

STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF MINING, LAND AND WATER

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March 25, 2009

Mr. Ken Deitering
P.O. Box 356
Hoonah, Alaska 99829

Dear Mr. Deitering,

I am responding to your request for information regarding public access to and fishing at Spasski Creek (River) near Hoonah, Alaska. While still in office, former United States Senator Ted Stevens forwarded your letter of concern to the Alaska Department of Natural Resources (DNR) for a response. In your letter, you ask three related questions: 1) Does the State of Alaska own "the river"; 2) Do you (the public) have a right to fish in Spasski Creek; and 3) Are there "buffer zones" allowing fishing along the river bank?

You state in your letter that last spring you were told by Sealaska personnel to leave the stream and that you would no longer be allowed to fish there. I understand that the fishing area to which you refer is in the vicinity of a local road, which crosses the stream about one mile upstream from where Spasski Creek enters Spasski Bay. Answers to your questions regarding ownership, fishing, and buffer zones follow.

The United States Bureau of Land Management (BLM) purportedly conveyed ownership of most of the riverbed of Spasski Creek to the local Native corporations, Huna Totem Corporation and Sealaska Corporation, under provisions of the Alaska Native Claims Settlement Act, also known as "ANCSA". Under federal law, the BLM did not, and could not, purport to convey the bed of the river insofar as permanently or periodically covered by the tides, or any portion of Spasski Bay. The State owns those lands, including the tidelands as far as they extend up Spasski Creek. In addition, the State may own the streambed upriver, or a portion of it, under federal law, depending on how "navigable" by watercraft that area is, but that has not been determined.

Notwithstanding ownership of the riverbed of Spasski Creek, the public has a constitutional and statutory right to access and use the state's navigable and public waters. Those waters were not conveyed. They are under state control. Section 14, Article VIII of the Alaska Constitution specifically provides: "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. Alaska Statute 38.05.126 reiterates the public's constitutional rights to "free access to and use of the navigable or public water of the state" and declares that the state "holds and controls" those waters "in trust" for the public use. Any right of title to the land below the water body's "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 . . . consistent with the public trust." Free passage or use by the public "of any navigable water" is also provided for by Alaska Statute 38.05.128. Under state law, "navigable water" is broadly defined as any body of water or waterway within the state, including "river, stream, lake, pond, slough, creek, bay [or] estuary", that is navigable in fact for any useful public

purpose, including boating, fishing, hunting, trapping, and other recreational purposes. AS 38.05.965 (13). Under that law “public water” is all “navigable water” and also “all other water, whether inland, or coastal, fresh or salt, that is reasonably suitable for public use and utility, habitat for fish and wildlife in which there is a public interest, or migration and spawning of fish in which there is a public interest.” AS 38.05.965 (18).

According to available information, the lower five miles or so of Spasski Creek is in a valley of generally low gradient. There the stream is generally 40-50 feet wide, from bank to bank. The lowest mile or so includes marshland periodically covered by tidal waters. Spasski Creek (AWC 114-27-10300) has been identified by the Alaska Department of Fish and Game as being important for the production of chum, pink, and Coho salmon, and Dolly Varden, cutthroat and steelhead trout. Based on this information, Spasski Creek is a navigable and public water under state law.

The bed and waters of Spasski Creek and similar streams reserved for public use under Alaska law include the stream’s gravel and sand bars, whether covered by water or exposed, as long as they are below what is legally known as the “ordinary high water mark” (OHWM). The OHWM serves as the boundary between navigable or public waters and adjoining uplands. Normally, the OHWM is a readily discernible “line” impressed by erosion on the upper edge of a stream bank. Aerial photographs of Spasski Creek above its tidelands show a river generally contained between its banks, including several, often-exposed sand and gravel bars. Incidental use of that streambed, including those bars, in connection with public fishing, boating, or floating the stream, is part of the protected public use.

Those public uses include walking and standing within the stream and upon its bars while fishing, or anchoring or hopping out of a boat, raft or other watercraft while boating or floating the stream. Such uses do not constitute trespass. Alaska Statute 38.05.128 also provides that the free passage 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 reentered immediately below the obstacle or obstruction at the nearest point where it is safe to do so.

Contrary to what you may have heard, there are no “buffer zones” on Native corporation lands allowing fishing or other public uses above the OHWM. The public’s right to use Spasski Creek, and similar navigable or public streams in the area, does not include the right to enter, cross, or use adjacent uplands in private ownership (except in the limited circumstances relating to safe portage described above). Owners of uplands, meaning those lands above the ordinary high water mark, generally have the right to exclude people from those lands. Therefore, the Native corporations and their agents have the right to post signs on their upland property and otherwise advise people that they are not welcome on those uplands and in trespass. In addition, other privately-held uplands, in particular an Alaska Native allotment, appear to exist adjacent to Spasski Creek near its mouth, below the road.

I understand Spasski Creek can be legally accessed, by boat and over State-owned tidelands, and without crossing uplands in Native or other private ownership, by entering Spasski Bay and Spasski Creek’s mouth. I also understand that one of the public right-of-way easements excluded from the lands granted to Huna Totem and Sealaska is a trail easement 25 feet wide for public travel by foot and small ATV vehicle to the waters and tidelands of Spasski Bay. It is listed as EIN 3 G on Patent No. 50-89-

0539 from the United States to Huna Totem Corporation dated August 23, 1989. Travel by boat or other means along those Bay waters and tidelands, and up the waters and tidelands of Spasski Creek, should be possible, assuming all laws applicable to those areas, including state regulations, are followed.

The public also appears to have a right of access to Spasski Creek by using the 60-foot wide roadway easement and road reserved for public travel by foot and all types of vehicles, including automobiles and trucks, which is listed as EIN 6 G in that same 1989 conveyance to Huna Totem Corporation. This appears to be the road easement you have used in the past to reach your "fishing hole." Generally such easements include more area than the existing roadway. Use of that easement should allow you to walk down from your vehicle to Spasski Creek to fish without entering or crossing the Native corporation's uplands.

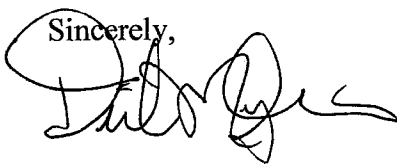
Another 25-foot trail easement excluded from a conveyance of the United States to Sealaska Corporation extends southwesterly and then south, east, and south again (around Elephant Mountain) to provide access to some of the tributary headwaters to Spasski Creek. That easement is listed as EIN 115 D9, G within Interim Conveyance No. 1779 to Sealaska dated December 30, 1998.

I enclose a DNR map showing the general location of these three "17(b) Easements" (named after section 17(b) of ANCSA, which provides for some public access within Native corporation lands).

Therefore, I conclude that you may legally access Spasski Creek by entering at the stream's mouth, by using one of the 17b easements outlined in this letter, and/or by traveling upon the state tidelands. Once you reach Spasski Creek by such means, you have the right to fish throughout the creek and its riverbed below the creek banks or other ordinary high water mark. You can do so from a boat, or by standing within the stream or upon its exposed gravel or sand bars, or from a log, other timber, or rock within the stream or streambed. You must, of course, abide by the applicable fishing regulations for that area.

I hope you find this letter responsive to your request for information. If you wish, more information on the State's position on navigable and public waters can be found at the DNR Navigability Program's website at <http://dnr.alaska.gov/mlw/nav/>. Please contact our Public Access Assertion and Defense Unit Manager, Scott Ogan, at 907-269-5515, if you have any further questions or information on this subject.

Sincerely,



Dick Mylius,
Director, DNR Division of Mining, Land and Water

cc: DNR Commissioner Tom Irwin
United States Senator Mark Begich
United States Senator Lisa Murkowski
Sealaska Corporation
Huna Totem Corporation

Enclosure: DNR map showing 17b access easements