

## APPENDIX C

# ISSUES THAT INFLUENCED THE PLAN

### Access and the Public Trust Doctrine

The Alaska Constitution (Article VIII, Sections 1, 2, 3, 6, 13, and 14) and Alaska Statutes (38.05.127 and 38.05.128) are the legal basis for applying the public trust doctrine in Alaska. This doctrine guarantees the public access to navigable or public waterways to engage in such things as navigation, commerce, fishing, and other uses.

The Alaska Constitution 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." Eliminating private upland owners' reasonable access to navigable waters may require compensation.

Both federal and state laws regarding the transfer of land to private parties provide for public access to navigable waters. The state constitution guarantees access to navigable waters (Article VIII, Section 14). AS 38.05.127 requires the state commissioner of natural resources to "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 eliminating access is necessary for other beneficial uses or public purposes."

It has never been held that any lands normally subject to the public trust doctrine in Alaska are exempt from it, including lands occupied and developed.

These statutes and concepts are considered and used throughout this plan. DNR management actions will be consistent with the public trust doctrine as defined by the Alaska Constitution, statutes, court decisions, and public involvement.

### The University Settlement

In August 1995, Alaska Superior Court Judge Larry Zervos approved a settlement to a seven-year lawsuit<sup>1</sup> regarding timber rights held by the University of Alaska for harvest of state timber in the Yakataga area. The settlement had been signed by the litigants on December 2, 1994 and is referred to in this plan as the December 1994 settlement agreement. It resulted in several eleventh-hour changes to the Draft Yakataga Area Plan, and set the pattern for timber harvest on state lands in the area for the next twenty years. Following is a history of events leading to the settlement.

In December 1987, the DNR Director of the Division of Land made a best interest finding and decision to convey to the University of Alaska one-time timber rights to three parcels in the planning area: at Yakataga (approximately 2,065 acres), Cape Suckling (approximately 32,300 acres), and White River (approximately 3,411 acres).<sup>2</sup> Maps on page C-3 show the locations of these parcels.

The timber rights were part of a settlement to compensate the University for trust lands that the state had conveyed to the Municipality of Anchorage under the Municipal Entitlement Act. The timber rights, valued at \$3 million in 1987, were a part of the \$25 million settlement.

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- 1 *Yakutat Fishermen's Association v. Brady*, Consolidated Case 1 JU-88-271 Civil. The appellants were: the City and Borough of Yakutat, Yakutat Fishermen's Association, Cordova District Fishermen United, Steven Ranney, Alaska Center for the Environment, Inc., and Southeast Alaska Conservation Council, Inc. The appellees were Alaska DNR and the University of Alaska.
  - 2 The University of Alaska also owns fee simple title to approximately 500 acres located near Cape Yakataga. This land is not subject to the Yakataga Area Plan.

## YAKATAGA AREA PLAN

This was a transfer of limited rights to cut up to a specific volume of timber within a defined area. The state retained ownership of the land and reserved the authority to approve the University's harvest plans and to hold the university to existing and subsequent laws and regulations applicable to timber harvest and operations on state-owned land [ADL 223456, Sec VI(C)]. All risk of loss to the timber rights conveyed due to any cause was to be borne by the university [ADL 223456 Appendix I].

DNR and the Department of Fish and Game (DFG) worked together to establish appropriate habitat mitigation for these parcels. Additional review by DFG and the Department of Environmental Conservation will occur when the harvest plans are submitted to DNR for approval. The harvest plans must comply with the Alaska Forest Resources and Practices Act and the Alaska Coastal Management Program, and now, the Yakataga Area Plan.

The decision to convey the timber rights precipitated two lawsuits against the state and the university. Both lawsuits sought to overturn the decision to convey the timber. The two cases were combined under the heading of Yakutat Fishermen's Association v. Brady 1 JU-88-271 Civil (consolidated).

In 1989, the case was remanded to DNR to consider additional information provided by the appellants and the University. DNR added some additional mitigation requirements (e.g. harvest plans would be approved annually, and newly discovered anadromous fish streams would have 100-foot set-backs).

In June 1990, the Superior Court found in favor of the University and the state on several issues, but returned the case to DNR to make additional findings on two issues: 1) sustained yield for this area, and 2) classification of the Yakataga parcel.

The court required additional findings on sustained yield for the Yakataga forest because there was not enough information in the record to determine the basis for the annual allowable cut used in the decision. A proposed decision on the annual allowable cut was made by then-Commissioner Harold C. Heinze on April 10, 1992.

Then-Commissioner Heinze also decided that Yakataga Tract 20 would be classified through the area plan. If Yakataga Tract 20 were classified Forestry, the Commissioner would subsequently decide anew whether or not to convey this parcel to the University.

The legislature in Chapter 143 SLA 1990 directed DNR to "make every reasonable effort to achieve settlement" of the timber litigation, and to "make every reasonable effort to reach agreement (with the University) on the fair market value" of the Cape Suckling and Yakataga timber tracts, with the intent that the tracts be reacquired by the next legislature.

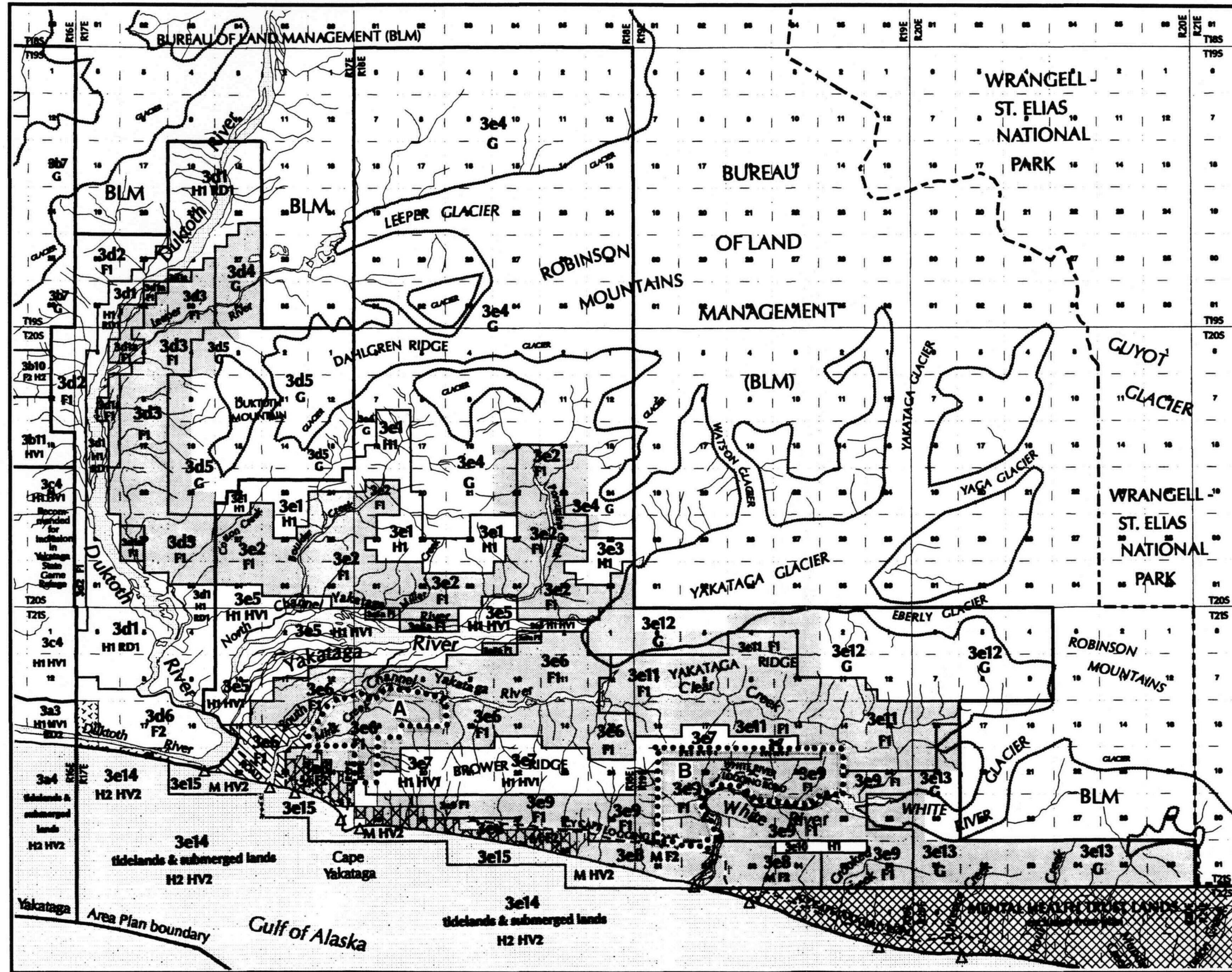
In 1991, DNR and the University agreed to the current fair-market-value of the Yakataga timber cutting rights (\$6.4 million), but declared an impasse with respect to the value of the Cape Suckling timber cutting rights. In 1991, the legislature was informed of the agreement on the value for the Yakataga parcel and the impasse on the value of the Cape Suckling parcel. During the 1992 legislative session, the legislature appropriated \$6 million from the Exxon Valdez criminal funds towards the purchase of timber cutting rights at Cape Suckling. This appropriation was vetoed by the then-Governor Walter Hickel, and the legislature has not taken any further action. During the 1993, 1994, and 1995 legislative sessions, there was little discussion of this issue by the legislature.

Litigants agreed to release the White River tract from the litigation. The University began harvest of the White River tract in 1994.

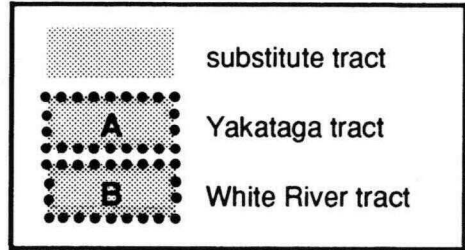
The timber rights litigation did not directly affect the area plan. The court gave no direction with respect to the area plan.

However, the legislature did give DNR directions for preparation of the area plan. The legislature directed DNR to "consider the full range of management options for the timber rights in each tract of land ... under litigation, including and excluding timber harvest." The alternatives DNR prepared for public review in 1992 presented options other than timber harvest for these parcels. When the planning team chose

Map C.1 University settlement tracts: substitute tract, Yakataga tract, and White River tract



Map C.1  
 University settlement tracts:  
 substitute tract, Yakataga tract,  
 and White River tract



among the alternatives, it considered the litigation, DNR's obligation to reimburse the university, resource information, public comments, and other factors before assigning land use designations.

Before the Yakataga Area Plan was adopted, most state lands in the planning area were classified Resource Management, which doesn't identify priority uses. This plan reclassifies as Forestry lands approximately 90 percent of the commercial timber in the planning area, in part to maintain a commercially-profitable timber base. The tracts with university timber rights were classified largely for forestry, except for small non-forestry areas that were either already excluded from timber harvest under ADL 223456 (see map on page C-3), or have no commercially harvestable timber, or have no operable commercial timber under current conditions.

On December 2, 1994, the parties in Yakutat v. Brady, No. 1 JU-88-271 Civil (Consolidated) signed a settlement agreement (hereafter called the December 1994 settlement agreement, or the agreement). The parties agreed to amend ADL 223456 to convey to the University of Alaska limited timber cutting rights on state land east of the Duktoth River in substitution for equivalent limited timber cutting rights the university held at Cape Suckling (see map in this Appendix).

The agreement required changes to the Draft Yakataga Area Plan. The agreement required specific land use designations, classifications, and management intent for several subunits of the area plan. The agreement also changed guidelines for mountain goat habitat, riparian buffers, and bear and moose habitat on the university's substitute tract and Yakataga tract. The agreement commits DNR to allow a cabin and trail system funded by the University on state lands west of the Duktoth River. See Chapter 4 of the Area Plan for a checklist of the area plan policies that result from the December 4 settlement agreement. For more information, see the *Final Finding and Decision of the Commissioner of the DNR regarding the conveyance of substitute timber cutting rights, annual allowable cut and sustained yield for Yakataga area; amendment #3 of ADL 223456*, February 8, 1995.

The parties also agreed to three main issues dealing with annual allowable cut and sustained yield:

- 1) The university will have an annual allowable cut of 17.24 million board feet per year.
- 2) Timber harvest will be prohibited on state land in the Yakataga area between Cape Suckling and Dry Bay for at least 20 years (until 2014), other than the University harvest and harvest incidental to the cabin and trail system). DNR must amend the Yakataga Area Plan and re-calculate the annual allowable cut using area plan provisions before additional harvesting can occur. Future state timber offerings may be delayed later than 2014 if the university's stipulated annual allowable cut of 17.24 MMBF, measured on a ten-year average, is found to have exceeded the annual allowable cut needed for even flow of timber on a sustained yield basis, from one decade to the next.
- 3) The agreement limits timber harvesting by the university to specific units east of the Duktoth River unless DNR does not make sufficient timber available from that area. If DNR does not make sufficient timber available, the university will have rights to the first state timber offered outside the substitute area, after 2014.

Finally, the agreement has several provisions between the university and various litigants, and DNR and various litigants. These include local hire preference for Yakutat residents for university timber harvest operations, and a land conveyance of 138 acres from DNR to the borough.

Following adoption of the Area Plan, DNR issued a Final Finding and Decision to convey the timber on Yakataga Tract 20 to the University (amendment #4 to ADL 223456), June 6, 1995.

If the University withdraws from the Agreement pursuant to paragraph 16 of the Agreement, the university shall have whatever rights it possessed prior to the Agreement, without the need for further modification of the area plan, to harvest timber on the Yakataga tract and the Cape Suckling tract, minus whatever volume has been harvested under the Agreement; provided that, if the University withdraws from the agreement, nothing herein shall preclude the Borough or the Association from continuing or

reinstating their legal challenges to the conveyance of limited timber cutting rights to the University under ADL 223456, as set forth in paragraph 16(c).

### **The Mental Health Settlement**

#### **Background**

Prior to statehood, Alaska was granted title to one million acres of federal land to generate revenue to support Alaska's mental health programs. Land that was thought to have high income-producing potential was selected to fulfill this trust entitlement. The original trust lands included coal and mineral deposits, commercial forests, agricultural areas and land near communities, especially communities in Southeast Alaska.

As Alaska's population increased, some Alaskans wanted certain of these lands for non-income-producing activities such as parks, municipal expansion, and public facilities. In 1978, the legislature removed the trust status of mental health trust land, and redesignated it as general statehood grant land. In return, the legislature was to appropriate 1.5 percent of all income from state lands to the Mental Health Trust Fund.

No appropriation was made, and in 1982, mental health advocates sued the state (Weiss v. State of Alaska, 4FA-82-2208 Civil.). After years of litigation, the Alaska Supreme Court ruled in 1988 in favor of the plaintiffs and ordered the state to "reconstitute, as nearly as possible the holdings which comprised the trust when the 1978 law became effective."

In 1991, the legislature passed the Mental Health Trust Lands Settlement Act to reconstitute the trust. This act reconstitutes the land trust with all unencumbered land from the original mental health trust and provides replacement land through an exchange process for land conveyed out of the trust.

In a recent decision, the Superior Court ruled that the Department must follow AS 38.04 and AS 38.05 (specifically planning and classification requirements) in order to transfer state land to the Mental Health Trust. Once land is transferred to the Trust, it is no longer subject to management by DNR or any of the land use designations or guidelines in this plan.

There are 45,312 acres of Original Mental Health Trust lands, located between the White River and Icy Bay. Mental Health Trust Land shall be managed consistent with the trust principles imposed on the state by the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (1956) and AS 38.05.801. Hence these trust lands have been excluded from the Yakataga Area Plan.

Subunit 8a-4 has been identified as substitute land. The draft plan proposed to classify Subunit 8a-4 Settlement, which is consistent with conveyance to the Mental Health Trust. DNR considers this parcel to be Mental Health Trust land and it is therefore not subject to this area plan.