



Preliminary Regional Manager's Decision

ADL 108674

Danny and Maxine Henderson

AS 38.05.850

I. Requested Action

Danny and Maxine Henderson ("Applicants") submitted an application for a public easement, 70 feet long and 30 feet wide, that would authorize access and utilities over an existing gravel road and bridge on state land in Tract B of the Mud Bight Subdivision in Ketchikan. The requested easement is to serve the Applicants' private property in the Kiffer Subdivision.

A diagram of the requested easement is included as Attachment 1.

Proposed Action

The Department of Natural Resources ("DNR"), Division of Mining, Land and Water ("DMLW") is proposing to (1) deny the request for a public easement, and (2) issue a private non-exclusive easement, approximately 100 feet long and 60 feet wide¹, for to Danny and Maxine Henderson an indefinite term.

A draft of the proposed private non-exclusive easement included as Attachment 2.

II. Statutory Authority

Alaska Statute ("AS") 38.05.850 and 11 Alaska Administrative Code ("AAC") 96

III. Administrative Record

The administrative record for this case is contained in the case file serialized as ADL 108674. Incorporated by reference is unauthorized use case file ADL 108787.

IV. Scope of Decision

The scope of this administrative review is limited to the following: (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) to issues that are material to the determination that issuance of the authorization will best serve the interests of the state.

V. Location Information

Geographic Location

The road is within a tract in the Mud Bight Subdivision that is dedicated both to the public and as a natural area. The Mud Bight Subdivision is adjacent to Mud Bay, north of Ketchikan and Ward Cove on Revillagigedo Island in the Ketchikan Gateway Borough. Coordinates (WGS84): 55.4163N, 131.7592W

¹ Exact easement dimensions will be determined by required survey; width is consistent with preliminary decision for ADL 107798 and 11 AAC 51(d)(1)(D)&(E).

Legal Description

Section 32, Township 74 South, Range 90 East, Copper River Meridian; Ketchikan Recording District (“KRD”)

Proposed easement/servient estate: An unsurveyed parcel, approximately 100 feet long and 60 feet wide, encompassing .13 acres, more or less within Tract B of the Mud Bight Subdivision, Alaska State Land Survey (“ASLS”) 79-243, Plat 80-35, KRD.

Applicant’s property/dominant estate: The proposed easement is to serve Lot 3 of the Kiffer Subdivision, a subdivision of US Survey (“USS”) 2165, according to Plat 2009-30, KRD.

Other Land Information

Municipality:	Ketchikan Gateway Borough, a second class borough
Regional Corporation:	Sealaska
Village Corporation:	none listed
Federally Recognized Tribe:	Ketchikan Indian Community

VI. Land Status Information

Title

The Mud Bight Subdivision is a subdivision of Lot 2 of USS 3769. The state received title to the land and mineral estates of Lot 2 of USS 3769 from the Bureau of Land Management (“BLM”) under a tentative approval and US Patent 1233084, both issued in 1963.^{2 3}

The patent is subject to subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of courts; and there is reserved from the lands granted:

- (1) A right-of-way thereon for ditches or canals constructed by the authority of the United States.
- (2) A right-of-way for the construction of railroads, telegraph and telephone lines in accordance with the Act of March 12, 1914 (38 Stat. 305; 48 US Code § 305)
- (3) A right-of-way for a Federal Aid Highway under 23 US Code § 317; and
- (4) Those certain rights-of-way for the Tongass Highway and the Forest Service Deer Mountain Trail, and all appurtenances thereto, constructed by the United States, through over and upon Lot 2, and the right of the United States, its officers, agents, or employees to maintain, operate, repair, or improve the same so long as needed for use for or by the United States.⁴

Planning and Classification

In accordance with AS 38.04.065(f), each decision about the location of easements and rights-of-way, other than for minor access, shall be integrated with land use planning and classification. Based on the use's insignificant effect on the land and resources and in accordance with 11 AAC 55.040(i)(6)(A), uses

² Tentative Approval. 8 Jul 1963. Doc No. 2011-000135-0.

³ US Patent 1233084. 21 Aug 1963. Doc No. 2006-000216-0.

⁴ DNR DMLW Realty Services Section. 12 Dec 16. Title Report. RPT No. 9300.

that the department may find to constitute minor access include a road or trail less than one mile in length to provide access to a private residence. This use of state land constitutes minor access and so integration with land use planning and classification is not required.

Local Planning and Zoning

The proposed easement is within the Ketchikan Gateway Borough (“KGB”) and is subject to local planning and zoning ordinances. The KGB will be notified of this Preliminary Decision.

VII. Third Party Interests

Gerald L. and Lecile E. Kiffer, owners of Lots 1 and 2 of the Kiffer Subdivision, use the road and have submitted a separate application for a public easement, serialized as ADL 107798. The Kiffers will be notified of this Preliminary Decision.

VIII. Background

Related Actions

The Kiffer Subdivision is a subdivision of USS 2165. USS 2165 is a survey of the Homestead Claim of Wesley Myers, conducted in 1933 and approved by the US Department of Interior, General Land Office in 1935. The proposed easement is for access at a location that is depicted as the Tongass Highway on this survey.

This portion of the Tongass Highway was rerouted onto filled tidelands and uplands closer to Mud Bay In 1952 and 1953. Sketch plats prepared by the US Bureau of Public Roads indicate that the land underlying the original right-of-way was to return to underlying grantors.⁵ At that time, the original right-of-way for the Tongass Highway transected USS 2165 and unimproved public domain land owned by the BLM.

The BLM surveyed the area in 1960 and approved USS 3769 in 1962. The former Tongass Highway is labelled “old road” and is depicted as an arterial road of the Tongass Highway in USS 3769. The state received patent to Lot 2 of USS 3769 in 1963.

In a letter from the Alaska Department of Highways (“ADH”) to the BLM, dated December 30, 1966, the ADH state the intention to release and relinquish all jurisdictional rights to the former Tongass Highway, also referred to as the old Meyers Spur Road, to the BLM. The letter indicates the ADH inherited only the jurisdictional rights of the US Bureau of Public Roads in and to the former Tongass Highway and the road was no longer necessary for highway purposes. At that time, the only one reportedly using the road was the landowner of USS 2165, a man named T.K. Sprague, who used it for access to the new North Tongass Highway.⁶

A Boundary Retracement Survey of USS 3769 was performed in 1978 and approved in March of 1980.⁷ Also in March of 1980, Rita McBride, then owner of USS 2165 and nearby USS 2347, wrote a letter to Governor Hammond expressing multiple concerns about property ownership, including issues

⁵ US Bureau of Public Roads. Jun 1951. Alaska Forest Highway System Project I-G4,I2.

⁶ Campbell, Bruce A. (ADH). 30 Dec. 1966. "Project No. FAS 920 Ward's Cove Ketchikan 23-2500." Letter to the BLM.

⁷ Boundary Retracement Survey of USS 3769. Plat 80-4BS, KR.D.

surrounding survey of lands surrounding USS 2165.⁸ In response to issues stated by McBride, the Commissioner of the Department of Transportation and Public Facilities (“DOTPF”) wrote the Governor on April 22, 1980, indicating that the DNR was surveying the land and had agreed to reserve a 30-foot right-of-way for the McBride’s access road.⁹

Later in 1980, the state re-subdivided Lot 2 of USS 3769 to create the Mud Bight Subdivision. When the land was subdivided, an area was reserved for an ingress and egress easement so to provide access to USS 2165.¹⁰ Although the portion of the former Tongass Highway that runs through the subdivision was being used for access at the time, the area reserved for ingress and egress easement did not encompass the former road. It is unclear whether omission or relocation of the current means of access was intentional or a result of a surveying oversight or miscommunication. Additionally, while the subdivision plat was approved by the DNR, signatures certifying approval from the Ketchikan Gateway Borough were not provided on the plat per AS 29.33.150(b) - *repealed, sec. 88 Ch. 74 SLA 1985*.

Carl R. and Rita M. McBride sold USS 2165 to Gerald L. and Lecile E. Kiffer in September 1987.¹¹ In 2009, the Kiffers subdivided USS 2165 into the three lots that comprise the Kiffer Subdivision. Lot 3 of the Kiffer Subdivision was sold to Maxine and Danny Henderson in January of 2015.¹² This application was received on October 21, 2016.

Unauthorized Use

The road has been used by the Applicants without an underlying easement or right-of-way since the Applicants purchased the private land in 2015. The file for this unauthorized use, serialized as ADL 108787, can be closed once the required land use authorization is obtained. The Compensation section below addresses incurred use fees for the unauthorized activity.

IX. Agency Review and Public Notice

Agency Review Summary

As this application is for the same road subject to ADL 107798, a duplicative Agency Review was not deemed necessary. Agency Review for ADL 107798 began on October 21, 2016, and ended on November 23, 2016. The application for ADL 107798 was distributed to the following state agencies:

Department of Environmental Conservation, Commissioners Office;
Department of Fish & Game (“ADFG”), Divisions of Habitat and Wildlife Conservation;
DOTPF, Southcoast Region; and
DNR, Division of Parks and Outdoor Recreation, Office of History and Archaeology

Agency Review Comments and Response: Both ADFG and DOTPF commented that they had no objection to the subject land use.¹³ DOTPF added that any future construction in the North Tongass Highway right-of-way would require prior approval from their office.¹⁴

⁸ McBride, Rita M. 13 Mar. 1980. “Untitled”. Letter to Governor Hammond.

⁹ Ward, Robert W. (DOTPF). 22 Apr. 1980. “McBride Property US Survey Nos. 2347 & 2165.” Letter to Governor Hammond.

¹⁰ Boundary of area reserved for ingress & egress easement. ASLS 79-243; Mud Bight Subdivision. Plat 80-35, KRD. 2.

¹¹ Statutory Warranty Deed. 10 Sept. 1987. Doc. No. 102-1987-003479-0.

¹² Warranty Deed. 5 Jan. 2015. Doc. No. 2016-000058-0.

¹³ Carter, Marla (ADFG). “Re: Agency Review Notice – ADL 107799, Gerald Kiffer”. 26 Oct 2016. Email.

¹⁴ Haines, Emily. (DOTPF). “Re: Agency Review Notice – ADL 107799, Gerald Kiffer”. 26 Oct 2016. Email.

Public Notice Summary

In accordance with AS 38.05.850(c), if it is determined, by evaluation of the nature and duration of the intended use, that an easement or right-of-way issued under this section will not be functionally revocable, public notice shall be provided before issuing the easement or right-of-way.

The proposed easement will provide legal access to the Applicants' private land. This decision will be sent to known interested parties and posted on the state's Online Public Notice web site for a 30-day comment period. Notice of the final finding and appeal provisions will be sent to those whom submit comments, if any.

X. Access

The proposed easement would provide legal access to the Kiffer Subdivision from Snow Goose Road using a portion of an existing road that was formerly the North Tongass Highway before it was realigned in 1952-1953.¹⁵ Snow Goose Road extends north from the realigned North Tongass Highway.¹⁶ The easement is also non-exclusive; if granted, the easement would not limit the public's right to use land within the proposed easement corridor or surrounding dedicated land. Any obstruction to public access, whether by physical obstruction, signage, or other means, is prohibited.

It is recommended that the existing road be used for access to the Kiffer subdivision in lieu of constructing new access within the area reserved for ingress and egress on Plat 80-35. A reroute would involve additional development in an anadromous stream and a tract of land that is both dedicated to the public and as a natural area.

XI. Environmental Considerations

No hazardous material or contamination from hazardous material is known to exist on the land proposed easement corridor. Environmental risks associated with this proposed authorization should be minimal; however, the Applicants use an existing culvert, bridge, and roadway located in Tract B and over an anadromous stream that flows into Mud Bay in the Tongass Narrows.

All tracts, including Tract B, within the Mud Bight Subdivision are dedicated as natural areas that are to remain in a natural, undeveloped state. No earth or vegetation within them is to be removed or deposited without consent of local planning and zoning authority.¹⁷ As the KGB is the local planning and zoning authority, the Applicants must receive prior approval from the KGB prior to conducting any road and bridge maintenance activities.

The culvert, bridge, and roadway cross a stream, cataloged by the ADFG as #101-47-10120, at the upper extent of fish habitat. Any proposal to conduct instream work in the future would require a Fish Habitat permit from the ADFG in addition to any other required authorizations.

¹⁵ Snow Goose Road (platted as Eagle Way). ASLS 79-243; Mud Bight Subdivision. Plat 80-35, KRD.

¹⁶ Tongass Highway; Ward Cove to Whipple Creek. DOTPF Right of Way Map. Plat 2006-45, KRD.

¹⁷ Dedication of Natural Areas. ASLS 79-243; Mud Bight Subdivision. Plat 80-35, KRD. 4.

XII. Performance Guaranty

In accordance with 11 AAC 96.060, the DMLW requires performance guaranties in the form of a bond or other security, which may only be waived after considering an Applicants' compliance history and the potential risk to the state from the land use. A performance guaranty is a mean to assure performance and to provide ways to pay for corrective action if the Applicants fail to comply with the requirements set forth in the easement. It may also be used to make certain that improvements are removed and that the land is returned in a usable condition upon termination of the authorization.

History of Compliance

The DMLW maintains a case file for the unauthorized use of state land, ADL 108787, which can be closed once land use authorization is granted.

Performance Guaranty Requirement: This requirement is waived as the potential risks associated with the Applicants' continued use of the road are low and the proposed easement is intended to resolve the Applicants' unauthorized use.

XIII. Insurance

Insurance is a means to protect the state from liabilities incurred through the use of state property, or from damage to state property as a result of accidental or catastrophic events. This type of protection is necessary in the event of an accident or negligence that was consequentially connected to activities conducted on state land, and/or if the state is named in a lawsuit as a result of an accident or negligence.

Insurance Requirement: Consistent with 11 AAC 96.065, the insurance requirement can be waived due to the nature of personal private uses such as this one. The state assumes no responsibility for maintenance of improvements constructed within the proposed easement corridor or liability for injuries or damages attributable to that construction.

XIV. Survey

The Applicants must submit a survey that meets the requirements and standards of the DMLW Survey Section. The area shown on Attachment 1 is the basis for the survey. Remittance of an acceptable survey is a prerequisite to the easement. Survey instructions can be requested by phone: (907) 269-8521, fax: (907) 269-8901, or mail: DNR, DMLW Survey Section | 550 W. 7th Ave, Suite 650 | Anchorage, AK 99501-3576.

XV. Compensation

Fees

Annual Land Use: \$200. In accordance with 11 AAC 05.010(e)(11)(A), the fee for a private right-of-way or easement under AS 38.05.850 for a non-exclusive use other than a fiber-optic telecommunications system as provided in 11 AAC 05.010(e)(11)(C) is an annual fee of \$100 per acre but no less than \$200.

Unauthorized Use: \$400. The Applicants bought the land in January 5, 2015. Fees for use of state land from January 5, 2015 to January 4, 2017 to \$400, due immediately.

Recording: To be determined at later time. Fees are required under 11 AAC 05.010(a)(14) for recording easement document. The first page of a document is \$20 and the second and each subsequent page of the same document is \$5.

Appraisal

An appraisal would not be required as the fee is established in regulation.

XVI. Term

Entry Authorization - n/a

No entry authorization is required; this is an existing land use and is subject of unauthorized case file ADL 108787.

Easement Term - indefinite/term of use

The term of proposed easement is indefinite, to begin upon receipt of required deliverables and signature of the final easement. The easement may not be transferred or assigned without the prior written consent of the DMLW.

Easement Termination

Easements issued under AS 38.05.850 may be revoked for cause if the area described is no longer used for the purpose intended or if a higher and better use of the land is established as determined by the DMLW. Following termination of the proposed easement, whether by abandonment, revocation, or other means, the Applicants (or assignee) shall restore the site to a condition that is acceptable to the DMLW. The Applicants' planned site restoration activities, including either removal or abandonment of installed improvements, must be described in writing and present to the DMLW prior to termination of the easement. The DMLW may require compliance with additional conditions specific to the site restoration effort that were not required for the construction, maintenance, or operation of described improvements. Should the Applicants fail or refuse to perform approved site-restoration activities within the time allotted by the DMLW, the improvements may become property of the DNR. However, the Applicants shall not be relieved of the cost of restoring the area to a condition that is acceptable to the DMLW.

XVII. Economic Benefit and Development of State Resources

In accordance with AS 38.05.850(a), in the granting, suspension, or revocation of a permit or easement of land, preference shall be given to that use of the land that will be of greatest economic benefit to the state and the development of its resources. The state will directly benefit from the annual fees paid for the land use and indirectly benefit from maintained access to an area of a reserved US Forest Service trail.

XVIII. Discussion

The Applicants applied for a public easement; the appropriate type of authorization was contemplated.

Denial of Application for Public Easement

An easement is an interest in land that allows the right to use or control the land for a specific limited purpose. According to Black's Law Dictionary (1990), a publication of common usage, "a private easement is one in which the enjoyment is restricted to one or a few individuals, while a public easement

is one the right to enjoyment of which is vested in the public generally or in an entire community; such as easement of passage on the public streets and highways or of navigation on a stream”¹⁸

The Applicants are using a road without authorization and the road is within a tract of land intended to be undeveloped and for public use. The requested land use is not for the general welfare of the public (a whole community, state or nation). The Applicants are a private citizen rather than a government entity and is not using or maintaining the road at the direction of a public entity but rather for appropriate self-interest.

A non-exclusive easement, or common easement, is an easement that allows the owner of land underlying the easement to share in the benefit of the easement. In this case, while the road and utilities benefit the Applicants, the conditions of the easement would allow for other compatible uses and continued public access to and within the easement corridor. Therefore, a private non-exclusive easement is appropriate.

Alternatives

In contemplating the appropriate land use authorization, we found three alternatives to the proposed private non-exclusive easement. If the Applicants pursue an alternative approach, a private non-exclusive easement would still be required to authorize the Applicants’ current use of state land and establish legal access to Lot 3 of the Kiffer Subdivision until the Applicants obtain another legal means of access across state land.

Alternative 1. Modify/relocate platted ingress & egress

The Applicants could petition the DNR to modify or relocate the reserved area for ingress and egress in Tract B to reflect the location of the existing access. Petition forms are supplied by and submitted to the DMLW Survey Section, Easement Vacation Unit, which may be reached by phone at (907) 269-8523. A similar petition must also be submitted to the platting authority, which is the Ketchikan Gateway Borough in this case.

Alternative 2. Purchase

The Applicants could apply to purchase the land needed for surface access to private property. As an adjacent landowner of a parcel created by highway realignment and considering that the road has historically provided access to the Applicants’ property, the Applicants may be eligible for a sale under AS 38.05.035(b).

Alternative 3. Public easement

The Ketchikan Gateway Borough or other government or public agency could apply for a public easement.

XIX. Preliminary Decision

Adjudicator Recommendation

Based upon the information provided by the Applicants, as well as review of relevant planning documents, statutes, and regulations related to this application, it is my recommendation to deny a public

¹⁸ Black, Henry Campbell. "Private and Public Easements." *Black's Law Dictionary*. 6th ed. St. Paul, MINN.: West Publishing Co., 1990. 510. Print.

easement and approve the draft private non-exclusive easement included as Attachment 2. I recommend proceeding to public notice for the purpose of providing interested parties an opportunity to review and submit comments.

Megs Harris
Megs Harris, Natural Resource Specialist

7.24.17
Date

Unit Manager Concurrence

I agree with the adjudicator's recommendation.

VBatts
Virginia Batts, Natural Resource Manager

July 24, 2017
Date

Regional Manager's 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 this preliminary decision can proceed to public notice and review.

Benjamin M. White
Benjamin M. White, Southeast Regional Manager

July 24, 2017
Date

Attachments:

- Attachment 1. Development Diagram
- Attachment 2. draft Private Non-exclusive Easement

The public is invited to comment on this preliminary decision. Written comments must be received by DNR no later than 5:00 p.m. on **August 24, 2017**. All comments must be submitted to the Department of Natural Resources, Division of Mining, Land and Water, Southeastern Regional Office 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 megs.harris@alaska.gov in order to ensure consideration. Please include your mailing address and telephone contact. The DNR reserves the right to issue additional public notice as it determines necessary.

Following the close of the comment period, all timely written comments will be considered, and the Department of Natural Resources may make appropriate revisions to the decision or issue the preliminary decision as a final written decision. A copy of the final decision will be sent to all persons who comment on the preliminary decision. Persons who are aggrieved by the final decision will have the right to appeal it.