

MEMORANDUM

State of Alaska

Department of Law

TO: Glenn Haight
Executive Director
Alaska Board of Fisheries

DATE: January 8, 2019

FILE NO.:

FROM: Seth M. Beausang *SMB*
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SUBJECT: Department of Law
comments on proposals
for the Arctic/Yukon/
Kuskokwim Finfish
meeting from January 15-
19, 2019

The Department of Law has the following comments on the proposals to be considered by the Board of Fisheries at the Arctic/Yukon/ Kuskokwim Finfish meeting from January 15-19, 2019 in Anchorage, Alaska.

Proposal 94: This proposal seeks an exemption from a prohibition on the taking of king salmon such that taking “the first king salmon” would be permitted for religious and ceremonial use. Under the Alaska Constitution, a person may be entitled to a religious exemption from a facially neutral law when the person can show that (1) religion is involved; (2) the conduct in question is religiously based; and (3) the person is sincere in his or her religious beliefs. If the person can make that showing, the person is entitled to an exemption unless the State can prove a compelling state interest that would justify curtailing the religiously based practice. In the context of fisheries management, the State can likely prove a compelling state interest if it can show that maintaining a healthy and sustainable king salmon population would be harmed if the religious exemption were granted. The board may but is not obligated to provide for a religious exemption in regulation; a religious exemption is already provided for under the Alaska Constitution. The board can provide an opportunity to take king salmon beyond the opportunity guaranteed under the Alaska Constitution, but that opportunity must be provided consistent with the equal protection clause.

Proposal 99: This proposal would establish beach seine as an optional gear for salmon in the Yukon Area. Were the board to adopt this proposal the new beach seine salmon fishery in the Yukon Area would not be a limited entry salmon fishery absent action by CFEC.

Proposals 115-117: These proposals would keep certain waters in the Kuskokwim Area open to subsistence fishing even when the department determines there is a need to conserve salmon. Under current regulations, when the department determines there is a need to conserve salmon, the department may open fishing in waters in order to provide for a subsistence harvest opportunity of non-salmon species. Even if the board adopted these proposals, the department would retain emergency order authority to close waters to fishing for a biological reason.

Proposal 120: This proposal would close “rafting,” but the board does not have authority over rafting unless there is a fishing nexus.

Proposal 122: This proposal would require that certain salmon parts be offered to “local dog mushers and garden groups” before being discarded. Such a requirement would likely violate the Alaska Constitution’s equal protection clause.

Proposal 127: This proposal would, among other things, impose subsistence harvest limits for sockeye salmon. The board likely cannot give the department the flexibility to establish harvest limits that are “no greater than” a number without giving the department direction as to how a lower limit will be determined. The board also likely cannot give the department the authority to make adjustments to subsistence gear without providing more specific direction to the department.