

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

**PRELIMINARY DECISION
CONVEYANCE OF TIDE AND SUBMERGED LAND
UNDER AS 38.05.825**

MATANUSKA-SUSITNA BOROUGH PORT MACKENZIE ADL 232659
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I. PROPOSED ACTION

The Department of Natural Resources (DNR) proposes to convey a total of 538 acres of state-owned tide and submerged lands (herein tideland) to the Matanuska-Susitna Borough (MSB or borough) under AS 38.05.825: Conveyance of Tide and Submerged Land to Municipalities.

Port MacKenzie District is located near the south end of Cook Inlet within the MSB. The selected tidelands are along the west bank of the Knik Arm, about 3.5 miles NW of the City of Anchorage and about 27 miles SW of the City of Wasilla.

The MSB plans to expand the infrastructure within the Port MacKenzie district. This expansion will assist in accommodating more bulk supplies and cargo transported into and out of the borough and interior Alaska. Plans have been made to create a railway link, conveyor belt, utility corridors, more roads, holding facility and deep water docks. Future cargo operations would include such items as coal, petroleum products, forest product exports, oil and gas field modules, natural gas pipeline logistics and processing, limestone products and other minerals and goods.

The tidal area is critical for providing better access for shipping vessels. Additional deep-draft docks with trestles are planned for the borough-owned tideland and for the selected tideland, which will allow for rapid transport of cargo on and off the vessels. The additional docks will also support such uses as ship repair and inspection.

This decision determines whether the tide and submerged land selection by the MSB meets the requirements for conveyance in accordance with AS 38.05.825, the Submerged Lands Act of 1953 and the Equal Footing Doctrine.

The public is invited to comment on this Preliminary Decision (PD). **The deadline for comments to be received is on or before August 7, 2017.** Refer to this decision under the heading PUBLIC NOTICE, DECISION AND APPEAL PROCEDURES on the final page of this decision for details on how, when and where to submit your comments.

II. OTHER REQUIRED ACTIONS

This decision is dependent on a revision to the management intent statement and plan designation and classification for the selected tideland in the Southeast Susitna Area Plan

(SSAP). Attached to this decision is a plan amendment and a Land Classification Order. If the plan revision is not approved, the selection affected by this component cannot be conveyed to the borough.

III. AUTHORITY

The proposed action for this PD is authorized pursuant to Alaska Statute (AS) and Alaska Administrative Code (AAC), specifically: AS 38.05.825, AS 38.05.035(e), AS 38.05.125, AS 38.05.127, 11 AAC 51 and 11 AAC 55.

IV. ADMINISTRATIVE RECORD

The administrative record for this PD is case file ADL 232659, which includes, but is not limited to the following: Southeast Susitna Area Plan, the Alaska Department of Environmental Conservation Contaminated Sites Map for the State of Alaska, and the Matanuska-Susitna Borough Port MacKenzie Master Plan.

V. SCOPE OF THE DECISION

The scope of this DNR review is limited to the determination of whether it is appropriate to convey these state-owned tidelands to the MSB under AS 38.05.825 and AS 38.05.035(e), and the determination of imposing a ‘to’ and ‘along’ easement under AS 38.05.127. It additionally includes identification of any third-party interests, other interests of record, and stipulations necessary to ensure that statutory requirements have been met.

VI. DESCRIPTION

A. Location and Geographical Features

Geographic:	South-central Alaska
Borough/Municipality:	Matanuska-Susitna Borough
Meridian:	Seward (S)
Regional Native Corp.:	Cook Inlet Regional Corporation
Native Village Corp.:	Knikatnu, Inc
USGS Map Coverage:	Anchorage Quadrangle (1:250,000): Map B-8 (1:63360)

B. Legal Description - Land Status - Third Party Interests

Table 1 identifies the MSB tide selection MTRS, state case file, title status, date, and third party interests affecting those lands owned by the state.

The state holds fee title to the tidelands through the Submerged Lands Act and Equal Footing Doctrine received from the Bureau of Land Management (BLM). The state will only convey the land approved for conveyance.

Table 1.

MTRS	State Case File	Title	Date	Third Party Interest	Interested Parties
S14N04W35 S14N04W36 S13N04W02	Submerged Lands Act of 1953 and Equal Footing Doctrine	Alaska Statehood Act PL 85-508 7/7/58	Statehood Jan 3, 1959	None	None

C. Background

The MSB owns the Port MacKenzie District which is comprised of approximately 8,940 acres of uplands and 1,238 acres of tidelands. Much of the uplands are currently undeveloped and are in close proximity to an existing deep-draft dock and barge dock. Bulk cargo products are offloaded, stored, and shipped via rail, truck, barge and ship. The Port Mackenzie Master Plan Update (2016) outlines plans for the expansion of infrastructure so that transportation of exports and imports would be more cost effective and efficient. The master plan update includes deep water docks and trestles, and additional tidelands are required to accommodate these future docks.

D. Planning, Classification, Mineral Orders and Local Planning

1. Planning

The SSAP provides both general management directions and specific management directions for management unit TT-01, which contains the tideland areas selected by the MSB. This area was designated Wildlife Habitat. The management intent for this unit currently states “Multiple uses are allowed within this tideland parcel. Protect Beluga whale feeding and migration areas; consult US FWS and NMFS prior to issuing authorizations.” Consistent awareness of the critical species and their feeding and migration habits could allow the management of various uses. ADF&G, in the comments below, has cited research of larger marine mammals that frequent the Knik Arm. However, ADF&G has no objections to conveying the selected tideland area to the borough as long as communication remains open between the responsible agencies to minimize any impacts to the marine resources.

2. Land Use Classification

The SSAP classifies the MSB tide and submerged land selection as Wildlife Habitat Land. A Land Classification Order (LCO) and plan amendment to change the classification from Wildlife Habitat Land to Waterfront Development Land is necessary to satisfy the requirements for conveyance of this tideland under AS 38.05.825(a)(5).

3. Mineral Orders

The mineral estate is reserved to the state pursuant to AS 38.05.125. There are no known mineral orders affecting the borough’s tideland selection.

4. Local Planning

The MSB created a master plan for the port area in 2011 to provide a framework and guidance for the development and growth of the district over the next 20 years. In 2016 this plan was updated based on new data, observations and recommendations. MSB owns tidelands and submerged lands in the area just north of the currently selected tidelands, which is referred to as the Waterfront Dependent District (WDD) of the Port District. The borough has planned for future dock design and expansion as well as an area for small ship repair and inspection, hence the need for additional tidelands to increase the size of the WDD.

E. Access

Access to the District is via the Knik Goose Bay Road to the Point MacKenzie Road. Don Young Road provides access to the docks. Lu Young Lane will allow access from the stockpile area of the docks to the Rail Loop Subunit. These roads function as public access for vehicular and pedestrian traffic to support activities in the dock area. The coastal area within the district may be restricted to authorized personnel for security and safety reasons.

The MSB will be subject to the requirements of the *Public Trust Doctrine* as it applies to these lands for access and use, including the requirements under AS 38.05.825.

1. Navigability

The navigability determination by the state and federal government determined all tidal waters within the Knik Arm, including those tidelands selected by the MSB proposed for conveyance are considered navigable under the Submerged Lands Act of 1953.

2. To & Along Easements

Pursuant to AS 38.05.127, the state must impose a continuous ‘*along*’ easement that extends 50 feet upland and seaward of the mean high water mark and a ‘*to*’ easement that is 50 feet wide that connects to the ‘*along*’ easement, unless DNR determines under 11 AAC 51.045(b) that an access easement is not necessary to ensure free access or that regulating public access is necessary for another public purpose or beneficial use. Under this condition, alternative access must be provided pursuant to 11 AAC 51.045(c), unless it is imprudent to do so.

F. Reservation of Mineral Estate

Conveyance of a tideland to a municipality under AS 38.05.825 conveys no interest in the mineral estate. All mineral related permits, licenses, claims and leases affecting the tideland proposed for conveyance, if any, will remain under the authority of the state. 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.

G. Hazardous Substances and Contaminants

It is the responsibility of the state to protect the overall public interest if there is a reasonable expectation that hazardous contamination may exist on tidelands being proposed for disposal. Based on review of the Alaska Department of Environmental Conservation's (DEC) list of Contaminated Sites, no hazardous material or contamination from hazardous material is known at this time to affect this tideland selection. The environmental risk associated with this proposed conveyance should be minimal or non-existent.

It is up to the MSB to inspect the area of their tideland selection 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 on the land proposed here for conveyance. The State does not assume any liability for the removal of hazardous substances, hazardous wastes, contaminants, or pollutants, nor for the remediation of the site should such substances ever be identified.

H. Survey

A survey determination may be requested by the borough subsequent to the Final Finding and Decision (FFD). An approved survey will be required prior to issuance of a conveyance document. If no approved survey exists, then one must be performed by an Alaska Registered Land Surveyor under direction of the DNR Survey Section. The borough will be responsible for the expense of any survey and plat recordation. There is no requirement under state statutes to appraise the land prior to conveyance.

I. Conditional Leases and Permits

If the tidelands are approved for conveyance, the MSB will receive management authority under AS 38.05.825, when the FFD becomes effective. The borough may lease the approved tideland area, but may not sell it, pursuant to AS 38.05.825(c). Additionally, the borough may not lease the tidelands approved for conveyance to shore fisheries, pursuant to AS 38.05.824(d). There are no shore fisheries within the selected tideland area.

J. Unauthorized Use

DNR has not physically inspected the borough's tideland selection for the presence of unauthorized use, but it has reviewed department records and is unaware of any existing unauthorized use. The borough is expected to and has been given the opportunity to inspect its tideland selection to familiarize itself with the condition and quality of the land.

K. Disposition of Leases, Permits and Applications

Administration of active leases, permits, and easements in the surface estate issued by DNR on tideland to be conveyed will be transferred to the borough when the FFD becomes effective,

unless specified differently. Applications for a lease or permit that have not been adjudicated or issued will be closed.

L. Archaeological Resources

The Alaska State Historic Preservation Office (SHPO) maintains the Alaska Heritage Resources Survey (AHRS) which is an inventory of all reported historic, prehistoric and archaeological sites in the state. There are no known archaeological or cultural resources on the tidelands selected for conveyance in this PD. However, should such resources be found once these tidelands are under construction or conveyed, the city must take those actions required by law in accordance with AS 41.35.070(d).

M. Agency Review

The intent for an Agency Review is to solicit comments from agencies that may be affected and have a strong interest in the borough's tideland selection. Agencies were given the opportunity to evaluate the selection, determine if the state's interests outweigh those of the borough, and if so, provide comments in support of retaining the selection in state ownership. Additionally, the agencies were requested to identify any stipulations that would be appropriate and necessary to impose on the tidelands if approved for conveyance.

State Agency Comments and Responses

The DNR responses are found at the end of each agency review comment received.

Comments from the Alaska Department of Fish & Game (ADF&G):

ADF&G's comments are summarized below. The detailed comment can be found in the case file for ADL 232659.

ADF&G has cited research of known marine mammals that frequent Cook Inlet.

Acoustic studies have found that the upper Cook Inlet area is already beset with human caused noises. These have the potential to mask marine mammal communication and echolocation range. Additional industrial activities (such as increased shipping, dredging, tug boat operations) would add to the already considerable amount of noise in the Inlet.

While the proposed parcel is still found to be important habitat for marine mammals, anadromous fish passage, and seasonal bird concentrations, ADF&G is not opposed to the conveyance of these state tide and submerged lands to the MSB. The intended shipping area will serve to benefit the people of Alaska, and ADF&G intends to work with the MSB during development to minimize impacts to these resources during the design and operation phases.

Response: DNR appreciates ADF&G's concerns and understands that it is important for the borough to work closely with the agency to minimize impacts to the local fauna. Port MacKenzie is well suited for handling bulk materials, serving the local communities and providing tidewater access to the interior of Alaska. These benefits to the local economy would

also serve statewide interests in transportation of resources, job creation, and developing business relationships.

A Land Classification Order (LCO) and plan amendment to re-classify a portion of unit TT-01 is included with this decision. This area is proposed to be re-classified as Waterfront Development Land, in a new unit TT-01a, and will include management intent to provide protection for beluga habitat and migration within the affected portion of unit TT-01.

Comments from Dept. of Environmental Conservation (ADEC) Contaminated Sites Program:
ADEC has no objection to the proposed tideland conveyance to the MSB.

Response: Acknowledged.

Comments from DMLW South Central Regional Office (SCRO) Easement Unit:
SCRO has no objection to the proposed tideland conveyance to the MSB.

Response: Acknowledged.

VII. DISCUSSION AND ALTERNATIVES

A. Discussion

This Preliminary Decision for the MSB tide and submerged land selection covers approximately 538 acres of state-owned tidelands intended for the purpose of constructing deep water docks and trestles in order to assist in the expansion of the borough's port district. DNR has determined in this decision that the state-owned tideland area is appropriate for conveyance to the MSB and meets the criteria under AS 38.05.825, if the area plan is amended appropriately. DNR is aware the benefits to the borough would also benefit the state. There would be several benefits from the conveyance of this tideland to MSB, including the creation of employment opportunities for local communities, which would stimulate economic development for both private and state interests, and the conveyance would establish a transportation link for exporting natural resources from the state. This expansion to Port MacKenzie would facilitate import and export growth while complimenting existing port operations that may be limited by land access, capacity or public access restrictions.

During the agency review process DNR received no stipulations or objections to the proposed conveyance for these tidelands. However, ADF&G had some concerns about the audio impacts to the marine mammals within the shipping lanes, but felt they could work with the borough to resolve any issues that may come up during the construction and future use of the marine area.

A Land Classification Order (LCO) and plan amendment to re-classify a portion of unit TT-01 is included with this decision. This area is proposed to be re-classified as Waterfront Development Land, in a new unit TT-01a, and will include management intent to provide protection for beluga habitat and migration within the affected portion of unit TT-01. The new Management Intent will read as follows: "Multiple uses are allowed within this tideland parcel, including waterfront development activities. Area will be managed to protect wildlife habitat values, specifically

Beluga whale feeding and migration areas; consult with U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) prior to issuing authorizations. Proposed authorizations are to avoid estuarine wetlands and important recreation and fish and wildlife habitat.”

If the tidelands are approved for conveyance, management authority will be transferred to MSB once the Final Finding and Decision becomes effective.

B. Alternatives

The following alternatives exist:

1. Take no action to approve, reject or postpone the tide and submerged land selection by the MSB. This alternative would, in effect, preclude the borough’s ownership of the tideland considered to be important for their community development and access. This action would be inconsistent with the purpose of AS 38.05.825 and inconsistent with the basis for the disapproval of a tideland selection in that section of statute. A tideland selection can only be rejected when the state’s interest outweighs that of the municipality, and there is no basis for such a determination.
2. Reject the borough’s selection in its entirety. This alternative would have the same effect as Alternative #1 and would, similarly, be inconsistent with the requirements of the statute.
3. Approve conveyance of the tideland with management authority to be transferred when the Final Finding and Decision becomes effective. This alternative meets the intent of the statute to convey tide and submerged land to municipalities where the municipality’s interest in obtaining the tideland outweighs the public interest in retaining state ownership.

VIII. RECOMMENDATION AND PRELIMINARY DECISION

A. Recommended Alternative

DNR has determined that Alternative 3 is the preferred action and is concurrent with the intent and requirements of AS 38.05.825. The tide and submerged land selection by the Matanuska-Susitna Borough proposed for conveyance, is subject to the recommended conditions, restrictions and reservations listed below.

B. Recommended Conditions, Restrictions and Reservations

If approved for conveyance, applicable conditions, restrictions and reservations will be imposed upon transfer of equitable title when the Final Finding and Decision is effective and on the final conveyance document, including but not limited to the following:

1. Administration of state leases and permits in the surface estate, if any, will be transferred to the MSB when the FFD is effective. Applications for state leases or permits in the subject area that have not been adjudicated or issued will be closed.
2. Management authority for the approved tidelands will be transferred to the MSB when the FFD is effective. When approved, the borough may execute leases and permits prior to issuance of a state conveyance document in accordance with AS 38.05.825.
3. All mineral related permits, licenses, claims and leases affecting the tideland proposed for conveyance, if any, will remain under the authority of the state.
4. The MSB is subject to the requirements of the *Public Trust Doctrine* as it applies to these lands and to the requirements under AS 38.05.825.
5. Notification to the Alaska State Historic Preservation Office in accordance with AS 41.35.070(d) is required upon discovery of historic, prehistoric, or archaeological sites, locations, remains or objects.

C. Conveyance Document to Include the Following:

The approved tideland conveyance to the MSB is subject to the following:

1. 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.
2. Reservation of the mineral estate pursuant to Section 6(i) of the Alaska Statehood Act and AS 38.05.125; and reservation of reasonably necessary access to the mineral estate in accordance with AS 38.05.130.
3. Reservation of a continuous public access easement, 50 feet wide upland of and adjoining the ordinary high water mark of all public waters and mean high water marks of all tidal shores pursuant to AS 38.05.127 and 11 AAC 51.

D. Recommended Action on Tideland Selection

Description of Tidelands Proposed for Conveyance

Seward Meridian	Sections	Legal Description	Acres
T014N, R004W	35	That portion of the SE¼ located below Mean High Water within Knik Arm;	145
	36	That portion of the SW¼ located below Mean High Water within Knik Arm; That portion of the SW¼ located N & W of MSB boundary line and located below Mean High Water within Knik Arm	75
T013N, R004W	02	That portion of the NE ¼ located N & W of MSB boundary line and located below Mean High Water within Knik Arm; That portion of the NW¼ located below Mean High Water within Knik Arm; That portion of the SW¼ located N & W of MSB boundary line and located below Mean High Water within Knik Arm	318
Total:			538


FINDING

The following are findings of this Preliminary Decision:

1. That it is appropriate to convey approximately 538 acres of state-owned tide and submerged lands to the Matanuska-Susitna Borough pursuant to AS 38.05.825.
2. That the interest of the state to retain these tide and submerged lands does not outweigh the interest of the MSB in obtaining the tideland selections.
3. That it is appropriate to prepare an LCO and plan amendment to re-classify the selected tideland area to Waterfront Development Land.

This is a Preliminary Decision and subsequent public and agency review may result in changes to the preferred alternative or disapproval of the proposed action altogether. If the decision is approved, a plan amendment and Land Classification Order will accompany the Final Finding and Decision.

This Preliminary Decision, described above, as represented by the preferred alternative has been reviewed and considered. I find that the recommended action may be in the best interest of the state and that it is hereby approved to proceed to public notice.



Mary Hermon, Adjudicator
Resource Assessment & Development Section
Municipal Entitlements

7/7/2017
Date



Nina Brudie, Manager
Resource Assessment & Development Section
Municipal Entitlements

7/7/2017
Date

PUBLIC NOTICE, DECISION AND APPEAL PROCEDURES

The public is invited to comment on this Preliminary Decision proposal to transfer ownership of state-owned tide and submerged lands to the Matanuska-Susitna Borough, the accompanying amendment to the Southeast Susitna Area Plan, and Land Classification Order (LCO).

Comments may be provided in written form to Mary Hermon, Adjudicator at mary.hermon@alaska.gov or Nina Brudie, Manager at nina.brudie@alaska.gov, mail address: Division of Mining, Land and Water, Resource Assessment and Development Section, 550 West 7th Avenue, Suite 1050, Anchorage, Alaska 99501-3579, or send by fax: (907) 269-8915 **on or before August 7, 2017** in order to ensure consideration.

The postmasters in the following communities will be requested to post the public notice per AS 38.05.945: City of Palmer, City of Wasilla, City of Houston, City of Willow. The public notice is available on the Alaska Online Public Notice System at: <http://dnr.alaska.gov/commis/pic/pubnotfrm.htm>. The Preliminary Decision is available on the Department of Mining, Land and Water, Municipal Entitlement website at: <http://dnr.alaska.gov/mlw/muni/>. Additionally, the public notice will be sent to the Cook Inlet Regional Corporation, Cook Inlet Tribal Council, Knik Tribe, and Knikatu, Inc.

Following the Preliminary Decision (PD) comment deadline, those written responses received will be considered and this PD may be modified to incorporate the public comments into the Final Finding and Decision (FFD). Only persons who comment in writing on the decision, the proposed amendment or LCO during the public comment period will be eligible to file an administrative appeal of the FFD. A copy of the FFD will be sent to any person who comments on the PD. The FFD will include appeal instructions.

The Department of Natural Resources is prepared to accommodate individuals with disabilities by providing auxiliary aids or services when requested. Individuals with audio impairments who wish to respond to this decision by telephone may call the Department of Natural Resources, Public Information Center in Anchorage between the hours of 10:00 a.m. and 5:00 p.m., Monday through Friday at TTY: (907) 269-8411.

ATTACHMENTS :

Map of Selected Tidelands