

STATE OF ALASKA

DEPARTMENT OF LAW

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Thomas V. Robinson, President
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Re: Public Use of Navigable and Public Water

Dear Messrs. Fortier and Robinson:

It has come to the attention of the Department of Law that Alaska Peninsula Corporation (APC) and its licensee, Rainbow King Lodge, Inc. (RKL), claim Dream Creek is off-limits to public use within Section 1, Township 10 South, Range 32 West, Seward Meridian, where Dream Creek flows into Gibraltar Lake. Apparently, APC and RKL do not restrict this claim to Dream Creek.

In correspondence to Valhalla Lodge dated July 15, 2009, APC's Lorianne Rawson stated that "Rainbow King enjoys an exclusive right of entry and duty to prohibit unpermitted entry by others on APC lands and interests, including but not limited to the Newhalen River Gorge and Upper Talarik Creek, as well as the Gibraltar River, Southeast Creek, Dream Creek, Fog Lake and the Copper River." In addition, RKL advertises on its website that it "bestows our guests with . . . several privately leased trophy streams" and that "Dream Creek is leased exclusively by Rainbow King Lodge."

APC's and RKL's representations of exclusivity are in error and are clearly inconsistent with Alaska's public trust doctrine as reflected in state statutes and in the state's constitution. The purpose of this letter is to explain the state's position in order to avoid future misunderstandings and to request that APC and RKL cease from further interfering with the public's right to access and use Dream Creek and the other water bodies.

In part this letter stems from reports by fishermen to the Alaska Departments of Natural Resources (DNR) and Fish and Game (ADF&G). They claim that they were accosted by RKL staff while fishing at Dream Creek. These fishermen contend that RKL personnel told them, in strong language, that the stream bed is private property and that the public may not use the stream. RKL staff also reportedly told these individuals that they were trespassing and demanded that they leave immediately or face being sued. According to the fishermen, they had landed on Gibraltar Lake by floatplane and at all times used the lake and stream below the ordinary high water marks, including while wading up the creek from the lake.

These reports appear to have been substantiated by correspondence sent to one of the fishermen by Mr. Fortier. Specifically, in a letter dated July 2, 2010, Mr. Fortier claimed that “APC’s Trespass Agent Rainbow King Lodge” had observed the fisherman “in trespass on APC property” walking “up the stream bed of Dream Creek,” and that any further such use would be considered criminal trespass. In a subsequent letter dated September 23, 2010, Mr. Fortier directed the fisherman to “stay off” the streambed of Dream Creek.

According to land records on file with DNR and the Bureau of Land Management (BLM), land within Section 1 was transferred by Interim Conveyance No. 1042 to APC pursuant to ANCSA. Apparently APC believes it owns the creek bed of Dream Creek within the area of that interim conveyance and that, as owner, it can control any use of the creek bed, including standing or wading while fishing or accessing fishing spots by walking on the exposed or unexposed creek bed.

However, as a matter of law, the transfer to APC did not include Dream Creek. APC’s position is contrary to Alaska’s constitutional provisions granting the public the right to access and use navigable and public waters regardless of who has title to the underlying bed. Specifically, Article VIII, Section 14 of the Alaska Constitution provides that: “Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State,” except as regulated or limited by the state legislature. Article VIII, Section 3 of the Alaska Constitution also provides that the waters, fish, and wildlife of Alaska are reserved to all Alaskans for common use wherever occurring in their natural state. Considering these constitutional guarantees, the Alaska Supreme Court has determined “the provisions in article VIII [of the Alaska Constitution] were intended to permit *the broadest possible access to and use of state waters by the general public.*”¹

The Alaska Legislature defines “navigable water” as any water body of the state,

¹ *Owsichek v. State*, 763 P.2d 488, 492 (Alaska 1988) (emphasis added).

including a stream, creek or lake, that is suitable for any useful public purpose including hunting, fishing, boating, or other recreational activities.² “Public water,” as defined in state statute, includes navigable water and all other water “that is reasonably suitable for public use and utility,” including habitat for fish and wildlife or the migration and spawning of fish.³ Dream Creek and the other water bodies mentioned in Ms. Rawson’s 2009 letter, clearly meet these statutory definitions and as such constitute navigable and public waters under state law.

The Alaska statutes reiterate that “[t]he people of the state have a constitutional right to free access to and use of the navigable or public water of the state” and that “[t]he state has full power and control of all of the navigable or public water of the state, both meandered and unmeandered, and the state holds and controls all navigable or public water in trust for the use of the people of the state.”⁴ The Alaska statutes also provide:

Ownership of land bordering navigable or public water does not grant an exclusive right to the use of the water *and a right of title to the land below the ordinary high water mark is subject to the rights of the people of the state to use and have access to the water for recreational purposes or other public purposes for which the water is used or capable of being used consistent with the public trust.*⁵

In *CWC Fisheries, Inc. v. Bunker*, the Alaska Supreme Court determined that this statutory declaration “constitutes a clear ‘legislative expression of . . . continued adherence to the “public trust” doctrine’” provided by Alaska’s Constitution.⁶ Accordingly, under the constitution and statutes public use of the water and the land below the ordinary high water mark is not considered trespassing. In fact, as reflected in AS 38.05.128(a) and (f), it is a criminal offense (Class B misdemeanor) for someone to “obstruct or interfere with the free passage or use by a person of any navigable water,” except under conditions inapplicable here. That statute also specifies: “Free passage or use of any navigable water includes the right to use land below the ordinary high water mark to the extent reasonably necessary to use the navigable water consistent with the

² AS 38.05.965(13).

³ AS 38.05.965(18).

⁴ AS 38.05.126 (a), (b); ch. 82, §§ 1(a), (b), SLA 1985; ch. 56, § 4, SLA 1999.

⁵ AS 38.05.126(c); ch. 82, § 1(c), SLA 1985; ch. 56, § 4, SLA 1999 (emphasis added).

⁶ 755 P.2d 1115, 1118 n.9 (Alaska 1988).

public trust.”⁷ In addition to the criminal penalties set forth in AS 38.05.128, Alaska Statute 11.76.110, which makes interference with constitutional rights a crime, as well as other statutes, may apply.

It is worth noting that courts in other western states with laws similar to Alaska have consistently held that the scope of the public right to use state water bodies includes using the privately-owned beds of those water bodies in ways incidental to the public’s use of the waters. For example, in *Conatser v. Johnson* which addressed the issue of whether members of the public trespassed by walking the stream bed while fishing, the Utah Supreme Court ruled that the stream bed is part of the stream subject to the public’s right of use and that as such, the use of the stream bed did not constitute a trespass.⁸ In affirming the public’s right of use, the court in *Conatser v. Johnson* made the following statements:

- We agree that touching the water’s bed is a common action in fishing and that it is reasonably necessary for the effective enjoyment of it. The same is true for hunting. In addition to the enumerated rights of floating, hunting, and fishing, the public may engage in any lawful activity that utilizes the water. In many cases, touching the water’s bed is reasonably necessary for the effective enjoyment of those activities.⁹
- We hold that the scope of the [public] easement [in state waters] provides the public the right to float, hunt, fish, and participate in all lawful activities that utilize the water. We further hold that the public has the right to touch privately owned beds of state waters in ways incidental to all recreational rights provided for in the easement, so long as they do so reasonably and cause no unnecessary injury to the landowner.¹⁰

In addition to the Utah decision, two Montana Supreme Court decisions support the rights of the public to use and access a stream bed regardless of who holds title to the

⁷ AS 38.05.128(d).

⁸ 194 P.3d 897, 901-03 (Utah 2008).

⁹ *Id.* at 902.

¹⁰ *Id.* at 903.

stream bed itself. In *Montana Coalition for Stream Access, Inc. v. Curran*,¹¹ the court prohibited interference with public use by an adjacent landowner and found that:

Streambed ownership by a private party is irrelevant. If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people.¹²

Likewise, in *Montana Coalition for Stream Access, Inc. v. Hildreth* the court further explained that:

The Montana Constitution clearly provides that the State owns the waters for the benefit of its people. The Constitution does not limit the waters' use. * * * Therefore, no owner of property adjacent to State-owned waters has the right to control the use of those waters as they flow through his property. The public has the right to use the waters and the bed and banks up to the ordinary high water mark.¹³

An earlier decision of the Idaho Supreme Court, *Southern Idaho Fish and Game Ass'n v. Picabo Livestock, Inc.*,¹⁴ was decided the same way, for much the same reasons as the Utah and Montana decisions. Based on Alaska's clear and compelling constitutional and statutory recognition of the public trust doctrine, our Court no doubt would conclude similarly to the courts of Idaho, Utah and Montana.

The state recognizes APC's interest in controlling trespass activities on such of APC's uplands as surround public water bodies. The fact that the public has a right to use Dream Creek (and other water bodies) does not confer upon the public the right to enter, cross, or use APC's adjacent uplands – except for safe portage. AS 38.05.128(e) provides that the free passage and/or use of any navigable water “includes the right to enter adjacent land above the ordinary high water mark as necessary to portage around obstacles or obstructions to travel on the water,” provided that entry is made in the least obtrusive manner possible and without injury or damage to the adjacent lands, there is no reasonable alternative to that entry, and the navigable water is re-entered immediately above or below the obstacle or obstruction at the nearest point where it is safe to do so.

¹¹ 682 P.2d 163 (Mont. 1984).

¹² *Id.* at 170.

¹³ 684 P.2d 1088, 1091 (Mont. 1984).

¹⁴ 528 P.2d 1295 (Idaho 1974).

The most practical legal access to Dream Creek by the public within Section 1 is by boat or floatplane from Gibraltar Lake to the mouth of Dream Creek and from there by boating or walking up the creek. Accordingly, once people reach Dream Creek within Section 1, they have the right, consistent with Alaska law, to fish and make other public use of the stream and the streambed below the ordinary high water mark. That use and access can be from a boat, including touching the bottom, or by wading or standing within the stream including its exposed gravel or sand bars, or from a log, other timber, or rock within the stream or streambed. The public must, of course, abide by the applicable fishing, hunting, and other resource use regulations that apply in that area.

In addition to the constitutional and statutory right of use and access afforded to the public, it appears that Dream Creek is navigable, and as such that the stream bed is in state ownership (for at least a third-mile upstream from its mouth) under the federal test for title navigability as applied to Alaska streams in such cases as *State of Alaska v. Ahtna, Inc. & United States*,¹⁵ and *Appeal of Doyon, Ltd.*¹⁶ The same holds true for the other water bodies listed in Ms. Rawson's 2009 letter. Nonetheless, based on the statutory and constitutional reasons previously stated, the issue of the state's ownership of the waterways and stream beds need not be addressed in the context of this letter.

This discussion of public access and use rights under Alaska law is not new to APC or RKL. In fact, court records reflect that in 1988 RKL sued a member of the public for trespass on Dream Creek and the Copper River and that on August 25, 1989, the Alaska Superior Court ruled

that the public has a right to use the lands between the ordinary high water marks of streams that are navigable or public under state law.

APC intervened in that case and on October 4, 1990, APC and RKL stipulated in writing that Dream Creek is navigable and public water pursuant to state law because it is "susceptible to recreational fishing" and that Gibraltar Lake is also navigable for purposes of state title. Subsequently, in 1998 in connection with the issue of public use and access to the Copper River and Fog Lake, the Alaska Department of Law sent letters to APC and RKL affirming the public's right to access and use navigable and public waters as defined by state law.

The public has a clear statutory and constitutional right to access and use Dream Creek and similarly situated water bodies. Neither APC nor RKL has any right to

¹⁵ 891 F.2d 1401 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990) (Gulkana River).

¹⁶ 86 Interior Dec. 692 (ANCAB 1979) (Kandik and Nation rivers).

interfere with that use and access. Accordingly, APC and RKL must abide by the rules of law associated with the public trust doctrine and cease from falsely representing that they have exclusive rights to those waters. Interference with the public's right to access and use those waters must stop.

Sincerely,

JOHN J. BURNS
ATTORNEY GENERAL

By: 
Elizabeth J. Barry
Chief Assistant Attorney General
Natural Resources Section

cc: Commissioner Daniel S. Sullivan, Alaska Department of Natural Resources
Commissioner Cora Campbell, Alaska Department of Fish and Game
Commissioner Joseph Masters, Alaska Department of Public Safety