

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

Southeast Regional Land Office

**Preliminary Decision**

**ADL 108990**

**Halibut Point Marine Services LLC**

Application for Lease

**Executive Summary**

This document represents a preliminary decision to issue a 10-year, non-competitive lease to Halibut Point Marine Services LLC (“applicant”) for an existing dock and cabin on approximately 0.40 acres of tidelands in Silver Bay, near Sitka, Alaska. The cabin was historically used for personal recreation, and back payments will be required for the period of unauthorized use. The proposed lease will now authorize a renovated cabin that will be used as a staging point for commercial day tours. Tour activities would include kayaking and stand up paddle boarding. The state intends to authorize the proposed lease, contingent upon the responses received during the public notification period and the evaluation of the state’s interest, contained herein.

**Requested Action**

The Halibut Point Marine Services applied for a lease on February 12, 2019, to authorize a dock and cabin on state-owned land in Silver Bay, near Sitka, Alaska.

The lease request is for renovation and use of an existing dock and cabin used in association with day tours operated by the applicant. A development diagram is included as Attachment 1.

**Existing Improvements:**

- Cabin, wood frame on log skid, approximately 800 sq. ft.;
- Dock, wood construction, approximately 1,680 sq. ft.;
- Float, wood construction, approximately 200 sq. ft.;
- Eight steel pilings (24 in. dia.)

The total area requested by the applicant is approximately 0.40 acres. Final acreage will be determined by an approved as-built diagram of the leasehold.

**Proposed Action**

The Division of Mining, Land & Water (DMLW) proposes to issue a 10-year lease to authorize a commercial cabin and dock on state tidelands.

### **Scope of Decision**

The scope of this decision limited to the determination of whether it is in the State's best interest to issue a 10-year 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) any issues that are material to the determination.

### **Authority**

This lease application is being 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. The authority to execute the Preliminary Decision, Final Finding and Decision (FFD), Entry Authorization (EA), 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, and other classification references described herein, and the casefile for the application serialized by the DNR as ADL 108990.

### **Location Information**

#### **Geographic Location:**

The proposed lease is located within in the City and Borough of Sitka. The site is on state tide and submerged land at the head of Silver Bay, approximately 10 miles southeast of Sitka, Alaska.

#### **Property Description:**

The proposed lease is located within Section 30, Township 56 South, Range 65 East, Copper River Meridian, and more particularly located seaward and adjacent to uplands managed by the U.S. Forest Service. The proposed leasehold contains approximately 0.40 acres more or less.

#### **Other Land Information**

Municipality: City and Borough of Sitka

Regional Corporation: Sealaska Corporation

Village Corporation: Shee Atika Inc.

Federally Recognized Tribe: Sitka Tribe of Alaska

Approximate Coordinate Location: 56.9814° N, 135.1376° W (WGS84)

**Title**

The State of Alaska holds title to lands beneath tidally influenced and navigable waterways within its jurisdiction, including lands underlying Silver Bay 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). A request for a title report (Request #408, Report #20452) was made on October 10, 2019. Once received, the title report will be included in the permanent casefile.

Title is subject to valid existing rights, including reservations, easements, and exceptions in the U.S. 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.

**Adjacent Landowners**

The land adjacent to the proposed leasehold is owned by the State of Alaska. Uplands near the proposed leasehold are federally owned, managed by the U.S. Forest Service. No use of the uplands is proposed, but the Forest Service will be noticed of this preliminary decision.

**Third Party Interests**

City and Borough of Sitka. Third party interests will be notified of this preliminary decision.

**Planning and Classification**

The proposed site is subject to the Northern Southeast Area Plan, October 2002 (NSEAP) and is located within the Sitka Sound Tideland Resource Management Zone (SSTRMZ). “The management intent for this area is twofold:

- To protect the sensitive fisheries, marine mammal concentration areas, shorebird and waterfowl concentration areas, anadromous streams and areas of estuarine wetlands, as well as brown bear and deer winter concentration within intertidal areas.
- To preserve and protect the customary, traditional, recreational, and personal use resources and public access to these resources (NSEAP, p. 3-124).”

The dock and cabin have been used in the area for several years without conflict. Additionally, the proposed use of this area will not prohibit the public from accessing the available resources and will likely have no negative impacts to the fish and wildlife habitat. Therefore, the proposed use is found to be consistent with the management intent described in the NSEAP.

**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.

**Access**

The physical and legal access to the proposed lease site is via tide and submerged lands associated with Silver Bay, a navigable body of water.

**Access Along Public Waters:**

The site is located in Silver Bay. 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, DMLW is required to reserve specific public-access easements to and along these waters. Unless comments and other information submitted to 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, 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, 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 Administrative Mineral Closing Order (MCO) No. 770 (NSEAP, Appendix B). Neither an MCO nor a leasehold location order is necessary or appropriate for this proposed lease.

**Hazardous Materials and Potential Contaminants**

Hazardous materials, specifically fuel, power generators, human waste, trash, and gray water, will be stored within the proposed leasehold. Stipulations will be included in the lease to ensure proper handling and storage. The use and storage of all hazardous substances must be done in accordance with existing federal, state, and local laws. Debris (such as soil) contaminated with used motor oil, solvents, or other chemicals may be classified as a hazardous substance and must be removed from the leasehold and disposed of in accordance with state and federal law.

## **Agency Review**

An agency review was conducted on October 9, 2019. The deadline for agency comments was November 11, 2019. The following agencies were included in the review: Alaska Department of Fish and Game (ADF&G); Alaska Department of Environmental Conservation (DEC); Alaska Department of Transportation (DOT); and Alaska Department of Natural Resources (DNR), Division of Parks and Outdoor Recreation, Office of History and Archaeology.

### **Agency Review Comment and Response**

Agency: Alaska Department of Fish and Game

Comment: Care should be taken by the operator to ensure bear attractants such as food, fuel, and waste are stored properly, and that mink and otters are excluded from indoor spaces.

DNR Response: Stipulations will ensure that fuel and waste are stored responsibly.

## **Background**

In 1969, Dormand McGraw, Sr. requested a lease from the Department of Natural Resources for a private recreation cabin at the head of Silver Bay, approximately 10 miles southeast of Sitka, Alaska. The cabin and float were placed at the site in May of 1970, though no authorization was issued by the Department of Natural Resources for this action. On November 27, 1970, the Department of the Army (DA) noticed an application from Mr. McGraw to construct a float at the site. In December of 1970, the U.S. Forest Service determined the cabin was placed above the line of mean high water; the Forest Service subsequently sent a letter to Mr. McGraw, requesting that the cabin be removed from national forest land. The cabin was moved seaward, and a letter from the forest service indicates that by September 25, 1972, the cabin had been moved from national forest land to the tidelands. A permit was issued on May 30, 1974 by the Department of the Army to Mr. McGraw for continued use of the cabin and for construction of a float. On February 7, 2008, that permit was modified to authorize the replacement the floating structures in the same location. Dormand McGraw, Sr. died in 2007. On March 5, 2008, the permit was transferred to Dormand McGraw's son, Charles McGraw. In February 2019, Charles McGraw applied for a tidelands lease from the Department of Natural Resources in order to renovate and conduct commercial recreation at the site.

## **Discussion**

The cabin and float have been in place since 1970, with minimal conflict. The proposed activity is consistent with the Northern Southeast Area Plan, and the impacts of the proposed activities on natural resources at the site are expected to be minimal. Given these considerations, the DMLW finds the proposed lease 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 2).

### **Development Plan**

The Development Plan attached to this decision (Attachment 1) is under consideration by DMLW. Should the proposed lease be granted, it is anticipated that the development plan 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 site development. The proposed EA is for a term of three 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 EA and the lease and to provide a mechanism for the state to ensure that the lessee shares in financial burden in the event of noncompliance for site cleanup, restoration and any associated costs after termination or expiration of the leases, the following bonds will be required.

**\$16,500 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 being made 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, 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 (its officers, agents and employees):

**Commercial General Liability Insurance Policy:** Such policy shall have minimum coverage limits of no less than \$1,000,000 combined single limit per occurrence.

If the applicant's 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 lease 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 30-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 this lease and shall be grounds, at the option of the State of Alaska, for termination of the lease.

**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.

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 108990.

### **Survey**

In accordance with AS 38.04.045, this lease does not require a survey. However, the State of Alaska reserves the right to require one in the future, should the need arise due to changes in statutes or increased use of the area. The applicant will be required to submit a scaled diagram with GPS coordinate points for all leasehold corners. Remittance of an approved diagram will be required before the lease may be issued.

### **Appraisal**

As provided by AS 38.05.840(b), the Applicant is not required to provide a fair market value appraisal to determine the initial lease compensation. Based on a Minimum Rent Determination Appraisal from the DMLW Appraisals Unit, the compensation will be the minimum required by 11 AAC 58.410.

## **Compensation**

### **Annual Land Use Fees**

Pursuant to 11 AAC 58.410(b), AS 38.05.075(f) and AS 38.05.840(b), the annual land use fee will be \$1,000.

### **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.

### **Visitor Day Use Fee**

All commercial recreation authorizations are subject to a \$4.00/day "Visitor Day" fee under 11 AAC 96.250(18), for each client using state land. A Visitor Day is defined as meaning all or any part of a calendar day which a commercial recreation client is present, with each client representing a separate visitor day if multiple clients are present at any time during a calendar day. This fee is collected once a year and will be due on the same day as the annual fee.

### **Payment for Land Use without Authorization**

The applicant used the cabin and dock on state land for personal recreation prior to securing authorization. If it is decided that a lease will be issued, the annual land use fee of \$6,000 will be charged for unauthorized activity and payment of these fees will be due as a deliverable for issuance of the Entry Authorization.

## **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 DMLW. 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 DMLW within 120 days after termination of the lease.

## **Public Notice**

Pursuant to AS 38.05.945, this preliminary decision will be advertised for a 30-day public comment period. 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.

The public is invited to comment on this preliminary decision. All comments received during the public comment period will be considered in the FFD. If public comments result in significant changes to the preliminary decision, 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 preliminary decision. 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 12/15/2019 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: Jacob Hall  
400 Willoughby Ave., Suite 400  
Juneau, AK 99811-1020  
Email: jacob.hall@alaska.gov  
Fax: (907) 500-9011

Questions about the lease portion of this project can be directed to Jacob Hall at (907) 465-3402.

***Signature page follows:***

**Adjudicator Recommendation**

Based on the information provided by the applicant and other agencies, as well as a review of planning documents, statutes, and regulations, I recommend approving a 10-year lease—authorizing the commercial use of a cabin and dock on state land. 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.

*Jacob T. Hall*

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Jacob Hall, Natural Resources Specialist II

*11/14/2019*

\_\_\_\_\_  
Date

**Unit Manager Concurrence**

*Ryan Wilson*

\_\_\_\_\_  
Ryan Wilson, Natural Resources Manager I

*11/14/2019*

\_\_\_\_\_  
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 10-year lease to the applicant, as described above. This preliminary decision shall now proceed to public notice.

*Lee V. Cole, Jr.*

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Lee V. Cole, Jr., Southeast Regional Manager

*NOVEMBER 14, 2019*

\_\_\_\_\_  
Date

**ATTACHMENTS:**

- Attachment 1. Development Plan
- Attachment 2. Standard Lease Agreement and Special Stipulations