

Navigable Waterbodies

Background

The intent of the plan is to designate and provide management intent for the shorelands under all navigable waterbodies and their waters. Since it is not practical to state the individual management intent for each and every navigable waterbody, the plan identifies general types of waterbodies, and some that are assigned unit numbers, management intents, and designations.

The term “shorelands” used below is defined as land belonging to the state which is covered by nontidal water that is navigable under the laws of the United States up to the ordinary high water mark as modified by accretion, erosion, or reliction [AS 38.05.965]. See *Figure 1-1* at the beginning of Chapter 1 for a generalized diagram that illustrates the difference between shorelands, submerged lands, tidelands, and uplands.

Shorelands are not identified on the plan maps within this Chapter. Identification of all such water bodies is impractical on maps of the scale used in this plan. However, navigable water bodies may be identified on DNR maps (titled "Navigability Status") at the 1:250,000 scale at DNR offices.

These maps identify navigable water bodies based upon court decisions, state and federal written determinations of navigability, and other waters that may be navigable, based on certain criteria. "Waters are navigable when they are used or susceptible of use in their natural and ordinary condition as highways for commerce over which trade and travel may be conducted."

Generally, shorelands are navigable if, at the time of statehood, they were unreserved (not subject to a federal withdrawal), and they were used, or were susceptible to use, for travel, trade or commerce. Case law indicates that an inflatable raft can be used as a standard for determining navigability (*Alaska v. Ahtna, Inc.*, 1989). If a waterway can float a fully loaded, medium size inflatable raft weighing 1000 pounds, it is presumed to be navigable. Streams six or more feet in channel width and 5 to 7 inches in depth are presumed navigable. See *DNR Department Order 125* for detailed information on navigability.

Public Trust Doctrine

The Public Trust Doctrine provides that public trust lands, waters and living resources in a state are held by the state in trust for the benefit of all the people, and establishes the right of the public to fully utilize the public trust lands, waters, and resources for a wide variety of public uses. Each state has the authority and responsibility for managing these public trust assets to assure the public's rights are upheld.

The Public Trust Doctrine applies whenever navigable waters or the lands beneath those waters are altered, developed, conveyed, or otherwise managed. It also applies whether the trust lands are publicly or privately owned. Public trust lands are generally those lands below navigable waters, with the upper boundary being the ordinary high water mark. Tidelands, shorelands of

navigable lakes and rivers, as well as the land beneath oceans, lakes and rivers are usually considered public trust lands.

The Alaska Constitution contains numerous provisions embracing principles of the Public Trust Doctrine that require the state to exercise authority to ensure that the right of the public to use navigable waters for navigation, commerce, recreation, and related purposes is protected. In Alaska, the Public Trust Doctrine extends beyond those submerged lands in which the state holds title to include all waters that are navigable. The state's waters are themselves reserved to the people for common use. The state has enacted laws that provide similar protections as those provided by the Public Trust Doctrine and apply to broader areas.

The Alaska Constitution (Article VIII, Sections 1, 2, 3, 6, 13, and 14) and Alaska Statutes (38.05.127 and 38.05.128) contain some of the provisions which are the legal basis for applying the Public Trust Doctrine in Alaska. In Alaska, this doctrine guarantees the public's right to engage in activities such as commerce, navigation, fishing, hunting, trapping, and swimming, while also providing for the protection of areas for ecological study.

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." The Alaska Supreme Court has concluded that "the provisions in article VIII [of the Constitution] were intended to permit the broadest possible access to and use of state waters by the general public." *Wernberg v. State*, 516 P. 2d 1191, 1198-9 (Alaska 1973). The Alaska legislature has broadly defined the navigable and public waters available for public use in AS 38.05.965. Moreover, the legislature has endorsed a broad interpretation of the Public Trust Doctrine constitutionalized in article VIII in finding that:

Ownership of land bordering navigable or public waters does not grant an exclusive right to the use of the water and any rights of title to the land below the ordinary high water mark are subject to the rights of the people of the state to use and have access to the water for recreational purposes or any other public purposes for which the water is used or capable of being used consistent with the public trust. (sec. 1, ch. 82, SLA 1985)

The legislature has also declared that the right to use state waters does not include the right to enter or trespass upon private lands. Nevertheless, with 99 percent of Alaska in public ownership at statehood, state laws providing that the transfer of land to private parties also provide for public access to navigable waters have had broad effect. For instance, AS 38.05.127 implements the state constitutional guarantee of access to navigable waters under Article VIII, Section 14. Under the statute, the Commissioner of the Alaska Department of Natural Resources must "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."

The State's responsibilities to implement the Public Trust Doctrine are considered and used throughout this plan. Any management actions will be consistent with the Public Trust Doctrine

as defined by the Alaska Constitution, statutes, court decisions, and public involvement.

On a related issue, the Director's Policy File 91-03 *Shorelands Adjacent to Non-State Land* outlines DNR's policy for consulting with adjacent landowners and considering their concerns when uses on adjacent state-owned shorelands are proposed.

For more information on state policies on navigable waters see the following website:

<http://www.dnr.state.ak.us/mlw/nav/index.htm>

Fortymile National Wild and Scenic River Corridor

Located within the planning area is the Fortymile River component of the National Wild and Scenic River system, which was established by the Alaska National Interest Lands Conservation Act (ANILCA)¹, and is administered by the Bureau of Land Management. It consists of a corridor of federal uplands along the main stem of the Fortymile River and some of its tributaries (see *Land Status Map*). Within this corridor, the main stem and certain portions of the tributaries have been determined to be navigable either through federal navigability determinations or state assertions of navigability. Those portions of the Fortymile River system determined navigable constitute shorelands; i.e., areas of state-owned and managed land. Such areas require designation in state area plans. A description of the designations that apply to the Fortymile River system follows.

The basic conflict concerning the Fortymile Wild and Scenic River corridor is the difference in management approach. The Bureau of Land Management views the Fortymile River corridor and its adjacent uplands as components of the Wild and Scenic River system, and associates this area with a corresponding management philosophy. The state has authorized mining activities within certain shorelands of the Fortymile River, and to some this kind of activity is inconsistent with the Wild and Scenic River designation. The area plan cannot resolve this disagreement in management approach, and makes no specific attempt to do so. A potential method of resolving some of the issues of navigability and shoreland / upland management would be through a joint planning process between the state and BLM. Such a process, or something similar, should be further examined.

Management Intent for Specific Rivers and River Types

Certain rivers and lakes, because of their importance for recreation, commerce, and habitat, are given specific designations. The designations applied to the shorelands are identical to those used for uplands.

¹ Under ANILCA all private and state lands are excluded from the boundaries of the Fortymile River Wild and Scenic River designation. See *ANILCA Sec. 606(a)*, which modifies Sec. 15 of the Wild and Scenic River Act, 94 STAT 2416.

Navigable Waters of the Fortymile River System

The Fortymile River system is codesignated ‘Mining’ and ‘Public Recreation – Undeveloped’ within areas of shorelands.² The ‘Mining’³ designation recognizes the importance of the long term mining activities in this area and the ‘Public Recreation’ designation⁴, the use of this system for a variety of recreation uses conducted by both personal and commercial users. The extent of the ‘Mining’ designation generally coincides with areas of historical or actual mining use.⁵

Yukon River within Management Unit E-20

Management unit E-20 consists of shorelands within a segment of the Yukon River adjacent to the City of Eagle and Eagle Village. For management intent and the land use designation for this unit, refer to the section on Region 1 and the Resource Allocation Table in this chapter.

Management Intent for Other Rivers and Lakes

The designation and management intent for water bodies that cross or are surrounded by state-owned, state-selected, and top filed lands are the same as those of the upland tract.

The designation of General Use applies to all other navigable water bodies; i.e., those rivers and lakes that do not meet the previous standard and are not within state-owned, state-selected, or top filed upland management units. When in the best interests of the state, these water bodies are to be managed to allow a diversity of uses, consistent with the uses authorized on adjoining uplands in federal, private, or other state-owned land (i.e., Mental Health, University, and tracts quit claimed to a state agency other than DNR).

² Areas of shoreland asserted by the state as navigable or navigable through state or federal determinations of navigability include: the main stem of the Fortymile River, the North Fork of the Fortymile River to its confluence with Independence Creek, the Middle Fork of the North Fork of the Fortymile River to its confluence with Joseph Creek, the South Fork of the Fortymile River, the Walker Fork of the South Fork of the Fortymile River, the Dennison Fork of the South Fork of the Fortymile River to its confluence with the West Fork, the West Fork of the Dennison Fork of the South Fork of the Fortymile River to its confluence with Logging Cabin Creek, and the Mosquito Fork of the South Fork of the Fortymile River to its confluence with Kechumstuk Creek, and any navigable tributaries associated with these waterbodies.

³ This designation converts to the classification of ‘Mineral Land’. Mining is allowed and is specifically recognized as the primary use for which will be managed. (In this instance, the shorelands will be managed under the co-designations of Mining and Public Recreation – Undeveloped.)

⁴ This designation converts to the classification of ‘Public Recreation’. Recreation of a variety of forms, both personal and commercial as well as motorized and non-motorized, are allowed. (In this instance, the shorelands will be managed under the co-designations of Mining and Public Recreation – Undeveloped.)