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REPRESENTATIVE
SAM COTTEN
DISTRICT 15



P.O. BOX 296, EAGLE RIVER, AK 99577
POUCH V, JUNEAU, AK 99811

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

MEMORANDUM

TO: Members of the House Resources Committee
FROM: Rep. Sam Cotten
RE: HB 316, an act relating to navigable or public waters
DATE: April 10, 1985

The purpose of this bill is to clarify the right of the public to use public and navigable waters, as created by the Alaska Constitution, Article VIII, Section 14.

Public and navigable waters are defined by statute, AS 38.05.965 (12) and (16). Basically, public waters encompass a very wide range of water bodies. Navigable waters are basically those waters that are susceptible for use in commerce, mainly navigation. All public waters are navigable but not all navigable waters are public. Public waters are those that may be important for any public purpose, including wildlife habitat.

This bill clarifies the public's right to use and have access over water. It creates a remedy, namely, misdemeanor sanctions for any obstructions of that public right.

Currently, courts are the only recourse. A public or private party that is obstructed faces the task of suing the obstructor in superior court. This can be very expensive. HB 316 will make this access right more easily enforced, providing the public with a clearer standard.

The bill does not guarantee or allow any access over private land, except to the extent already provided by AS 38.05.127 over state land.

There is one case currently being handled by the Department of Law concerning the obstruction across a passage along the Talkeetna River. The bill, if it becomes law, would expedite abatement of such an obstruction.

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38.05.945(c)" was : section" in the or of statutes in

ited; penal- mpts to bar- not bid freely e public sale; nt, hinders, idding upon e by a fine of an one year, 2 ch 61 SLA

Revisor's notes. — Formerly AS 38.05.355. Renumbered in 1984.

Sec. 38.05.965. Definitions. In this chapter, unless the context otherwise requires,

(1) "acquired land" means land belonging to the state including tide, submerged and shoreland which has been obtained by escheat, purchase, or any means other than by general land grant;

(2) "agricultural land" means land chiefly valuable for agricultural purposes;

(3) "commissioner" means the commissioner of natural resources;

(4) "department" means the Department of Natural Resources;

(5) "director" means the director of the division of lands of the Department of Natural Resources;

(6) "geothermal resources" means the natural heat of the earth at temperatures greater than 120 degrees Celsius, measured at the point where the highest-temperature resources encountered enter or contact a well or other resource extraction device, and includes

(A) the energy, including pressure, in whatever form present in, resulting from, created by, or that may be extracted from that natural heat;

(B) the material medium, including the geothermal fluid naturally present, as well as substances artificially introduced to serve as a heat transfer medium; and

(C) all dissolved or entrained minerals and gases that may be obtained from the material medium, but excluding hydrocarbon substances and helium;

(7) "grazing land" means land chiefly valuable for grazing purposes;

(8) "industrial and commercial land" means land chiefly valuable for industrial trade, manufacturing or business use;

(9) "lieu and indemnity land" means land which the state is entitled to select under the provisions of 38 Stat. 1214, as amended (48 USC 353) or a similar statute to compensate for land in place of surveyed rectangulars, which have been lost to the state by reason of deficient sections, prior rights, claims, withdrawals, reservations and other appropriations;

(10) "mineral land" means land prospectively valuable for mineral deposits;

(11) "multiple use" has the meaning given in AS 38.04.910;

(12) "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;

(13) "park and recreation land" means land chiefly valuable for public park and recreation use;

(14) "preference right forest lease" means a lease granted to a lessee whose United States Forest Service term special use permit was cancelled to allow the land under permit to be selected by the state;

(15) "preference right grazing lease" means a grazing lease granted to a lessee whose federal grazing lease was cancelled to allow the land under lease to be selected by the state;

(16) "public water" means navigable water and 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;

(17) "rule of approximation" is the rule which is applied in determining whether or not a lease complies with the area limits set forth in this chapter and regulations adopted under it and in keeping the boundaries of leased land coincidental with legal subdivisions; under the rule, if the area covered by a lease in excess of the permitted maximum is smaller than the area of any deficiency that would result by eliminating from the lease the smallest legal subdivision covered by the lease or application for lease, the excess area will be permitted to remain in the lease; if the excess area is greater than the deficient area would be, then the smallest legal subdivision will be eliminated from the lease;

(18) "shoreland" means land belonging to the state which is covered by nontidal water that is navigable under the laws of the United States up to ordinary high water mark as modified by accretion, erosion, or reliction;

(19) "state land" or "land" means all land, including shore, tide and submerged land, or resources belonging to or acquired by the state;

(20) "submerged land" means land covered by tidal water between the line of mean low water and seaward to a distance of three geographical miles or further as may hereafter be properly claimed by the state;

(21) "tideland" means land which is periodically covered by tidal water between the elevation of mean high and mean low tides;

(22) "timber land" and "material land" mean state land chiefly valuable for materials, including, but not limited to, sand, stone, gravel, pumice, common clay, or timber and other forest products;

(23) "university land"

(A) means

(i) all sections 33 reserved to the university under 38 Stat. 1214, as amended;

(ii) all land granted to or reserved for the benefit of the university that retains its designation as university land;

Section 11. Mineral Rights. Discovery and appropriation shall be the basis for establishing a right in those minerals reserved to the State which, upon the date of ratification of this constitution by the people of Alaska, were subject to location under the federal mining laws. Prior discovery, location, and filing, as prescribed by law, shall establish a prior right to these minerals and also a prior right to permits, leases, and transferable licenses for their extraction. Continuation of these rights shall depend upon the performance of annual labor, or the payment of fees, rents, or royalties, or upon other requirements as may be prescribed by law. Surface uses of land by a mineral claimant shall be limited to those necessary for the extraction or basic processing of the mineral deposits, or for both. Discovery and appropriation shall initiate a right, subject to further requirements of law, to patent of mineral lands if authorized by the State and not prohibited by Congress. The provisions of this section shall apply to all other minerals reserved to the State which by law are declared subject to appropriation.

Section 12. Mineral Leases and Permits. The legislature shall provide for the issuance, types and terms of leases for coal, oil, gas, oil shale, sodium, phosphate, potash, sulfur, pumice, and other minerals as may be prescribed by law. Leases and permits giving the exclusive right of exploration for these minerals for specific periods and areas, subject to reasonable concurrent exploration as to different classes of minerals, may be authorized by law. Like leases and permits giving the exclusive right of prospecting by geophysical, geochemical, and similar methods for all minerals may also be authorized by law.

Section 13. Water Rights. 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.

Cross reference. — See note to Alaska Const., art. VIII, § 15.

Legislative intent. — The provisions in this article were intended to permit the broadest possible access to and use of state

waters by the general public. *Wernberg v. State*, Sup. Ct. Op. No. 972 (File No. 1797), 516 P.2d 1191 (1973), rehearing denied, 519 P.2d 801 (1974).

Section 14. Access to Navigable Waters. 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.

Legislative intent. — The provisions in this article were intended to permit the broadest possible access to and use of state waters by the general public. *Wernberg v. State*, Sup. Ct. Op. No. 972 (File No. 1797) 516 P.2d 1191 (1973), rehearing denied, 519 P.2d 801 (1974).

The owner of the uplands has been stated to have the right of access for the purpose of navigation, but no right of possession of the land below high water mark as against another. 1959 Op. Att'y Gen., No. 1.

Free access may be exercised by means of wharf or other structure. — In *Dalton v. Hazelet*, 182 F. 561 (9th Cir. 1910), it was recognized that the right of free and unobstructed access may be exercised by means of a wharf or other structure over shoal water from the upland property to deep water. 1959 Op. Att'y Gen., No. 1.

Section 15. No Exclusive Right of Fishery. No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State. [Amendment effective October 14, 1972]

Cross reference. — For provisions relating to the limitation of entry into the fisheries of the state, see AS 16.43.

Effect of amendment. — The amendment approved August 22, 1972 (7th Legislature's HCS CSSJR 10) added the last sentence.

This section was derived from the White Act, 48 U.S.C. §§ 221, 222. 1961 Op. Att'y Gen., No. 3.

The first judicial application of this constitutional provision should properly be by an Alaska court. *Reetz v. Bozanich*, 397 U.S. 82, 90 S. Ct. 788, 25 L. Ed. 2d 68 (1970).

The White Act merely expressed the common law in prohibition against exclusive fishing rights. *Grimes Packing Co. v. Hynes*, 11 Alaska 154, 67 F. Supp. 43 (D. Alas. 1946), vacated and remanded on other grounds, 12 Alaska 348, 337 U.S. 86, 69 S. Ct. 968, 93 L. Ed. 1231 (1949).

It did not permit a monopoly of fishing in Indian citizens as a conservation measure. *Hynes v. Grimes Packing Co.* 11 Alaska 154, 67 F. Supp. 43 (D. Alas. 1946), vacated and remanded on other grounds, 12 Alaska 348, 337 U.S. 86, 69 S. Ct. 968, 93 L. Ed. 1231 (1949).

Right to use foreshore. — The mere physical passage is not the only right involved in the right of access. The upland owner has the right to use the foreshore in such manner as is necessary for the complete enjoyment of his right. 1959 Op. Att'y Gen., No. 1.

Actionable use of tidelands. — Any use of tidelands in such a manner as to deny the upland owner access to the navigable waters would be actionable. 1959 Op. Att'y Gen., No. 1.

The Alaska Constitution allows the state to take riparian or littoral property rights for "beneficial or public uses" other than in aid of water navigation. *Wernberg v. State*, Sup. Ct. Op. No. 972 (File No. 1797), 516 P.2d 1191 (1973), rehearing denied, 519 P.2d 801 (1974).

other grounds, 12 Alaska 348, 337 U.S. 86, 69 S. Ct. 968, 93 L. Ed. 1231 (1949).

Under the language of the White Act (48 USC § 222) the Secretary of Interior was prohibited from granting any exclusive or several right of fishery in favor of the Natives on the Karluk River on Kodiak Island. The court held that the prohibition against granting and exclusive right of fishery applied to commercial fishing by natives equally with fishing companies, and that the secretary could not grant to the occupants of an Indian reservation the privilege of exclusive commercial fishing rights. 1960 Op. Att'y Gen., No. 9, citing *Hynes v. Grimes Packing Co.*, 12 Alaska 348, 337 U.S. 86, 69 S. Ct. 968, 93 L. Ed. 1231 (1949).

Constitutionality of ch. 186, SLA 1968. — See *Bozanich v. Reetz*, 297 F. Supp. 300 (D. Alas. 1969); *Reetz v. Bozanich*, 397 U.S. 82, 90 S. Ct. 788, 25 L. Ed. 2d 68 (1970).

Quoted in *Metlakatla Indian Community v. Egan*, 11 Alaska 154, 67 F. Supp. 43 (D. Alas. 1946), vacated and remanded on other grounds, 12 Alaska 348, 337 U.S. 86, 69 S. Ct. 968, 93 L. Ed. 1231 (1949).

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: HR 316
Title: Navigable or Public Waters

FISCAL DETAIL

Agency Affected: Natural Resources
Program Category Affected: NRMEC

Sponsor: Cotten, Shultz, MW Miller, & Phillips
Requestor: _____
Date of Request: _____

BRU, Program or Subprogram(s) Affected: Land & Water Management

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL		-0-	-0-	-0-	-0-	-0-
REVENUE		-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

No fiscal impact

Prepared By: Mike Vediner
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Phone: 465-2400
Date: 4-9-85

Approved by Commissioner: William D. Arnold, Deputy
Agency: Department of Natural Resources

Date: 4-9-85

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