

STATE OF ALASKA DEPARTMENT OF NATURAL RESOURCES
DIVISION OF MINING, LAND AND WATER

Southeast Regional Land Office

Preliminary Decision

ADL 107159

Alaska Mountain Guides Adventures, Inc.

Application for Lease

Requested Authorization

Alaska Mountain Guides Adventures, Inc. ("applicant") applied to lease approximately 3.5 acres of state uplands in Skagway for a commercial recreation operation for a 10 or 25-year term. The lease is to support seasonal rock climbing and ziplining tours provided by the applicant from May 1st to September 30th annually. The applicant currently leases 2.9 acres of the requested land under an existing lease, valid until March 31, 2019. The applicant also requests to use additional state land, approximately .5 acre, to rearrange ziplining infrastructure and provide a better experience for guests.

This request is for a lease of approximately 3.5 acres of state uplands for a term of 10 or 25 years. The applicant's development plan is included as **Attachment 1**.

Proposed Authorization

The Department of Natural Resources ("DNR"), Division of Mining, Land and Water ("DMLW") is proposing to lease 3.5 acres of state land for the commercial recreation operation referenced above. The DMLW will issue an entry authorization that would allow the applicant use of the site while completing the survey and appraisal lease prerequisites. The term authorized by proposed lease and entry authorization is 25 years, beginning April 1, 2019 and ending March 31, 2044, unless sooner terminated. Drafts of the proposed authorizations are incorporated into this preliminary decision as **Attachment 2** and **Attachment 3**.

This decision and proposed authorization(s) may be modified after the public comment period.

Authority

AS 38.05.035, AS 38.05.070, AS 38.05.075, AS 38.05.102, AS 38.05.850

Administrative Record

The administrative record for this case is contained within the case file serialized as ADL 107159. Incorporated by reference is the *Northern Southeast Area Plan* (October 2002).

Scope of the Decision

The purpose of this decision is to determine whether it is in the state's best interest to issue a 25-year lease of 3.5 acres of state land to the applicant for the purpose of operating seasonal rock climbing and

ziplining tours. The scope of this decision is limited to: (1) reasonably foreseeable, significant effects of the uses to be authorized; (2) applicable statutes and regulations; (3) the facts pertaining to the land or resources; and (4) issues that are material to the determination that issuing the authorization will best serve the interest of the State of Alaska (AS 38.05.035(e)(1)–(2)).

Site Description

Geographic Location: State-owned land near Porcupine Hill along the Klondike Highway in Skagway, Northern Southeast Alaska.

Legal Description: The proposed leasehold is within SW¼ SE¼ of Section 17, Township 27 South, Range 60 East, Copper River Meridian. More particularly, it is an unsurveyed portion of Lot 8, US Survey 5110, located at 59.522°N, 135.241°W, and contains 3.5 acres, more or less.

Other Land Information:

Local Government: Skagway is a 1st Class Borough and commonly referred to as the “Municipality of Skagway”

Regional Corporation: Sealaska Corporation

Village Corporation: none

Federally Recognized Tribe: Skagway Village

Title

A title report prepared by the DNR’s Realty Services Section on March 19, 2018, confirms that the State of Alaska (“state”) holds title to the subject land (RPT 10562). The Bureau of Land Management conveyed the land and mineral estates of Lot 8, US Survey 5110 to the state with US Patent 50-2005-0588 on September 29, 2005 (Doc No. 2005-000211-0).

Adjacent Landowners

The state holds title to the land surrounding the proposed site. It is managed by the DNR, except that the Department of Transportation & Public Facilities (“DOTPF”) manages the Klondike Highway, which is a public right-of-way authorized by the DNR (ADL 64097, ROW Map S-0999). Records in the DNR’s Land Administration System indicate that the land on the other side of the highway, located in the SE ¼ of Section 17 and N ½ of Section 20, has been approved for conveyance to the City of Skagway under certain conditions (ADL 106322).

Third Party Interests

None identified.

Planning & Classification

The site is subject to the Northern Southeast Area Plan (“NSEAP”) and is located within Management Unit S-13 for the White Pass Road, Upslope Area (NSEAP, Map 3-5). The land is designated General

Use, which converts to Resource Management Land classification (11 AAC 55.200). Management intent for this unit is to manage it for multiple uses.

The NSEAP further states that development of this unit wasn't anticipated during the planning period, but it provides that development should concentrate adjacent to the Skagway ("Klondike") Highway and for heritage resources to be maintained and protected. It also notes that portions of the White Pass Trail and Bracket Wagon Road traverse this unit (NSEAP, c 3 p 99).

The proposed use is compatible with this classification. The proposed lease includes a stipulation for the Alaska Historic Preservation Act and a stipulation requiring development and activity to blend with the local landscape and wilderness setting.

Mineral Orders: The proposed leasehold does not fall within the areas delineated in Administrative Mineral Closing Order No. 770 (NSEAP, Appendix B). Neither a mineral closing order nor a leasehold location order is necessary to or appropriate for this proposed leasehold.

Local Planning: The proposed leasehold is within the Municipality of Skagway and is subject to any applicable local planning and zoning ordinances. The Municipality of Skagway, Planning & Zoning Commission Resolution No. 09-08 issued a Conditional Use Permit to the applicant to provide retail sales in a Residential Conservation District until 2017. As a condition of the proposed lease, the applicant must continue to receive authorizations required by the City of Skagway. The Municipality of Skagway will be notified of this preliminary decision.

Traditional Use Finding: Pursuant to AS 38.05.830, this finding is not required since the proposed leasehold is located within an organized borough.

Access

Physical and Legal Access: Physical and legal access to the proposed lease site is from the Klondike Highway, which is a public right-of-way (ROW Map S-0999) managed by the DOTPF under ADL 64097. The DOTPF issued Encroachment Permit No SGY-06-001, effective from March 1, 2013 to February 28, 2018, for a parking and pullout area within the Klondike Highway right-of-way. As a condition of the proposed lease, it is the applicant's responsibility to maintain authorization from the DOTPF for access improvements within the right-of-way.

Environmental Risk

Environmental risk associated with this authorization should be minimal. No contamination from hazardous material is known to exist on the proposed leasehold. A small amount of gas for a generator and chainsaw may be temporarily used and kept on-site in a five-gallon fuel cans. A stipulation for Fuel and Hazardous Substances is included in the proposed lease.

Background

Consistent with 11 AAC 96.014, the applicant began commercial recreation day-use of the site without written authorization around 2002. The first permit issued to the applicant, serialized as LAS 24304, authorized development of a commercial rock climbing facility on 3.62 acres and was effective from June 1, 2003 to October 1, 2003. A second permit, also serialized as LAS 24304, authorized the same land use over a five-year period and was made effective May 1, 2003. This five-year permit was amended in 2004 to allow an access corridor, trail maintenance, temporary platforms, and limited fuel storage.

The applicant submitted a lease application in December of 2003 (ADL 107159). The DMLW distributed notice of the preliminary decision for ADL 107159 on February 11, 2005. In the preliminary decision, the DMLW proposed to offer a 25-year lease of two acres of state land for commercial recreation rock climbing facilities on a competitive bid basis at public auction.

The DMLW issued a final decision for ADL 107159 on August 9, 2005. The decision identified the applicant as the only bidder to prequalify and compete for the recreation lease and modified its initial determination in the preliminary decision. Due to public comments received in response to the preliminary decision, the DMLW's final decision favored issuance of a ten-year lease of approximately six acres, rather than a 25-year lease of two acres. The applicant appealed the final decision on the basis that ten years was not enough time to amortize the lease, but the DNR Commissioner denied the applicant's appeal.

The DMLW closed LAS 24304 and issued the applicant a 13-month early entry permit, effective May 1, 2006 to March 31, 2007, allowing continued use of the site, completion of the required lease diagram and appraisal, and execution of the final lease. The lease was made effective from April 1, 2007 to March 31, 2017 and authorizes 2.96 acres (Doc No 2007-000175-0). The lease, specifically the development diagram, was amended for the first time on March 17, 2008, adding improvements to the ropes course (Doc No 2008-000047-0). It was amended for a second time on April 27, 2011, adding a retail shop and reflect changes to the course (Doc No 2011-000071-0).

In 2014, the applicant requested an amendment to their existing lease that would allow use of the .5-acre area. In 2015, the DMLW informed the applicant that the amendment request would be considered with an application to renew the lease. The DMLW received an application to renew the lease on June 3, 2016. The application materials, which are subject of this preliminary decision, were updated by the applicant on December 19, 2017, to clarify and consolidate the amendment and renewal requests. In accordance with AS 38.05.070(f), the DMLW extended the lease until March 31, 2019 in order to allow continued use of the existing leasehold while the DMLW considered the application for lease renewal and expansion onto an additional 0.5 acre of state land (Doc No 2018-000001-0). The stated purpose of the expansion is to change the orientation of the ropes course infrastructure, requiring additional area.

Related Actions: None.

Application Review

The DMLW held a thirty-day agency review of the application materials that began December 29, 2017 and ended February 1, 2018. Invitations to review the application and submit comments were sent to the following state agencies: Department of Fish & Game, Division of Habitat and Division of Wildlife Conservation; Department of Environmental Conservation, Commissioner's Office and Division of Environmental Health; Department of Natural Resources, Division of Forestry; Department of Natural Resources, Division of Parks and Outdoor Recreation, Southeast Superintendent and Office of History and Archaeology; Department of Natural Resources, Mental Health Land Trust; and Department of Transportation & Public Facilities, Right of Way and Utilities, Southcoast Region.

Agency Comments: The DMLW received one comment from the Department of Fish & Game, Division of Wildlife Conservation ("ADFG") on January 17, 2018. The ADFG did not object to the requested land use but recommended the applicant be made aware of the following concerns regarding bears and training:

Bears. "...Bears may frequent the area and it is important to manage attractants (e.g. food, trash, recycling, fuel jugs, and other odoriferous items), and they should never be left unattended. When this is not possible, all attractants should be secured (e.g. inside bear resistant containers, electric fences, etc.) so that bears do not obtain any reward. It is not advisable to leave food and other attractants inside unattended vehicles..."

Training. "...Staff should be given bear safety training and visitors should be provided with basic information and instructed on proper handling of attractants. Bear safety information can be found on our department website..."

Further, the ADFG advises the applicant to report negative interactions with wildlife to Carl Koch at the ADFG Division of Wildlife Conservation office in Douglas, Alaska at (907) 465-4329.

DMLW Response: The DMLW has included a stipulation for ADFG's wildlife concerns in the proposed lease.

Discussion

The applicant applied for both an amendment and renewal of an existing lease. The existing lease was offered competitively under AS 38.05.070, issued to the applicant for a ten-year term, amended twice, and extended for two years. The proposed lease is to allow the applicant continued use of state land for a commercial recreation operation for a 25-year term. The applicant requested preference for a non-competitive lease under AS 38.05.035(b)(3), AS 38.05.035(f), and AS 38.05.102.

AS 38.05.035(b)(3) allows the DNR to grant a preference right to a claimant who shows bona fide improvement of state land and who has sought to obtain title to the land, but through errors or omissions of others, has been denied title to it. The DMLW finds that the applicant does not qualify for preference under AS 38.05.035(b)(3) as the applicant did not seek title to the land.

AS 38.05.035(f) allows the DNR to grant a preference right to lease up to five acres of state land without competitive bid to an individual who has erected a building on the land and used the land for bona fide business purposes for five or more years under a federal permit or without the need for a permit and, after selection by the state, under a state use permit or lease. To qualify, the business must have produced no less than 25 percent of the total income of the applicant for the five years preceding the application to purchase or lease the land. The DMLW finds that the applicant does not qualify for preference under AS 38.05.035(b)(3) because the applicant did not erect a building prior to state selection of the subject land.

AS 38.05.102 allows for a holder in good standing of a leasehold created under AS 38.05.070-.105 to purchase or lease the land for its appraised fair market value, if offered for sale or long-term lease at the termination of the existing leasehold. The DMLW finds the applicant qualifies for lessee preference under AS 38.05.102 because the leasehold was created under AS 38.05.070 after soliciting interest.

Unless comments are received indicating to the DMLW that it is in public interest to do otherwise, the DMLW will issue a lease of 3.5 acres at this site for a 25-year term. Alternatively, the DMLW may deny the application, or lease either 2.96 acres or 3.5 acres for up to 10 years lease under AS 38.05.070(e) or AS 38.05.070(b).

Preliminary Decision

Authorization Types & Terms

Lease: Pursuant to AS 38.05.102, the DMLW recommends issuance of a 25-year lease to the applicant for the purpose of operating commercial recreation business involving rock climbing and ziplining on approximately 3.5 acres of state land. The proposed lease, included in draft form as **Attachment 2**, is the standard DMLW Lease Agreement (form 102-111, revised May 2001) with Additional Stipulations.

Entry Authorization: The DMLW is proposing to issue an entry authorization, included in draft form as **Attachment 3**, to allow the applicant use of the 3.5-acre site while completing survey and appraisal lease prerequisites. The term of the proposed entry authorization is two years, beginning April 1, 2019 and ending March 31, 2021, and is included in the 25-year term of the proposed lease. If the survey and appraisal requirements are satisfied prior to expiration of the entry authorization, the entry authorization will be terminated and the lease will be issued at that time.

Generally Allowed Use: In accordance with regulations for “Generally Allowed Uses” promulgated under 11 AAC 96.020, the applicant may enter onto the area of expansion, approximately .5 acres, prior to April 1, 2019 for the purpose of completing the required survey and appraisal. 11 AAC 96.020(a)(4)(B) provides that no written authorization is required for brushing or cutting a survey line less than five feet wide using only hand-held tools, including a chainsaw, or setting a survey marker, so long as no survey monument is set without written

survey instructions issued under 11 AAC 53 and the land use is consistent with regulations for “Conditions for Generally Allowed Uses” promulgated under 11 AAC 96.025.

Lease Prerequisites

Survey: In accordance with AS 38.04.045, the applicant will be required to provide an Alaska State Land Survey that meets the requirements and standards of the DMLW’s Survey Section. The survey must be as-built. The applicant’s completion of an acceptable survey is prerequisite to lease issuance, and one must be submitted and approved by the expiration date of the proposed entry authorization, March 31, 2021. The area shown on **Attachment 1** is the basis for the survey.

Appraisal: In consultation with the DMLW Appraisals Unit and in accordance with AS 38.05.840(a), it was determined that an appraisal is required. The applicant must provide a fair market value appraisal of the proposed leasehold prepared by a licensed appraiser approved by the Appraisals Unit. The applicant’s completion of an acceptable appraisal is prerequisite to issuance of the proposed lease. The cost of the appraisal shall be borne by the applicant.

Lease Deliverables

Compensation: In accordance with 38.05.075(a), the compensation method for the proposed lease is a form set out in AS 38.05.073(m) that is designed to maximize the return to the state. AS 38.05.073(m) provides that compensation to be paid to the state may include, in the discretion of the DNR Commissioner, (1) a percentage of the annual gross receipts as reported to the United States Internal Revenue Service; (2) a guaranteed annual minimum rent or a percentage of gross receipts, whichever is greater; (3) the fair market rental value; (4) a fixed annual rent that is not less than the fair market rental value of the land; (5) a fee for each user; (6) other compensation acceptable to the commissioner; or (7) a combination of the above.

Based on AS 38.05.073(m)(7), compensation for the existing lease is based on the combination of the fair market rental value of the leasehold and a \$2.00 per **visitor day fee**. “Visitor day” is defined by 11 AAC 96.250(18) as all or any part of a calendar day during which a commercial recreation client is present, with each client representing a separate visitor day if multiple clients are present at any time during a calendar day. Terms of the existing lease require the base annual rent to be provided by April 1st prior to each season, and visitor day fees to be provided each November 1st after each season. In the past, the DMLW and the applicant entered into annual agreements allowing visitor day fees to be provided in installments. These agreements typically enabled the total amount of visitor day fees to be provided by April 1st of the following year.

Consistent with the existing lease, compensation method for the proposed lease, at the state's discretion, will be the greater of:

- a) A two-part compensation calculation comprised of a base amount plus a per client/visitor day amount. The annual base rental amount will be equivalent to the fair market rental value of the leasehold, as determined by an appraisal approved by the DNR.

- b) An amount equal to 2.5% of the annual gross receipts from the business or businesses deriving income from the lease facility, as reported to the IRS.
- c) A combination of these or other methods as described in AS 38.05.073(m).

The initial lease compensation for the proposed lease is the same as the existing lease: annual fair market rental value plus a visitor day fee. The visitor day fee for the first five years will be set at \$2.00 per visitor day. The base annual rent will be due by each April 1st. Additionally, visitor day fees and annual reports are to be provided by April 1st annually, rather than November 1st, so to avoid the administrative burden of separate payment agreements in the future.

Entry Authorization Compensation: In accordance with 11 AAC 05.010(e)(6), the fee for a land use permit under AS 38.05.850 authorizing entry onto a prospective surface leasehold for site development is an annual fee equal to the director's estimate of the prospective rental. According to Appraisal Report No. 3454-1 (2012), the most recent appraisal of the existing leasehold set the base fair market value rent for the 2.96-acre parcel at \$6,300.00 or \$2128.38 per acre. Using this rate, the fair market value rent for the additional area, approximately .5 acres, is \$1,064.19. The DMLW has set the annual land use fee for the proposed entry authorization at a minimum fee of \$7,449.00 until a new fair market value appraisal has been completed.

Once the appraisal has been completed and fair market value rent has been determined, the annual land use fee will be adjusted to reflect the appraised amount from the effective date of the lease. If the amount greater than \$7,449.00, the applicant must pay the difference from payments made during the term of the entry authorization. If the amount is less than \$7,449.00, the difference will be credited to the applicant's account. The applicant must also provide the \$2.00 per visitor day fee for the term of the entry authorization.

Periodic Rate Adjustment: In accordance with AS 38.05.105, the annual land use fee payment will be subject to adjustment at five-year intervals after the issuance of the lease. Information gathered from annual reports during the first four years of each five-year period of the lease may be averaged and used to determine the annual rental at the next periodic rent adjustment period required under AS 38.05.105.

Annual Reports: The applicant shall submit to DMLW a written annual report on or before November 1st of each year with information the DMLW determines to be necessary to obtain a clear and detailed understanding of the financial status of commercial operations occurring on or being facilitated by the lease. At a minimum, the report shall include the following information:

- a) A statement indicating the number of visitor days for the year. The data should be organized by month with totals for the year.

- b) A certified statement by a certified public accountant stating the gross amount of annual business revenue reported to the Internal Revenue Service for the business or businesses which derive income from the lease parcel.
- c) Any other information the DMLW determines to be necessary to obtain a clear and detailed understanding of the commercial operations occurring on or being facilitated by the lease parcel. This may include copies of all brochures and promotional materials; the total number of employees residing on the lease site; the total number of non-paying guests served at the site for promotional purposes; the maximum number of employees and guests on-site at any one time; the total number of paying guests served on the lease site; the retail sales price for services; and number of days each guest was served. The lessee shall immediately make all necessary financial records available and shall fully cooperate with an independent audit by state auditors to verify any particular annual report submitted, if the DMLW in its discretion determines that verification is necessary. At the DMLW's discretion, the annual reporting requirement may be adjusted, temporarily suspended, or reinstated as appropriate.

Registration of Commercial Activities: Prior to beginning seasonal operations each calendar year covered under this lease, the applicant shall register commercial recreation activities on the DNR's Commercial Recreation Day Use Registration website at <http://dnr.alaska.gov/mlw/commrec/>. The purpose of this requirement is to allow the DNR to collect information about where commercial day uses of state land are occurring, how many clients are recreating on state land, and the type of activity that is occurring. The applicant will not be charged an additional registration for reporting commercial recreation activities authorized by the proposed lease.

Performance Guaranty: Performance guaranties provide a means to pay for corrective action if a lessee fails to comply with the lease requirements. The amount of the performance guaranty is based on the scope and the nature of the activity and the potential cost of restoring the site. A performance guaranty in the amount of \$4,200.00 is held for the existing lease. The DMLW determined the performance guaranty amount required for the proposed lease is **\$14,000.00**. The amount was calculated according to the size and composition of improvements to be removed at the end of the lease.

Performance guaranties are subject to periodic adjustments being made during the term of the authorization to address increases or decreases in the costs of rectifying problems and rehabilitating state land due to inflation, changes in the level or nature of development, or other appropriate factors.

Insurance: The applicant shall secure or purchase at its own expense, and maintain in force at all times during the term of this lease, the following policies of insurance to protect both themselves and the State of Alaska (its officers, agents and employees):

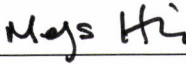
Commercial General Liability Insurance: Such policy shall have minimum coverage limits of no less than \$1,000,000 combined single limit per occurrence. If the applicant's policy contains higher limits, we shall be entitled to coverage to the extent of such higher limits. Certificates of Insurance must be furnished to us prior to the issuance of this lease and must provide for a notice of cancellation, non-renewal, or material change of conditions in accordance with policy provisions. The applicant must provide for a 30-day prior notice to the State of Alaska before they cancel, not renew or make material changes to conditions to the policy. Failure to furnish satisfactory evidence of insurance, or lapse of the policy, is a material breach of this lease and shall be grounds, at the option of the State of Alaska, for termination of the lease.

Workers' Compensation Insurance: The applicant shall provide and maintain, for all its employees, Workers' Compensation Insurance as required by AS 23.30.045. Where applicable, coverage must comply with any other statutory obligations, whether federal (i.e. U.S.L.&H. or Jones Act) or other state laws in which employees are engaged in work on the leased premises. The insurance policy must contain a waiver of subrogation clause in favor of the State of Alaska.

All insurance policies shall comply with, and be issued by, insurers licensed to transact the business of insurance under Alaska Statute, Title 21. The policy shall be written on an "occurrence" form and shall not be written as a "claims made form unless specifically reviewed and agreed to by the Division of Risk Management, Department of Administration. The State of Alaska must be named as an additional named insured on the policy with respect to the operations of the applicant on or in conjunction with the leased premises, referred to as **ADL 107159**.

Recommendation and Decision

Adjudicator Recommendation: Based on the information provided by the applicant and other agencies, as well as review of existing case file documents, planning documents, statutes, and regulations, I recommend approving a 25-year lease authorizing the applicant use of 3.5 acres of state land for a commercial recreation operation as described above. I recommend distributing this decision for public notice in order to provide the public an opportunity to review and comment.

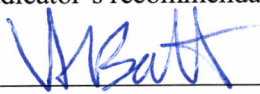


Megs Harris, Natural Resources Specialist

4.19.18

Date

Unit Manager Concurrence: I reviewed this decision and attached documents and agree with the adjudicator's recommendation.



Virginia Batts, Natural Resources Manager

April 20, 2018

Date

Regional Manager Decision: It is the finding of the Division of Mining, Land & Water, Southeast Region Land Office that this decision can be distributed for public notice and comment.

Lee V. Cole J.
Lee Cole, Acting Southeast Regional Manager

April 20, 2018
Date

Attachments

- Attachment 1. Development Plan
- Attachment 2. Proposed Lease (Standard Lease and Additional Stipulations) - draft
- Attachment 3. Proposed Entry Authorization - draft

Public Notice, Final Decision, and Appeal Process

In accordance with the provisions of AS 38.05.945, public notice seeking comments on this preliminary decision will be given to Central Council of the Tlingit and Haida Indian Tribes, Lynn Canal Conservation, the Lynn Canal Fish and Game Advisory Committee, Sealaska Corporation, the Municipality of Skagway, Skagway Village, Southeast Alaska Soil and Water Conservation District, U.S. Army Corps of Engineers, U.S. Forest Service, and the National Parks Service. The DMLW will request that the Skagway Post Office post the notice, and it will be published on the Alaska Online Public Notice website at www.state.ak.us/OnlinePublicNotices/.

The public is invited to comment on this preliminary decision. In order to ensure consideration, comments must be received in writing by the Department of Natural Resources, Division of Mining, Land & Water by mail at PO Box 111020, Juneau, Alaska 99811-1020; by fax at (907) 465-3886; or by electronic mail to megs.harris@alaska.gov by the close of business on May 21, 2018. Please include your mailing address and telephone contact. In order to establish appeal rights regarding this decision, you are required by law to meaningfully participate in the decision process by commenting on the decision, in writing, prior to the comment deadline. Following the deadline, all timely written comments will be considered, and the DNR may modify this decision based on public comments received.

If the DNR determines that public comments in response to this notice indicate the need for significant changes to the decision, additional public notice will be given. If no significant changes are required, the preliminary decision, after any necessary minor changes, will be issued as a final decision. A copy of the final decision, along with instructions on filing an appeal, will be sent to all persons who comment on the preliminary decision. Persons who do not submit written comments during the comment period will have no legal right to appeal the final decision.