

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

Southeast Regional Land Office

Regional Manager Decision

ADL 53899

Emily and Robert McClory

Lease Amendment

Requested Authorization

Emily and Robert McClory ("lessee") are requesting amendment to their lease of state tide and submerged lands in Refuge Cove, Ketchikan. The lease authorizes placement and use of a commercial dock and expires on July 22, 2030. The requested amendment involves complete redesign and reconstruction of the dock and installation of an outfall.

The leasehold, surveyed as Alaska Tideland Survey ("ATS") 917, contains .217 acres. The lessee's development plan is included as **Attachment 1**. The applicant requests authorization to place the following improvements within the leasehold:

- A walkway, consisting of two aluminum bridge sections, one 55 ft. x 7 ft. and the other 60 ft. x 7 ft. (totaling 805 sq. ft.), with fiberglass grates.
- One ramp, aluminum, 75 ft. x 5 ft. (375 sq. ft.).
- One main float, 80 ft. x 16 ft. (totaling 1,280 sq. ft.)
 - Not pictured by the development plan diagram but indicated in the narrative, the applicant intends to eventually widen the first 20 ft. addition of a section, 4 ft. x 20 ft. (80 sq. ft.), bringing the total area of the main dock to 1360 sq. ft.
- One skiff ramp float, 17 ft. x 11 ft., (187 sq. ft.)
- One jet ski float, 10 ft. x 5 ft. (50 sq. ft.)
- Eight pilings, steel, each 12.375-inches in diameter
- One outfall, consisting of polyvinyl chloride ("PVC") pipe, 4-inches diameter, which is to be installed within a trench, 140 ft. x 18 ft., requiring 35 cubic yards of fill material.

Regional Manager Decision

The Department of Natural Resources ("DNR"), Division of Mining, Land and Water ("DMLW") will amend the lease, subject to the terms described in this decision and the lease amendment included as **Attachment 2**.

Authority

AS 38.05.070, AS 38.05.075

Administrative Record

Two files, both serialized as ADL 53899, contain the administrative record for this lease. More specifically, file 2 of 2 contains the administrative record for this amendment decision. The area plan applicable to this site, *Central Southern Southeast Area Plan* (November 2000), is incorporated by reference.

Scope of the Decision

The scope of this administrative review is limited to (1) reasonably foreseeable, significant effects of the proposed lease amendment; (2) applicable statutes and regulations; (3) facts pertaining to the land or resources; and (4) issues that are material to the determination that this lease amendment is in the best interest of the State of Alaska.

Description

Geographic Location: State tide and submerged land underlying Refuge Cove, a navigable body of water connected to the Tongass Narrows, at approximately 55.4059° N, 131.7458° W (WGS84).

Legal Description: ATS 917, within Section 33, Township 74 South, Range 90 East, Copper River Meridian, containing 0.217 acres, more or less, recorded in the Ketchikan Recording District (Doc No. 102-2007-2007-19-1).

Other Land Information:

Municipality: Ketchikan Gateway Borough
Regional Corporation: Sealaska Corporation
Village Corporation: Cape Fox Corporation
Federally Recognized Tribe: Ketchikan Indian Community

Title

The State of Alaska ("state") holds title to lands beneath tidally influenced and navigable waterways within its jurisdiction, including land underlying Refuge Cove in the section and survey referenced above. The state received title through the Submerged Lands Act of 1953, Alaska Statehood Act, and Equal Footing Doctrine. Management is subject to the Public Trust Doctrine. Title is subject to valid existing rights, including reservations, easements, and exceptions in the US 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.

Third Party Interests: None known.

Adjacent Land Ownership: The contiguous upland parcel is described as Lot 1, Block 2, US Survey ("USS") 1192, according to the subdivisional survey thereof made by Harold Miller C.E. and recorded in the office of the US Commissioner at Ketchikan, Alaska on April 5, 1948, in the Ketchikan Recording District, First Judicial District, State of Alaska (Doc No. 102-1948-V1-35). It is owned by the lessee (Warranty Deed, Doc No. 102-2015-002236-0). The lessee also owns the adjacent upland lot to the north, described as Lot 2, Block 2, USS 1192 (Warranty Deed, Doc No. 102-2015-002236-0).

Further to the north, Lydia Ouellette and John Bradley own Lot 3, Block 2, USS 1192 (Warranty Deed, Doc No. 102-2016-000519-0). Immediately to the south, Jensen Way is a 15-foot public right-of-way, according to ATS 917. Michael T. Jensen owns the upland lot adjacent to this right-of-way, described as Lot 4, Block 1, USS 1192 (Personal Representatives Deed, Doc No. 102-1986-004480).

Further south also along Refuge Cove, the applicant owns Lot 110-C, USS 1923; however, this lot is not within the immediate vicinity of the project area (Warranty Deed, Doc No. 102-2013-002563-0).

Planning and Classification

State land in this area is subject to management provisions specified in the *Central Southern Southeast Area Plan* ("CSSEAP") for Region 5, Ketchikan – South, Management unit KT - 60 (CSSEAP, Map 3-25, c 3 p 249).

KT-60 – Tidelands adjacent to the City of Ketchikan and existing uses north of city

Management Intent: "This parcel encompasses the main developed area of the Ketchikan community, extending from Ward Cove on the north to the City of Ketchikan on the south. Tideland uses of a commercial and industrial nature occur throughout this parcel, especially at Ward Cove and near the City of Ketchikan. This parcel is to be managed for the continued development of relatively high intensity commercial, industrial and certain public uses. Since there are also areas of residential development, the parcel should be managed to permit shoreline development consistent with residential uses" (CSSEAP, c 3 p 317).

Other Information: "The zoning within this parcel varies quite substantially, reflecting the diversity of uses. However, the more intensive uses of industrial and commercial zoning tend to dominate throughout the parcel. There are areas of residential zoning, however. The tideland designations generally reflect the upland zoning designations of the Ketchikan Gateway Borough and are meant to be generally consistent with the zoning ordinance. Areas of private or city-owned tidelands are not affected" (CSSEAP, c 3 p 317).

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. Approving authorizations in these areas will be conducted in compliance with the coastal development standards in the Alaska Coastal Management Act (6 AAC 80.040) [repealed]. This land may be available for conveyance to municipalities under AS 38.05.820 and AS 38.05.825 but cannot be sold to individuals" (CSSEAP, c 3 p 5).

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).

The subject dock is to be used for commercial purposes and consistent with the management intent, designation, and classification outlined by the CSSEAP for this unit.

Mineral Orders: The leasehold does not fall within the areas delineated in Administrative Mineral Closing Order No. 747 (CSSEAP, Appendix B). The adjacent upland lot is also not subject to a

mineral closing order. Neither a mineral closing order nor a leasehold location order is necessary to or appropriate for this leasehold.

Local Planning: This leasehold is within the Ketchikan Gateway Borough and is subject to local planning and zoning ordinances. According to the borough's online database, the uplands are Commercial General Zone – CG Zone.

Traditional Use Finding: This finding is not required since the leasehold is located within an organized borough (AS 38.05.830).

Access

Physical and Legal Access: The lessee's physical and legal access to the leasehold is over the lessee's private upland property or by vessel over state-owned tide and submerged lands underlying Refuge Cove.

Access to and along Public Waters: The people of the state have a constitutional right to free access to and use of the navigable or public water of the state (AS 38.05.126(a)). In accordance with AS 38.05.127 and 11 AAC 51.045, the DMLW reserves specific public access easements to and along public and navigable waters before the sale, lease, grant, or other disposal of any interest in state land. This leasehold is subject to a 50-foot public access easement seaward of the line of mean high water; however, this easement is not depicted by ATS 917, rather it is stipulated by Stipulation No. 10 of the existing lease (Doc No. 102-2010-000328-0). The lease amendment includes a stipulation that further clarifies that this easement is a 50-foot pedestrian access easement seaward of the line of mean high water.

Environmental Risk

No hazardous material or contamination from hazardous material is known to exist on the leasehold. Hazardous materials will not be stored on site aside from fuel, lubricants, and batteries contained in vessels. Environmental risk associated with the proposed authorization should be minimal. Stipulations are included in the existing lease to ensure proper use and disposal of waste, wastewater, fuel and hazardous substances.

Background

The original lease was issued on July 23, 1975 and was first amended and assigned in 1983 (Book 120, Pages 111-121, Ketchikan Recording District ("KRD")). On July 23, 2009, the lease was amended a second time and the original lease was replaced entirely with updated terms and conditions (Doc No. 102-2010-000328-0). In 2010, the lease was assigned to Edward and Rosanna Hamlin, who were the previous owners of the contiguous upland parcel. On August 12, 2015, the DMLW issued a decision approving lease assignment from the Hamlins to the lessee on condition that unauthorized floats would be removed from the leasehold and the lease would be amended. The lease was assigned to the lessee on June 27, 2016 (Doc No. 102-2010-000327-0). In August 2017, the DMLW contacted the lessee regarding plans for the lease amendment. The lessee worked with engineers to finalize plans from the fall of the 2017 until the spring of 2018.

Related Actions: No other actions relate to the proposed amendment.

Unauthorized Use: Floats that ground on state tidelands were placed within the leasehold without authorization; however, these floats were not placed by the lessee. No separate file was opened for this matter, and the DMLW is not requiring compensation or otherwise penalizing the current lessee or responsible party. This unauthorized use is resolved by the lessee's removal of unauthorized floats and the proposed dock reconstruction.

Application Reviews

The DMLW did not hold an agency or public review of this request as it is not required. The US Army Corps of Engineers ("USACE") and Alaska Department of Environmental Conservation ("ADEC") reviewed and approved project components within their respective regulatory jurisdictions.

USACE: The USACE issued at least three authorizations for this project between February and May 2018. The first Letter of Permission, dated February 2, 2018, stated that installation of the outfall would be authorized under Nation Wide Permit No. 7 - Outfall Structures and Associated Intake Structures (POA-1973-134). The second Letter of Permission, dated February 16, 2018, authorized the lessee's initial plans for the dock (POA-1973-134). A permit modification, dated May 4, 2018, authorized minor changes to the applicant's initial plans (POA-1973-134-M1). The lessee's development diagram, attached to this decision and the proposed amendment, reflects insignificant changes to the plans approved May 4, 2018, such as a minor changes to the area of the proposed floats.

ADEC: The ADEC reviewed and approved engineering plans for the outfall and issued a "Certificate of Construction" on February 20, 2018.

Discussion

The original lease was issued for a commercial-industrial purpose, and the lessee is required by regulation and lease term to use the leasehold for a commercial purpose. The lessee indicated that improvements within the leasehold (dock and outfall) supports a vacation rental on the lessee's upland property and potentially a charter fishing business in the future. The lessee is required by the lease to submit annual reports documenting commercial activity, which is further noted in the Annual Reports section below.

The following regulations regarding lease utilization and commercial-industrial lands are for reference:

11 AAC 58.510: "Leases must be utilized for purposes within the scope of lease and land classification. Utilization or development for other than the allowed uses is a violation of the lease. A development plan may be required on all leases. Failure to make substantial use of the land, consistent with the development plan, within five years, will, in the director's discretion, constitute grounds for cancellation".

11 AAC 58.020: "All lands leased for commercial or industrial purposes shall be utilized only for these purposes, and in accordance with applicable building and zoning codes. In the absence of such codes the lessee shall, at least 30 calendar days prior to the commencement of construction or

utilization, file with the director a plot plan, a general description of contemplated construction and a brief description of the business proposed. The director shall reject said plan within 30 calendar days of receipt thereof if he deems such utilization or construction contrary to the orderly development of the area or incompatible with existing development.”

Recommendation

Authorization Type and Term: The existing lease is issued for a 55-year term, from July 23, 1975 through July 22, 2030. This lease amendment will be effective upon the DMLW’s receipt of the deliverables described below and signature of the amendment document.

Survey: No new survey is required at this time. A survey of the leasehold has already been completed and engineering plans for the reconstructed dock depict the configuration of new dock improvements within the leasehold.

Appraisal: No appraisal is required at this time. The Appraisal Section advised that an appraisal was required to set the fair market value rent at the last rent adjustment on July 23, 2015; however, the DMLW did not require one. An appraisal will likely be required at the next rent adjustment. The next adjustment date is on July 23, 2020.

Annual Reports: The existing lease requires the lessee to submit an annual report of operations occurring on or facilitated by the lease on or before each May 1st under the lease. The lessee has not submitted an annual report since the lease was assigned to them in 2016. The lessee must submit the annual report for 2017 before the proposed amendment is made final and continue to submit annual reports by May 1st of each subsequent year under the lease.

Compensation:

Annual Land Use Fee: The annual land use fee for this lease is \$1,618.00, which was previously calculated at the last rent adjustment according to the assessed value of the upland lot.

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. The next adjustment date is on July 23, 2020.

Fees for Recording: Fees are required under for recording the amendment document. The fee for the first page of a document is \$20 and the second and each subsequent page of the same document is \$5 (11 AAC 05.200(a)(1)-(2)). The fee for recording the amendment document and attached development plan (8 pages) is a one-time fee of \$55.00.

Performance Guaranty: A performance guaranty is required by Lease Condition No. 25 and Special Stipulation No. 4 of the existing lease. The performance guaranty currently required by those stipulations is \$1,200.00, which the lessee satisfied by posting a cash bond with the DMLW. Because existing improvements are to be removed and new improvements are to be added to the leasehold, the DMLW recalculated the performance guaranty. Based on the number, type, and size of improvements that need to be removed upon termination of the lease, the DMLW determined that the performance guaranty is \$10,000.00. However, in accordance a Regional Policy Addendum, dated April 15, 1998,

performance guaranties for docks supporting upland commercial lodging establishments may be reduced if the dock could be considered a "Generally Allowed Use" of state land upon cessation of commercial activities. In accordance with this policy addendum, the DMLW will accept a performance guaranty in the amount of **\$5,000.00** because the lessee's dock may be considered a "Generally Allowed Use" of state land upon cessation of commercial use. The lessee may provide an additional negotiable instrument, such as cash or certificate of deposit, in the amount of \$3,800.00, or the lessee may provide negotiable instrument in the full amount and the DMLW will release the existing \$1,200.00.

The proposed lease amendment includes a stipulation revising Special Stipulation No. 4 of the existing lease to reflect the updated amount. This amount is subject to periodic adjustments made during the term of the lease 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: In accordance with Lease Condition No. 24 and Special Stipulation No. 2, the lessee shall secure or purchase at its own expense, and maintain in force at all times during the term of the lease, the Commercial General Liability and Workers Compensation insurance policies to protect both themselves and the State of Alaska (its officers, agents and employees). The lessee is required to submit a current Certificate of Insurance prior to execution of the proposed amendment.

Adjudicator Recommendation: Based on the information provided by the lessee, as well as review of planning documents, statutes, and regulations, I recommend approving the attached lease amendment.



Megs Harris, Natural Resources Specialist II

7.11.18

Date

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

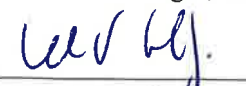


Virginia Batts, Natural Resources Manager I

7/11/2018

Date

Regional Manager Decision: It is the finding of the Division of Mining, Land & Water, Southeast Region Land Manager, that issuance of the attached lease amendment is appropriate.



Lee V. Cole, Jr., Southeast Regional Manager

July 11, 2018

Date

ATTACHMENTS:

Attachment 1. Development Plan

Attachment 2. Amendment No. 3 to Lease Agreement ADL 53899

A person affected by this decision who provided timely written comment or public hearing testimony on this decision may appeal it, in accordance with 11 AAC 02. Any appeal must be received within 20 calendar days after the date of "issuance" of this decision, as defined in 11 AAC 02.040(c) and (d) and may be mailed or delivered to the Commissioner, Department of Natural Resources, 550 W. 7th Avenue, Suite 1400, Anchorage, Alaska 99501; faxed to 1-907-269-8918, or sent by electronic mail to dnr.appeals@alaska.gov. Effective July 1, 2018, under 11 AAC 02.030, appeals and requests for reconsideration filed under 11 AAC 02 must be accompanied by the fee in 11 AAC 05.160(d)(6), currently \$250.00. Effective July 13, 2018, under 11 AAC 05.160 (a) and (b), this fee was reduced to \$200.00 for each appeal or request for reconsideration.

This decision takes effect immediately. If no appeal is filed by the appeal deadline, this decision goes into effect as a final administrative order and decision of the department on the 31st day after issuance. An eligible person must first appeal this decision in accordance with 11 AAC 02 before appealing this decision to Superior Court (11 AAC 02.020(a) and (b)). A copy of 11 AAC 02 may be obtained from any regional office of the Department of Natural Resources.