

## **PUBLIC TRUST DOCTRINE**

### **ALASKA CONSTITUTION**

**Alaska Constitution Article VIII, section 3 states:**

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

**Alaska Constitution Article VIII, section 13 states:**

All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife.

**Alaska Constitution Article VIII, section 14 states:**

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 that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.

**Alaska Constitution Article VIII, section 15 provides, in pertinent part:**

No exclusive right of special privilege of fishery shall be created or authorized in the natural waters of the State...

**Alaska Statute 38.05.965(13) defined navigable waters:**

“navigable water” means any water of the state forming a river, stream, lake, pond, slough, creek, bay, sound, estuary, inlet, strait, passage, canal, sea or ocean, or any other body of water or waterway within the territorial limits of the state or subject to its jurisdiction, that is navigable in fact for any useful public purpose, including but not limited to water suitable for commercial navigation, floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other public recreational purposes;

### **LEGISLATIVE INTENT**

**The Legislature further interpreted the constitutional protections for public use of the waters in an act relating to the navigable or public waters of the state, declaring in the preamble (85 SLA ch.82):**

- (a) The people of the state have a constitutional right to free access to the navigable or public waters of the state.
- (b) Subject to the federal navigational servitude, the state has full power and control of all of the navigable or public waters of the state both meandered and unmeandered, and it holds and controls all navigable or public waters in trust for the use of the people of the state.
- (c) Ownership of land bordering navigable or public waters does not grant an exclusive right to the use of the water and any rights of title to the land below the ordinary high water mark are subject to the rights of the people of the state to use and have access to the water for recreational purposes or any other public purpose for which the water is used or capable of being used consistent with the public trust.
- (d) This Act may not be construed to affect or abridge valid existing rights or create any right or privilege of the public to cross or enter private land.

### **ALASKA STATUTES**

**38.05.126. Navigable and public water.**

- (a) The people of the state have a constitutional right to free access to and use of the navigable or public water of the state.
- (b) The 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.
- (c) 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.
- (d) This section may not be construed to affect or abridge valid existing rights or create a right or privilege of the public to cross or enter private land.

**Sec. 38.05.127. Access to navigable or public water.**

- (a) Before the sale, lease, grant, or other disposal of any interest in state land adjacent to a body of water or waterway, the commissioner shall,
- (1) determine if the body of water or waterway is navigable water, public water, or neither;
  - (2) upon finding that the body of water or waterway is navigable or public water, provide for the specific easements or rights-of-way necessary to ensure free access to and along the body of water, unless the commissioner finds that regulating or limiting access is necessary for other beneficial uses or public purposes.
- (b) The department shall adopt regulations implementing this section.
- (c) Nothing in this section affects valid existing rights or limits in any way the constitutional right of the public to use and have free access to the navigable or public waters of the state.
- (d) Upon application by a municipality or an affected owner of land, the department may vacate, release, modify, or relocate an easement and right-of-way for public access to or along navigable or public waters reserved by the department in a patent issued under AS 29.65 or former AS 29.18, if the commissioner determines the action is consistent with the public interest.
- (e) The establishment of easements or rights-of-way for oil and gas and mineral leases under (a) of this section need not be made until the leases are ready to be developed.
- (f) Rights-of-way or easements to waterways established under (a)(2) of this section shall be established approximately once each mile unless the commissioner makes a written finding that regulating or limiting access is necessary for other beneficial uses or public purposes.
- (g) The commissioner may exchange land under AS 38.50 to create access to public water of the state.

**Sec. 38.05.128. Obstructions to navigable water.**

- (a) A person may not obstruct or interfere with the free passage or use by a person of any navigable water unless the obstruction or interference is
- (1) authorized by a federal agency and a state agency;
  - (2) authorized under a federal or state law or permit;
  - (3) exempt under 33 U.S.C. 1344(f) (Clean Water Act);
  - (4) caused by the normal operation of freight barging that is otherwise consistent with law; or
  - (5) authorized by the commissioner after reasonable public notice.
- (b) An unauthorized obstruction or interference is a public nuisance and is subject to abatement. The cost of abatement shall be borne by the violator and is in addition to any penalty imposed by the court.
- (c) This section may not be construed to affect or abridge valid existing rights.
- (d) 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 public trust.
- (e) 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
- (1) entry is made without injury or damage to the land;
  - (2) entry is made in the least obtrusive manner possible;
  - (3) there is no reasonable alternative available to avoid the use of the adjacent land above the ordinary high water mark;
- and
- (4) the navigable water is reentered immediately below the obstacle or obstruction at the nearest point where it is safe to do so.
- (f) A violation of (a) of this section is a class B misdemeanor.