

MEMORANDUM

State of Alaska
Department of Law

TO: The Honorable Frank Rue
Commissioner
Department of Fish and Game

DATE: June 12, 1996

FILE NO.: 663-96-0554

TELEPHONE NO.: 465-3600

SUBJECT: Closure of Riparian Areas on
•Public Lands•

FROM:
Assistant Attorney General
Natural Resources Section

Steven A. Daugherty

I. QUESTION

You have asked whether certain public access and nondevelopment easements, held by the federal government as part of the Kenai National Wildlife Refuge, can be considered "public lands" for the purposes of a delegation of authority from the Alaska Board of Fisheries (Board) to the Alaska Department of Fish and Game (ADF&G). In February 1996, the Board delegated authority to ADF&G to "close riparian habitat areas along the fresh waters of upper Cook Inlet if the commissioner determines that in-river fisheries are likely to result in riparian habitat loss which could negatively affect the fishery resources of the fresh waters of upper Cook Inlet. Only public lands are covered under this delegation."¹ Under this delegation, ADF&G has proposed regulations to close a number of riparian areas to fishing. These areas include Moose Range Meadows land that is privately owned but subject to federal public access and nondevelopment easements. You have requested advice as to whether ADF&G has been delegated regulatory authority over these lands.

¹ At the same time, the Board adopted regulations giving the department emergency order authority to protect riparian habitat on "public lands." However, the language in the final regulations, at the suggestion of the Department of Law, was modified to more accurately express the Board's intent by limiting the authority to areas in which there is a state, federal, or municipal property interest. See 5 AAC 56.065; 5 AAC 61.065.

II. SHORT ANSWER

The delegation from the Board to ADF&G to close riparian habitat areas to fishing extends to areas in which the federal government holds a public access and nondevelopment easement. Thus, ADF&G has delegated regulatory authority that includes the federal easements in the Moose Range Meadows.

III. DISCUSSION

When the Board delegated authority to ADF&G to close riparian habitat areas, it limited the delegated authority to "public lands," but it did not define the term "public lands." The term "public lands" does not have a general or common meaning, but instead may have varying meanings depending on the context in which the term is used.² Therefore, it is necessary to look to the intent of the Board to determine the meaning of the term "public lands."

The record of the Board's decision indicates that the Board intended for the term "public lands" to include privately held lands over which there is a public access easement or a conservation easement. Further, the record clearly indicates that the Board intended for the Moose Range Meadows public access easements to be considered public land for purposes of both emergency order authority and the delegation of regulatory authority to the Commissioner.

² See, e.g., 43 U.S.C.S. • 1702 (Law. Co-op. 1995) (any land and interest in land owned by the United States and administered by the Secretary of the Interior through the Bureau of Land Management); 16 U.S.C. 3102 (Law. Co-op. 1995) (federal lands, waters, and interests therein--with specified exceptions); 16 U.S.C.S. 670k (Law. Co-op. 1995)(all lands, with certain specified exceptions, under the jurisdiction of The Secretary of Interior, Secretary of Agriculture, Administrator of the National Aeronautics and Space Administration, and the Chairman of the Atomic Energy Commission); 16 U.S.C.S. • 1333 (Law. Co-op. 1995) ("any lands administered by the Secretary of the Interior through the Bureau of Land Management or by the Secretary of Agriculture through the Forest Service"); 50 C.F.R. • 36.2 (1995) (lands situated in Alaska that are federally owned with exceptions for state and Native corporation land selections that have not been conveyed or approved).

ADF&G presented the Board with a report that identified the Moose Range Meadows river frontage as public lands. ADF&G, *Summary of Research Conducted by and Recommendations of the Kenai River Interagency Habitat Technical Group* 8 (February 1996). This report also identified 25-foot public access easements on private water frontage as "public lands." *Id.* at App. Fig. 8 A1, A2, A3. Further, it also identified state park land, state land, borough land, city land, and federal land as "public land." *Id.*³ During deliberations, ADF&G also informed that Board that it intended to use the authority granted by the Board to close conservation easement areas to bank fishing. *See, e.g.*, Board of Fisheries Upper Cook Inlet Meeting, Tape 44B, log no. 236-259 (February 26, 1996). During the Board's deliberations, ADF&G also specifically identified lands managed by the Kenai National Wildlife Refuge at Moose Range Meadows as lands that were likely to be subject to regulatory action if the Board delegated closure authority on public lands to the department. *See, e.g., id.* at Tape 45A, log no. 222-235. ADF&G also specifically identified borough lands as areas that would probably be subject to regulatory action. *Id.* at log no. 290-306.

A review of the record indicates that the Board intended for its delegation of regulatory authority over riparian areas on "public lands" to reach public access easements. The record further indicates that the Board intended for its delegation to reach federal, borough, and city lands as well as state lands, and that the Board specifically understood that the delegation would extend to Kenai National Wildlife Refuge lands at Moose Range Meadows. Therefore, the National Wildlife Refuge easements at Moose Range Meadows are clearly "public lands" within the regulatory authority of the commissioner of ADF&G under the Board's delegation of authority.

IV. CONCLUSION

We hope this response answers your questions. We note that this advice regarding the meaning of the term "public lands" is limited to the context of the regulations and delegation of authority adopted by the Alaska Board of Fisheries in March 1996. The term "public lands" may have other meanings in different contexts. Please do not hesitate to contact us if further assistance or clarification is desired.

SAD:lm

cc: Kevin Delaney, Director, Division of Sport Fish, ADF&G
Doug Vincent-Lang, Division of Sport Fish, ADF&G

³ The treatment of public access easements as "public lands" is also consistent with the classifications used by ADF&G in an earlier study of the Kenai River that was also before the Board. *See Gary S. Liepitz, ADF&G, An Assessment of the Cumulative Impacts of Development and Human Uses on Fish Habitat in the Kenai River: Technical Report No. 94-6* (July 1994).

The Honorable Frank Rue, Commissioner
Department of Fish and Game
A.G. file no: 663-96-0554

June 12, 1996
Page 4

Laird Jones, Executive Director, Alaska Board of Fisheries