharges that would lower or degrade the existing water quality would not be allowable unless they were temporary or limited."<sup>6</sup> Because this standard would likely completely prevent the legislature from permitting projects that result in the permanent destruction of outstanding national resource water, a court is likely to find that an initiative nominating outstanding national resource water constitutes an unconstitutional appropriation.<sup>7</sup>

Note that the passage of CSSB 51(RES) would not change this analysis.

2. Could "by law" on page 1, line 11, include regulations?

The phrase "by law" is used throughout the statutes. It seems clear that the phrase refers to law-making power of the legislature exercised through the enactment of statute, rather than to the law-making power of the executive branch exercised through adoption of regulation. Article. XII, sec. 11 of the state constitution provides:

SECTION 11. Law-Making Power. As used in this constitution, the terms "by law" and "by the legislature," or variations of these terms, are used interchangeably when related to law-making powers. Unless clearly inapplicable, the law-making powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of Article XI.

Related to the effect and enactment of legislation, AS 01.10.070 states that a bill "becomes law" when "(A) a bill which is passed by the legislature is signed by the governor; (B) the period specified in art. II, § 17 of the Alaska Constitution expires without gubernatorial action; [or] (C) the legislature overrides the governor's veto of a bill."

If you remain concerned about use of the phrase "by law" in CSSB 51(RES), another option is to replace it with the phrase "by statute". Although used less often, the phrase

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<sup>5</sup> 40 C.F.R. 131.12. An identical standard appears in the state's antidegradation policy, at 18 AAC 70.015.

<sup>6</sup> Division of Water, Alaska Department of Environmental Conservation, *Outstanding National Resource Water (Tier 3 Water) Fact Sheet* (2018). Available at <http://dec.alaska.gov/media/4800/tier-3-factsheet-032018.pdf>

<sup>7</sup> See *Mallott*, 431 P.3d at 170 ("Because 17FSH2 would completely prevent the legislature from permitting projects that result in the permanent destruction of anadromous fish habitat, the initiative constitutes an unconstitutional appropriation as written.")

does rule out the possibility that the language permits a department to designate outstanding national resource water by regulation.

3. Could changing "by law" to "by the legislature" preclude a waterbody from being designated as outstanding national resource water by initiative?

Whether or not an outstanding national resource water could be designated by initiative is discussed in part one of this memorandum. However, use of the phrase "by the legislature" is problematic. It does not seem to acknowledge that the governor has veto authority over bills. Also, it creates an ambiguity about whether or not an outstanding national resource water could be designated by resolution.

4. Could a recommendation by the department not to designate a water an outstanding national resource water be subject to a legal challenge?

Any action by the government could be subject to a legal challenge, however, the bill is drafted to make clear that the legislature does not view a recommendation as a final agency decision subject to appeal or challenge. The power to designate an outstanding national resource water resides in the legislature. Relatedly, the legislature is not required to follow a nomination of the department of environmental conservation.

If I may be of further assistance, please advise.

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