

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES OFFICE OF THE COMMISSIONER

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The Honorable Carl E. Moses
Alaska House of Representatives
P.O. Box 730
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*Rec'd 6/4/01
Please forward to all
area assist. biologists -
Explains rights to portage
on private lands.*

JUN 12 2001

Dear Representative Moses:

Thank you for your recent letter expressing concerns from Mr. Norman Jacko, Treasurer of the Pedro Bay Corporation about the recent amendment of AS 38.05.128. You have asked for the Department's opinion as to the effect of the amendment on private property rights. We believe that the amendment does not result in an expansion of rights or obligations but instead merely codifies and thus clarifies existing rights guaranteed under Alaska's Constitution.

In Alaska, the public has a constitutional right to access and use the state's navigable and public waters. Article VIII, section 14 of the Alaska Constitution is of particular relevance. It 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 that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.

The Alaska Supreme Court has interpreted the provisions in Article VIII as intended to permit the broadest possible access to and use of state waters by the general public. (*See Wernberg v. State*, 516 P.2d 1191, 1198-9 [Alaska 1973]). The provisions of AS 38.05.126-128, among others, represent a codification in state law of those important constitutional guarantees.

Because AS 38.05.128 merely codifies existing constitutional rights, it does not effect a taking without compensation. Landowners' properties have always been subject to the public's right of use of navigable waters and the State has consistently maintained that private owners may not interfere with that use. The recent amendment of AS 38.05.128 simply provides additional clarification of existing rights.

You have advised that your constituent is particularly concerned with the amendment of AS 38.05.128 relating to portage. AS 38.05.128(e) states:

"Develop, Conserve, and Enhance Natural Resources for Present and Future Alaskans."

- (e) Free passage and 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; and
 - (2) Entry is made in the least obtrusive manner possible; and
 - (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 re-entered immediately below the obstacle or obstruction at the nearest point where it is safe to do so.

This language provides legislative recognition of the fact that the constitutional right of use of the state's navigable waters necessarily includes a limited privilege to portage around obstructions. The codification of this right does not amount to a taking without compensation or otherwise deny the landowner the economical use of his property. Any use of private lands remains directly linked to the immediate use of the public water and is *de minimis*. Use that is not *de minimis* or fails to meet the standards listed is not protected and the landowner is free to seek redress from the users as appropriate.

You have also asked for an assessment of your constituent's concern that AS 38.05.128(e) will subject landowners to liability if persons injure themselves while portaging over Pedro Bay Corporation's lands or that the Corporation might need to purchase expensive insurance. AS 38.05.128 however does not impose or create any additional duties on landowners with regard to recreational users of navigable waters that need to portage. Moreover, to the extent that the Pedro Bay Corporation land is unimproved, your constituent may find protection under AS 09.65.200 (Tort Immunity for personal injuries or death occurring on unimproved land).

I hope that this information will be helpful in responding to your constituent's inquiry.

Sincerely,



Pat Pourchot
Commisioner

cc: Bob Loeffler, Director, Division of Mining, Land, and Water