

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

Preliminary Decision  
ADL 108949  
Haida Energy, Inc.  
Application for Lease

This preliminary decision is the State of Alaska's preliminary best interest finding regarding a proposed disposal of interest of state-owned land. The public is invited to comment on this preliminary decision. The deadline for commenting is 5:00 pm **May 24, 2019**. Please find the Public Notice section at the end of this decision for requirements related to submitting comments for consideration.

### Requested Action

Alaska Power and Telephone Company ("AP&T") submitted an application on behalf of Haida Energy, Inc. ("applicant") on December 3, 2018, requesting a lease of state-owned tide and submerged land ("state land") underlying Copper Harbor for a 55-year term without competitive bidding under the authority of AS 38.05.810(e). The purpose of the requested lease is to authorize indefinite placement and maintenance of existing and new marine access improvements for the Híilangaay Hydroelectric Project. The requested improvements are within two unsurveyed tracts, together consisting of approximately .61 acres.

The first tract is approximately .4770 ac. (20,777.6 sq. ft) and contains existing access improvements, including:

- A barge landing area, consisting of a concrete-plank ramp with rock foundation structure laid on geotextile fabric over existing beach gravel and riprap along the perimeter edges of ramp and foundation fill (63 cu. yd. of material). These improvements are currently authorized by a permit issued to AP&T, LAS 32292, effective from June 15, 2018 through June 14, 2020.

The second tract is approximately .1376 ac. (5996 sq. ft) and would contain new access improvements that the applicant would construct, including:

- A permanent dock, consisting of a wood float, (40 ft. x 20 ft.= 800 sq. ft.), three 24-in. steel pilings, and a gangway (6 ft. x 70 ft. = 420 sq. ft.) connecting to a bulkhead and approach on uplands.

The applicant's development plan is included as **Attachment 1**.

### Proposed Action

The Department of Natural Resources ("DNR"), Division of Mining, Land and Water ("DMLW"), Southeast Regional Land Office ("we") are proposing to issue an entry authorization and lease to the applicant without competitive bidding for a 31-year term under the authority of AS 38.05.075(c). Attachment 1 depicts and describes the proposed use of land; however, final acreage will be determined following a survey. The proposed entry authorization and lease documents are included as **Attachment 2**.

Research concerning the proposed lease and any changes from the applicant's request are discussed below. This preliminary decision may be modified after the public notice period and consideration of comments.

### **Scope of Decision**

The scope of this administrative review includes: (1) reasonably foreseeable, significant effects of the uses to be authorized; (2) applicable statutes and regulations; (3) facts pertaining to the land or resources; and (4) materials supporting the determination that issuing the authorization will best serve the interest of the State of Alaska ("state") (AS 38.05.035(e)(1)-(2)).

### **Authority**

AS 38.05.035, AS 38.05.070, AS 38.05.075(c)

### **Administrative Record**

The administrative record for the proposed action consists of the Constitution of the State of Alaska, the Alaska Land Act as amended, applicable statutes and regulations referenced herein, the *Prince of Wales Area Plan* (Revised October 1998) and the *Prince of Wales Island Area Plan Amendment* (2008), and the casefile for the application serialized by the DNR as ADL 108949.

### **Location Information**

**MTRS:** Section 4, Township 77 South, Range 85 East, Copper River Meridian, Alaska; approximately .61 acres, more or less.

**Geographic Description:** Two unsurveyed tracts of tide and submerged land, together consisting of approximately .61 acres, along the northern shore of Copper Harbor, within Hetta Inlet, Prince of Wales Island;  $\approx 55.2161^{\circ}\text{N}$ ,  $132.6133^{\circ}\text{W}$  (WGS 84).

**Adjacent Upland Description:** The proposed leasehold is seaward and adjacent to U.S. Mineral Survey 419-B. The adjacent upland parcels are described by name as follows: High Ore, Green Mountain, Maine, and Monterey mill sites.

### **Other Land Information**

<u>Municipality:</u>	Unorganized Borough
<u>Recording District:</u>	Ketchikan Gateway Borough
<u>Regional Corporation:</u>	Sealaska Corporation
<u>Village Corporation:</u>	Haida Corporation
<u>Federally Recognized Tribes:</u>	Hydaburg Cooperative Association, Central Council of Tlingit & Haida Indian Tribes of Alaska

**Title**

The state holds title to lands beneath tidally-influenced and navigable waterways within its jurisdiction, including lands underlying Copper Harbor in the section referenced above, based on the Equal Footing Doctrine, Submerged Lands Act of 1953, and Alaska Statehood Act. Title is subject to valid existing rights, including reservations, easements, and exceptions in the federal conveyance, and in acts authorizing the issue thereof, easements, rights-of-way, covenants, conditions, reservations, notes on the plat, and restrictions of record, if any. Management is subject to the Public Trust Doctrine.

**Public Trust Doctrine:** In accordance with AS 38.05.126, the proposed lease will be subject to the principles of the Public Trust Doctrine; specifically, the right of the public to use navigable waterways and the land beneath them for navigation, commerce, fishing, hunting, protection of areas for ecological studies, and other purposes. These rights must be protected to the maximum extent practicable while allowing for the development of this project. As such, we reserve the right to grant other authorizations for the use of the subject area consistent with the Public Trust Doctrine.

**Adjacent Landowners**

According to the Híilangaay Hydropower Lease Agreement, recorded in the Ketchikan Recording District as Document No. 2016-002190-0 on August 15, 2016, the applicant leases the surface estate of adjacent uplands from Sealaska Corporation. This lease, dated August 8, 2016, replaced a previous lease between the two parties, dated December 16, 2015, and is to expire December 14, 2070.

**Third Party Interests**

There are no known third-party interests within the boundaries of the state land which is proposed for lease.

**Planning and Classification**

State land in the subject area is managed according to the provisions outlined in the *Prince of Wales Island Area Plan* and the *Prince of Wales Island Area Plan Amendment* (“POWIAPA”). More specifically, the proposed site is within Regional Management Unit 19: Hydaburg/Cordova Bay; Management Unit HT-64 (POWIAPA, Map 6).

**Management Unit HT-64: Other Region 19 Tidelands**

Designation and Classification: This unit is designated “General Use,” which converts to the classification of “Resource Management Land.”

Management Intent: “Manage the unit for multiple uses, while protecting important habitats and resources. Protect heritage sites, anchorages, estuarine wetlands, waterfowl/shorebird wintering and spring and fall concentration areas, waterfowl nesting/molting areas, herring spawning areas, dense eelgrass beds, anadromous streams and salmon migration routes. Consult ADF&G concerning harvest areas and specific purse seine hook-off locations as described, prior to authorization issuance and maintain harvest opportunities” (POWIAPA, c 2 pp. 93).

Since the land within the proposed site is designated as “General Use” and classified as “Resource Management Land,” the proposed use of land is allowed. The ADF&G reviewed the subject application

materials and did not indicate concerns relating to habitat and harvest resources. In addition, the Army Corps of Engineers has included detailed mitigation measures in its authorization to protect the outmigration of salmonids and to protect marine mammals during construction (pile driving, rock socketing, excavation, and fill) of the dock facility.<sup>1</sup>

### **Traditional Use Finding**

Before a lease of state land is authorized in the unorganized borough, we consider the potential effects of the lease on the density of the population in the vicinity and potential conflicts with traditional uses of the land (AS 38.05.830). After due consideration, we do not anticipate the proposed lease to significantly influence or affect the density of the population in the vicinity, nor do we anticipate the proposed use of state land to conflict with traditional uses. If information is provided during the public comment period that clearly demonstrates otherwise, we may modify this decision.

### **Access**

The applicant's physical and legal access to the proposed lease site is over tide and submerged lands underlying Copper Harbor. The applicant may also access the site over uplands, which the applicant leases from Sealaska Corporation.

**Access to and along Public Waters:** The public has a constitutional right to free access to, and use of, navigable and public waters of the state (AS 38.05.126(a)). As such, we reserve public access easements to and along navigable and public waters before leasing state land underlying or adjacent to these waters (AS 38.05.127). Unless comments and other information submitted to the DMLW provide justifiable and convincing evidence to do otherwise, the proposed leasehold will be subject to a 50-foot public access easement seaward of the line of mean high water.

### **Reservation of Mineral Estate**

The state, in this decision, reserves unto itself the mineral estate, including oil and gas, and the rights expressed in the reservation clause of AS 38.05.125, that being the right to reasonable access to the surface for purposes of exploring for, developing, and producing the reserved mineral resources (section 6(i) of the Alaska Statehood Act). Exploration and development, if any, which could occur, would be consistent with AS 38.05.130 and other applicable statutes and regulations.

### **Mineral Orders**

The proposed leasehold does not fall within the areas delineated in a mineral closing order (Mineral Order No. 1080, POWIAPA, App. B). Neither a mineral closing order nor a leasehold location order is necessary or appropriate for the proposed use of land.

### **Hazardous Materials and Potential Contaminants**

The Department of Environmental Conservation ("DEC"), Spill Prevention and Response's Contaminated Sites database indicates that a contaminated site, referred to as the Copper Mount Smelter Site, exists within Copper Harbor. According to the database, the Copper Mount Smelter, located east of the proposed site at approximately 55.217099 °N, 132.610681 °W (NAD83), processed copper ore from

<sup>1</sup> See October 7, 2016 letter from the National Marine Fisheries Service to the Army Corps upon completion of consultation with the Corps under section 7(2)(a) of the Endangered Species Act.

nearby Copper Mountain in the early 1900s (Hazard ID No. 26656). Copper slag remains in the marine intertidal area to a depth of at least 12-18 feet, and elevated concentrations of arsenic, cadmium, copper, lead, mercury, and selenium have been found in sediments.

In order to minimize resuspension of potentially-contaminated sediment into the water column, a no-wake zone will be required within Copper Harbor. In the course of the proposed land use, the applicant would not otherwise generate, use, store, transport, or dispose of hazardous materials and/or hydrocarbons.

### **Agency Review**

We distributed the subject application materials to state agencies for a review and comment period beginning December 20, 2018 and ending January 20, 2019. The following agencies were included in the review: ADFG, Division of Habitat and Division of Wildlife Conservation; DEC, Commissioner's Office and Water Division; and DNR, Division of Parks and Outdoor Recreation, Office of History and Archaeology.

**Agency Review Comment and Response:** We received two comments from agencies. These comments and our responses to them are summarized as follows:

1. Alaska Department of Fish and Game ("ADF&G"), Division of Habitat, December 26, 2018

The ADFG does not have significant concerns about the proposed land use. The project does not require a fish habitat permit from the ADF&G.

*Response.* We recognize that the ADF&G does not have concerns related to this project, including any related to fisheries, harvest, and habitat. No response is required.

2. Alaska Department of Conservation ("DEC"), Contaminated Sites Program, January 22, 2019

The DEC, Contaminated Sites Program has no objection to the proposed land use. The Contaminated Sites Program would appreciate the continuance of the applicant's practice of minimizing vessel speeds and implementing a no-wake zone in Copper Harbor in order to minimize resuspension of possible contaminated sediment in the area.

*Response.* We have included a stipulation requiring a no-wake zone in the proposed authorization.

### **Background**

AP&T and Haida Corporation have pursued development of a hydroelectric project on nearby uplands along Reynolds Creeks since the late 1990s. Haida Corporation received a FERC license for the Reynolds Creek Hydroelectric Project, now known as Hiilangaay Hydroelectric Project, in 2000 (P-11480). Created in 2009, Haida Energy, Inc. is a joint venture between Haida Corporation and AP&T. The Hiilangaay Hydroelectric Project is to serve the communities of Craig, Klawock, Coffman Cove, Hollis, Hydaburg, Thorne Bay, Kasaan, and Naukati on Prince of Wales Island.

We received the subject application materials on December 3, 2018. This application package supersedes application materials previously submitted for cases that were subsequently closed, serialized as ADL 108907, ADL 108740, ADL 108583, and ADL 106288.

**Related DMLW Cases:** Cases relating to the use of state land or resources associated with the Híilangaay project are listed below.

Copper Harbor (7 cases): The following cases refer uses of land or resources within Copper Harbor or the immediate vicinity.

- (1) *LAS 32292* refers to a land use permit issued to AP&T for the marine access ramp subject to the proposed lease (exp. June 14, 2020); and
- (2) *LAS 32585* refers to a land use permit issued to AP&T for two anchor buoys and a temporary float, which are to be removed before expiration of the permit (exp. December 31, 2021).

Other cases relating to previous applications for land use permits or expired land use permits for temporary access improvements at Copper Harbor include *LAS 32120*, *LAS 31961*, and *LAS 31753*. Cases relating to applications or permits for water rights in the area include *LAS 29341* and *LAS 19845*.

**Unauthorized Use:** On February 9, 2017, the DMLW opened a case, *ADL 108740*, documenting Haida Energy Inc.'s use of a float (960 sq. ft.) and gangway (360 sq. ft.) on state land in Copper Harbor without land use authorization. The DMLW visited the site in April 2017 and found that the float and gangway had been removed but a mooring was present.

Híilangaay Hydroelectric Project (6): The following cases refer to other valid land use authorizations issued by the DMLW for the Híilangaay Hydroelectric Project:

- (1) *ADL 108586* refers to an entry authorization issued to the applicant for a lease allowing access facilities in Deer Bay (entry authorization expires June 29, 2020; lease would expire in 2050);
- (2) *ADL 106437* refers to an entry authorization issued to the applicant for an easement allowing a power transmission line over Hetta Inlet (exp. April 30, 2019);
- (3) *LAS 31750* refers to a land use permit issued to AP&T for use of an existing barge ramp at Saltery Point (exp. June 22, 2022);
- (4) *LAS 31660* refers to a land use permit issued to AP&T for two anchors and a float north of Copper Harbor in Hetta Inlet (exp. April 22, 2022);
- (5) *LAS 31659* refers to a land use permit issued to AP&T for two anchors and a float within Deer Bay (exp. April 27, 2022); and
- (6) *LAS 31658* refers to a land use permit issued to AP&T for undeveloped beach landing at Jumbo Island (exp. April 27, 2022).

**Related Non-DMLW Authorizations:** Authorizations relating to the proposed use of land that were issued by other regulatory agencies are listed below. This list does not include all authorizations that may have been issued or may be required.

US Army Corps of Engineers: POA-1995-127

Federal Energy Regulatory Commission: FERC No. 11480

National Marine Fisheries Service: NMFS AKR-2016-9585

Regulatory Commission of Alaska: Certificate of Public Convenience and Necessity No. 760, dated August 24, 2015

## **Discussion**

The proposed lease would authorize improvements to support the Híilangaay Hydroelectric Project. This project will provide valuable services to the communities of Craig, Klawock, Coffman Cove, Hollis, Hydaburg, Thorne Bay, Kasaan, and Naukati on Prince of Wales Island. The services provided will be critical to the vitality of these communities. Due to the value of the Híilangaay Hydroelectric Project to the surrounding communities, the DMLW finds that it is in the best interest of the state to authorize the proposed marine access improvements to support and maintain the project.

## **Recommended Authorization Terms and Deliverables**

**Lease Type:** The applicant applied for a lease under the authority of AS 38.05.810(e); however, the proposed lease would be issued under the authority of AS 38.05.075(c). The applicant is eligible for a non-competitive lease under both AS 38.05.810(e) and AS 38.05.075(c); however, a lease under AS 38.05.075(c) would provide the applicant with greater flexibility and increased ability to accommodate a sublease or assignment request and requests to change the primary use of the proposed leasehold.

The proposed lease agreement document is included in Attachment 2. This document is the standard DMLW Lease Agreement (form 102-111, revised May 2001) with additional stipulations.

**Lease Term:** We recommend issuance of a 31-year lease to the applicant for the use and construction of existing and new marine access improvements. This lease term would coincide with the expiration of the authorization for the neighboring Deer Bay marine access facility held by the applicant (ADL 108856), and the termination of the FERC license issued for the project, both of which will expire in 2050.

**Entry Authorization:** The proposed entry authorization allows the applicant to develop and use the proposed access improvements, while completing a survey and appraisal of the proposed leasehold. The proposed entry authorization is for a term of three years and would be issued after the final decision is made effective. Once the conditions of the proposed entry authorization are met, the proposed lease will be issued. The total lease term is inclusive of the term of the entry authorization; in other words, the lease would expire in 2050 regardless of how long the entry authorization period lasts.

**Development Plan:** The development plan attached to this decision (Attachment 1) is under consideration. This plan is incorporated into the proposed entry authorization by attachment; however, this plan may need to be updated if changes to the development plan are approved by the DMLW.

We must approve revisions to this plan, in writing, before any construction, deconstruction, replacement of infrastructure, or change in use occurs. We reserve the right to require additional agency review and/or public notice for changes that we deem to be beyond the scope of this decision.

**Performance Guaranty:** A performance guaranty is a way to incentivize performance of the conditions of the entry authorization and the lease, as well as a means to pay for corrective action

should the applicant fail to comply with the authorization 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. The DMLW has determined that the performance guaranty for the subject lease will be **\$22,000.00**.

Performance guaranties are subject to periodic adjustments during the term of the authorization. These adjustments allow us to address any changes 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:** Should the proposed lease be issued, the applicant would be required to secure or purchase, at its own expense, and always maintain, the following policies of insurance to protect both itself and the state (its officers, agents and employees):

Commercial General Liability Insurance Policy: Such a 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, the state 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 before canceling, not renewing, or making material changes to conditions to the policy. A lapse of the policy or failure to furnish satisfactory evidence of insurance would be a breach of the lease and would be grounds, at the option of the state, 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.

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 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 108949**.

**Survey:** Prior to the issuance of a lease, the applicant must provide a professionally-accomplished Alaska Tideland Survey that meets the standards of the DMLW Survey Section. The applicant would complete this requirement during the term of the proposed entry authorization at its own expense. The measurements identified in this survey will be used to accurately calculate the total acreage of the proposed leasehold.

**Appraisal:** Land may not be leased unless it has been appraised within two years before the lease begins (AS 38.05.840(a)). The applicant must provide a fair market value appraisal that has been



prepared by a licensed appraiser and approved by the DMLW Appraisals Unit. The cost of the appraisal shall be borne by the applicant. The applicant would complete this requirement during the term of the proposed entry authorization at its own expense.

### **Compensation**


Annual Rent: Compensation will either be the minimum rent, \$1,000.00, or market rent determined by the required appraisal, whichever is greater. Until a fair market value appraisal has been completed, which would occur during the term of the proposed entry authorization, the fee would be the minimum lease fee of \$1,000.00 (11 AAC 58.410(b)). If it is determined that market rent is greater than \$1,000.00, the applicant would be responsible for payment of the difference between market rent and payments made during the term of the entry authorization.

Periodic Rate Adjustment: In accordance with AS 38.05.105, the annual rental payment will be subject to adjustment at five-year intervals after the issuance of the lease.


**Subleases:** If the proposed lease is approved, subleasing may be permissible through AS 38.05.095; however, we must first approve, in writing, any potential sublease and may conduct further agency review and/or public notice before making a determination about the appropriateness of a sublease. The DMLW will require an annual sublease fee, which will not be less than 25% of the annual fee paid to the proposed lessee by the sublessee.


**Reclamation:** In accordance with AS 38.05.090, the leasehold must be restored to a good and marketable condition within 120 days after termination of the proposed lease.

**Recommendation and Preliminary Decision:** Based on the information provided by the applicant and other agencies, as well as review of planning documents, statutes, and regulations, I recommend approving a 31-year lease to the applicant authorizing construction and maintenance of a marine access facility as described in Attachment 1. I recommend proceeding to public notice for the purpose of providing the members of the public and those entities identified in AS 38.05.945 an opportunity to review this preliminary decision and submit comments.


  
\_\_\_\_\_  
Jacob Hall, Acting Natural Resource Specialist III

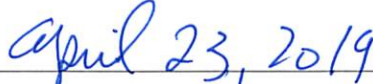
  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Chris Carpeneti, Natural Resource Manager I

  
\_\_\_\_\_  
Date

**Regional Manager Decision:** It is the determination of the Division of Mining, Land & Water that it may be in the state's best interest to issue a 31-year lease to the applicant, as described above. This preliminary decision shall proceed to public notice.

  
\_\_\_\_\_  
Lee V. Cole, Jr., Southeast Regional Manager

  
\_\_\_\_\_  
Date

## ATTACHMENTS:

Attachment 1. Development Plan

Attachment 2. Proposed Entry Authorization and Lease Agreement

### Public Notice

Pursuant to AS 38.05.945, this preliminary decision will be advertised for a 30-day public comment period, starting on April 24, 2019. In addition, post office(s) located near the proposed leasehold will be requested to post the notice (AS 38.05.945(b)(3)(C)). The notice will also be published on the state's Online Public Notice website, located at <https://aws.state.ak.us/OnlinePublicNotices/Default.aspx> (AS 38.05.945(b)(3)(B)). In accordance with AS 38.05.946, a municipality or a corporation entitled to receive notice under AS 38.05.945(c) may hold a hearing within 30 days after the receipt of the notice.

The public is invited to comment on this preliminary decision. All comments received during the public comment period will be considered in the final decision. If public comments result in significant changes to the preliminary decision, additional public notice may be given. A copy of the final decision, along with instructions on filing an appeal, will be sent to all persons who comment on this preliminary decision. To be eligible to appeal, a person affected by the final decision must provide written comments during the public comment period (AS 38.05.035(i)).

**Written comments about this project must be received in this office no later than  
5:00 PM on May 24, 2019 to be considered.**

To submit comments please choose one of the following methods:

Mail: Department of Natural Resources  
Division of Mining, Land and Water  
Southeast Regional Land Office  
ATTN: Jacob Hall  
PO Box 111020  
Juneau, Alaska 99811-1020  
Email: [jacob.hall@alaska.gov](mailto:jacob.hall@alaska.gov)  
Fax: (907) 465-3889

Questions about this proposal can be directed to Jacob Hall, Natural Resource Specialist, at (907) 465-3402.