

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

Regional Office Name

Preliminary Decision

ADL 108691

Whale Island Dock Association

Application for Lease

AS 38.05.035(b)(5)

Executive Summary

This Preliminary Decision (PD) is the State's preliminary best interest finding regarding a proposed disposal of interest in state land. The requested authorization is an already existing dock and pier on the northeastern side of Whale Island in Sitka, Alaska. The applicant is requesting a 25-year tideland non-competitive lease for operation and maintenance of the dock and pier for property owners to access their lots on Whale Island. At this time the state has intent to authorize this lease, contingent on comments received during public notice and the best interest findings continued herein. The public is invited to comment on this PD. The deadline for commenting is 5:00 pm November 30, 2020. Please see the Public Notice section of this decision for requirements related to submitting comments for consideration. Only the applicant and those who comment have the right to appeal the Final Finding and Decision (FFD).

Requested Action

The Whale Island Dock Association ("applicant") applied for a lease on September 20th, 2019, to authorize an existing pier and dock for residents to access their properties in Sitka, Alaska.

The lease request is for continued use of an existing dock and pier for personal use by the applicant. A development diagram is included as Attachment 1.

Existing Improvements:

- Pier, 16' x 16', 256 square feet
- Ramp, 80' x 4', 160 square feet
- Floating dock, 30' x 15', 450 square feet

The total area requested by the applicant is approximately 0.12 acres. Final acreage will be determined by an approved as-built survey of the leasehold.

Proposed Action

The Division of Mining, Land & Water (DMLW) proposes to issue a 25-year non-competitive tideland lease for the operation of a dock and pier on Whale Island.

Scope of Decision

The scope of this decision is limited to the determination of whether it is in the State's best interest to issue a 25-year non-competitive tideland lease to the applicant. The administrative review for this authorization is defined by AS 38.05.035(e)(1)–(2) and is limited to (1) reasonably foreseeable, significant effects of the uses to be authorized; (2) applicable statutes and regulations; (3) facts pertaining to the land or resources; and (4) issues that are material to the determination. It should be noted that this applicant held a previous DMLW issued permit for their dock, but due to the permanent nature of their dock, were advised to obtain a DMLW issued lease.

Authority

This lease application is adjudicated pursuant to AS 38.05.035(b)(1) and AS 38.05.035(e) Powers and Duties of the Director, AS 38.05.070 Generally, AS 38.05.075 Leasing Procedures, and AS 38.05.945 Notice. It is also adjudicated under AS 38.05.035(b)(5) as the improvements have been on land before statehood. The authority to execute the PD, Final Finding and Decision (FFD), and the lease has been delegated to the Regional Managers of the DMLW.

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 here-in, the 2002 Northern Southeast Area Plan (NSEAP) and other classification references described herein, and the casefile for the application serialized by DNR as ADL 108691.

Location Information

Geographic Location:

The parcel is located on Whale Island in Sitka, Alaska, an island within Sitka Sound, a navigable body of water. The site is on state tide and submerged land on the northeastern side corner of Whale Island.

Property Description:

The proposed lease is located within Section 11, Township 56 South, Range 63 East, Copper River Meridian and more particularly located seaward and adjacent to conveyed land to the northwest and Mental Health Trust land to the southeast. It is within Lot 1 of USS 3556. The proposed leasehold contains approximately 0.12 acres more or less.

Other Land Information

Municipality: City and Borough of Sitka

Regional Corporation: N/A

Village Corporation: Shee Atika, Incorporated

Federally Recognized Tribe: Sitka Tribe of Alaska

Approximate Coordinate Location: 57.0268° N, 135.3405° W (WGS 84)

Title

The State of Alaska holds title to lands beneath tidally influenced and navigable waterways within its jurisdiction, including lands underlying the Sitka Sound in the section(s) 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).

Adjacent Landowners

The Bureau of Land Management (BLM) is the upland owner.

Third Party Interests

BLM is the upland owner of this proposed lease, subsequently the BLM has an interest in how this pier and dock could influence their land and the people using it. The Whale Island Dock Association is working with BLM to obtain a permit for the upland portion of the dock. The Mental Health Trust also has an interest as they own most of the land on Whale Island and the uplands of this authorization is to be conveyed to them if/when the parcel is conveyed to the state. The Mental Health Trust has submitted a letter of concurrence regarding this authorization (Attachment 2).

Planning and Classification

State land in the proposed subject area is managed in accordance with policies outlined in the Northern Southeast Area Plan, 2002 (NSEAP). This land has been state selected and is located within Management Unit B-26. There is no land use designation for this management unit.

Management Intent: Parcel is to be conveyed to the Mental Health Trust Authority if/when the selection is conveyed to the state.

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

This authorization follows the management intent because DMLW has received a letter of concurrence from the Mental Health Trust. The Mental Health Trust also provided us with stipulations they would like to be covered in the final lease agreement. DMLW plans on incorporating these stipulations in the final lease agreement which will be signed and agreed upon by the applicant before issuance.

Traditional Use Finding

This finding is not required since the proposed leasehold is located within an organized borough (AS 38.05.830). The Borough will be notified of this Preliminary Decision. Additional traditional uses may be identified during the public notice period. If further traditional uses become known, they will be discussed in the final finding and decision.

Access

The physical and legal access to the proposed lease site is limited because Whale Island is only accessible by boat, and this is the only year-round access point to the properties on Whale Island.

Without this dock and pier, the properties owners of Whale Island would have a difficult time accessing their property for most of the year due to inclement weather conditions during the fall and winter and rugged terrain and coastline that makes it difficult for residents to hike and climb around other areas of the island to reach their properties.

Access Along Public Waters:

The site is located on the Sitka Sound. Pursuant to AS 38.05.126(a), the public has a constitutional right to free access to, and use of, navigable or public waters of the State of Alaska. Under 11 AAC 51.045 and AS 38.05.127, the DMLW is required to reserve specific public-access easements to and along these waters. Unless comments and other information submitted to the DMLW provide justifiable and convincing evidence to do otherwise, this disposal of state interest will be subject to a 50-foot public access easement seaward and landward of the line of mean high water.

Public Trust Doctrine

Pursuant to AS 38.05.126, the proposed lease will be subject to the principles of the Public Trust Doctrine; specifically, the right of the public to use navigable waterways and the land beneath them for: navigation, commerce, fishing, hunting, protection of areas for ecological studies, and other purposes. These rights must be protected to the maximum extent practicable while allowing for the development of this project. As such, the DMLW is reserving the right to grant other authorizations to the subject area consistent with the Public Trust Doctrine.

Reservation of Mineral Estate

In accordance with section 6(i) of the Alaska Statehood Act and AS 38.05.125, the state, in this decision, reserves unto itself the mineral estate, including oil and gas, and the rights expressed in the reservation clause of the statute, that being the right to reasonable access to the surface for purposes of exploring for, developing and producing the reserved mineral resources. Exploration and development, if any, which could occur, would be consistent with AS 38.05.130 and other applicable statutes and regulations.

Mineral Orders

The proposed leasehold does not fall within the areas delineated in an Administrative Mineral Closing Order (MCO). Neither an MCO nor a leasehold location order is necessary or appropriate for this lease

Hazardous Materials and Potential Contaminants

No hazardous materials, specifically fuel, motor oil, power generators, human waste, trash, gray water, will be stored within the proposed leasehold.

Agency Review

An agency review was conducted on October 22nd, 2019. The deadline for agency comments was November 5th, 2019.

The following agencies were included in the review:

- Alaska Department of Fish and Game (ADFG), Habitat Division
- Alaska Department of Fish and Game (ADFG), Wildlife Cons. Division
- Department of Environmental Conservation (DEC), Div. Wastewater
- Department of Environmental Conservation (DEC), Commissioner's Office
- Alaska Department of Transportation & Public Facilities
- DNR DMLW DPOR OHA (SHPO)

Agency Review Comment and Response:

DMLW did not receive agency comments.

Background

This dock and pier have been at this location prior to World War II. The Whale Island Dock Association previously had a permit with DNR for use of this dock (see associated file LAS 21673). This permit under Linda Behnken expired on November 30, 2014. The permit holder was non-responsive to renewal requests from DNR and the dock on site was not removed. A trespass case was opened for this site (see associated file ADL 108382) until Erik Speck bought the dock and on September 6, 2016, applied for a permit with DNR (see associated file LAS 30288). Because of the permanent nature of the dock, he was advised to obtain a lease and the permit application was closed on October 10, 2016. DNR received the new lease application materials on November 2, 2016. The trespass file will be closed should the lease be issued.

Discussion

The Whale Island Dock Association is a group of three property owners on Whale Island who have an interest in this dock and pier. The Whale Island Dock Association was formed to coalesce interest in the dock and to incorporate new property owners on the island. All island property owners have the ability to access the dock by becoming members of Whale Island Dock Association and have been invited to do so. By becoming a member, they agree to share in the liability of the current dock and contribute to its basic maintenance.

The dock and pier facilities are not intended for commercial use. Whale Island has a rugged coastline and uneven terrain that can be difficult to traverse. There is currently a trail managed by BLM from the dock that allows residents to easily go from the dock to their residences. Without this dock and pier, Whale Island property owners would only be able to access to their properties by climbing over the coastline when weather permits. Those without the requisite physical agility would not have adequate access.

The existing dock does not alter the coastline or natural terrain of the area because the dock and the pier are placed over the top secured by concrete footings.

A dock and pier have been located at this location for this purpose prior to World War II, however, overtime the dock and pier has been subject to damage and general degradation. Previous owners have worked to rebuild the dock and pier and make it safe. There is no waste generated on site, no hazardous substances present, and no water supply or wastewater disposal. There is no parking or storage or power source on the site. Approximately 20 persons may use

the dock and pier. The long-term requirements for maintenance of the site include upkeep of the dock and pier, which the Whale Island Dock Association is responsible for.

An economic interest exists for the state because the realization of this lease would generate money through an annual use fee for the state for the term of the lease, which is 25 years. The lease would also provide a useful and necessary service to the residents of Whale Island. The residents of Whale Island rely on the use of state land in the lease and are willing to pay a fee to use that land on an annual basis, therefore providing economic stimulus to the state. Given the minimal impact of this use and the activities compliance with the land management intent of the area plan, the proposed lease is found to be in the best interest of the state.

The lease shall be subject to the standard DMLW Lease Agreement (form 102-111, revised May 2001), Special Stipulations and the terms and conditions set forth therein (Attachment 3).

Development Plan

The Development Plan (DP) attached to this decision (Attachment 1) dated October 24th, 2016 and is under consideration by the DMLW. Should the proposed lease be granted, it is anticipated that the DP will need to be updated throughout the life of the lease as activities and/or infrastructure are added or subtracted. All updates must be approved, in writing, by the DMLW before any construction, deconstruction, replacement of infrastructure, or change in activity will be authorized. The DMLW reserves the right to require additional agency review and/or public notice for changes that are deemed by the DMLW to be beyond the scope of this decision.

Entry Authorization

Pursuant to AS 38.05.075(f), DNR-DMLW will authorize the applicant entry onto state land through the issuance of an Entry Authorization (EA) to allow the applicant to conduct the required survey and appraisal, described below. The proposed EA is for a term of two years and would be issued after the Final Decision becomes effective. Once the conditions of the EA are met, the lease will be issued. The total lease term is inclusive of the term of the EA.

Performance Guaranty

In accordance with AS 38.05.035, AS 38.05.860, and 11 AAC 96.060(a) Performance Guaranty, the applicant will be required to submit performance guaranties for the lease to incentivize performance of the conditions of the lease. This provides a mechanism for the state to ensure that the lessee shares any financial costs associated with noncompliance of the lease agreement for site cleanup, restoration, and any associated costs after termination or expiration of the leases. The following bonds will be required:

\$3,070.00 Performance Bond: Performance guaranties provide a means to pay for corrective action if the lessee fails to comply with the lease requirements. In accordance with AS 38.05.035(a)(4), the applicant will be required to submit a performance guaranty. 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. Performance guaranties are subject to periodic adjustments during the term of the authorization to address increases

or decreases in the costs of rectifying problems and rehabilitating state land due to inflation, changes in the level or nature of development, or other appropriate factors.

Insurance

Per Condition #24 of the lease document, the applicant shall secure or purchase at its own expense, and maintain in force at all times during the term of this lease, the following policies of insurance to protect both themselves and the State of Alaska (officers, agents and employees):

Commercial General Liability Insurance Policy: Consistent with AS 38.05.035 (a) to protect the State from liability associated with the use of the site, the applicant shall provide and maintain a comprehensive general liability insurance policy with the State of Alaska named as an additional insured party per the stipulations of the Lease Agreement. The applicant shall secure or purchase at its own expense, and maintain in force at all times during the term of this lease, liability coverage and limits consistent with what is professionally recommended as adequate to protect the applicant and the State, its officers, agents and employees from the liability exposures of ALL the insured's operations on state land. The insurance requirement may be adjusted periodically.

All insurance policies shall comply with, and be issued by, insurers licensed to transact the business of insurance under Alaska Statute, Title 21. The policy shall be written on an "occurrence" form and shall not be written as a "claims made" form unless specifically reviewed and agreed to by the Division of Risk Management, Department of Administration. The State of Alaska must be named as an additional named insured on the policy with respect to the operations of the applicant on or in conjunction with the leased premises, referred to as ADL 108691.

Survey

In accordance with AS 38.04.045, the applicant must complete an approved survey that meets the standards of DMLW's Surveys Section prior to lease issuance. The measurements identified in the approved survey will be used to accurately calculate the total acreage. The survey must be performed by a registered Land Surveyor under survey instructions issued by the Surveys Section. The applicant is responsible for the cost of the survey. The applicant shall submit an initial draft of the survey at least one year prior to the expiration of the EA. Within 10 business days of the execution of the EA, the applicant shall contact the DNR survey section at (907) 269-8523 to obtain instructions.

Appraisal

In consultation with the DMLW Appraisals Unit and in accordance with AS 38.05.840(a), it was determined that an appraisal is required. The applicant must provide a fair market value appraisal of the proposed leasehold prepared by a licensed appraiser approved by the Appraisals Unit. The cost of the appraisal shall be borne by the Applicant.

Compensation

Annual Land Use Fees:

The annual land use fee shall be the minimum lease fee of \$1,000.00 as established in 11 AAC 58.410(b) until a fair market value appraisal has been completed. Once the appraisal has been completed and fair market value rent for the subject parcel has been determined, if the amount is less than \$1,000 per annum the annual fee shall remain at \$1,000 in accordance with 11 AAC 58.410(b). However, if it is determined from the appraisal that the fair market value for the subject parcel is greater than the minimum land use fee, then the annual land use fee will be adjusted to reflect this amount from the effective date of the lease. Additionally, the Whale Island Dock Association will be responsible for the payment of any difference from payments made during the term of the Entry Authorization.

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 after the issuance of the lease.

Payment for Land Use without Authorization:

The applicant used state submerged land and state tideland to operate and maintain a dock and pier facility between 2014-2016 prior to securing authorization. If it is decided that a lease will be issued, the annual land use fee will be charged for the duration of unauthorized activity and payment of these fees will be due as a deliverable for lease issuance.

Subleases

Subleasing may be permissible through AS 38.05.095, if the proposed lease is approved. All potential subleases must first be approved in writing by the DMLW. The DMLW may conduct further agency review and/or public notice before making a determination on the appropriateness of the proposed sublease. The sublease fee will not be less than 25% of the annual fee paid to the lessee by the sublessee.

Reclamation

In accordance with AS 38.05.090, the leasehold must be restored to a “good and marketable condition” as determined by the DMLW within 120 days after termination of the lease.

Public Notice

Pursuant to AS 38.05.945, this PD will be advertised for a 30-day public comment period, starting on October 26, 2020. In addition, the post office(s) located near the proposed leasehold will be requested to post the notice pursuant to AS 38.05.945(b)(3)(C). The notice will also be posted on the State of Alaska Online Public Notice website pursuant to AS 38.05.945(b)(3)(B) located at: <https://aws.state.ak.us/OnlinePublicNotices/Default.aspx>. In accordance with AS 38.05.946, a municipality or a corporation entitled to receive notice under AS 38.05.945(c) may hold a hearing within 30 days after the receipt of the notice.

Comments

The public is invited to comment on this PD. All comments received during the public comment period will be considered in the FFD. If public comments result in significant changes to the PD, additional public notice may be given. A copy of the FFD, along with instructions on filing an appeal, will be sent to all persons who comment on the PD. To be eligible to appeal, a person affected by the FFD must provide written comments during the public comment period per AS 38.05.035(i).

Written comments about this project must be received in this office no later than 5:00 PM on November 30, 2020 to be considered.

To submit comments please choose one of the following methods:

Mail: Department of Natural Resources
Division of Mining, Land and Water
Southeast Region Office
ATTN: *Kaitlyn Raffier*
400 Willoughby Ave., 4th Floor
PO Box 111020
Juneau, Alaska 99811-1020
Email: kaitlyn.raffier@alaska.gov
Fax: (907) 500-9011

Questions about the lease portion of this project can be directed to *Kaitlyn Raffier* at (907) 465-3524.

Signature page follows:

Adjudicator Recommendation

Based on the information provided by the applicant and other agencies, as well as review of planning documents, statutes, and regulations, I recommend approving a 25-year lease to the applicant authorizing operation and maintenance of the dock and pier for property owners to access their lots on Whale Island. I recommend proceeding to public notice for the purpose of providing the members of the public and those entities identified in AS 38.05.945 an opportunity to review and submit comments.



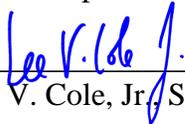
Kaitlyn Raffier, Natural Resource Specialist II

10/26/2020

Date

Preliminary Decision

It is the determination of the Division of Mining, Land & Water that it may be in the State’s best interest to issue a 25-year lease to the applicant, as described above. This preliminary decision shall now proceed to public notice.



Lee V. Cole, Jr., Southeast Regional Manager

October 26, 2020

Date

ATTACHMENTS:

- Attachment 1. Development Plan
- Attachment 2. Mental Health Trust Letter of Concurrence
- Attachment 3. Standard Lease Agreement and Special Stipulations
- Attachment 4. Entry Authorization