

**STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES
SOUTHCENTRAL REGIONAL LAND OFFICE**

Regional Manager's Decision

ADL 233100
Gulkana Village Council
Easement Application
AS 38.05.850

REQUESTED ACTION

On February 9th, 2018, the Department of Natural Resources (DNR), Division of Mining, Land, and Water (DMLW) received an application from the Gulkana Village Council (the applicant) via project agent Michael Baker International that requests approval of a public easement across state-owned, DMLW-managed shorelands within the Gulkana River, near the community of Gulkana, Alaska. The requested easement would authorize the construction, survey, operation and maintenance of an erosion control revetment. This infrastructure will stabilize a portion of bank along the Gulkana River below Ordinary High Water (OHW) to protect upland property and improvements, including an access road to a nearby cultural camp. The applicant has requested a public easement approximately 775 feet in length, 15 feet in width, and approximately .27 acres in size.

RECOMMENDED ACTION

Staff recommend that the requested action be modified as follows, and that an easement be created with the following parameters.

- Width: Change from 15 feet to 50 feet.
- Length: Approximately 775 feet, dependent on a DMLW-approved as-built survey.
- Acreage: Change from .27 acres to .89 acres.
- Term: Indefinite.
- Grantee: Gulkana Village Council.
- Type of Easement: Public easement.

Staff's research and recommendations concerning the creation of this easement and any changes from the applicant's request are discussed below.

SCOPE OF DECISION

The scope of this decision is to determine if it is in the State's interest to create an easement for the proposed use. The scope of administrative review for this authorization 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 serve the interest of the State of Alaska. All other aspects of the applicant's project are outside the scope of this decision.

STATUTORY AUTHORITY

This easement application is being adjudicated pursuant to AS 38.05.850 and the Alaska Land Act as amended, and AS 38.05.127.

ADMINISTRATIVE RECORD

The administrative record for the proposed action consists of the Constitution of the State of Alaska, the Alaska Land Act as amended, applicable statutes and regulations referenced herein, the 1986 Copper River Basin Area Plan, other classification references described herein, and the casefile for the application serialized by DNR as ADL 233100.

LOCATION INFORMATION

Geographic Location

The applicant has requested that DMLW authorize an easement within the Gulkana River near the community of Gulkana, Alaska.

Township Range

The applicant has applied to use state-owned, DMLW-managed shorelands within the SE 1/4 of Section 27, Township 6 North, Range 1 West, Copper River Meridian.

Other Land Information

Municipality: None.

Regional Corporation: Ahtna, Inc.

TITLE

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

THIRD PARTY INTERESTS

The applicant has requested an easement that may impact the following interests. Third-party interest notification has been sent to all interest holders noted below.

Third Party Notice Comment & Response

Native Village of Gulkana/ADL 231125: Native Village of Gulkana has provided DMLW with non-objection to the proposed action by submitting the application under ADL 233100.

No other third-party interests were identified.

PLANNING & CLASSIFICATION

The proposed project is within the Copper River Basin Area Plan, Management Unit 27 (Gulkana River-Richardson Highway), Subunit 27C (State (navigable waters)-Gulkana River, Paxson Lake). This area is designated as public recreation and wildlife habitat, which converts to a classification of Public Recreation Land and Wildlife Habitat Land.

The entire unit is to be managed for multiple uses, with an emphasis on public recreation, providing for a transportation and utility corridor, and protecting fish and wildlife. To protect such uses and resources, Subunit 27C is closed to mineral entry and is not available for oil and gas leasing. Additionally, for sections of the Gulkana River below Sourdough, land leases not related to river recreation are generally prohibited and should be consulted with Bureau of Land Management (BLM) and the DNR-Division of Park and Outdoor Recreation (DPOR).

While the proposed project is not directly related to river recreation, it should not interfere with recreational uses and it supports the infrastructure necessary to improve and protect the adjacent uplands and access to those lands. The Plan recommends consultation with BLM and DPOR, however neither agency provided comment during the Agency Review. In regard to wildlife habitat, though the Alaska Department of Fish and Games (ADF&G) did not provide comment during the Agency Review, the project agent confirmed they were coordinating with that agency to obtain a Fish Habitat permit, which would address any wildlife concerns during construction.

The proposed project under ADL 233100 does not conflict with the management intent of the Copper River Basin Area Plan.

ACCESS

Functional access between the Richardson Highway and state land discussed herein exists via 2nd Street, B Street and Tract F of USS 4861. Legal access exists up to Tract F.

Construction of the improvements described herein is contingent on the ability to cross Tract F of USS 4861 between the southwestern end of B Street and the project area. Staff recommend that an entry authorization not be granted until the applicant has supplied evidence of having obtained permanent authorization for access from the land owner of Tract F. Additionally, the applicant must obtain the written concurrence from all directly adjacent, upland landowners and provide copies to DMLW, prior to the issuance of an entry authorization.

The authorization proposed herein will not impair public access; therefore, an easement pursuant to AS 38.05.127 is not necessary to ensure free access to and along any public or navigable waters. However, DMLW reserves the right to subsequently create an easement under AS 38.05.127 without the concurrence of the Grantee.

PUBLIC NOTICE & AGENCY REVIEW

Public Notice Summary

Public Notice of the application was conducted from April 10, 2018 to May 10, 2018. The notice was posted to the State of Alaska Online Public Notice System and was sent to the Gakona and Tok post offices for display on their notice boards.

Public Notice Comment & Response

Comment: On April 10, 2018, a member of the public raised concerns about riprap being placed in an anadromous stream during salmon season and asked if DMLW was in contact with ADF&G on this project.

Response: The Agency Review for ADL 233100 was provided to ADF&G, but no comments were received from that agency. However, per communication with the project

agent, the applicant is working with ADF&G on a Title 16 permit (Fish Habitat permit), which would contain stipulations regarding wildlife concerns, including anadromous fish.

No further comments were received for the public notice.

Agency Review Summary

Agency Review of the application was conducted from April 10, 2018 to May 10, 2018. The notice was sent to the following recipients:

State of Alaska:

DNR, DPOR, State Historic and Preservation Office

DNR, Division of Oil and Gas, State Pipeline Coordinator's Section

DNR, DMLW: Water Section; Mining Section; Survey Section; Resource Assessment and Development Section; and Realty Services Section

DEC: Division of Environmental Health, Drinking Water Program; Division of Water, Storm and Wetlands; Domestic and Industrial Utilities

ADF&G, Division of Wildlife Conservation, Access Defense Program

Alaska Department of Transportation and Public Facilities (DOT&PF), Central Region Office

Alaska Mental Health Trust Land Office

Federal Agencies:

United States Army Corps of Engineers

BLM, Glennallen Field Office

Local Entities:

Ahtna, Inc.

Michael Baker International (project agent)

The applicant

Agency Review Comment & Response

Comment: On April 13, 2018, Ahtna Inc. submitted a letter of support for this application, as it will protect the road to a culture camp for the Gulkana Village, as well as other infrastructure such as the water supply intake for the Village.

Response: DMLW acknowledges this comment.

Comment: The DOT&PF Maintenance & Operations and Right-of-Way groups have no comment.

Response: DMLW acknowledges this comment.

Comment: On May 9, 2018, DEC identified that the project area intersects with a Drinking Water Protection Area for a public water system source and has requested that the applicant follow "Recommendations for General Construction Projects" where applicable.

Response: DMLW acknowledges this comment and has forwarded DEC's comment to the applicant and project agent.

No further comments were received for the agency review.

ENVIRONMENTAL CONSIDERATIONS

Staff evaluate environmental factors directly related to the authorization of use of state lands, specifically whether the approval of the authorization is in the State's interest. The purpose of this consideration is to identify any associated mitigation measures or other requirements necessary to protect the public interest, while informing the overall decision of whether or not to approve the authorization.

Environmental contamination risk associated with this proposed easement is minimal. Staff recommend that fuel, lubricants, and other hazardous materials be restricted to those necessary and be contained within tools and vehicles when equipment is necessary for construction and maintenance activities. Staff further recommend that no fuel or other hazardous materials are authorized to be stored on site. There are no other known environmental considerations or constraints in this location.

ECONOMIC BENEFIT & DEVELOPMENT OF STATE RESOURCES

In accordance with AS 38.05.850, DMLW considers if the requested authorization will provide the greatest economic benefit to the State and development of its natural resources. Specifically, staff assess both direct and indirect economic benefits and whether the proposed authorization encourages the development of the State's resources.

The authorization considered herein will provide a direct economic benefit to the State in the form of land use fees. Additionally, the proposed easement will facilitate the protection of property from erosion, which will promote conditions for economic development, thus providing an indirect benefit to the State. In consideration of these factors, and because there are no competing requests for authorization, approval of this easement will provide the greatest economic benefit to the State.

DISCUSSION

Dimensions

Staff recommend that an easement of a width of 50 feet instead of 15 feet be created in order to provide adequate space for infrastructure placement and maintenance activities. A change in width subsequently increases the acreage from .27 acres to .89 acres

Term

Staff recommend that the easement considered herein be granted for an indefinite term from the effective date of this decision as the need for this easement can be expected to exist as long as the adjoining land requires erosion control protection.

DMLW-created easements may be terminated when the Grantor determines that the easement is abandoned, no longer in use for the purpose(s) authorized or the easement is revoked as a result of violation of the terms and conditions.

Following termination, whether by abandonment, revocation, or any other means, the applicant shall rehabilitate the site(s) to a condition that is acceptable to DMLW.

DMLW authorizations may not be transferred or assigned without written approval from DMLW. DMLW reserves the right to amend the terms, conditions and/or stipulations of the easement prior to assignment, or to withhold approval for the assignment entirely.

Grantee and Easement Type

Staff recommend that the authorization considered herein be a public easement granted to the Gulkana Village Council on behalf of the public as the applicant is a government body and operation of the proposed infrastructure is within the scope of the activities the body is authorized to conduct by its governing statutes. Easements created by DMLW are non-exclusive unless described otherwise.

Limited Waiver of Sovereign Immunity

To protect the State from risks or unplanned activities that may result in damage to state lands and for the easement to be held by the Gulkana Village Council, a federally recognized tribal government¹, staff recommend that a limited waiver of sovereign immunity is required. A resolution supporting the waiver and certifying that the Gulkana Village Council has the authority to waive immunity must accompany the waiver. The applicant must provide a copy of its Constitution and Bylaws for verification that it has the authority to sign the resolution and waiver. A copy of the applicant's Constitution and Bylaws must be provided to DMLW prior to issuance of the entry authorization. The resolution and waiver must be provided before the issuance of the final easement document.

PERFORMANCE GUARANTY

A performance guaranty is intended to incentivize compliance with the terms and conditions of the entry authorization and easement. It also provides a mechanism for the State to ensure that the applicant shares in the financial burden in the event of noncompliance (including fee payment, survey, etc.), restoration (interim and final), and any associated costs after termination or expiration of the easement. Staff recommend that the applicant be required to submit a performance guaranty in the amount of \$4,000.00 to ensure completion of entry authorization requirements. These funds will also serve as a survey deposit (per AS 38.05.860) and may be reduced one time during the term of the entry authorization by an amount equal to payments made by the applicant to a licensed surveyor under contract for completion of an as-built survey in accordance with survey instructions issued by the DMLW Survey Section, as described herein. This performance guaranty shall remain in place during the term of the entry authorization and will be subject to release upon the acceptance of a DMLW-approved as-built survey and the fulfillment of all conditions and stipulations of this decision and the entry authorization. The performance guaranty may also be adjusted to reflect updates and changes in the associated project, and the applicant may be required to provide an additional performance guaranty if DMLW determines there is additional risk to the State. The performance guaranty may be utilized by DMLW to cover actual costs incurred by the State to pay for necessary corrective actions in the event the applicant does not comply with site utilization and restoration requirements and other stipulations contained in the entry authorization. An additional performance guaranty may be required for an extension of the entry authorization beyond the initial term proposed under this decision.

¹ Gulkana Village Council is listed in the Federal Register by the U.S. Department of Interior, Bureau of Indian Affairs (BIA) as a federally acknowledged Indian Tribe in Alaska and is acknowledged to have the immunities and privileges available to federally recognized Indian Tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations, and obligations of such Tribes.

History of Compliance

DNR Land Administration System records indicate that the applicant is in a state of compliance with the terms of other DMLW-issued authorizations.

Performance Guaranty

A performance guaranty in the amount of \$4,000.00, typically in the form of a bond or other security, will be required.

INSURANCE

Staff recommend that the applicant be required to submit proof of insurance in an amount the insurance company determines necessary to protect both the State and the applicant from risks associated with the planned activities under the entry authorization for ADL 233100. The applicant will be responsible for maintaining the necessary insurance during the term of the entry authorization. The insurance may be adjusted to reflect updates and changes in the associated project, and the applicant may be required to furnish additional insurance if DMLW determines there is additional risk to the State. A certificate of insurance listing the State of Alaska, Department of Natural Resources as an additional insured on the policy, or other insurance acceptable to the State, must be submitted to DMLW prior to entry on state land and must be maintained throughout the term of the entry authorization.

SURVEY

Staff recommend that a DMLW-approved pre-construction survey be required to determine the position of ordinary high water prior to construction. A DMLW-approved as-built survey is also required to determine the proper location and acreage of installed improvements and the associated easement on state-owned, DMLW-managed lands. Pre-construction ordinary high water and post construction details may be combined in a single final survey. The applicant will be required to request survey instructions prior to issuance of the entry authorization. The survey must be produced in accordance with survey instructions provided by the DMLW Survey Section and stamped by a Professional Land Surveyor registered in the State of Alaska. A final easement will not be issued until the as-built survey has been approved by DMLW. The applicant is required to submit a preliminary draft as-built survey a minimum of one year prior to the expiration of this authorization to allow adequate time for DMLW's review and approval of a final as-built survey.

FEES

Staff find that the following fees are applicable to this request. These fees may be adjusted if the regulation(s) and/or schedule(s) pertaining to the fee(s) change during the term of the entry authorization or easement and will be subject to non-sufficient fund and late payment penalty fees. The applicant shall pay:

- An interim, annual rental fee of \$240.00 during the term of the entry authorization, in accordance with 11 AAC 05.070 (d)(2)(I). This fee is based on acreage at \$240.00 for up to two acres; \$120.00 for each additional acre.
- An estimated one-time fee of \$1,600.00 prior to issuance of the final easement, in accordance with 11 AAC 05.070 (d)(2)(H)(i). This fee is based on acreage whereas an erosion control structure less than 1 acre in area is charged a one-time fee of \$1,600.00; greater than 1 acre is a one-time fee of \$4,000.00 in accordance with 11 AAC 05.070

- (d)(2)(H)(ii). The applicant will be subject to the one-time fee of \$4,000.00 if the improvement is determined to be greater than 1 acre, per the DMLW-approved survey.
- Applicable document recording fees prior to DMLW's execution and recordation of the easement document for ADL 233100.

ENTRY AUTHORIZATION

The entry authorization is an interim authorization issued when a survey is necessary prior to easement issuance. Staff recommend that an entry authorization be issued for a term ending 5 years from the date of issuance for the purpose of constructing, surveying, operating, and maintaining the infrastructure considered herein prior to DMLW's issuance of a public easement. An extension of the entry authorization may be granted at the written request of the applicant if granting the extension is deemed appropriate by DMLW and may be subject to applicable fees. If an extension is required, the applicant must contact DMLW no later than 30 days prior to the expiration of the entry authorization and certify there have been no changes to the approved development plan. Following termination, whether by abandonment, revocation, or any other means, the applicant shall rehabilitate the site(s) to a condition that is acceptable to DMLW. Staff recommend that entry authorization not be granted until the following deliverables have been provided to DMLW, as described or recommended above:

- First year of interim, annual land use fees.
- Evidence of having made request for survey instructions to the DMLW Survey Section.
- Insurance.
- A performance guaranty.
- Copies of written concurrence from all directly adjacent, upland landowners of the project area.
- A record of permanent authorization to cross Tract F of USS 4861 between the southwestern end of B street and the project area.
- Copy of applicant's Constitution and Bylaws.

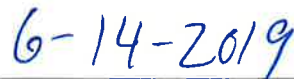
Staff recommend that the application filed under ADL 233100 be suspended following the effective date of this decision until all deliverables described herein are provided, or the decision is revoked as allowed for below.

RECOMMENDATION

Based upon the information provided by the applicant, as well as review of relevant planning documents, statutes, and regulations related to this application, it is the recommendation of staff to issue an easement as described above, on the condition that all stipulations are followed as described in the attached authorization.



Carol Hasburgh, Natural Resource Specialist
DMLW Southcentral Regional Land Office



Date

REGIONAL MANAGER'S DECISION

When adjudicating an easement authorization pursuant to AS 38.05.850, DMLW seeks to responsibly develop Alaska's resources by making them available for maximum use and benefit consistent with public interest. In consideration of all events and criteria listed above, I hereby determine that the authorizations to be granted by this decision are consistent with DMLW's mission, that this project is consistent with the overall classification and management intent for this land, and that issuance of an authorization as described above is in the interest of the State of Alaska. The Department assumes no responsibility for maintenance or liability for injury or damages attributable to this authorization.

This decision may be rescinded by written notification if, after 60 days from the effective date of this decision, the applicant has not completed all requirements outlined in this decision for issuance of the authorization. Additional time may be allotted to complete these requirements; however, this will not extend the total term of the authorizations issued under this decision.



Clark Cox, Regional Manager
DMLW Southcentral Regional Land Office



Date

ATTACHMENTS

Draft entry authorization
Draft easement document

APPEAL

A person affected by 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. Under 11 AAC 02.030, appeals and requests for reconsideration filed under 11 AAC 02 must be accompanied by the fee established in 11 AAC 05.160(d)(1)(F) which has been set at \$200 under the provisions of 11 AAC 05.160 (a) and (b).

If no appeal is filed by the appeal deadline, this decision becomes a final administrative order and decision of the department on the 31st calendar day after issuance. An eligible person must first appeal this decision in accordance with 11 AAC 02 before appealing this decision to the Superior Court. A copy of 11 AAC 02 may be obtained from any regional information office of the Department of Natural Resources.