

Briefing:

Cape

Yakataaga

Negotiations

2-20-91

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LTR TO DNR

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February 19, 1991

BETHEL:

CHRISTOPHER R. COOKE

Gary Gustafson, Director
Division of Land and Water Management
Department of Natural Resources
PO Box 107006
Anchorage, AK 99510

RE: Remand Procedure, ADL 223456

Dear Gary:

As you know, I represent the City of Yakutat in the Superior Court action which resulted in reversal and remand of the decision to convey timber rights at Cape Suckling, Yakataga, and White River to the University of Alaska. In the City's view, Commissioner Heinze's January 14 letter set forth the only reasonable way for the agency to proceed regarding the two issues (sustained yield analysis and Yakataga classification) on remand. The Commissioner's letter to counsel for the parties on appeal set forth several good reasons for handling these two issues "in parallel", one of which was that all matters concerning this unified timber disposal would return to the Court simultaneously, instead of in pieces. Particularly in view of the fact that a sustained yield analysis should encompass all, rather than separate parts, of the timber disposed under ADL 223456, I am certain that the Superior Court would not be enthusiastic about agency action which retains part of the timber on remand, returning the other part to the Court for piecemeal adjudication.

The best reasons for simultaneous resolution of the two issues on remand, however, were left unstated in Commissioner Heinze's letter. By enacting HB 346 prior to the Court's decision on this disposal, the Legislature set forth two clear State purposes: (1) State buy back of the Cape Suckling and Yakataga timber rights, under Section 5 of the Act; and (2) undertaking and completion of a Yakataga Area

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Plan by July 1, 1993, prior to any further agency authorization for timber sales, timber activities, or timber-related construction activities, under Section 4 of the Act. Given such clear legislative mandates, DNR would plainly be ignoring Legislative intent if it chose to short circuit the process by affirmatively acting to authorize the University to commence harvest on the Cape Suckling tract. Such action would be so contrary to both the letter and spirit of HB 346 that, in my opinion, it would be illegal and subject to a separate administrative appeal to Superior Court and/or an action for injunctive relief. In short, Commissioner Heinze's accurate assessment of administrative convenience in simultaneously resolving two interrelated issues on remand coincides with the letter and spirit of HB 346, which anticipated sufficient delay in timber activities so as to provide ample time for a negotiated buy back and for preparation of an Area Plan.

The University of Alaska now appears bent upon thwarting both legislative purposes of HB 346. University Vice President Brian Rogers, in his letter to yourself dated February 4, 1991, offers faulty logic, mistaken references to "vested" University timber rights, and a threat of litigation in an effort to convince the agency to ignore the legislative mandates of HB 346 as well as the obvious requirements of Judge Craske's Decision, as it relates to the sustained yield issue. A decision by the Commissioner to adopt Mr. Rogers' suggestions will result in far greater legal jeopardy than a decision to retain the present course. HB 346 has substantially strengthened the appellants' hands insofar as legal challenges to State-authorized timber activities on the University tracts.

Fulfillment of the legislative intent for a timber buy back would, of course, moot all legal issues, allowing both DNR and the University of Alaska to reallocate staff and legal assistance to more important missions. Given the fact that both the Department of Natural Resources and the University of Alaska regard themselves as agencies of the State, my client is, to say the least, disappointed when it beholds the spectacle of the two agencies frustrating the clear legislative intent for a buy back by failing to come to agreement on a fair market value of the timber. As I understand it, the two agencies have agreed that the Yakataga parcel alone is worth \$6.4 million, which is far in excess

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of the \$2.9 million (plus three years' interest) in replacement land pool value which all three of these timber parcels was intended to fulfill. Evidently, the University nevertheless seeks a total windfall of many, many multiples of the \$2.9 million which the University had previously agreed would fairly compensate it for the Anchorage trust lands wrongfully taken by the municipality during the 70's. Yet, it is my understanding that this same University seeks approximately \$100 million in capital funding from the State of Alaska, and is presently funded to receive nearly \$150 million in general fund receipts from the State under HB 75, the Governor's proposed operating budget for the fiscal year beginning July 1, 1991. Given the massive, on-going funding of the University by the State, is the amount which is designated as timber buy back really anything more than an accounting function? Should the legislative intention that the timber be returned by the University to the State be frustrated because the University and DNR cannot agree upon the dollar amount shown as compensation for timber? Could not a \$20 million overpayment for timber rights be offset by a \$20 million reduction in general fund receipts? The "impasse" in FMV negotiations between the University and DNR conjures up Alice in Wonderland.

In any case, HB 346 did not require, nor assume, that the FMV agreement and legislative appropriation for the buy back would occur during the 1991 legislative session.¹ The Legislature did not intend that its long term goal of repurchasing the timber rights be frustrated by interim agency authorization for University logging.

If, by holding out for a tremendous windfall profit in timber compensation, the University were to cause further delay, it will be in no position to complain to the agency

¹Section (5)(d) of the statute provides that revenues from the Icy Cape II Timber Sale would be placed into trust, for use in funding the buy back, until January 21, 1991. However, this was neither stated nor intended as a deadline for the buy back, which could easily be negotiated and funded through legislative appropriation during the 1992 or 1993 sessions.

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or the Court regarding its delayed realization of compensation for the University trust lands. The University has already been offered multiples of the \$2.9 million, plus interest, in replacement value to which it was originally entitled and from which its legal rights spring, and has refused to accept it.

Mr. Rogers' proposal of "bifurcation" would frustrate the Legislature's intention that a Yakataga Area Plan be completed prior to further timber-related activity. Section 4(b) of the Act requires the Commissioner to ". . . consider the full range of management options for the timber rights in each tract of land of the University of Alaska (ADL 223456) under litigation, including and excluding timber harvest . . .", in undertaking and completing the area plan by July 1, 1993. The logic of the Alaska Survival decision of the Alaska Supreme Court, along with the statutory language, mandates that the Area Plan be completed prior to decisions regarding timber harvest, including sustained yield analysis. Bifurcation to facilitate a quick, partial sustained yield analysis, which guesses in advance as to what the Area Plan ~~will~~ provide, is putting the cart before the horse in a manner clearly struck down in Alaska Survival v. State, Dept. of Natural Resources, 723 P.2d 1281, 1288-91 (Alaska 1986).

With respect to the specific, alternative sustained yield analyses suggested by Mr. Rogers at paragraph 4 of his

²By contorted logic, Mr. Rogers argues, at paragraph 2, that the Yakataga parcel is on a "settlement track" and may well be bought back by the State, thereby justifying a sustained yield analysis in advance of such development. If, in fact, such a bifurcated buy back were agreed to by both DNR and the Legislature, it would make more sense to delay any sustained yield analysis until such buy back occurred, so that the total amount of timber base from which a sustained yield analysis would be computed would then be definite. In any case, however, any sustained yield analysis should await conclusion of an attempted buy back of all tracts by the State as well as completion of the Yakataga Area Plan.

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letter, it will suffice to say that both proposals supply ripe targets for litigation; I am quite sure that you do not need my assistance to recognize these.

The University has no "vested" rights in the subject timber. The University has a "vested" right to be compensated for the \$2.9 million in replacement lands to which it is entitled. The Quitclaim Deed to the University dated October 6, 1989 is expressly subject to the Superior Court appeal and any agency actions in compliance with Court orders issued in the appeal. The Deed therefore is a conditional conveyance, which may or may not ever result in actual timber rights being received by the University. Therefore, where Section 4(d) of HB 346 stops all timber related activity, subject to "valid existing rights", the only "valid existing right" of the University is its conditional right to timber conveyance when and if such conveyance is authorized by a sustained yield analysis and Yakataga Area Plan conducted in accordance with Section 4 of the statute.

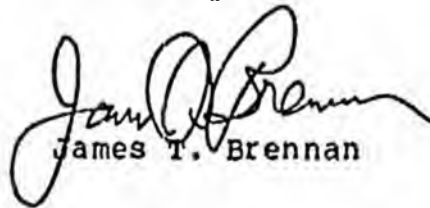
In summary, the City of Yakutat strongly urges the agency to stay the course adopted by Commissioner Heinze and to take necessary actions to facilitate the buy back and the Area Plan mandated by the Legislature.

With reference to Mr. Rogers' request to participate in a meeting of key DNR personnel regarding the schedule for the sustained yield remand, the City of Yakutat, or its representative, clearly has a right to attend any meeting to which the University is permitted to attend. Please notify me of the schedule for any such meeting, and whether or not the various parties to the remand will be permitted to be present or participate.

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Thank you for your attention to this matter.

Sincerely,



James T. Brennan

JTB/bjf

cc: Harold Heinze, Commissioner DNR
Brian Rogers
via fax to:
Russ Winner, Esq.
James N. Wanamaker, Esq.
Robert Lindekugal, Esq.
Rep. Cliff Davidson, House Resources Committee

07/664/91-1

STEVE KALLICK
Attorney for case

CITY OF YAKUTAT, et al. v. DNR and UNIVERSITY OF ALASKA, et al.
Consolidated Case No. 1-JU-88-271 CI

SUMMARY OF LITIGATION

On December 4, 1987, DNR Commissioner Judy Brady issued an administrative decision, designated "ADL 223456," which transferred over 100 parcels of DNR-managed property to the University of Alaska in order to satisfy a \$24 million debt. Like the Mental Health Lands Trust controversy, this debt was incurred when the University Trust was raided, pursuant to the same 1978 law making state trust lands available to municipalities for selection.

As part of the entire settlement lands package, DNR also gave the University timber rights to approximately 38,000 acres of state land, in three parcels, located in the Yakataga area. These parcels were the White River tract (3500 acres), the Yakataga tract (2500 acres) and the Cape Suckling tract (32,000 acres).

In January and February of 1988, the City of Yakutat and a coalition of fishing and environmental groups sued DNR and the University over the transfer of timber rights, but not the other lands. Among many alleged violations of state law, Yakutat and the fishermen claimed that DNR could not show that logging in the three parcels would meet sustained yield requirements and that the Yakataga parcel had been improperly transferred prior to classification as timber land.

On June 18, 1990, Superior Court Judge Duane Craske ruled in favor of Yakutat and the fishermen on these two points, sending ADL 223456 back to DNR for further consideration of the sustained yield issue and for classification of the Yakataga parcel. DNR was ordered to set forth in detail its plans for sustained yield management of the three timber parcels. In a follow-up decision, the Judge also awarded full attorney's fees to Yakutat and the fishermen.

DNR, currently engaged in area-wide planning for Yakataga (including a sustained yield analysis for the entire area), recently announced it would address the court's concerns as part of that planning process. The University has objected to this procedure, but Yakutat and the fishermen support DNR's approach.

Since these limited issues are the only ones now before DNR, none of the buyback negotiations are or could possibly be raised in the litigation. The litigation provides no excuse for DNR and the University to continue to shield their negotiations from public scrutiny.

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

400 WILLOUGHBY AVENUE
JUNEAU, ALASKA 99801-1796
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January 17, 1991

RECEIVED JAN 21 1991

The Honorable Cliff Davidson
Chair, House Resources Committee
P.O. Box V
Juneau, AK 99811

RE: University Land Settlement, Timber Settlement Negotiations

Dear Representative Davidson:

As you may be aware, the Department of Natural Resources and the University of Alaska are involved in litigation with the Southeast Alaska Conservation Council (SEACC) and several fishing groups, and the City of Yakutat (City of Yakutat v. the Department of Natural Resources; Civil No. 1JU-88-271). The litigation is the result of the state's 1987 decision to transfer three limited timber rights parcels in the Yakataga area to the University (see attached fact sheet). While the case progressed in court, several attempts at settlement were made. The latest settlement endeavor was part of legislation last year establishing the Yakataga State Game Refuge (SCS CSHB 346 (Res) am S), now Ch. 143 SLA 1990.

Under Section 5(b) of that bill, the commissioner of Natural Resources is to "engage in every reasonable effort to reach agreement (with the University) on the fair market value for the timber rights to Tract A-148 at Cape Suckling and Tract 20 at Yakataga." The bill then directs the commissioner to report that value to the chairs of the resources committees of the Legislature in order for the Legislature to consider the purchase of these timber tracts from the University. If the timber at Cape Suckling is purchased, that tract will be added to the Yakataga State Game Refuge.

Following passage of the bill, the Department of Natural Resources and the University entered into a Memorandum of Understanding (MOU) regarding the valuation and reporting process to be followed. Under that MOU, you were to be notified should these negotiations result in an impasse. Unfortunately, despite the best efforts of both parties, we have reached an impasse with regard to the value of the Cape Suckling Tract.

In order to establish a value for these tracts, the University contracted for cruise, engineering and appraisal reports of the timber tracts.

January 17, 1991

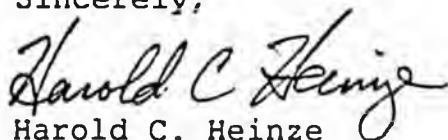
Per the MOU, the University's contractor's reports were then reviewed by an independent timber appraiser retained by the Department of Natural Resources. That appraiser disagreed with the University's contractors on a number of issues, and assigned different values to the parcels.

The two appraisers then met to discuss their differences, but could not come to agreement on value. Negotiators from the University and the Department subsequently met to attempt to negotiate a value, but, due to the wide valuation difference, could not agree on a value for the Cape Suckling parcel. Because the case is in active litigation, the reports must remain confidential. However, members of the Legislature or the administration may view the report through the Department of Law (contact Jim Wanamaker, 276-3550).


The parties were able to agree on the value of the Yakataga parcel. The value is \$6,400,000, independent of the effect of the uncertainty caused by the pending litigation. In addition, although the parties agree that it is likely that this litigation would have an effect on the value of the parcels, we could not agree on the result. It is possible that the litigation would have very little effect if the Legislature intends to reacquire the timber rights "regardless of the disposition of City of Yakutat v. the Department of Natural Resources." However, it is also possible that the Alaska Superior Court's recent reversal of the parcel's conveyance, and a remand back to the department, could significantly reduce the value.

We regret that we have been unable to reach agreement on value of all parcels. However, we have exerted "every reasonable effort" as required by law. We also continue to consider other options.

Sincerely,



Harold C. Heinze
Commissioner
Department of Natural Resources



Jerome Komisar
President
University of Alaska

Enclosure

Original letters sent to the following:

The Honorable Walter J. Hickel, Governor
The Honorable Dick Eliason, President of the Senate
The Honorable Ben Grussendorf, Speaker of the House
The Honorable Lloyd Jones, Chair, Senate Resources

cc: Brian Rogers, University of Alaska
Gary Gustafson, Director
Division of Land & Water Management
Jim Wanamaker, Assistant Attorney General
Department of Law
Russ Winner, Attorney

Fact Sheet
University Settlement II Timber Litigation
January, 1991

BACKGROUND: The Territory of Alaska was granted land to be used by or in support of a university (agricultural college and school of mines) by congressional acts in 1915 and 1929. In 1960, the Legislature gave the Commissioner of Natural Resources the authority to sell, lease or dispose of university land, with the approval of the Board of Regents, under Title 38. These lands were managed by the Department of Natural Resources in trust for the University under a Memorandum of Agreement entered into that same year.

In 1978, the Legislature attempted to redesignate school, university and mental health trust lands as general grant lands. In return, funds established for each of the trusts were to be financed by a percentage of revenues from all state lands. The University Board of Regents, however, rejected the redesignation of university land.

That same year, the Legislature passed a law (AS 29.18) allowing municipalities with a per capita entitlement of less than one and one-half acre, to select vacant trust land, including university land, for its entitlement. The university land conveyed to a municipality was to be replaced with land, acceptable to the Board of Regents, of approximately equal value.

Seven parcels of university land were selected by the Municipality of Anchorage in 1979. The parcels were approved for conveyance in 1980 and reconfirmed in 1986. Because land from the two other trusts was redesignated as general grant land by the 1978 legislation, and only the Municipality of Anchorage qualified, this is the only instance in which this provision of the Municipal Entitlement Act has been used.

LITIGATION: In 1979, the same year that Anchorage selected the parcels, the University sued the state for breach of trust. A settlement agreement was entered into in 1982 and was ratified and approved by the Legislature in 1983. That settlement answered all of the University's claims except the conveyance of the seven parcels to Anchorage under the Municipal Entitlement Act. Under that settlement, all university land was returned to the University for management, university land that had been conveyed to third parties (except the Anchorage parcels) was replaced with other state land or paid for in cash, and the provision allowing for municipal selection of university land was repealed.

The University again sued the state (and the municipality) in 1985. The Superior Court found in favor of the state, but held that the land must be replaced under the Municipal Entitlement Act. The University appealed the case to the Alaska Supreme Court.

In December, 1986, the parties entered into a memorandum of understanding (MOU) that provided a mechanism for the suit to be settled. Under that MOU, the University selected other state land and interests in land for possible redesignation and transfer to replace the Anchorage land, which had been valued at \$24,752,000. The parties worked for approximately one year to assemble acceptable replacement land and put it through the public process. In December, 1987 the Commissioner of Natural Resources, Judith M. Brady, found that the conveyance of 71 priority areas of approximately equal value to the Anchorage land were suitable for conveyance to the University. The priority areas included 20,460 acres of land scattered throughout the state and three parcels of Gulf Coast timber. The Board of Regents accepted the commissioner's finding as a basis for settlement of the litigation.

In January, 1988 several parties asked the commissioner to reconsider her decision with regard to the timber tracts. That request was denied and the appellants (City of Yakutat, SEACC, ACE, Yakutat Fisherman's Association, et al.) sued. Over the next year, parties to the timber litigation tried, without success, to settle the case. Finally, an agreement settling the University's municipal entitlement litigation was entered into in May, 1988.

In February 1989, the court remanded the timber litigation to the Department of Natural Resources in order to allow the appellants to supplement the record and make any arguments that had not previously been heard. The department had a change of commissioners since the first decision, and new department personnel were assigned to review the case. On June 1, 1989 Commissioner Gorsuch issued her decision essentially upholding Commissioner Brady's original decision, but adding a few new stipulations. Again, the commissioner's decision on remand was accepted by the Board of Regents.

The limited timber rights were then conveyed to the University in October, 1989. The conveyance was conditioned to preclude any on-the-ground activity, such as timber cutting or harvest until after the lawsuit is resolved. The court may also void the conveyance.

The 1990 Legislature then passed HB 346, which established the Yakataga State Game Refuge and Special Management Area, provided for area wide planning, provided certainty for the Icy Cape II Timber Sale Extension, and created a mechanism to help settle the University timber litigation. Under that legislation, the University and the department were to try to come to agreement over the value of two of the three timber rights parcels. The bill stated that the Legislature intended to repurchase the timber rights at current market value, in which case the largest timber tract (at Cape Suckling) would be added to the Yakataga

State Game Refuge and the disposition of the smallest (at Cape Yakataga) would be decided through the area plan.

The Superior Court ruled on the case in July 1990. That ruling remanded the case back to the department for clarification of its sustained yield findings with regard to all three timber rights parcels, and reversed and remanded the decision to convey the parcel at Yakataga.

CURRENT SITUATION: The University and the department have come to agreement with regard to the current fair market value of the Yakataga timber parcel, but reached an impasse regarding the current fair market value of the Cape Suckling timber parcel. A letter explaining the agreement and impasse has been sent to Governor Hickel, the President of the Senate, Speaker of the House, and the Chairpersons of the Senate and House Resources Committees. The underlying cruise, engineering, appraisal, and review appraisal reports are confidential because of the ongoing litigation.

Department personnel are also working to provide the additional sustained yield information and findings requested by the court. The remand of the Yakataga parcel requires planning and classification work prior to any reconsideration. Therefore, no action on this remand is expected until after the legislatively mandated Yakataga Area Plan is completed on or before July, 1993.

For more information contact: Salli Slaughter, Special Projects Coordinator, Division of Land and Water, Department of Natural Resources, (907) 762-2692; PROFS NRSCSSL; 3601 C Street, Suite 814, P.O. Box 107005, Anchorage, Alaska 99510.



Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802

907-463-3366

YAKATAGA STATE GAME REFUGE
REPURCHASE OF CAPE SUCKLING TIMBER RIGHTS

2/19/91

Passed last year, CSHB 346 established the Yakataga State Game Refuge and directed the Department of Natural Resources to repurchase University of Alaska timber rights on adjacent lands at Cape Suckling and Yakataga. The bill, designed to allow logging but protect critical habitat, represents a carefully crafted compromise between DNR, the University, local communities, and fishermen. Buyback of the Cape Suckling parcel is a critical part of the Yakataga compromise.

Located just to the west of the refuge, the 32,000 acre Cape Suckling parcel includes some of the best wildlife habitat in the state of Alaska, supporting important herds of moose and mountain goat. Brown bear hunting in this area is considered world class. Recreation and tourism development potential in the Yakataga area centers on Cape Suckling. Because of these values, the Legislature directed that Cape Suckling be automatically included in the Yakataga refuge when repurchased. Without Cape Suckling the refuge is incomplete.

The Yakataga legislation directs DNR and the University to negotiate a fair market value for repurchase of Cape Suckling, but these two state entities have been unable to agree. This impasse should be easily resolved: buyback simply requires transferring state money from one account to another. Buyback is just another appropriation from the general fund, to the University, which benefits the public interest.

(OVER)

Numerous organizations supported last year's legislation, which includes **the buyback of Cape Suckling timber rights:**

Alaska Center for the Environment
Alaska Department of Fish and Game
Alaska Department of Natural Resources
Alaska Discovery
Chugach Timber Corporation
City of Yakutat
Cordova District Fishermen United
Fairbanksians for Responsible University Land Management
Northern Alaska Environmental Center
Sealaska Corporation
Southeast Alaska Conservation Council
Southeast Regional Fish and Game Advisory Council
Tongass Tourism and Recreation Business Association
United Fishermen of Alaska
Yakutat Fish and Game Advisory Committee
Yakutat Resource Council



Southeast Alaska Conservation Council

419 SIXTH ST. #328 JUNEAU, ALASKA 99801 • (907-586-6942)

February 19, 1991

Gary Gustafson, Director
Division of Land and Water Management
Department of Natural Resources
PO Box 107006
Anchorage, AK 99510

Dear Gary:

This letter is in response to the February 4th letter you received from Brian Rogers, Vice President for Finance of the University of Alaska. That letter concerned Commissioner Heinze's January 14th letter to the parties regarding how the agency intended to handle the remand from the Superior Court in Yakutat Fishermen's Association v. Brady (1JU-88-271).

In its June 18, 1990 decision, the Superior Court reversed DNR's decision to convey the Yakataga timber parcel to the University and found that DNR had failed to articulate a reasonable basis for its conclusion that ADL 223456 did not violate the principle of sustained yield. The court remanded ADL 223456 to DNR with directions to make additional findings with regard to sustained yield on all three timber parcels.

In his January 14th letter, Commissioner Heinze concluded that it was appropriate to await completion of the Yakataga Area Plan before deciding whether or not to reconvey the Yakataga parcel to the University. Additionally, the Commissioner chose to postpone making a proper sustained yield analysis for all three parcels until completion of the Yakataga Area Plan. The Southeast Alaska Conservation Council (SEACC) supports Commissioner Heinze's decision.

Contrary to statements in Mr. Roger's letter, the completion of the Yakataga Area Plan is a necessary condition for a satisfactory sustained yield analysis. DNR will use the area planning process to determine the compatibility or incompatibility of permitted uses, including timber harvest, on all lands in the Yakataga area. These findings form the basis for identifying the timber base to be included in any sustained yield analysis. Thus, it is illogical to bifurcate the classification and sustained yield analysis as suggested by Mr. Rogers.

We believe that the Commissioner's decision is also supported by Section 4 of the Yakataga State Game Refuge bill, HB 346. In subsection 4(b), the Alaska Legislature pronounced a clear policy


directive by mandating that the Area Plan "shall consider the full range of management options for the timber rights in each tract of land of the University of Alaska (ADL 223456) under litigation, including and excluding timber harvest." Thus, DNR would be unable to prepare a sustained yield analysis of the Cape Suckling and Yakataga parcels before deciding what, if any, acreage in these parcels will be excluded from the timber base. Moreover, even if the Superior Court is satisfied with DNR's sustained yield analysis for the three parcels at issue in Yakutat Fishermen's Assoc. v. Brady, the Legislature stated its clear intention for the State to reacquire the University's interests in Tract A-148 at Cape Suckling and Tract 20 at Yakataga. See Section 5(c), HB 346.

SEACC also objects to Mr. Rogers' characterization of the University's rights to timber in the White River, Cape Suckling, and Yakataga tracts as "vested." According to Quitclaim Deed # 1148, executed on October 6, 1989, the University's interests are "subject to the Final Finding and Decision for ADL 223456." Until the Superior Court is satisfied that ADL 223456 complies with all applicable legal requirements, the University's rights under the Quitclaim Deed can not vest.

Finally, the Mr. Rogers requested that the University be given the opportunity to address key DNR personnel at the meeting "to plan the schedule for the sustained yield remand." If the University is going to be invited to appear at that meeting, we respectfully request notice as to the time and place of that meeting, as well as the opportunity to explain our position on this important issue.

Thank you for considering our position on this question. Please keep us informed as to when the meeting regarding the schedule for the sustained yield remand will be held.

Sincerely,


Robert E. Lindekugel
Staff Attorney

Yakataga

The Land Between

by Debra Clausen

Looking toward Cape Yakataga
from Sunshine Point.



Photos by David Hardy

Most people who have seen the land between Cape Suckling and Cape Yakataga have seen it from the air. Flying between Anchorage and Juneau or Cordova and Yakutat reveals an impressive geography. With the storm-beaten North Gulf Coast pounding on its southern shore and the mountains of the Chugach Coast Range rising precipitously to the north, isolated to the west by the Bering Glacier and to the east by the Yaktse/Guyot glaciers, the Yakataga forelands are truly a land between. Essentially uninhabited, wild and remote, the area is, however, not empty.

Lying along the main Pacific migration route of birds flying north to breed, the high coastal mountain range funnels millions of birds along the narrow coastal corridor. A majority of waterfowl stop to rest and feed in these coastal lowlands on their way to summer nesting grounds. Nearly 100 trumpeter swans nest in the area. Hundreds of bald eagles winter in high densities along the lower stream reaches.

Several hundred moose are known to use the coastal lowlands, concentrating in the winter along the lower reaches of the major river floodplains. Extreme

weather conditions and heavy snowfall often drive mountain goats to lower elevations during winter. One to two hundred brown bear are found in the area, feeding in sedge flats during spring, in strawberry patches during July, and along fish streams during summer and fall. Several dozen wolves are estimated to range throughout the area. Wolverine, coyote, lynx, marten, mink, land otter and beaver can also be found. The Tsiu/Tsivat river system supports one of the richest commercial salmon fisheries for its size, and other productive salmon streams flow through the area. Accessi-

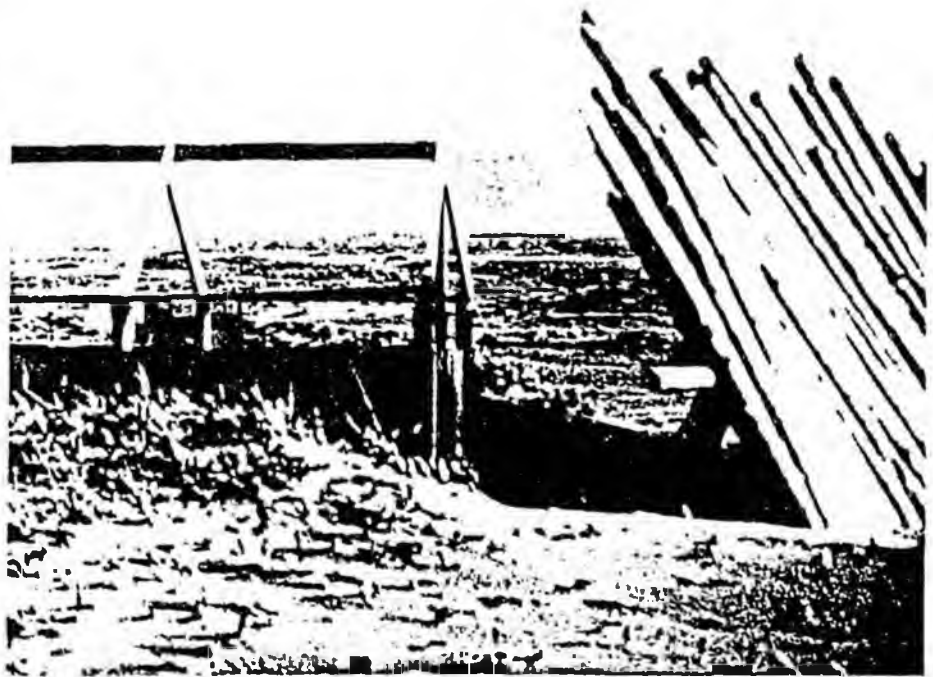
ble primarily by plane but also by boat, the area has long been important hunting and fishing grounds for Yakutat residents. Commercial set net sites are concentrated at the mouths of every major river. Sport fishing opportunities are also abundant, with the Tsiu River a popular coho fishing stream. Waterfowl, moose, black and brown bear, and mountain goat are hunted by residents and guided non-residents.

Rich in wildlife, the area also possesses extensive forests and mineral laden beaches. Gold was discovered on the area's beaches in 1897 or 1898 and mining activity continued until World War II.

Recently, commercially valuable stands of spruce and hemlock have attracted the attention of state and private logging interests. Controversy has arisen over the sale and harvest of the area's forests. One outcome of this controversy was the establishment in 1990 of a new state game refuge, the Yakataga State Game Refuge, encompassing the state-owned lowlands between the Seal River and Kaliakh River. Legislation establishing the refuge also provides for inclusion of lands to the east of Kaliakh River into the refuge on the recommendation of the Commissioner of the Alaska Department of Natural Resources (DNR) following an area planning study and directs the Commissioner of DNR to purchase timber rights now held by the University of Alaska west of the Seal River. Once the timber rights are re-acquired by the state, those lands would also become part of the new refuge.

Passage of this recent legislation ensures that these newly established refuge lands will be managed for the protection of fish and wildlife habitat and popula-

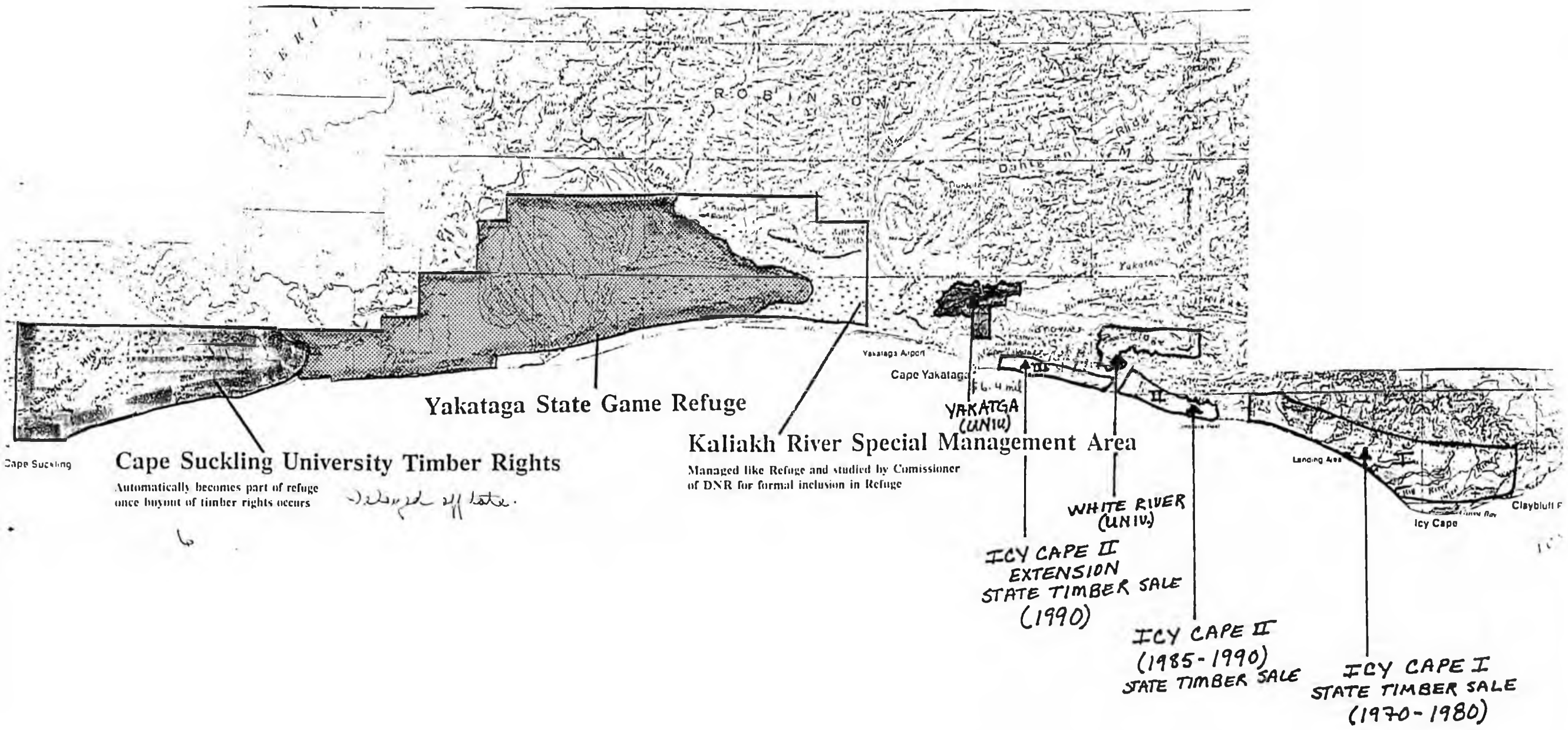
Set net tent frame on the Tsiu River.



tions, including salmon spawning and rearing habitat and critical goat and moose winter habitat; public uses of fish and wildlife and their habitat, particularly commercial, sport, and subsistence fishing, hunting, viewing, photography, and general public recreation in a high quality environment; and the use and disposition of other resources when the activities are not inconsistent with protection of fish and wildlife and public use

of the area. Although important timber harvest issues still await resolution, the future of this wild, remote and productive "land between" is now a lot more secure. Recent legislation ensures that although uninhabited, it won't be forgotten.

Debra Clausen is a Habitat Biologist, Division of Habitat, ADF&G, Anchorage.



Cape Suckling University Timber Rights

Automatically becomes part of refuge once buyout of timber rights occurs

Delayed off later.

Yakataga State Game Refuge

Kaliakh River Special Management Area

Managed like Refuge and studied by Commissioner of DNR for formal inclusion in Refuge

YAKATGA (UNIV)

WHITE RIVER (UNIV)

ICY CAPE II EXTENSION STATE TIMBER SALE (1990)

ICY CAPE II (1985-1990) STATE TIMBER SALE

ICY CAPE I STATE TIMBER SALE (1970-1980)

Cape Suckling

Yakataga Airport

Cape Yakataga

6.4 mil

Landing Area

Icy Cape

Claybluff F

R-O-B-I-N-S-O-N

D-O-H-E-R-Y

R-I-D-G-E

M-I-S-S-I-S-S-I-P

Y-A-K-A-T-A-G-A

Y-A-K-A-T-A-G-A

Y-A-K-A-T-A-G-A

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Agreement on Confidentiality

I have read paragraph 1 (one) of the attached MOU between University and DNR.

Certain information which is covered by that paragraph is to be discussed in an executive session of the House Natural Resources Committee

on 2/20/91.

I agree to abide by the requirements of that paragraph 1, of the M. O. U. to keep that information confidential.

Gustafson

Rego

I affirm that I am an Alaska Legislator or Legislative Staff person.

MEMORANDUM OF UNDERSTANDING
REGARDING THE TIMBER VALUATION PROCESS
FOR SETTLEMENT OF LITIGATION (IJU-88-271 CIVIL)
BETWEEN THE
UNIVERSITY OF ALASKA
AND THE
ALASKA DEPARTMENT OF NATURAL RESOURCES

The University of Alaska (the University) and the Alaska Department of Natural Resources (the Department) enter into this Memorandum of Understanding (MOU) regarding the process used for valuation of limited timber rights (timber) conveyed to the University in the Gulf of Alaska area.

PURPOSE The purpose of this MOU is to set out the responsibilities and understandings of the respective parties with regard to the process to be followed to determine the value of two tracts of timber (Parcel A-148, Cane Suckling; and Parcel 20, Yakataga) conveyed to the University by the Department on October 6, 1989. The value of the timber determined under the procedures set forth in this MOU is to be used in the negotiation of settlement of pending litigation Yakutat Fisherman's Association v. State, IJU-88-271 (the litigation) as directed by the legislature under SCS CSHB 346 (RES) AM S, Ch. 143 SLA 1990, attached hereto as Attachment "A."

BACKGROUND The litigation stems from the settlement of a prior lawsuit between the University and the Department over the conveyance of University trust land to the Municipality of Anchorage (the Municipality) under the Municipal Entitlements Act (University of Alaska v. Municipality of Anchorage, et al., S-1815 and S-1826), filed in 1985.

Under the settlement of University of Alaska v. Municipality of Anchorage, et al., the value of the University land conveyed to the Municipality was established. As a result of a MOU entered into in December 1986, the University and the Department assembled a pool of potential replacement lands, and interests in land. This pool was reviewed by other governmental agencies and the public during the spring and summer of 1987.

A final finding and decision setting out the land and interests to be conveyed to the University to replace the lands conveyed to the Municipality was issued by the Department on December 4, 1987, and accepted by the University as the basis for settlement of the litigation on December 16, 1987. Included in the final replacement pool was timber at three limited timber rights tracts in the Gulf

of Alaska area (#20, Yakataga, 53,823.2 MBF; #A-148 Cape Suckling, 294,630; A-154 White River, 94,715.72 MBF.)

Two requests for reconsideration were filed in January, 1988. The Commissioner of Natural Resources (the Commissioner), Judith M. Brady, refused to reconsider her decision, and the decision was appealed in the litigation to the Alaska Superior Court. On motion of the Department of Natural Resources and the University, the case was remanded for reconsideration in February 1989. Newly appointed Commissioner Lennie Gorsuch upheld her predecessor's decision, with slight modifications, in June 1989. On June 18, 1990, the court again remanded the matter back to the Department for further action. See Attachment "B" hereto.

By a quitclaim deed, dated October 6, 1989, the State of Alaska conveyed to the University the timber on the Cape Suckling, Yakataga and White River tracts. See Attachment "C" hereto. However, the Department continues to hold the remainder of the fee title and will continue to engage in practices necessary to perform its duties concerning management of state land with respect to these tracts.

HB 346 was introduced in the first session of the sixteenth Alaska State Legislature to establish a Yakataga State Game Refuge. Prior to the bill's passage during the second session, it was amended to include provisions intended to lead to settlement of the litigation. One of those provisions of HB 346, as amended and enacted as Ch. 143 SLA 1990, requires that:

The commissioner of natural resources shall engage in every reasonable effort to reach agreement on the fair market value for the timber rights to Tract 1-148 at Cape Suckling and Tract 20 at Yakataga.

This MOU is intended to facilitate that effort.

1. CONFIDENTIALITY: Contractors hired under the process described in this MOU are considered professional witnesses who are to provide professional services or testimony relating to the litigation. Because the evidentiary phase of this proceeding is completed, it is expected that these contractors will not be called as witnesses. Instead, their main function will be to provide professional services to the parties and their attorneys, based upon their expertise in the requisite field.

The parties agree that, except as expressly provided elsewhere in this MOU, any correspondence to or from any contractors, review contractor or subcontractors (the contractors) and any reports or writings prepared by them under the instructions contained in this MOU (see Attachments "E," "G," "H" and subparagraph 7(a), below),

or pursuant to employment with reference to the litigation, (collectively, the contractors' documents) are for the purposes of settlement of the litigation and will be deemed confidential and protected, without limitation, by the provisions of AS 09.25.120(4); 6 AAC 95.010(b), 95.090(a)(4), and 95.150; Alaska Evidence Rule 408; the attorney work product privilege; and the attorney-client communication privilege. All reports shall be transmitted by the contractors only to the parties or their representatives and shall contain the following notation:

Prepared for settlement purposes and subject to AS 09.25.120(4); 6 AAC 95.010(b); 95.090(a)(4), and 95.150; Alaska Evidence Rule 408; the attorney work product privilege; and the attorney-client communication privilege.

Under Ch. 143 SLA 1990, the Commissioner is required to report any fair-market-value agreed to by the parties regarding the Cape Suckling and the Yakataga tracts to the Chairs of the Resource Committees of the Alaska Senate and House of Representatives. While any figure reported to the legislature will be made public as soon as it is reported, the correspondence, reports and resulting figures produced under this MOU are to remain confidential.

None of the contractor's documents will be used in the litigation, either before the courts or on remand, without agreement of the parties, unless otherwise ordered by the court. The Department agrees that it will not seek a court order for the use of the contractor's documents. If the University does not agree to the use in the litigation or on remand of the cruise report, engineering report and appraiser's conclusions about the operational plan, the University will not insist that the Department expend its own funds to do cruise studies and engineering studies requires for such new appraisal. If in the litigation a court order or decision shall fairly be construed to require the Department to reappraise any of the timber on remand, and if money for such appraisal is not appropriated by the legislature or otherwise provided to the Department to do so by the end of the first complete legislative session following the Department's written request for such money, the parties agree that, at the University's election they will do one of the following:

- a. Use the contract documents for such reappraisal;
- b. Seek a stay of the remand to last until the end of the second complete legislative session following the Department's above written request;
- c. The University may pay for another appraisal performed to Department standards; or

d. The University shall take, in lieu of the timber required to be appraised, that replacement land identified at paragraph three of that Memorandum of Agreement between the parties, dated April 22, 1988, and the attachment thereto, as amended October 6, 1989.

2. CONTRACTING: All initial contracting for experts in litigation (see Sections 4 through 6 below) will be done by the law firm of Winner & Associates, counsel for the University of Alaska. Winner & Associates will be responsible for contracting and paying for the initial contracts; the Department of Law will be responsible for contracting and paying for the review contracts under paragraph 7, below. Because these contracts are for professional witnesses for an existing lawsuit, these contracts are exempted from the state procurement regulations under AS 36.30.850(b)(2).

The University will provide funding for all initial contracting; the Department will provide funding for its subsequent review contracts. The University's initial contractors are as follows:

- a.) Sanders and Kerr, a J.V., Anchorage, Alaska - cruiser;
- b.) David Gardiner of Reid, Collins, Vancouver, B.C. (employed through Sanders & Kerr, a J.V.) - logging engineer; and
- c.) Ray Granvall and Larry Ismert of Cascade Appraisal, Inc., Wilsonville, Oregon - appraisers.

The Department's review contractor is Carl Newport, Ph.D., of Mason, Bruce and Girard, Inc., Portland, Oregon. He will be utilizing Logging Engineer Jim Rynearson for the purpose of analyzing transportation aspects of the appraisal.

2.a. COMMUNICATION WITH CONTRACTORS: The following rule shall govern communication with the contractors:

Any communication between a party and a contractor which could affect the value of the property shall be copied to the other party if in writing, or reported in writing if oral. This requirement of written reporting shall not be necessary if the other party is present at a meeting where those communications are made. All such communications will be made by and through the attorneys for the parties.

3. TERM: This MOU will take effect when signed by both parties, and will remain in effect until the valuation and negotiation process set forth is complete, or until terminated in writing by mutual consent of the parties. The schedule for completion of the

various reports and events to be completed under this MOU are outlined in Attachment "D."

4. ENGINEERING STUDY: The parties agree that an engineering study must be done to determine the location, design, cost and feasibility of timber harvest infrastructure for the Cape Suckling and the Yakataga tracts prior to the performance of a timber appraisal. Instructions for this study, along with an addendum thereto, are set forth in Attachment "E."

5. TIMBER CRUISE: The parties agree that a cruise of the commercially operable forest land within the Cape Suckling and Yakataga tracts to determine the volume, grade, and the quality of the timber shall be performed. Instructions for the cruise, along with an addendum thereto, are set out in Attachment "F."

The conduct of a proper timber cruise will require the cutting of up to 40 trees within the Cape Suckling tract in order to accurately estimate quality of the timber involved. The Department has proposed to cut up to 40 trees on the Cape Suckling tract for the purpose of such cruise, and the University is in agreement therewith.

Accordingly, the University has disclaimed and quitclaimed the interest it may have, if any, in 40 trees on the Cape Suckling tract which it will be necessary to cut in order to obtain a timber cruise and timber appraisal for that parcel. The disclaimer and quitclaim is found at Attachment "G" hereto. The parties agree that this disclaimer and quitclaim deed, and the cutting of up to 40 trees for purposes of this cruise, do not impair or void the quitclaim deed of limited timber rights to the University, Attachment "C" hereto.

6. APPRAISAL: The parties agree that an appraisal of the fair market value of the University's timber on commercially operable forest land within the Cape Suckling and Yakataga parcels is to be performed by a qualified timber appraiser agreed upon by the parties. The appraisal is to be conducted under the instructions set forth in Attachment "H"

7. REVIEW AND NEGOTIATION: All documents required under this valuation process will be provided by the contractor to the attorney employing him. That attorney will send a copy of the document to the attorney for the other party the same day that it is received.

a. The reports and conclusions of value of the University's contractor(s) will be reviewed by the Department's review

contractor, Carl Newport, pursuant to this subparagraph. The review contractor will review the reports of the University's contractors and make recommendations regarding appropriate adjustments, if any. These recommendations will be in the form of a letter of opinion, setting forth in sufficient detail the factual background, basis and analysis supporting the recommendation and shall include an opinion of overall value. This letter of opinion will be transmitted by the review contractor within thirty days after his receipt of the reports of the University's contractor(s). The review contractor will make reasonable effort to transmit this letter earlier.

b. If the University's contractor(s) disagree with any of the recommendations made by the review contractor, the University's contractor(s) and the review contractor shall immediately, or as soon thereafter as possible, meet to review those recommendations and resolve the differences. They shall report to the attorneys for both parties, in writing, the results of their efforts within three days after they initially meet. If they agree on changes, they shall be implemented by the University's contractor. The contractors shall report individual values for Cape Suckling and Yakataga.

c. If there are situations that cannot be corrected within the time-frame of this process, such as a data gap, the parties will negotiate a value under subparagraph e. below.

d. If, following the process of subparagraph a-c above, there remains a difference of valuation between the University's contractor(s) and the Department's review contractor of less than ten percent, the parties will split the difference to arrive at the fair-market-value of the parcels.

e. If, following the process of subparagraphs a-c above, there remains a difference of valuation between the University's contractors and the Department's review contractor of greater than ten percent, the University and the Department shall expeditiously exert every reasonable effort to arrive at a negotiated valuation, provided such negotiated value is within the range of difference of valuation between the two contractors. The negotiated valuation shall report individual values for Cape Suckling and Yakataga.

f. If the contractors agree on a value, or if the parties agree upon a negotiated valuation pursuant to subparagraph e. above, within three days following the beginning of negotiations, the Commissioner of the Department shall expeditiously report this valuation to the Chairs of the Resource Committees of the Alaska Senate and the House of Representatives.

g. If, within three days following the beginning of negotiations the parties are unable to arrive at a negotiated valuation pursuant to subparagraph e. above, then the parties will

declare an impasse in the negotiations. The President of the University and the commissioner of the Department will send a joint letter, summarizing the position on valuation of each party, and reporting the value which they each recommend, to the Governor, the President of the Alaska Senate, the Speaker of the Alaska House of Representatives, and the Chairs of the Resource Committees of the Alaska Senate and the House of Representatives.

8. AMENDMENTS: This MOU, including Attachments hereto, may be amended only by mutual written agreement of the parties.

9. This MOU and all attachments shall be given to all contractors.

University of Alaska

by: _____
Brian Rogers
Vice President, Finance

Date

State of Alaska, Department of
Natural Resources

by: Gary Gustafson
Gary Gustafson, Director
Director, Division of Land
and Water Management

10-11-90
Date