

LEGAL SERVICES

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

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101


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

MEMORANDUM

May 1, 2019

SUBJECT: Outstanding National Resource Water: Initiative
(HB 138; Work Order No. 31-LS0811\A)

TO: Representative Geran Tarr
Attn: Thatcher Brouwer

FROM: Emily Nauman
Deputy Director 

You asked whether, if HB 138 passed, the law would preclude designation of outstanding national resource water by initiative.

The short answer is, under the recent Alaska Supreme Court holding in *Mallott v. Stand for Salmon*,¹ 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, regardless of whether HB 138 passes.

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."² 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."³ 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."⁴

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

¹ 431 P.3d 159 (Alaska 2018).

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

³ *Id.* at 170.

⁴ *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."⁵ 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."⁶ 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.⁷

Again, the passage of HB 138 would not change this analysis.

If I may be of further assistance, please advise.

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

⁶ 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>

⁷ 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.")