

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

Southeast Regional Office

Preliminary Decision

ADL 108159

McNamee Ventures, LLC

Application for Lease

AS 38.05.075(c)

Executive Summary

This Preliminary Decision (PD) is the State's preliminary best interest finding regarding a proposed lease of state tide and submerged land. This lease is to resolve the unauthorized use documented in the Agreement to Resolve Unauthorized Use on State Land (Doc No. 2018-000397-0). The prospective authorization is for a 25-year non-competitive lease of an existing breakwater near Halibut Point Road, approximately 5 miles north of Sitka, Alaska. The lease will be approximately 50 feet wide by 200 feet long, centered on the existing breakwater, and adjacent to an existing dock (ADL 65550) contained within Alaska Tideland Survey (ATS) 979. The final size of the lease authorization will be determined by an approved as-built survey. Figure 1 below displays the proposed lease area denoted in yellow. The State intends to authorize the proposed lease contingent upon the responses received during the public notification period and evaluation of the State's interest, contained herein. The public is invited to comment on this PD. The deadline for commenting is 5:00 pm February 22, 2021. Please see the Public Notice section of this decision for requirements related to submitting comments for consideration. Only the applicant and those who comment have the right to appeal the Final Finding and Decision (FFD).



Figure 1: The proposed non-competitive lease (in yellow) over the existing breakwater approximately 5 miles north of Sitka on Halibut Point Road.

Requested Action

Kevin McNamee, doing business as McNamee Ventures (“applicant”), applied for a lease on June 26, 2012, requesting to lease a tract of state-owned tide and submerged land for continued use of an existing breakwater directly adjacent to an existing dock contained within ATS 979. McNamee Ventures is a commercial recreation business owned by the applicant. A development diagram is included as Attachment 1.

Existing Improvements:**Breakwater construction:**

- 150’x10’ high density polyethylene (HDPE) pipe
- Four (4) steel galvanized pilings (12”)
- Containing approximately 1,500 square feet

The total area requested by the applicant is approximately 0.2 acres. Final acreage will be determined by an approved survey of the leasehold.

Proposed Action

The Division of Mining, Land & Water (DMLW) proposes to issue a 25-year non-competitive lease for the continued use and maintenance of the existing breakwater.

Scope of Decision

The scope of this decision is limited to the determination of whether it is in the State’s best interest to issue 25-year non-competitive lease to the applicant. The administrative review for this authorization is defined by AS 38.05.035(e)(1) – (2) and is limited to (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) issues that are material to the determination.

Authority

This lease application is adjudicated pursuant to AS 38.05.035(b)(1) and AS 38.05.035(e) Powers and Duties of the Director, AS 38.05.070 Generally, AS 38.05.075 Leasing Procedures, and AS 38.05.945 Notice. The authority to execute the PD, Final Finding and Decision (FFD), Entry Authorization (EA), and the lease has been delegated to the Regional Managers of DMLW.

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 here-in, the Northern Southeast Area Plan, 2003 (NSAP) and other classification references described herein, and the casefile for the application serialized by DNR as ADL 108159.

Location Information**Geographic Location:**

The parcel is located approximately 5 miles north of Sitka, Alaska, on state-owned tide and submerged land near the eastern shore of Sitka Sound.

Property Description:

The proposed lease is located within Section 09, Township 055 South, Range 063 East, Copper River Meridian, and more particularly located seaward and adjacent to ATS 979, as described on Sitka Recording District Plat No. 86-06. The proposed leasehold contains approximately 0.2 acres, more or less.

Other Land Information:

Municipality: City and Borough of Sitka (CBS)

Regional Corporation: Sealaska Corporation

Village Corporation: Shee Atiká, Inc.

Federally Recognized Tribe: Sitka Tribe of Alaska

Approximate Coordinate Location: 57° 6' 46.44" N, 135° 23' 46.68" W (DMS)

Title

The State of Alaska holds title to lands beneath tidally influenced and navigable waterways within its jurisdiction, including lands underlying Sitka Sound in the section referenced above, on the basis of the Equal Footing Doctrine, the Submerged Lands Act of 1953 and AS 38.04.062 (Identification of State Submerged Lands).

Adjacent Landowners

The following lands are functionally connected to the subject land or are in the immediate vicinity:

(ATS 979): Municipal tideland previously conveyed to CBS and currently owned by the applicant.

(ATS 1559 Tract D): Municipal tideland conveyed to CBS.

Third Party Interests

The proposed leasehold is within the CBS and is subject to local planning and zoning ordinances. The Borough will be notified of this Preliminary Decision.

Planning and Classification

State land in the proposed subject area is managed in accordance with policies outlined in the 2002 NSAP and is located within the Sitka Sound Tidelands Resource Management Zone (SSTRMZ) in the Tideland Unit Boundary BT-127 (NSAP, 3-197). The management intent for tidelands adjoining uplands with nonresidential use or zoning is designated for Waterfront Development (Wd), which converts to Waterfront Development Land as the land classification.

Management Intent:

Tidelands in BT-127 are designated Shoreland Development (Sd) in those areas where the adjoining uplands are residentially used or zoned and Waterfront Development (Wd) in areas of industrial use or zoning. Marine uses necessary to these uses are appropriate (NSAP 3-273).

The management intent for SSTRMZ is twofold:

- to protect the sensitive fisheries, marine mammal concentration areas, shorebird and waterfowl concentration areas, anadromous streams, and areas of estuarine wetlands, as well as brown bear and deer winter concentration areas in intertidal areas and,
- to protect the traditional, recreational, and personal use activities, including public access to areas important for such activities (NSAP 3-124).

Classification:

Waterfront Development Land – Land classified waterfront development is tideland, submerged land, or shoreland that is suitable to be used for commercial or industrial activities such as fish processing, aquatic farming, mineral and log transfer facilities, or commercial recreation (11 AAC 55.215).

Designation:

Waterfront Development – Wd – Use of tidelands, submerged lands, or shorelands for water-dependent or water-related facilities, usually for industrial or commercial purposes. Waterfront development includes piers, wharves, harbors, mineral transfer facilities, seafood processing facilities, commercial recreation facilities, and other resource development support facilities except for activities related to forestry, which is covered by the Forestry designation (NSAP 3-5).

The CBS commercial zoning does not appear to extend seaward beyond the mean high-water line. Therefore, the state's intent to manage the tide and submerged lands containing the proposed lease area for Waterfront Development, in accordance with the SSTRMZ and the associated land classification applies to the proposed lease as designated by the NSAP Management Unit BT-127. The management intent and land designation for this area do not prohibit the installation of a breakwater. The management intent is to protect the sensitive fisheries, marine mammal concentration areas, shorebird and waterfowl concentration areas, anadromous streams and areas of estuarine wetlands, and brown bear and deer winter concentration areas in intertidal areas, as well as protect the traditional, recreational, and personal use activities, including public access to areas important for such activities. The proposed lease is found to be consistent with Waterfront Development designation and classification because the breakwater assists in securing access for vessels to transport people and resources to and from uplands for commercial purposes. The proposed land use does not appear to conflict or require additional action relating to mineral orders. The CBS will be invited to review this preliminary decision and may submit comments regarding local planning and zoning, traditional uses, or other local governance matters.

Traditional Use Finding

This finding is not required since the proposed leasehold is located within an organized borough (AS 38.05.830). The CBS will be notified of this Preliminary Decision.

Access

The physical and legal access to the proposed lease site is via the tide and submerged lands of Sitka Sound, a navigable body of water. The site can also be accessed by the adjacent upland and dock, which are owned by the applicant.

Access Along Public Waters:

The site is located approximately 5 miles north of the City and Borough of Sitka within the Sitka Sound Tidelands Resource Management Zone. Pursuant to AS 38.05.126(a), the public has a constitutional right to free access to, and use of, navigable or public waters of the State of Alaska. Under 11 AAC 51.045 and AS 38.05.127, DMLW is required to reserve specific public-access easements to and along these waters. This leasehold appears to potentially be within 50 feet of the existing Mean High Water line. Unless comments and other information submitted to DMLW provide justifiable and convincing evidence to do otherwise, this disposal of state interest will be subject to a 50-foot public access easement seaward of the line of mean high water. A final determination of the easement will be determined by an approved survey of the leasehold.

Public Trust Doctrine

Pursuant to 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, DMLW is reserving the right to grant other authorizations to the subject area consistent with the Public Trust Doctrine.

Reservation of Mineral Estate

In accordance with section 6(i) of the Alaska Statehood Act and AS 38.05.125, the state, in this decision, reserves unto itself the mineral estate, including oil and gas, and the rights expressed in the reservation clause of the statute, that being the right to reasonable access to the surface for purposes of exploring for, developing and producing the reserved mineral resources. 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 an Administrative Mineral Closing Order (MCO). Neither an MCO nor a leasehold location order is necessary or appropriate for this lease.

Hazardous Materials and Potential Contaminants

No hazardous materials will be stored within the proposed leasehold. No other hazardous materials/contamination are known to exist on the proposed site.

Agency Review

An agency review was conducted on February 10, 2020. The deadline for agency comments was March 11, 2020. No comments were received during the 30-day agency review period.

Background

- 2004 - A visibly dilapidated breakwater is documented in a NOAA Shorezone photograph.
- 2012.07.19 - Lease application submitted by Tina McNamee doing business as Island View Resort Charters.
- 2012 - Applicant renovated the breakwater, driving 3 steel galvanized pilings into state owned land and using an existing piling, also on state land, to secure the 10-foot by 150-foot high density polyethylene (HDPE) breakwater.
- 2017 - Kevin McNamee becomes 100% owner of Island View Resort Charters, LLC and McNamee Ventures, LLC. Mr. McNamee quitclaimed all ownership of associated parcels to McNamee Ventures, LLC. Therefore, McNamee Ventures is properly considered the lease applicant.
- 2018.03.27 – In response to continued use of the breakwater, the state issued an Agreement to Resolve Unauthorized Use of State Land (Doc No. 2018-000397-0) to McNamee Ventures, LLC. Based on an annual minimum rent amount of \$1,000, consistent with 11 AAC 58.410(b), the applicant received beneficial use of state land during the calendar years 2003 - 2018, in the amount of \$16,000. However, the application was submitted in 2012 to renovate the existing breakwater and had the state processed the application when it was received, the state would have required payment of back fees for the preceding six years. Therefore, the state received \$13,000 for use of state land through calendar years 2006-2018.
- 2018.12.07 - Payment received of \$1000 for use of state land through calendar year 2019.
- 2019.12.05 - Payment received of \$1000 for use of state land through calendar year 2020.

Discussion

The breakwater is used to secure access to vessels for the applicant's commercial recreation business. The continued use of the breakwater assists the applicant in promoting tourism opportunities for visitors and providing employment opportunities to Alaskans.

The breakwater construction is minimally invasive and poses no significant environmental risk to the area. A letter of permission (POA-2012-0585) was issued by the Army Corps of Engineers, indicating the 2012 piling installation and breakwater rehabilitation would not have significant individual or cumulative impact on environmental values, and should encounter no appreciable opposition. The SSTRMZ values and promotes the use of resources found in Sitka Sound and specifically states that the management intent is to preserve and protect recreational use and access to those resources (NSAP, 3-124).

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McNamee Ventures, LLC

It is in the best interest of the state to approve this request as it supports economic development, enhances public use, and promotes tourism which are all significant contributors to local economies and governments throughout Southeast Alaska.

An unauthorized use agreement (Doc No. 2018-000397-0) was issued to the applicant to resolve minimum annual rent back fees, paid to the state in association with using breakwater since at least calendar year 2006. The applicant has resolved the back fees and has agreed to pay any difference between the minimum amount collected and the amount calculated in this land use authorization decision for the entire use period dating back to calendar year 2006, as detailed in the unauthorized use agreement.

The existing breakwater, and the commercial recreation it supports, is consistent and compatible with the waterfront development and SSTRMZ management intent for the area, which both designate tide and submerged lands for commercial development and activities. Alaskans, visitors, and the State will benefit from the activities the breakwater supports. Given these considerations, the DMLW is proposing to issue a 25-year non-competitive lease of state land to the applicant, under AS 38.05.075(c), on the area occupied by the breakwater, the final lease area is contingent upon an as-built survey of the breakwater. The lease shall be subject to the standard DMLW Lease Agreement, Special Stipulations and the terms and conditions set forth therein (Attachment 2).

Development Plan

The Development Plan (DP) attached to this decision (Attachment 1) and dated June 15, 2012, is under consideration by DMLW. Should the proposed lease be granted, it is anticipated that the DP will need to be updated throughout the life of the lease as activities and/or infrastructure are added or subtracted. All updates must be approved, in writing, by DMLW before any construction, deconstruction, replacement of infrastructure, or change in activity will be authorized. DMLW reserves the right to require additional agency review and/or public notice for changes that are deemed by DMLW to be beyond the scope of this decision.

Entry Authorization

Pursuant to AS 38.05.075(f), DNR-DMLW will authorize the applicant entry onto state land through the issuance of an Entry Authorization (EA) to conduct the required survey and appraisal, described below. The proposed EA is for a term of two years and would be issued after the Final Decision becomes effective. Once the conditions of the EA are met, the lease will be issued. The total lease term is inclusive of the term of the EA.

Performance Guaranty

In accordance with AS 38.05.035, AS 38.05.860, and 11 AAC 96.060(a) Performance Guaranty, the applicant will be required to submit performance guaranties for the lease to incentivize performance of the conditions of the EA and the lease. This provides a mechanism for the state to ensure that the lessee shares any financial costs associated with noncompliance of the lease

agreement for site cleanup, restoration, and any associated costs after termination or expiration of the leases. The following bonds will be required.

\$3,160 Performance Bond:

Performance guaranties provide a means to pay for corrective action if the lessee fails to comply with the lease requirements. In accordance with AS 38.05.035(a)(4), the applicant will be required to submit a performance guaranty. 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. Performance guaranties are subject to periodic adjustments 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.

The amount of the performance guaranty would previously have been **\$6,320**. However, the DMLW recently withdrew guidance establishing this figure, and has instead made this figure the maximum bonding amount. Given that the breakwater is minimally invasive, the applicant has submitted back fees owed to the state for the prior use, and is seeking authorization for a long-term lease, DMLW has decided that imposing 50% of the maximum bonding amount is appropriate. Therefore, the applicant will be required to submit **\$3,160** in bonding.

Insurance

Consistent with AS 38.05.035 (a), to protect the State from liability associated with the use of the site, the applicant shall provide and maintain a comprehensive general liability insurance policy with the State of Alaska named as an additional insured party per the stipulations of the Lease Agreement. The applicant shall secure or purchase at its own expense, and maintain in force at all times during the term of this lease, liability coverage and limits consistent with what is professionally recommended as adequate to protect the applicant and the State, its officers, agents and employees from the liability exposures of ALL the insured's operations on state land. The insurance requirement may be adjusted periodically.

Survey

In accordance with AS 38.04.045, the applicant must complete a survey that meets the standards of DMLW's Surveys Section prior to lease issuance. The measurements identified in the approved survey will be used to accurately calculate the total acreage. The survey must be performed by a registered Land Surveyor under survey instructions issued by the Surveys Section. The applicant is responsible for the cost of the survey. The applicant shall submit an initial draft of the survey at least one year prior to the expiration of the EA. Survey of the existing breakwater shall include up to 25' from center of the breakwater to the North, East, South, and West directions. The lease shall adjoin to the boundary of ATS 979 if it is less than 25' from the center of the existing breakwater. Final acreage of the leasehold will be determined by survey.

Appraisal

In consultation with 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 cost of the appraisal shall be borne by the Applicant.

Compensation**Annual Land Use Fees:**

The annual land use fee shall be the minimum lease fee of \$1,000.00 as established in 11 AAC 58.410(b) until a fair market value appraisal has been completed. Once the appraisal has been completed and fair market value rent for the subject parcel has been determined, if the amount is less than \$1,000 per annum the annual fee shall remain at \$1,000 in accordance with 11 AAC 58.410(b). However, if it is determined from the appraisal that the fair market value for the subject parcel is greater than the minimum land use fee, then the annual land use fee will be adjusted to reflect this amount from the effective date of the lease. Additionally, the applicant will be responsible for the payment of any difference from payments made during 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.

Payment for Land Use without Authorization:

The applicant used state submerged land to renovate and secure a breakwater used in association with a commercial recreation business owned by the applicant on an adjacent dock prior to securing authorization. If it is decided that a lease will be issued, the annual land use fee determined by the approved appraisal. If the appraisal determines the annual land use fee is greater than the back fees charged through the unauthorized use agreement (Doc No. 2018-000397-0), the applicant will be charged the difference for each calendar year since 2008 of unauthorized use. Payment of these fees will be due as a deliverable for lease issuance.

Subleases

Subleasing may be permissible through AS 38.05.095, if the proposed lease is approved. All potential subleases must first be approved in writing by DMLW. DMLW may conduct further agency review and/or public notice before making a determination on the appropriateness of the proposed sublease. The sublease fee will not be less than 25% of the annual fee paid to the lessee by the sublessee.

Reclamation

In accordance with AS 38.05.090, the leasehold must be restored to a "good and marketable condition" as determined by DMLW within 120 days after termination of the lease.

Public Notice

Pursuant to AS 38.05.945, this PD will be advertised for a 30-day public comment period, starting on January 20, 2021. In addition, the post office(s) located near the proposed leasehold will be requested to post the notice pursuant to AS 38.05.945(b)(3)(C). The notice will also be posted on the State of Alaska Online Public Notice website pursuant to AS 38.05.945(b)(3)(B) located at: <https://aws.state.ak.us/OnlinePublicNotices/Default.aspx>. 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.

Comments

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

**Written comments about this project must be received in this office no later than
5:00 PM on February 22, 2021 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 Region Office
ATTN: Ryan Wilson
400 Willoughby Avenue, 4th Floor
PO Box 111020
Juneau, AK 99811-1020
Email: Ryan.Wilson@alaska.gov
Fax: (907) 500 - 9011

Questions about the lease portion of this project can be directed to Ryan Wilson at (907) 465-3405.


Signature page follows:

Adjudicator Recommendation

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 25-year lease to the applicant authorizing the applicant to continue using an existing breakwater on state owned tide and submerged land. The breakwater is adjacent to and associated with a dock owned by and used for the applicant's commercial business 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 and submit comments.



Ryan M. Wilson, Natural Resource Specialist

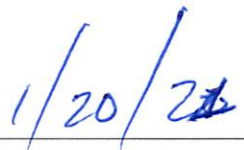


Date

Unit Manager Concurrence



Chris Carpeneti, Natural Resources Manager



Date

Preliminary 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 25-year lease to the applicant, as described above. This preliminary decision shall now proceed to public notice.



Lee V. Cole, Jr., Southeast Regional Manager

January 20, 2021

Date

ATTACHMENTS:

- Attachment 1. Development Plan
- Attachment 2. Standard Lease Agreement and Special Stipulations Draft
- Attachment 3. Entry Authorization Draft