

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

PRELIMINARY DECISION
ADL 109138

Proposed Tideland Conveyance to City of Edna Bay
AS 38.05.035(e), AS 38.05.825

RELATED ACTIONS:
None

PUBLIC COMMENT PERIOD ENDS 5:00 PM, TUESDAY, FEBRUARY 8, 2022

I. Proposed Action

Preliminary Decision: Proposed Tideland Conveyance to a Municipality ADL 109138
Attachment A: Vicinity Map
Attachment B: Public Notice

Primary Proposed Action: The State of Alaska (State), Department of Natural Resources (DNR), Division of Mining, Land and Water (DMLW), Land Conveyance Section (LCS), proposes to convey one parcel of State-owned tide and submerged land to the City of Edna Bay (City), pursuant to Alaska Statute (AS) 38.05.825 *Conveyance of Tide and Submerged Land to Municipalities*. The parcel encompasses the area required for the City's small boat harbor expansion within Edna Bay and is 8.8 acres, more or less. See *Attachment A: Vicinity Map* for a depiction of the project area.

This decision determines whether the City's request for tide and submerged land meets the requirements for conveyance in accordance with AS 38.05.825 *Conveyance of Tide and Submerged Land to Municipalities*, the Submerged Lands Act of 1953, and the Equal Footing Doctrine.

Proposed Related Actions: No related actions proposed.

Public Notice of Proposal: In accordance with AS 38.05.945 *Notice*, during a period of at least 30 consecutive days, the public will have the opportunity to submit written comment on this proposal.

See **Section XV. Submittal of Public Comments** at the end of this document and *Attachment B: Public Notice* for details on how to submit a comment for consideration. If, after consideration of timely, written comments, LCS moves forward with the proposal, a Final Finding and Decision will be issued.

II. Authority

DNR has the authority under AS 38.05.825 to convey State-owned tide and submerged lands if, on preparation and issuance of a written finding, it is determined to be in the best interest of the State, as required by AS 38.05.035(e) *Powers and Duties of the Director*. Article VIII, Section 1, of the Constitution of the State of Alaska states "It is the policy of the State to encourage the settlement

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of its land and the development of its resources by making them available for maximum use consistent with the public interest.”

III. Administrative Record

Tideland conveyance ADL 109138 case file constitutes the administrative record for this proposed action. Also incorporated by reference are:

- Prince of Wales Island Area Plan (POWIAP, adopted 1998) and associated land classification files;
- *Alaska Department of Fish and Game Catalog of Waters Important for the Spawning, Rearing, or Migration of Anadromous Fishes*; and
- DNR case files: Interagency Land Management Agreement ADL 104317, Public Easement ADL 107433, and Public Easement ADL 106135.

IV. Scope of the Proposal

The scope of this proposal, under the statutes described in the preceding **Section II. Authority**, is limited and specific to the determination of whether it is in the State’s best interest to convey the subject parcel to the City under *AS 38.05.825*. It additionally includes identification of any third-party interests, other interests of record, and stipulations necessary to ensure that statutory requirements have been met. This decision does not consider any future development, or the effects of such development, that may occur after the transfer.

V. Location

The subject parcel is located within DNR’s Southeast Region, on tide and submerged lands within Edna Bay, seaward of Alaska State Land Survey No. 2012-68, adjacent to Prince of Wales Island.

USGS Map Coverage: Craig D-5

Municipality: City of Edna Bay

Regional Corporation: Sealaska Corporation

Federally Recognized Tribe: None

Village Corporation: None

VI. Property Description

Alaska Tideland Survey No. 1309, according to the plat filed in the Ketchikan Recording District on July 29, 1986, as Plat No. 86-54, containing 5.5278 acres, more or less.

Also including:

Beginning at corner number 4 of Alaska Tideland Survey No. 1309; thence S 60°00’00”E, 449.94 feet along the south line of Alaska Tideland Survey 1309 to corner number 3 of said survey; thence S 30°00’00”W, 250.00 feet; thence N 60°00’00”W, 525.00 feet; thence N 30°00’00”E, 400.00 feet; thence S 60°00’00”E, 75.06 feet to the west line of Alaska Tideland Survey 1309; thence following said west line S 30°00’00”W, 150.00 feet to the point of beginning, containing approximately 3.27 acres.

VII. Title

Information from Title Report No. 21555, current as of February 24, 2021, indicates the State of Alaska received title to the affected tide and submerged lands under the Alaska Statehood Act,

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Public Law 85-508, the Submerged Lands Act, Public Law 83-31, and under the Doctrine of Equal Footing upon entry of the State into the Union. Management is subject to the Public Trust Doctrine.

State Reservation of and Access to Mineral Estate: In accordance with *Section 6 (i) of the Alaska Statehood Act* and *AS 38.05.125 Reservation [of Rights to Alaska]*, the State retains ownership of the mineral estate that may be in or upon the land that it sells. This retention is for all minerals, including both locatable minerals (such as gold, copper, silver, etc.), and leasable minerals (such as oil, gas, coal, etc.).

The State and its successors reserve the right to enter onto the land for the purposes of exploring for, developing, and producing these reserved mineral resources. Access reserved to these retained interests is superior to any and all surface uses. The State may also lease these retained interests to mineral developers or allow mining locations to be staked. However, *AS 38.05.130 Damages and Posting of Bond* also provides that the land estate owner will be compensated for damages resulting from mineral exploration and development.

Navigable Waters: Edna Bay is a navigable body of water. Per *AS 38.05.126(b) Navigable and Public Waters*, "...the State has full power and control of all of the navigable or public water of the state, both meandered and unmeandered, and the State holds and controls all navigable or public water in trust for the use of the people of the state." This trust is in accordance with the principles of the Public Trust Doctrine, which are included in Article VIII, Section 14 of the Constitution of the State of Alaska and protected in the United States Constitution. It is vested in the title to this land, is not transferable, and the State's title to submerged lands under navigable waters cannot be relinquished by a transfer of the property. In holding with this concept, navigability determinations are made and access will be reserved per *AS 38.05.127 Access To and Along Public and Navigable Water*. For more information, see **Section XI. Access, Including Access To and Along Public or Navigable Water**.

Other Conflicts or Pending Interest: None.

VIII. Background and Discussion

On September 25, 2020, the City applied for conveyance of the subject parcel pursuant to *AS 38.05.825*. The harbor within the subject parcel has been authorized under ADL 104317; an Interagency Land Management Agreement (ILMA) issued to the State of Alaska, Department of Transportation & Public Facilities (DOT&PF) since November 26, 1984. The ILMA was reissued on September 20, 2012 for an indefinite term, but DOT&PF now desires to relinquish their interests. The existing improvements are near the end of their useful life, and DOT&PF is upgrading and expanding the floats and harbor infrastructure before transferring management and ownership to the City. If the subject parcel is conveyed, the City will operate and maintain the harbor, seaplane float, and breakwater and the ILMA will be closed prior to patent issuance.

To accommodate the expanded harbor improvements, the area proposed for conveyance extends 3.2716 acres beyond the ILMA authorized under ADL 104317. This expanded area overlaps with a public easement issued to the U.S. Forest Service (USFS) under section 4407 of Public Law 10959. The authorization does not allow conveyance of lands within the easement, therefore DMLW has amended the easement to remove approximately 0.26 acres that are proposed for conveyance.

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The uplands adjacent to the harbor are authorized under ADL 106135, a public easement issued to DOT&PF to provide public access to the harbor from FDR 1525, and to provide parking for associated users. On January 22, 2021, the adjacent uplands were approved for a municipal entitlement conveyance (ADL 108519) to the City under AS 29.65 *General Land Grant*. When the Final Finding and Decision for ADL 108519 became effective, the administration of any active easements (such as ADL 106138) was transferred to the City.

AS 38.05.825(a) requires DNR to convey to the municipality tide and submerged lands suitable for occupation and development when requested by the municipality unless it is found that public interest in retaining State ownership clearly outweighs municipal interest. The municipality must apply for conveyance, the tide and submerged lands must be within the boundaries of the municipality, the use cannot unreasonably interfere with navigation or public access, the land may not be subject to a shore fisheries lease under AS 38.05.082 *Leases for Shore Fisheries Development*, the land classification must be consistent with or compatible with the proposed use, and the land must be required for a public or private development approved by the municipality. The City has met the application requirements of the statute through the following:

- Public Interest- The public interest in retaining the lands within the subject parcel in State ownership does not outweigh the municipal interest in managing these submerged lands. The City plans to operate and maintain a facility that will be used by the public as the sole access point to the community. LCS believes that there are no other overriding State interests in the subject parcel for conveyance; the municipal interest clearly rises above the public interest in retaining these lands in State ownership.
- Location- The land is within the boundary of the municipality.
- Navigation- The proposed use would not unreasonably interfere with navigation.
- Public Access- The proposed use would not unreasonably interfere with public access.
- Application- The municipality has submitted an application for conveyance.
- Shore Fisheries Leasing- The land is not subject to shore fisheries lease.
- Land Classification- The land classification in the Prince of Wales Island Area Plan is consistent with the proposed action.
- Municipal Approval of Development- The City Council supports the proposed harbor development and this conveyance of tidelands through City of Edna Bay Resolution No. 2019-18 and No. 2021-29.

IX. Planning and Classification

1. *Planning*: The subject parcel is located within the Prince of Wales Island Area Plan (POWIAP, adopted 1998), Unit 8 – Edna Bay, Subunit 8b. The plan designates the subject parcel as Public Facilities, Shoreline Development – Commercial/Industrial, and Floathomes – Secondary Use. These designations convert to classifications of Reserved Use Land and Settlement Land.

The POWIAP states that the plan’s management intent for Subunit 8b is as follows:

Management Intent:

“To support community development and to protect the most important recreation and fish and wildlife habitat and harvest areas. Specific tracts of state land will also be managed to support timber harvest, and to accommodate public and commercial services required by the residents of the community. . . .”

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The management intent specified within the POWIAP is consistent with the current and future use of the subject tide and submerged lands for a public boat harbor and community access point. The nearest anadromous stream is approximately 1/2 mile away. The tidelands have been authorized as a boat harbor for 37 years, so no new impacts to wildlife are expected.

AS 38.05.825(a)(5) requires that land to be conveyed must be either “classified for waterfront development or for another use that is consistent or compatible with the use proposed by the municipality, or the proposed use of the land is consistent or compatible with a land use plan adopted by the municipality or the department.” Pursuant to 11 AAC 55.170 *Reserved Use Land*, the Reserved Use Land classification is applied to land that (1) is reserved for transfer to another governmental or nongovernmental agency that is performing a public service; (2) is reserved for transfer through land exchanges; or (3) has been designated for a public facility. LCS finds that the classification of Reserved Use Land as set forth in the POWIAP will fulfill the requirement of AS 38.05.825(a)(5).

The POWIAP states that the Public Facilities designation applies to areas reserved for public facilities. The Shoreline Development designation applies to areas of state tidelands and submerged lands where commercial or industrial facilities may be located. Shoreline Development is defined as “any water-dependent or water-related structure or facility that is permanent and or used for private, public, commercial, or industrial purposes, excluding resource development support facilities associated with forestry or mineral development. LCS finds that the use of the subject tide and submerged lands for the Edna Bay small boat harbor is consistent with the Subunit 8b designations.

2. *Land Use Classification*: The State classified the subject parcel as Reserved Use Land and Settlement Land under Classification Order CL SE-98-001 based on the (POWIAP, adopted 1998).

X. Traditional Use Findings

The project area is within the Unorganized Borough, and a traditional use finding is therefore required under AS 38.05.830 *Land Disposal in the Unorganized Borough*. Information obtained from the POWIAP, Alaska Department of Commerce, Community, and Economic Development, Division of Community and Regional Affairs database, and Agency Review indicates that the project area is currently used as an access point to the community by boat or floatplane. A log transfer facility is adjacent to the project area, but is reportedly not used. Harvest of fish and shellfish occurs in Edna Bay. There are no anticipated significant changes to traditional uses of the land and resources of this area as a result of the proposed action. Additional information on traditional use is welcome during the public comment period and if this proposal is approved, LCS will address the information received in a subsequent Final Finding and Decision, if one is issued. See the **Section XV. Submittal of Public Comments** at the end of this documents and *Attachment B: Public Notice* for details on how to submit comment.

XI. Access, Including Access To and Along Public or Navigable Water

The parcel is accessible by Kosciusko Drive and boat or float plane via Edna Bay, a navigable body of water. The parcel is adjacent to uplands approved for municipal entitlement to the City. Pursuant to AS 38.05.825, the conveyance of tidelands cannot unreasonably interfere with public access and the municipality must provide reasonable access to public waters and tidelands.

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Access To and Along Public or Navigable Waters: In accordance with AS 38.05.127 *Access To Navigable or Public Water*, DNR will determine if a water body is navigable or public and establish easements or rights-of-way as necessary to ensure unobstructed access to and along the body of water. Regulations dictating the creation of easements or rights-of-way under this statute include 11 AAC 51.035 *Determination of Navigable and Public Water*, 11 AAC 51.045 *Easements To and Along Navigable and Public Water*, and 11 AAC 53.450, *Buffer Strips, Reserved Areas, and Public Easements*.

Easements and Setbacks:

- a 50-foot continuous public access easement seaward from the current MHW of public or navigable water bodies shall be reserved to the State in accordance with AS 38.05.127 *Access To Navigable or Public Water*

Where appropriate, reservations and restrictions will be depicted on the plat and described in plat notes.

XII. Hazardous Materials and Potential Contaminants

There is no known contamination of, or hazardous materials on, the subject parcel. The applicant is expected to inspect the subject parcel to ascertain the quality and condition 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 for conveyance to the applicant. 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.

XIII. Survey

Upon DNR approval for conveyance of the parcel, an Alaska Tideland Survey (ATS) performed by an Alaska Registered Land Surveyor under direction of the DMLW Survey Section will be required at the expense of the applicant. This survey will be required to plat the additional portion that is not surveyed and platted for conveyance. ATS 1309 exists for the parcel currently authorized under the ILMA. DMLW recommends that ATS 1309 be vacated, and the additional tidelands be combined and surveyed under one new ATS. The survey will be required prior to issuance of a state tideland patent. There is no requirement under state statutes to appraise the land prior to conveyance.

XIV. DMLW and Agency Review

Information and comments received from multiple sections within DMLW prior to and during agency review have been considered and included in the preparation of this PD. The conveyance application documents were distributed to State agencies for review from May 5, 2021 through May 20, 2021. The intent of an agency review is to request comments from agencies that may be affected by a conveyance decision. Agencies are given the opportunity to evaluate and comment on the municipality's land request to determine if the State should retain all or a portion of the subject lands, and if so, provide supporting reasons for the requested action. Additionally, agencies are requested to identify any stipulations that may be appropriate if the land is to be conveyed out of state ownership.

DNR DMLW LCS received brief comments of non-objection from the following agencies:

Alaska Department of Fish and Game, Alaska Mental Health Trust Land Office, DNR Division of Parks and Outdoor Recreation, and DNR Division of Oil and Gas.

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DNR DMLW LCS response: LCS appreciates your review of the application materials.

Alaska Department of Transportation & Public Facilities (DOT&PF) comment: Any existing permits showing ownership to DOT&PF should be transferred. Please work with Southcoast Region DOTPF as needed.

DNR DMLW LCS response: LCS appreciates your review of the application materials and will coordinate with the DMLW Southeast Regional Land Office and the DOT&PF Southcoast Region as needed.

The following agencies or groups were included in the agency review, but no comment was received:

- Alaska Conservation District;
- Alaska Department of Environmental Conservation; and
- Department of Natural Resources;
 - Division of Geologic and Geophysical Surveys; and
 - Division of Agriculture.

XV. Submittal of Public Comments

See Attachment B: Public Notice for specific dates and conditions.

Pursuant to *AS 38.05.945 Notice*, LCS is issuing public notice inviting comment on this Preliminary Decision.

In accordance with *AS 38.05.946(a) Hearings*, a municipality or corporation entitled to receive notice under *AS 38.05.945(c)* may hold a hearing within 30 days after receipt of the notice. If a hearing is held, the Commissioner (or representative) shall attend the hearing. The Commissioner has discretion whether or not to hold a public hearing.

LCS will consider all timely, written comments received. If analysis of such comments indicates the need for significant changes to the Preliminary Decision, additional public notice for the affected lands will be given. Reducing the amount of land offered and making minor changes to any of the proposals will not be considered significant changes requiring additional public notice.

If the proposal is approved and no significant change is required, the Preliminary Decision including any deletions, minor changes, and summary of comments and LCS responses will be issued as a subsequent Final Finding and Decision without further notice.

Only persons from whom LCS receives timely, written comment during the identified comment period will be eligible to file an appeal of the Final Finding and Decision. Upon approval and issuance of a Final Finding and Decision, a copy of the decision will be made available online at <http://landsales.alaska.gov/> and sent with an explanation of the appeal process to any party who provides timely written comment.

DNR is prepared to accommodate individuals with disabilities by providing auxiliary aids, services, or special modifications in order to participate in this review. Individuals who may need such assistance should contact DNR's Public Information Center. For more information refer to the attached Public Notice.

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DEADLINE TO SUBMIT WRITTEN COMMENT IS 5:00 PM, TUESDAY, FEBRUARY 8, 2022

XVI. Stipulations

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 City 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 City when the FFD is effective. When approved, the City may execute leases and permits prior to issuance of a state conveyance document in accordance with AS 38.05.825.
3. Interagency Land Management Agreement ADL 104317 will be closed when the FFD is effective.
4. All mineral related permits, licenses, claims, and leases affecting the tidelands proposed for conveyance, if any, will remain under the authority of the State.
5. The City 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.
6. 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.
7. A notice to proceed to survey will be issued if no appeals are received, or when appeals are resolved, after issuance of a Final Finding. The applicant must hire a surveyor and the surveyor must apply to DMLW's Survey Section for Survey Instructions. The applicant's survey must be approved by DMLW as set forth in the Survey Instructions. Survey costs shall be borne by the municipality.
8. The approved tideland conveyance is subject to valid existing rights, all required easements, and the following conditions: 1) Grantee may lease the land, but may not sell it; 2) Title to the land conveyed under this authority reverts to the State upon dissolution of the municipality; 3) Grantee takes title to the tide and submerged lands subject to the Public Trust Doctrine that may be enforced by the State in a court of competent jurisdiction; 4) The municipality shall be required to ensure that reasonable access to public waters and tidelands is provided; 5) The municipality may not lease land conveyed under this section for shore fisheries, but after conveyance, the land may be leased by the State for shore fisheries under AS 38.05.082 if the Commissioner determines that the lease is compatible with the municipality's use of the land.

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9. Pursuant to *AS 38.05.127 Access To Navigable or Public Water*, a 50-foot continuous public access easement seaward from the current MHW of public or navigable water bodies shall be reserved to the State.
10. Pursuant to *AS 38.05.125* the mineral estate shall not be conveyed.

XVII. Discussion and Alternatives

The following alternatives were considered:

Alternative 1: Convey subject parcel

Approve the proposed conveyance of the 8.8-acre tide and submerged land parcel to the City with management authority to be transferred when the Final Finding and Decision becomes effective. The subject parcel encompasses the area required for the expansion of the existing small boat harbor. This alternative meets the intent of *AS 38.05.825* 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.

Alternative 2: Retain

LCS will reject and retain the tide and submerged land requested by the City. This alternative would, in effect, preclude the City's ownership of the tidelands 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 conveyance request in that section of statute. A tideland conveyance request can only be rejected when the State's interest outweighs that of the municipality, and there is no basis for such a determination.

For the aforementioned reasons, Alternative 1 is the preferred alternative.

Recommendation follows.

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XVIII. Recommendation and Preliminary Decision

This Preliminary Decision for the proposed disposal of State lands described throughout this document and its attachments is consistent with the overall management intent for State-owned land. Alternative 1 is the preferred alternative. Under AS 38.05.825, no direct economic benefit is realized by the State, but further development of this parcel will serve the needs of the community of Edna Bay. Facilitating community development activities in Edna Bay indirectly provides economic benefit to the State by encouraging settlement and related economic activity. LCS believes that the proposed conveyance complies with the requirements of AS 38.05.825, as discussed above. Unless public comment indicates that the parcel does not qualify for conveyance under AS 38.05.825, or that the public interest in retaining the parcel clearly outweighs the municipality’s interest in retaining the parcel, DNR must convey the parcel subject to the completion of an ATS.

The 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.

This is a Preliminary Decision, and analysis of subsequent public review may result in changes to the preferred alternative of the proposed disposal of State lands.

signature on file
Prepared by: John King
Natural Resource Specialist 3
Land Conveyance Section
Division of Mining, Land and Water
Department of Natural Resources
State of Alaska

January 3, 2022
Date of Signature

signature on file
Approved by: Rachel Longacre
Section Manager
Land Conveyance Section
Division of Mining, Land and Water
Department of Natural Resources
State of Alaska

January 3, 2022
Date of Signature