



Preliminary Decision
Smart Construction Company, Inc.
ADL 106955 – Lease
AS 38.05.075(c)

I. Requested Authorization

Smart Construction Company, Inc. (applicant) requested, on December 6, 2002, a 25-year tideland lease for existing commercial improvements located on State tidelands adjacent to Lots 32 and 33 of Block 2, Gravina Island Subdivision and adjacent to and seaward of ATS 1477. ATS 1477, tidelands owned by the Ketchikan Gateway Borough (KGB), is seaward of Lot 34 (adjacent to Lot 33) of Block 2, Gravina Island Subdivision.

The facilities are used to tie and lay up barges for periodic moorage and maintenance. A diagram of all improvements is included in Attachment 1.

All requested improvements have already been placed on state land, below the line of MHW (14.5 feet). These improvements are:

Improvements Seaward of Lot 32:

- A portion (about 2/3) of a 6 ft. by 44 ft. steel walkway on four (4) steel piles set on concrete pads drilled into bedrock on the uplands – 176 ft²
- One 6 ft. by 60 ft. steel ramp attaching walkway to float – 360 ft²
- A 16.5 ft. by 134 ft. steel float – 2,211 ft², secured with two (2) steel piles
- A 6 in. diameter, 70 ft. long PVC marine outfall line to -12 ft. elevation.
- A 9 ft. by 55 ft. rip rap wall for bank stabilization comprised of approximately 60 cy of rock fill.
- Approximately 50 cy of existing rock fill at the common seaward corner of Lots 32 and 33.

Improvements Seaward of Lot 33:

- Approximately 0.2 acres of tidelands graded below MHW for access onto the barge grid.
- Approximately 100 cy of rock fill, including concrete blocks, within the bulkhead of the barge grid.
- An 8 in. diameter, 50 ft. long, PVC marine outfall line to -8 ft. elevation.
- Two (2) existing steel piling within the barge grid.
- One (1) existing free steel standing piling.

Use of State Tidelands Seaward of ATS 1477:

- The use of approximately 0.23 acres of State tidelands seaward of ATS 1477 for moorage of barges.

II. Proposed Authorization

We are proposing the issuance of a 25-year non-competitive lease under Alaska Statute 38.05.075(c) (lessee of adjacent lands) to Smart Construction Company, Inc. for the above referenced use of State owned tide and submerged lands.

III. Authority

AS 38.05.035, AS 38.05.070, AS 38.05.075 and Alaska Administrative Code 11 AAC 55 and 11 AAC 58.

IV. Administrative Record

Case file ADL 106955 is the administrative record for this case. Also incorporated by reference is tideland permit file LAS 19292, material sale file ADL 106070, easement application file ADL 106073, unauthorized use file ADL 107940, municipal conveyance file ADL 106985, and the Central/Southern Southeast Area Plan, dated November 2000. ACOE Permit No. D-1998-1094 and Army COE Permit No. M-900836 are also included by reference.

V. Scope of the Decision

The scope of administrative review for this authorization [AS 38.05.035(e)(1)–(2)] 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.

VI. Description

Geographic Location

The project is located in Tongass Narrows, a navigable body of water in Southeast Alaska, within the Ketchikan Gateway Borough, seven miles north of Ketchikan, USGS map Ketchikan B-6 within the SE 1/4 of the NE 1/4 of Section 8, Township 75S Range 90E CRM.

Legal Description

The proposed tidelands lease is located seaward of and adjacent to Lots 32 and 33 of Block 2, Gravina Island Subdivision, U.S. Survey No. 3840 and seaward of and adjacent to ATS 1477, which itself is seaward of and adjacent to Lot 34 of Block 2, Gravina Island Subdivision, U.S. Survey No. 3840.

The proposed lease area is depicted on Attachment 1 and will contain approximately 2 acres of tide and submerged land.

Other Land Information

i. Municipality: Ketchikan Gateway Borough

ii. Regional Corporation: Sealaska Corporation

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iii.Village Corporation: Cape Fox Corporation

iv.Federally Recognized Tribe: Ketchikan Indian Community

VII. Title

A DNR title report (RPT 9250) issued on November 16, 2016 from DNR's Realty Services reports that the State of Alaska holds title to the subject submerged and tideland estates of the project area under the Equal Footing Doctrine and the Submerged Lands Act of 1953.

Title is subject to valid existing rights, including reservations, easements, and exceptions in the U.S. Patent or other State or 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.

VIII. Planning and Classification

According to 11 AAC 55.040(c), "A classification identifies the primary use for which the land will be managed, subject to valid existing rights and to multiple use."

The November 2000 Central/Southern Southeast Area Plan (CSSEAP) identifies the project area as large tideland tract KT-65, Tidelands Adjacent to Ketchikan International Airport, Gravina Island, in Region 5. The site is designated as Waterfront Development (Wd). This designation converts to a classification of Waterfront Development Land. Intensive industrial, commercial and public uses are considered appropriate for this site.

Issuance of this lease is compatible with the designation, classification and management intent for the land.

Mineral Orders

The proposed leasehold does not fall within the areas delineated in Administrative Mineral Closing Order (MCO) No. 747 (CSSEAP, Appendix B). The uplands adjacent to the proposed site are also not subject to an MCO. Neither an MCO nor a leasehold location order is necessary to or appropriate for this proposed leasehold.

Local Planning

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

Traditional Use Finding

This finding is not required since the proposed leasehold is located within an organized borough (AS 38.05.830).

IX. Access

Physical and Legal Access

The physical access to the proposed site is via tide and submerged lands associated with Tongass Narrows, a navigable body of water.

The lease area is seaward of the applicant's leased uplands. Access to the applicant's uplands is from the Gravina Island Highway.

Access To and Along Public Waters:

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. 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-ft. public-access easement seaward of the line of mean high water.

X. Environmental Risk

It is our management responsibility to protect the overall public interest if there is a reasonable expectation that a hazardous condition, or hazardous, toxic or radiological material or contamination from such material exists or is known to exist on the land being disposed of. No hazardous material or contamination from hazardous material is known to exist on the land proposed for lease. Environmental risk associated with this proposed authorization should be minimal.

The storage of fuel within the boundaries of the leasehold will be prohibited in the Special Stipulations that will accompany the lease.

XI. Background

This Preliminary Decision addresses the proposed lease, ADL 106955, to Smart Construction Company, Inc. of tidelands containing existing improvements seaward of Lots 32 and 33 of Block 2, Gravina Island Subdivision as well use of State owned tidelands seaward of ATS 1477.

Background of Tideland Lease application ADL 106955:

Smart Construction Company, Inc. applied on December 6, 2002, for a State tideland lease (the subject of this Preliminary Decision) to include existing unauthorized improvements in front of Lot 32 and Lot 33. Later, in 2016, the application was updated to include tidelands in from of ATS 1477 (seaward of Lot 34) for moorage of barges.

On April 28, 2003 DNR determined the project to be consistent with the Alaska Coastal Management Program (AK 0207-16J) but, due to workload and staff changes, did not process the lease decision application.

On November 20, 2009, DNR advised the applicant that the existing commercial operation was an "unauthorized use and occupancy" of State land. DNR recognized their desire to resolve the unauthorized use by their submittal of the lease application but informed them that staff was not available to adjudicate the application at that time.

On December 9, 2009, to resolve the unauthorized use issue, DNR issued a 5-year "Agreement to Resolve Unauthorized Use" to the applicant. The agreement required \$6,000 in back rent,

which was paid, and annual payments of \$1,000, which were paid until the Agreement expired on December 8, 2014.

On September 26, 2016 DNR resumed adjudication of the project and contacted the applicant for an updated application and development plan. That updated application is the subject of this Preliminary Decision and has the same file number, ADL 106955, as the original 2002 lease application.

Background of improvements to be leased seaward of Lot 32:

In 1998 the Army Corps of Engineers (ACOE) issued a Notice of Violation (NOV) to the applicant for unauthorized fill and construction of docking facilities on tidelands seaward of and adjacent to Lot 32, Block 2, Gravina Island Subdivision, U.S. Survey No. 3840.

Following up on the NOV, the Environmental Protection Agency (EPA) required the applicant to pay a fine and remove some of the fill. As a condition of allowing retention of the remaining fill and a riprap wall, the EPA required that he apply for an after the fact (ATF) Army COE permit.

In 2003, ACOE Permit No. D-1998-1094 authorized Bill Smart to retain 60 cy of riprap placed below MHW at the common seaward corner of Lots 32 and 33, the 6-in. marine outfall, the 6 ft. by 44 ft. steel walkway, the 16.5 ft. by 134 ft. steel float and two pilings, and the 6 ft. by 60 ft. steel ramp which are included in this Preliminary Decision.

These improvements in front of Lot 32 have not yet been authorized by DNR and are the subject of unauthorized use file, ADL 107940. If the lease is issued, unauthorized use file ADL 107940 will be closed.

Background of improvements to be leased seaward of Lot 33:

In November of 1994, the applicant applied for State tideland permit LAS 19292, material sale ADL 106070, and easement application ADL 106073, to construct a barge storage grid, remove 150 cubic yards of rock from State tidelands, install a sewer line outfall, and authorize an existing wood piling.

On April 11, 1995 the Army COE issued Permit No. M-900836 for work seaward of Lot 33.

The barge grid and bulkhead were constructed and the material was excavated without State authorization; DNR closed both the tideland permit LAS 19292 and material sale ADL 106070 applications in 1998 due to lack of response from the applicant. The sewer outfall line was also completed without State authorization but the file has remained open. Should the lease be issued, easement application file ADL 106073 will be closed and the outfall line, barge grid, bulkhead, and piling will be authorized by the lease.

Again, these improvements seaward of Lot 33 have not been authorized by DNR and are the subject of unauthorized use file, ADL 107940. If the lease is issued, unauthorized use file ADL 107940 will be closed.

Background of ATS 1477 (seaward of Lot 34):

ATS 1477 is seaward of and adjacent to Lot 34 which is owned by Bill and Trish Smart. The Ketchikan Gateway Borough (KGB) owns ATS 1477 per municipal conveyance ADL 106985 under AS 38.05.825. This conveyance also transferred management of a tideland lease on ATS 1477, ADL 105547, to the KGB. Tideland lease ADL 105547 contains a dock and other improvements. The KGB currently leases ADL 105547 to Smart Construction Company, Inc.

The proposed lease area seaward of ATS 1477 includes barge moorage, but no improvements.

Related Actions

As noted, should the lease be issued, unauthorized use file ADL 107940 and easement application file ADL 106073 will be closed.

Unauthorized Use

After the "Agreement to Resolve Unauthorized Use" expired in 2014, the applicant continued to utilize the tidelands for commercial activities. They now owe \$2,000 for back rent (2015 and 2016). See Back Rent Section.

XII. Application Reviews**Agency Review**

A thirty-day agency review period was conducted on November 1, 2016. The deadline for comments was December 1, 2016.

The following were included in this review:

- Habitat Division, Department of Fish and Game (ADF&G)
- ADF&G, Wildlife Conservation (Access Defense)
- Alaska Department of Environmental Conservation (ADEC), Division of Environmental Health
- ADEC, Department of Water
- Alaska Department of Transportation and Public Facilities (DOT&PF)
- DNR, Division of Parks and Outdoor Recreation, Office of History and Archaeology
- DNR, DMLW, Water Section
- DNR, Division of Forestry
- Southeast Soil and Water Conservation District

Agency Comments

ADF&G Division of Habitat, commented on November 29, 2016:

"Pursuant to AS 38.05.127, ADF&G recommends reservation of a 50-ft wide public access easement seaward of the mean high tide line. We have no additional fish or wildlife concerns."

DNR Response

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DNR has included the following language in our Preliminary Decision:
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. 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.

The Alaska Department of Transportation and Public Facilities commented on November 4, 2016:

"The proposed tideland lease ADL 106955 to Smart Construction Company does not appear to have any negative impacts of DOT&PF transportation infrastructure or operations."

DNR Response

None required.

The ADNR, Water Resources Section, commented on November 1, 2016:

"The ADNR Water Resources Section has reviewed the ADL 106955 Application for Lease of State Land. There does not appear to be any current significant water use per 11 AAC 93.035 associated with this application that would require authorization from the Department, and as such the Water Resources Section has no objection to the issuance of this lease. However, please advise the applicant that if there is to be any significant use of water associated with the activities outlined within the ADL 106955 Application for Lease of State Land, then a water use authorization will need to be applied for through the ADNR Water Resources Section. Per 11 AAC 93.035 the use of a significant amount of water that requires an authorization is any amount of consumptive water use greater than 5,000 gallons from a single source in a single day; or the regular daily or recurring consumptive use of more than 500 gallons per day from a single source for more than 10 days per calendar year; or the non-consumptive use of more than 30,000 gallons per day from a single source; or any water use that may adversely affect the water rights of other appropriators or the public interest."

DNR Response

None required.

Public Review

A thirty-day agency review period was conducted on November 1, 2016. The deadline for comments was December 1, 2016.

The following were noticed of the application:

- U.S. Army Corps of Engineers
- Sealaska Corporation
- Southeast Alaska Conservation Council (SEACC)
- US Forest Service

- Applicant
- City of Ketchikan
- Ketchikan Gateway Borough

The Ketchikan Gateway Borough commented on December 2, 2016:

"Planner Chris spoke with the Borough Manager, and the Borough does not have any objections to this request."

DNR Response

None required.

XIII. Discussion

We reviewed the information provided by the applicant and other agencies, as well as planning documents, statutes, and regulations. We have determined that a lease authorizing the applicant to continue to maintain their use of State tidelands is in the best interest of the State.

XIV. Recommendation and Preliminary Decision

Authorization Type and Term

We are proposing the issuance of a 25-year non-competitive lease (Attachment 2) under Alaska Statute 38.05.075(c) to Smart Construction Company, Inc. for the above referenced use of State owned tide and submerged lands.

According to Alaska Statute 38.05.075(c):

Sec. 38.05.075. Leasing procedures

(c) The owner or lessee of land that fronts on shoreland, tideland, or submerged land of the State may be granted a preference right to a lease for the shoreland, tideland, or submerged land without competitive bidding if the director determines that

- (1) the lease of the shoreland, tideland, or submerged land is necessary to facilitate water transportation of goods, services, or resources to or from the owned or leased upland or for another water-dependent purpose;
- (2) the proposed use of the shoreland, tideland, or submerged land is compatible with the classification of the land and with any applicable land use plan adopted under AS 38.04.065; and
- (3) issuance of the lease to the shoreland, tideland, or submerged land will not interfere with prior existing rights to the leased land.

Smart Construction Company, Inc. is the lessee of Lot 32 and Lot 33 of Block 2, Gravina Island Subdivision, U.S. Survey No. 3840 (leased from William S. Smart and Patricia D. Smart) and of ATS 1477 (leased from the Ketchikan Gateway Borough, owner of ATS

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1477). Smart Construction Company, Inc. therefore qualifies under Alaska Statute 38.05.075(c) to be granted a preference right to this lease.

The lease is necessary to facilitate water transportation of goods and services; the proposed use is compatible with the planning, classification, and management intent of this area; and there are no prior existing rights to the leased land.

The lease shall be subject to the standard DMLW Lease Agreement (form 102-111, revised September 25, 2001) and Stipulations and the terms and conditions set forth therein.

Entry Authorization

DMLW is proposing to authorize the applicant entry onto State land through the issuance of an Entry Authorization (EA, Attachment 3) pending completion of the required survey and appraisal for the site. The proposed EA will be issued after the Final Decision goes into effect and the effective date of the EA will be the start of the lease term.

The term of the EA will be 3 years. The EA will be subject to all of the terms and conditions of the proposed lease (Attachment 2). The term of the lease is inclusive of the 3-year term of the EA.

Performance Guaranty

Performance guaranties provide a means to pay for corrective action if the lease-holder fails to comply with the lease requirements. In accordance with AS 38.05.035(a)(4), Smart Construction Company, Inc. will be required to submit a performance guaranty for the lease site.

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. DMLW has determined that the performance guaranty for the subject lease will be **\$10,100**.

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

Per Condition #24 of the lease document, Smart Construction Company, Inc. 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 Policy: 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 60-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 106955.

Compensation and Appraisal

Annual Use Fees

The annual fee shall be the minimum lease fee of \$1,000.00 as established in 11 AAC 58.410(b) until an appraisal to determine fair market value 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 rent for the subject parcel is greater than the minimum amount, then the rent will be adjusted to reflect this amount from the effective date of the lease and the Applicant will be responsible for the payment of any difference.

Periodic Rate Adjustment

In accordance with AS 38.05.105, the annual use fee payment will be subject to adjustment at five-year intervals after the issuance of the lease.

Back Payment

As noted above, the applicant has used State tide and submerged lands for commercial purposes since the "Agreement to Resolve Unauthorized Use" expired December 8, 2014. If a lease is issued, this decision will require \$2,000 in annual use fees for two years of use (2015 and

2016) at \$1,000 per year. We will issue the EA subject to the payment of back rent. This yearly amount may be adjusted upwards depending on the results of the appraisal.

Survey

The applicant will be required to provide an Alaska Tideland Survey (ATS) that meets the requirements and standards of the DMLW Survey Section. The applicant's remittance of the survey is a prerequisite to lease issuance. The area shown on Attachment 1 is the basis for the survey, and the survey must be as-built.

Pursuant to 11 AAC 51.045 and AS 38.05.127, a 50-foot public-access easement seaward of the line of mean high water must be included in the survey.

XV. 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 lease authorizing the applicant to continue to tie and lay up barges for periodic moorage and maintenance. 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.



Ted Deats, Natural Resources Specialist



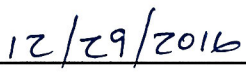
Date

Regional Manager Decision

The file has been reviewed and found to be complete. It is the finding of the Division of Mining, Land & Water, Southeast Region Land Manager, that issuance of this lease is appropriate.



Robert H. Edwardson, Southeast Regional Manager



Date

ATTACHMENTS:

Attachment 1. Development Plan

Attachment 2. Standard Lease Agreement and Lease Special Stipulations

Attachment 3. Entry Authorization

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 Sealaska Corporation, the above referenced Village Corporations and Federally Recognized Tribes, the Ketchikan Gateway Borough, and adjacent landowners. We will request that the Ketchikan Post Office and public library post the notice. It will be available on the internet as the Alaska Online Public Notice website, which can be accessed at www.state.ak.us.

The public is invited to comment on this preliminary decision. Comments must be received in writing by the DNR Division of Mining, Land & Water by mail at 400 Willoughby Avenue, P.O. Box 111020, Juneau, AK 99811-1020; by fax at (907) 465-3886; or by electronic mail to sero@alaska.gov by the close of business on **January 30, 2017** in order to ensure consideration. 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 DNR may modify this decision based on public comments received.

If 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.

ADL 106955 Attachment 1

