



Preliminary Regional Manager's Decision
Southern Energy, Inc.
ADL 108655 – Easement
AS 38.05.850

I. Requested Action

An application dated September 02, 2016 was received from Southern Energy Inc. (Applicant) requesting an easement for the use of state-owned rights-of-way, and the construction and maintenance of access roads, a penstock, and a buried transmission line across state-owned land within the Haines State Forest, approximately 30 miles northwest of Haines, near Walker Lake, south of the Klehini River and Porcupine Trail. The easement request is related to the Applicant's proposed 1 megawatt hydropower project at Walker Lake. A separate lease application for the hydropower facilities is being adjudicated under ADL 108656.

Proposed Action

The Southeast Region Department of Natural Resources (DNR), Division of Mining, Land & Water (DMLW) intends to issue the Applicant a private non-exclusive easement for use of state-owned land and rights-of-way with a 30-year term, or less than 30 years if the easement is no longer used for the requested purpose.

II. Statutory Authority

AS 38.05.035, AS 38.05.850 and Alaska Administrative Code 11 AAC 55.

III. Administrative Record

Case file ADL 108655 is the administrative record for this case. Also, incorporated by reference is the Haines State Forest Management Plan 2002 (HSFMP).

IV. Scope of the Decision

The scope of administrative review for this authorization is guided by AS 38.05.850(a) and 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.

V. Location Information

Geographic Location

The proposed easement is on state-owned land and rights-of-way located in the Haines State Forest, approximately 30 miles northwest of Haines, to the east of Walker Lake.

Legal Description

28 South Portion (DNR reservation and easements across University-owned land):

Copper River Meridian, Township 28 South, Range 55 East, Sections 27,32,33, & 34.

Width: 50’ **Length:** 18,500’ **Acreage:** 21.2

29 South Portion (State-owned land)

Copper River Meridian, Township 29 South, Range 55 East, Sections 1, 2, & 3.

Copper River Meridian, Township 29 South, Range 56 East, Section 6.

Width: 50’ **Length:** 13,000’ **Acreage:** 15

Width: 100’ **Length:** 12,500’ **Acreage:** 28.7

Section 1 & Section 2 combined approximate acreage: 65

Other Land Information

i. Municipality: City and Borough of Haines

ii. (ANCSA) Regional Corporation: Sealaska Corporation

iii. Village Corporation: Klukwan, Incorporated

iv. Federally Recognized Tribe: Central Council of the Tlingit and Haida Indian Tribes, Chilkat Indian Village, & Chilkoot Indian Association

VI. Land Status Information

Title

The State of Alaska owns the land and mineral estates of the project area, within Copper River Meridian, Township 29 South, Range 55 East and Township 29 South, Range 56 East.¹ The State owns the subject right-of-way reservation and easements across University-owned land within Copper River Meridian, Township 28 South, Range 55 East, Sections 27, 32, 33, & 34.²

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.”

¹ Title Reports: RPT-9800, RPT-10076, and RPT-10077.

² Quitclaim Deed No. 271, Jun 13, 1984; LSH 589, Relocatable Easement, Haines Recording District 2009-000508-0.

The proposed site is located within the City and Borough of Haines. The area is subject to the Haines State Forest Management Plan 2001 (HSFMP) and is located within management unit 3 (Klekini River), and subunits 3h (Herman and Walker Lakes), and 3f (lower Klehini).³

Subunit 3h is classified Public Recreation Land. Existing public recreation uses include backcountry fishing, hiking, and camping.

Subunit 3f is classified Forest Land and will be managed for commercial timber harvest and to accommodate existing dispersed recreation activities including berry picking, cross-country skiing, and snow machining. Scenic resources should also be protected in this area.⁴

The HSFMP states that Public Recreation Land should be managed as follows:

*Areas classified as Public Recreation Land will primarily be managed for the purposes of maintaining and enhancing the use of these areas for public recreational uses. Although most areas classified Public Recreation Land will allow for a wide variety of public recreational uses (both non-motorized and motorized), not all recreational uses may be appropriate in some units. In these instances the management intent and management guidelines for the unit specify those uses that are not allowed or are allowed under specific conditions. Private, commercial or not-for-profit operations are allowed within areas classified Public Recreation land, but all such uses must be compatible with the management intent and management guidelines of specific units. They may also be allowed in the land classifications of Forest Land and Resource Management Land if authorized under the permitting requirements described in this section. Public recreation facilities are recognized as an appropriate use within all such land classifications...*⁵

Considering the HSFMP's emphasis on promoting multiple uses that do not conflict with designated uses, and the increased access that the project will provide, the proposed project is consistent with the management intent of the HSFMP.

Mineral Orders

The subject area in CRM 29S 55E Section 3 is under Leasehold Location Order 25 and is closed to new mining claims.

VII. Third Party Interests

³ HSFMP, p. 3-21

⁴ HSFMP, p. 3-25

⁵ HSFMP, p. 2-24

There is a leasehold location order (LLO 25) extending approximately 500 feet south from the southern shore of Walker Lake and along both sides of the Little Salmon River. Additionally, ADL 708575 and ADL 708378 are State Mining Claims in the N½ section 1, 29 S, 55 E, CRM.

VIII. Background

The Walker Lake hydropower project was originally pursued separately by both the Applicant and the Tlingit and Haida Regional Electric Authority (THREA). In June 2013, THREA received a preliminary permit from FERC to further develop the project. However, THREA relinquished the FERC permit in November 2014, because it could not obtain sufficient funding for the project. The Applicant continued to pursue the project, and in December 2015, FERC issued a jurisdictional decision, determining that a FERC license was not required under section 23(b) of the Federal Power Act.⁶ Following FERC's determination, the Applicant submitted separate lease and easement applications to DMLW for the dam locations and access to the project site, respectively, in September 2016.

Related Actions

In conjunction with this easement application the Applicant also applied for a lease for two dams and a powerhouse site (ADL 108656). That lease application remains in adjudication. Additionally, the Applicant will need to receive authorizations from the Alaska Dam Safety Program and water rights permits from DMLW.

IX. Agency Review

Agency review was conducted from July 20 to August 4, 2017.

Summary of Agency Comments

From Alaska Department of Fish & Game

The Alaska Department of Fish & Game (ADF&G) commented that Walker Lake and Walker Creek provide important fish habitat for resident Dolly Varden, waterfowl, trumpeter swans, beaver, and river otters. ADF&G supports the proposed access routes and encourages limited public access by four-wheeler and foot traffic to the Walker Lake area. The upland area around the lake contains habitat suitable for black bears, brown bears, and wolves. At lower elevations along the penstock route to the powerhouse site, the habitat is suitable for moose. Moose are an important subsistence food source for residents in the area.

ADF&G documented 3 brown bear dens uphill from Walker Lake in recent years. Potential denning habitat is within 1km of dam site 2 and portions of the penstock. The con-

⁶ FERC Order 153 ¶ 62,197, Docket No. DI15-2-000
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struction of the dams would remove a small amount of habitat suitable for waterfowl, river otter, and beaver. The installation of the penstock has the potential to disturb black bears, brown bears, wolves, and moose (in the lower elevation areas). Any penstock which isn't buried will cause habitat loss as will the installations of the dams, the powerhouse, and the access road extension.

ADF&G has no objection to the issuance of the proposed easement; however, we do have the following recommendations for minimizing wildlife disturbances:

- 1) Restore disturbed habitat as close as possible to its natural state (e.g. replacing vegetation that has been removed).
- 2) Avoid high disturbance activities during winter and spring (November-June) when denning bears and newly emerged cubs may be present. This recommendation would also reduce potential effects on nesting waterfowl.
- 3) Contact ADF&G for guidance if sows with cubs are observed within 1 km of the worksite.
- 4) A bear safety program, to include proper food and waste management, should be developed and approved by ADF&G wildlife biologists.

DMLW's Response

DMLW will include ADF&G's recommendations as stipulations to all land use authorizations made for the Walker Lake hydropower project.

From DPOR Office of History and Archaeology (OHA)

Review of the Alaska Heritage Resources Survey (AHRS) database indicated there are no *known* cultural resource sites within the project area. However, based on the currently available information we believe that a more thorough cultural resource analysis (desktop assessment and/or on-ground survey) by a qualified cultural resource professional (CRP) is appropriate. It is possible that a review of photographs from a site visit would provide enough information on the environment and topography to alter our current recommendations, however, having an archaeological survey done by a CRP is considered by our office to be the most efficient way of identifying potential conflicts with cultural resources.

Should inadvertent discoveries of cultural resources occur during the duration of the project, work in the area of the discovery should halt, and our office notified, so that we may evaluate whether the resources should be preserved in the public interest (as specified at Section 41.35.070[d]). Any information provided helps the State better manage Alaska's heritage resources.

Examples of cultural resource sites that could be encountered include: historical cabin remains (collapsed, standing, or foundations); adits; dredges or other mining equipment;

cultural depressions or pits; graves or cemeteries; prehistoric tools or artifacts; and paleontological (fossilized) remains.

DMLW's Response

The Applicant's obligations under AS 41.35.070 will be noted in the stipulations for any land use authorization granted for this project. DMLW will work with the Applicant to acquire additional photography of the project area and provide those photographs to OHA. If OHA determines that a CRP performed archeological survey is required, DMLW will require the survey as part of any land use authorizations issued.

From DNR Division of Forestry

The Division of Forestry (DOF) has determined that the Walker Lake hydropower project is consistent with the management intent in the Haines State Forest Management Plan.

The access road for the construction of the facilities and the pipeline pass through a forest land subunit. The road location through this area will create an opportunity for timber sales and forest management that was not economical in the past.

Walker Lake is designated a public recreation subunit. The dam and intake facility proposed on Walker Lake will not conflict with recreational use of the lake. And the access road will improve public access to the subunit.

During the installation of the underground transmission line along Little Salmon River Road, the Applicant should work closely with the Haines DOF staff to limit the impacts on public use during the construction period.

DMLW's Response

DMLW will open the access roads for non-commercial public access once the project is completed. Additionally, DMLW will require the Applicant to allow for public access during the installation of the transmission line along the existing Little Salmon River Road.

Once the hydropower project is completed, DMLW encourages DOF to work with the Applicant to develop a plan for forest resource development within the applicable project area. Any third parties using the access roads for commercial purposes should enter into a road maintenance and management agreement with DOF and the Applicant to equitably share road maintenance responsibilities.

X. Access

Physical and Legal Access

The physical access to the subject area is via Porcupine Trail, a recognized RS 2477 route (RST 1225), to a former logging road, Sunshine Mountain Road, and then on to a partially developed spur road. Sunshine Mt. Rd. traverses University of Alaska-owned land northeast of the subject area. DNR retained a right-of-way for Sunshine Mountain Road

when it conveyed the land to the University.⁷ And DNR obtained a relocatable easement from the University for a small section of Sunshine Mountain Road in 2009 (LSH 589).

Because DNR's reservation of interest in Sunshine Mountain Road is not a public easement, DMLW will issue the applicant a private non-exclusive easement over these roads, in addition to the easements issued under this authorization, so that the Applicant has legal access to the proposed leasehold areas (ADL 108656).

XI. Environmental Considerations

The Applicant is expected to inspect the prospective easement area and familiarize itself with the condition and quality of the land. The state makes no representations and no warranties, express or implied, concerning the existence or absence of any hazardous substances, hazardous wastes, contaminants, or pollutants, nor for the remediation of the site should such substances ever be identified.

The Applicant plans to build a small hydropower facility at the south end of Walker Lake. The easements at issue here will provide the primary overland access to the project area, which is a remote location. The primary environmental concerns for the access roads relate to impacts on wildlife, soil erosion from road construction and road use, and the associated impacts of operating heavy equipment and machines in remote areas.

ADF&G has provided guidance on how best to avoid impacts on wildlife, and the Applicant has developed a bear safety plan that was reviewed by ADF&G. Additionally, the roads will be required to meet forest road standards as established in 11 AAC 95, Alaska Forest Resources & Practices Regulations, which will address soil erosion issues. Furthermore, the Applicant has developed a hazardous substance management plan to address the storage and use of equipment, fuels, and other hazardous substances on state land. The hazardous substance management plan was submitted for review to ADEC and ADF&G, before final approval from DNR.

XII. Performance Guaranty

In accordance with 11 AAC 96.060, performance guaranties are means to assure performance and to provide ways to pay for corrective action if the permittee fails to comply with the requirements set forth in the project plans and easement. The amount of the performance guaranty is based on the scope and the nature of the activity and the potential cost of restoring the site.

The performance guaranty for this authorization will be \$65,000 based on the acreage requested and the potential cost to reclaim the land. Once project construction and the as-

⁷ Quit Claim Deed No. 721; ADL 214785.
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built survey are complete, and DMLW accepts a final construction-phase completion report, the Applicant may request that up to \$40,000 of the guaranty be returned. With the remainder to be held for the lifetime of the project to ensure compliance.

Performance guaranties are subject to periodic adjustments being made during the term of the authorization to address increases or decreases in risk associated with the project, the costs of rectifying problems, and restoring state land due to inflation, changes in the level or nature of development, or other appropriate factors.

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.

- **Commercial General Liability Insurance:** Such policy shall have minimum coverage limits of \$1,000,000 combined single limit per occurrence.
- **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.

If the Applicant's general liability policy contains higher limits, the State shall be entitled to coverage to the extent of such higher limits. Certificates of Insurance must be furnished to us prior to the issuance of this easement 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 40-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 the easement and shall be grounds, at the option of the State of Alaska, for termination of the easement.

XIV. Survey

Upon receiving an Early Authorization from DNR, the Applicant shall conduct an as-built survey acceptable to the standards of the DMLW Survey Section prior to the expiration of the Grantee's Entry Authorization. Except for Little Salmon River Road, the as-built survey shall include all the authorized area within CRM, T 29 S, R 55 E, Sections 1, 2, & 3; and in addition, all the buried transmission line from origin to end. The Applicant will be responsible for all costs associated with conducting the survey. The Applicant shall request and pay for survey instructions prior to issuance of the Entry Authorization.

XV. Fees/Appraisal

Fee Narrative: 11 AAC 05.070(d)

As required by Director's Fee Order #3 (June 12, 2018), and under 11 AAC 05.070(d)(2)(A)(i) the fee for this non-exclusive private easement under AS 38.05.850 will be an annual fee of \$240 per acre. During the EA period, the annual fee will be \$15,600 (\$240 x 65 acres). Once the as-built survey is complete, the annual fee will be established based on the actual as-built acreage. An appraisal is not required.

XVI. Term

EA Term: Three years, or shorter if the easement is issued prior to the EA expiration.

Easement Term: Thirty years, or sooner, if the easement is no longer used for the requested purpose.

XVII. Economic Benefit and Development of State Resources

AS 38.05.850(a) requires that in the granting of easements DNR give preference to the use of the land that will be of greatest economic benefit to the state and the development of its resources.

XVIII. Discussion

AS 38.05.850(a) requires that preference be given to easements that will be of greatest economic benefit to the state. Here, the proposed road development, and the hydropower project, are complementary to the goals in the HSFMP. The improved access to the Walker Lake area will increase public access for recreational purposes, and could potentially allow for additional small-scale timber harvests in the future, according to the Division of Forestry. Additionally, the Haines Borough Planning Commission issued the Applicant a conditional use permit for the Walker Lake hydropower project on February 16, 2016.⁸

Road Maintenance

Under ADL 107964 the Division of Forestry is responsible for the maintenance of Little Salmon River Road. Sunshine Mountain Road was reserved by the State under Quit Claim Deed No. 721 (ADL 214785), and has been managed and maintained by DOF. The Applicant plans to utilize both of these existing roads and the proposed easement will include these portions. While these roads are frequently used by the public for recreational access to parts of the Haines State Forest, they are not designated public rights-of-way. The Applicant's proposed commercial use of the roads differs from that of the public, and as such, the Applicant will enter into a road maintenance agreement

⁸ Haines Borough Planning Commission, Conditional Use Permit # 16-05.
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for these existing roads with the DMLW and the Division of Forestry as part of this proposed authorization.

Public Access

Under the HSFMP, Walker Lake is designated as a recreational subunit, as such, any authorization for land use at Walker Lake should enhance public recreational opportunities at the lake. The Applicant's requested easements over state land will serve as the primary access to the lake for recreational activities post construction. On the southeastern shore of the lake, adjacent to the southeast dam and penstock origin, the applicant will be required to clear and level an approximate half-acre area that can be used for additional staging during construction, and after construction as a future recreation or cabin site. As such, the Applicant will be required to develop a recreation management plan for approval by the Division of Forestry prior to the issuance of this easement. The recreation management plan should include details regarding restrictions placed on the use of the access roads by the public, including whether gates are placed within the State Forest, and if so, where and when they will be used to restrict public access.

With these considerations, the Southeast Regional Office of the DNR Division of Mining, Land and Water plans to issue the Applicant a private non-exclusive easement for approximately 65 acres of state land and state-owned easement across University-owned land.

XIV. Recommendation

Authorization Type and Term

Pursuant to AS 38.05.850, the Southeast Region Department of Natural Resources, Division of Mining, Land and Water recommends the issuance of a 30-year private nonexclusive easement to the Applicant for access across state land and a state-owned easement. Special Stipulations and the terms and conditions set forth therein (Attachment 2).

This is a preliminary decision and subsequent public review may result in changes or disapproval of the proposed action altogether.

Terms and Conditions

1. Public access shall be maintained, but for temporary restrictions required for public safety.
2. Quarterly progress reports will be required during the construction phase of the project. A final construction completion report will also be required.
3. Applicant shall contact and inform Division of Forestry, if any commercial grade trees (hemlock or spruce trees, 8" or more in diameter) are to be removed from state land.
4. Applicant shall develop a public recreation and public access plan for approval by the Division of Forestry prior to the issuance of this easement.
5. The permit and entry authorization shall contain modifications and/or provisions that are justified by public comment.

6. The grantee shall restore the area to a condition acceptable to the commissioner. Reclamation of the site may require the removal of certain improvements, upon expiration or termination of the easement. A future decision will determine the extent of required restoration.
- a. In order to ensure appropriate site restoration, two years before the expiration of the easement, the Applicant shall apply to DNR for a new easement for the same site, or submit to DNR a site restoration and or preservation plan and a commensurate performance guaranty.
 - b. The performance guaranty amount may be adjusted during the term of the permit.



Adam Moser, Natural Resource Specialist

7/11/2018

Date

Natural Resource Manager's Concurrence

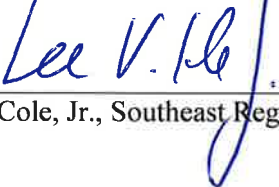
for 

Steve Winker, Natural Resource Manager

7/12/18

Date

Regional Manager's Decision



Lee V. Cole, Jr., Southeast Regional Lands Manager

July 11, 2018

Date

Attachments: A – Development Plan
B – Easement and Stipulations
C – 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: City and Borough of Juneau; Sealaska Corporation; Goldbelt, Inc.; Central Council of the Tlingit and Haida Indian Tribes; Douglas Indian Association; and those parties that have previously requested written notice. We will also request that the Juneau Post Office 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 adam.moser@alaska.gov by the close of business on **August 15, 2018** 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.