

**ALASKA DEPARTMENT OF NATURAL RESOURCES
DIVISION OF MINING, LAND AND WATER
SOUTHEAST REGIONAL OFFICE**

**Final Finding and Decision
ADL 107932**

**Tide and Submerged Land Conveyance to the
City and Borough of Juneau at Statter Harbor in Auke Bay
In Accordance with AS 38.05.825**

This Final Finding and Decision, and all attachments hereto, supplement the Preliminary Decision dated August 5, 2013, and comprise the record of decision for this tide and submerged land conveyance under AS 38.05.825.

A Summary of Agency and Public Comments:

- There was one agency comment and it is summarized in Attachment 1.
- There was one public comment and it is summarized in Attachment 1.

There are no modifications to the Preliminary Decision.

The documents and decision referenced above have been fully reviewed and considered. The case-file has been found to be complete and the requirements of all applicable statutes have been satisfied. It is the finding of the Commissioner of the Department of Natural Resources that it is in the best interest of the State to proceed with this conveyance under the authority of AS 38.05.825.



David L. Kelley
Southeast Regional Manager

9-25-2013

Date

A person affected by this decision who provided timely written comment or public hearing testimony on this decision may appeal it, in accordance with 11 AAC 02. Any appeal must be by October 16, 2013, and may be mailed or delivered to Daniel S. Sullivan, Commissioner, Department of Natural Resources, 550 W. 7th Avenue, Suite 1400, Anchorage, Alaska 99501-3561; faxed to 1-907-269-8918; or sent by electronic mail to dnr.appeals@alaska.gov. If no appeal is filed by that date, this decision goes into effect as a final order and decision on October 29, 2013. An eligible person must first appeal this decision in accordance with 11 AAC 02 before appealing this decision to Superior Court. A copy of 11 AAC 02 is attached hereto as Attachment 2.

Attachment 1, Summary of Agency and Public Comments and Response
Attachment 2, Appeal References

FINAL FINDING AND DECISION
ADL 107932
Attachment 1
Summary of Comments and Responses

Agency Comment:

There was one agency comment from the Alaska State Historic Preservation Office, Office of History and Archaeology (SHPO). SHPO commented that there are no known or previously recorded cultural resources in the immediate area to be conveyed. SHPO stated that it would appreciate being contacted and is willing to offer technical assistance or recommendations on avoiding or minimizing impacts if previously unidentified resources are discovered at the Statter Harbor parcel in the future.

DMLW's Response:

Once the Final Finding and Decision becomes the final administrative order,¹ management of the 3.34 acre parcel of submerged and tidelands within Statter Harbor will transfer to the City and Borough of Juneau (CBJ) subject to the terms of the Preliminary Decision and FFD. CBJ will receive a copy of the FFD and all attachments, including this Attachment 1 which documents SHPO's offer of assistance and recommendations if at some future date previously unidentified cultural resources are discovered.

Public Comment:

There was one public comment. It was submitted on August 20, 2013, by the Douglas Indian Association Tribal Government (DIA) and states in relevant part that DIA "has determined that this project is located near known sites of historic, traditional or cultural importance to DIA." The letter also states that DIA believes that: "this project may have areas of potential effect or interest to the Tribe. Should anything of possible significance to the Tribe come to light or be disturbed," DIA requests immediate notification.

DMLW's Response:

Once the FFD becomes the final administrative order, management of the 3.34 acre parcel of submerged and tidelands within Statter Harbor will transfer to the City and Borough of Juneau (CBJ) subject to the terms of the PD and FFD. CBJ will receive a copy of the FFD and all attachments, including this Attachment 1 which serves as notice to CBJ of the comment and expectation expressed by the DIA.

¹ On the 31st day after the signing of a final finding and decision to convey state owned land, the decision becomes the final administrative order provided an appeal of the decision is not received by the DNR Commissioner's Office on or before the end of 20th day of the appeal period.

Final Finding and Decision

ADL 107932

Attachment 2

Appeal References

Alaska Statute (AS) 38.05.035

(i) A person who is eligible to file an administrative appeal or a request for reconsideration, as appropriate, under this subsection and who is aggrieved by the final written finding of the director entered under (e)(5) or (6) of this section may, within 20 days after the issuance of the final written finding, file an administrative appeal or request reconsideration of the decision by the commissioner. A person is eligible to file an administrative appeal or a request for reconsideration if the person

(1) meaningfully participated in the process set out in this chapter for receipt of public comment by

(A) submitting written comment during the period for receipt of public comment; or

(B) presenting oral testimony at a public hearing, if a public hearing was held; and

(2) is affected by the final written finding.

(j) An administrative appeal or a request for reconsideration submitted under (I) of this section must specify the written finding complained of and the specific basis upon which it is challenged. The commissioner shall grant or deny the administrative appeal or reconsideration request within 30 days after issuance of the final written finding. Failure of the commissioner to act on the request for reconsideration within this period is a denial of the request for reconsideration and a final administrative decision for purposes of appeal to the superior court.

Alaska Administrative Code (AAC) - 11 AAC 02. Appeals

11 AAC 02.010. APPLICABILITY AND ELIGIBILITY. (a) This chapter sets out the administrative review procedure available to a person affected by a decision of the department. If a statute or a provision of this title prescribes a different procedure with respect to a particular decision, that procedure must be followed when it conflicts with this chapter.

(b) Unless a statute does not permit an appeal, an applicant is eligible to appeal or request reconsideration of the department's decision on the application. An applicant is eligible to participate in any appeal or request for reconsideration filed by any other eligible party.

(c) If a statute restricts eligibility to appeal or request reconsideration of a decision to those who have provided timely written comment or public hearing testimony on the decision, the department will give notice of that eligibility restriction as part of its public notice announcing the opportunity to comment.

(d) If the department gives public notice and allows a public comment period of at least 30 days on a proposed action, and if no statute requires opportunity for public comment, the department may restrict eligibility to appeal or request reconsideration to those who have provided timely written comment or public hearing testimony on the proposed action by including notice of the restriction as part of its public notice announcing the opportunity to comment.

(e) An eligible person affected by a decision of the department that the commissioner did not sign or cosign may appeal the decision to the commissioner within the period set by 11 AAC 02.040.

(f) An eligible person affected by a decision of the department that the commissioner signed or cosigned may request the commissioner's reconsideration within the period set by 11 AAC 02.040.

(g) A person may not both appeal and request reconsideration of a decision. (Eff. 11/7/90, Register 116; am 9/19/2001, Register 159)

11 AAC 02.015. COMBINED DECISIONS. (a) When the department issues a combined decision that is both a final disposal decision under AS 38.05.035(e) and any other decision, including a disposal decision combined with a land use plan decision, or a disposal decision to grant certain applications combined with a decision to deny others, the appeal process set out for a disposal decision in AS 38.05.035(i) - (m) and this chapter applies to the combined decision.

(b) A decision of the department may include a statement that a final consistency determination under AS 46.40 (Alaska Coastal Management Program) has been rendered in conjunction with the decision. A person may not, under this chapter, appeal or request reconsideration of the final consistency determination, including a requirement necessary solely to ensure the activity is consistent with the Alaska coastal management program as approved under AS 46.40. (Eff. 9/19/2001, Register 159)

11 AAC 02.020. FINALITY OF A DECISION FOR PURPOSES OF APPEAL TO COURT. (a) Unless otherwise provided in a statute or a provision of this title, an eligible person must first either appeal or request reconsideration of a decision in accordance with this chapter before appealing a decision to superior court.

(b) The commissioner's decision on appeal is the final administrative order and decision of the department for purposes of appeal to the superior court.

(c) The commissioner may order or deny a request for reconsideration within 30 calendar days after issuance of the decision, as determined under 11 AAC 02.040(c)—(e). If the commissioner takes no action during the 30-day period, the request for reconsideration is considered denied. Denial of a request for reconsideration is the final administrative order and decision of the department for purposes of appeal to the superior court.

(d) If the commissioner timely orders reconsideration of the decision, the commissioner may affirm the decision, issue a new or modified decision, or remand the matter to the director for further proceedings. The commissioner's decision, other than a remand decision, is the final administrative order and decision of the department for purposes of appeal to the superior court. (Eff. 11/7/90, Register 116; am 9/19/2001, Register 159)

11 AAC 02.030. FILING AN APPEAL OR REQUEST FOR RECONSIDERATION. (a) An appeal or request for reconsideration under this chapter must

- (1) be in writing;
- (2) be filed by personal *service*, mail, fax, or electronic mail;
- (3) be signed by the appellant or the appellant's attorney, unless filed by electronic mail; an appeal or request for reconsideration filed by electronic mail must state the name of the person appealing or requesting reconsideration and a single point of contact to which any notice or decision concerning the appeal or request for reconsideration is to be sent;
- (4) be correctly addressed;
- (5) be timely filed in accordance with 11 AAC 02.040;
- (6) specify the case reference number used by the department, if any;
- (7) specify the decision being appealed or for which reconsideration is being requested;
- (8) specify the basis upon which the decision is challenged;
- (9) specify any material facts disputed by the appellant;
- (10) specify the remedy requested by the appellant;
- (11) state the address to which any notice or decision concerning the appeal or request for reconsideration is to be mailed; an appellant may also provide a telephone number where the appellant can be reached during the day or an electronic mail address; an appeal or request for reconsideration filed electronically must state a single address to which any notice or decision concerning the appeal or request for reconsideration is to be mailed;
- (12) identify any other affected agreement, contract, lease, permit, or application by case reference number, if any; and

(13) include a request for an oral hearing, if desired; in the appeal or request for reconsideration, the appellant may include a request for any special procedures to be used at the hearing; the appeal or request for reconsideration must describe the factual issues to be considered at the hearing.

(b) At the time an appeal is filed, and up until the deadline set out in 11 AAC 02.040(a) to file the appeal, an appellant may submit additional written material in support of the appeal, including evidence or legal argument.

(c) If public notice announcing a comment period of at least 30 days was given before the decision, an appellant may not submit additional written material after the deadline for filing the appeal, unless the appeal meets the requirement of (a) of this section and includes a request for an extension of time, and the department determines that the appellant has shown good cause for an extension. In considering whether the appellant has shown good cause, the department will consider factors including one or more of the following:

- (1) comments already received from the appellant and others;
- (2) whether the additional material is likely to affect the outcome of the appeal;
- (3) whether the additional material could reasonably have been submitted without an extension;
- (4) the length of the extension requested;
- (5) the potential effect of delay if an extension is granted.

(d) If public notice announcing a comment period of at least 30 days was not given before the decision, an appellant may submit additional written material after the deadline for filing the appeal, if the appeal meets the requirements of (a) of this section and includes a notice of intent to file the additional written material. The department must receive the additional written material within 20 days after the deadline for filing the appeal, unless the appeal also includes a request for an extension of time, and the department determines that the appellant has shown good cause for an extension. In considering whether the appellant has shown good cause, the department will consider factors including one or more of the following:

- (1) comments already received from the appellant and others;
- (2) whether the additional material is likely to affect the outcome of the appeal;
- (3) whether the additional material could reasonably have been submitted without an extension;
- (4) the length of the extension requested;
- (5) the potential effect of delay if an extension is granted.

(e) At the time a request for reconsideration is filed, and up until the deadline to file a request for reconsideration, an appellant may submit additional written material in support of the request for reconsideration, including evidence or legal argument. No additional written material may be submitted after the deadline for filing the request for reconsideration.

(f) If the decision is one described in 11 AAC 02.060(c), an appellant who believes a stay of the decision is justified may ask for a stay as part of the appeal or request for reconsideration. The appellant must include an argument as to why the public interest requires a stay. (Eff. 11/7/90, Register 116; am 9/19/2001, Register 159)

Editor's note: The address for an appeal or request for reconsideration by personal service and by mail is: Department of Natural Resources, Commissioner's Office, 550 W. 7th Avenue, Suite 1400, Anchorage, Alaska 99501-3561. The number for an appeal or request for reconsideration by fax is: 1-907-269-8918. The electronic mailing address for an appeal or request for reconsideration by electronic mail is: dnr_appeals@dnr.state.ak.us

11 AAC 02.040. TIMELY FILING; ISSUANCE OF DECISION. (a) To be timely filed, an appeal or request for reconsideration must be received by the commissioner's office within 20 calendar days after issuance of the decision, as determined under (c) or (d) of this section, unless another period is

set by statute, regulation, or existing contract. If the 20th day falls on a day when the department is officially closed, the appeal or request for reconsideration must be filed by the next working day.

(b) An appeal or request for reconsideration will not be accepted if it is not timely filed.

(c) If the appellant is a person to whom the department delivers a decision by personal service or by certified mail, return receipt requested, issuance occurs when the addressee or the addressee's agent signs for the decision. If the addressee or the addressee's agent neglects or refuses to sign for the certified mail, or if the address that the addressee provided to the department is not correct, issuance by certified mail occurs when the decision is deposited

in a United States general or branch post office, enclosed in a postage-paid wrapper or envelope, addressed to the person's current address of record with the department, or to the address specified by the appellant under 11 AAC 02.030(a)(11).

(d) If the appellant is a person to whom the department did not deliver a decision by personal service or certified mail, issuance occurs

(1) when the department gives public notice of the decision; or

(2) if no public notice is given, when the decision is signed; however, the department may state in the decision a later date of issuance and the corresponding due date for any appeal or request for reconsideration.

(e) The date of issuance constitutes delivery or mailing for purposes of a reconsideration request under AS 44.37.011(d) or AS 44.62.540(a). (Eff. 11/7/90, Register 116; am 9/19/2001, Register 159)

11 AAC 02.050. HEARINGS. (a) The department will, in its discretion, hold a hearing when questions of fact must be resolved.

(b) The hearing procedure will be determined by the department on a case-by-case basis. As provided in 11 AAC 02.030(a)(13), any request for special procedures must be included with the request for a hearing.

(c) In a hearing held under this section

(1) formal rules of evidence need not apply; and

(2) the hearing will be recorded, and may be transcribed at the request and expense of the party requesting the transcript. (Eff. 11/7/90, Register 116)

11 AAC 02.060. STAYS; EXCEPTIONS. (a) Except as provided in (c) and (d) of this section, timely appealing or requesting reconsideration of a decision in accordance with this chapter stays the decision during the commissioner's consideration of the appeal or request for reconsideration. If the commissioner determines that the public interest requires removal of the stay, the commissioner will remove the stay and allow all or part of the decision to take effect on the date set in the decision or a date set by the commissioner.

(b) Repealed 9/19/2001.

(c) Unless otherwise provided, in a statute or a provision of this title, a decision takes effect immediately if it is a decision to

(1) issue a permit, that is revocable at will;

(2) approve surface operations for a disposal that has already occurred or a property right that has already vested; or

(3) administer an issued oil and gas lease or license, or an oil and gas unit agreement.

(d) Timely appealing or requesting reconsideration of a decision described in (c) of this section does not automatically stay the decision. However, the commissioner will impose a stay, on the commissioner's own motion or at the request of an appellant, if the commissioner determines that the public interest requires it.

(e) A decision takes effect immediately if no party is eligible to appeal or request reconsideration and the commissioner waives the commissioner's right to review or reconsider the decision. (Eff. 11/7/90, Register 116; am 9/19/2001, Register 159)

11 AAC 02.070. WAIVER OF PROCEDURAL VIOLATIONS. The commissioner may, to the extent allowed by applicable law, waive a requirement of this chapter if the public interest or the interests of justice so require. (Eff. 11/7/90, Register 116; am 9/19/2001, Register 159)

11 AAC 02.080. DEFINITIONS. Repealed. (Eff. 11/7/90, Register 116; repealed 9/19/2001, Register 159)

11 AAC 02.900. DEFINITIONS. In this chapter,

(1) "appeal" means a request to the commissioner to review a decision that the commissioner did not sign or cosign;

(2) "appellant" means a person who files an appeal or a request for reconsideration.

(3) "commissioner" means the commissioner of natural resources;

(4) "decision" means a written discretionary or factual determination by the department specifying the details of the action to be allowed or taken;

(5) "department" means, depending of the particular context in which the term is used, the Department of Natural Resources, the commissioner, the director of a division within the Department of Natural Resources, or an authorized employee of the Department of Natural Resources;

(6) "request for reconsideration" means a petition or request to the commissioner to review an original decision that the commissioner signed or cosigned. (Eff. 11/7/90, Register 116; am 9/19/2001, Register 159)

**LEGAL DESCRIPTION FOR THE
CITY AND BOROUGH OF JUNEAU DOCKS AND HARBORS
JUNEAU, ALASKA**

The following description was prepared by PND Engineers, Inc. on January 22, 2013 at the request of the City and Borough of Juneau for the purpose of describing a conveyance parcel.

CONVEYANCE PARCEL DESCRIPTION

The following conveyance parcel is located within Sections 22 & 23, Township 40 South, Range 65 East of the Copper River Meridian and within the City and Borough of Juneau, Alaska and is more particularly described as follows:

Commencing at the southwestern corner of ATS 756, as shown on the official plat as recorded as Plat 2001-2 in the Juneau Recording District, State of Alaska on January 11, 2001, from which the southeast corner of ATS 756 bears South 62° 15' 00" East a distance of 231.43 feet thus being the **Basis of Bearing** for this legal description. Said southwestern corner of ATS 756 is the **True Point of Beginning** for this description.

Thence South 62° 15' 00" East along the south boundary of ATS 756 a distance of 231.43 feet to the southeast corner; thence North 27° 45' 00" East along the east boundaries of ATS 756 and ATS 121 a distance of 325.00 feet to the southwest corner of lot 5, USS 2664; thence South 39° 05' 00" East along the boundary of said lot 5 to the common corner of lots 4 & 5, USS 2664 a distance of 130.02 feet; thence South 27° 26' 00" East along the boundary of said lot 4 to the common corner of ATS 16 and said lot 4 a distance of 124.08 feet; thence South 38° 02' 00" West along the boundary of ATS 16 to a common angle point with ATS 1118 a distance of 670.00 feet; thence South 78° 32' 37" West along the boundary of ATS 1118 a distance of 124.44 feet; thence North 25° 41' 42" East away from ATS 1118 to an point of intersection with ATS 1362 between corners 5 and 6, a distance of 84.48 feet; thence continuing along the previous bearing to a point of intersection with the boundary line between corners 3 and 4 of said ATS 1362, a distance of 153.05 feet, thence North 25° 41' 42" East to angle point a distance of 139.66 feet; thence North 26° 58' 25" West a distance of 273.50 feet to the **True Point of Beginning**, containing 3.34 acres, more or less and all according to the attached **Exhibit A**.

**ALASKA DEPARTMENT OF NATURAL RESOURCES
DIVISION OF MINING, LAND AND WATER
SOUTHEAST REGIONAL OFFICE**

**Preliminary Decision
ADL 107932**

AS 38.05.035(e)

**Proposed Tide and Submerged Land Conveyance to the
City and Borough of Juneau at Statter Harbor in Auke Bay
In Accordance with AS 38.05.825**

PROPOSED ACTION:

The Alaska Department of Natural Resources, Division of Mining, Land and Water, Southeast Region (DMLW), proposes to convey a parcel containing approximately 3.34 acres of State tide and submerged lands to the City and Borough of Juneau (CBJ) within its municipal boundaries, pursuant to AS 38.05.825. The parcel conveyance will be used for the purpose of constructing and operating a two-lane boat launch ramp and associated upland parking under CBJ's management of the Statter Harbor docks and harbor. The ramp and parking are expansions to the existing loading facility and will be for public use.¹

The public is invited to comment on this Preliminary Decision to convey tidelands to CBJ for the expansion of the existing loading facility. Please see the Public Notice section on page 10 for details on the submission of comments, comment deadlines, preservation of appeal rights, and related requirements.

SCOPE OF DECISION:

The scope of administrative review for this proposed conveyance is limited to the decision to convey title of the tidelands from the State of Alaska to CBJ under AS 38.05.825. It does not take into account any future development, the effects of such development, or other issues that may occur after the parcel is transferred.

ADMINISTRATIVE AUTHORITY:

The applicable authority for the proposed conveyance of State tide and submerged lands includes Alaska Statutes AS 38.05.035(e), AS 38.05.825, AS 38.05.127, AS 38.04.065, and the Alaska Administrative Code 11 AAC 51. The 1956 Alaska Constitution Article VIII, Natural Resources, is also incorporated.

The DMLW Director is authorized by AS 38.05.035(a) (6) to act on behalf of the State in this matter. The Director has delegated to the Regional Manager the authority to approve proposed and final decisions under AS 38.05.035(e).

ADMINISTRATIVE RECORD:

¹ See Attachment A for the Statter Harbor project's design plan.

DMLW tideland conveyance file ADL 107932, and by reference the Alaska Department of Fish and Game's Anadromous Stream Catalogue, and the Juneau State Land Plan.

DESCRIPTION:

Location:

The unsurveyed parcel comprising approximately 3.34 acres is located within the Copper River Meridian, S1/2, NE1/4, and N1/2, SE ¼ of Section 22 of Township 40 South, Range 65 East, USGS Quad Map B2, Latitude 58.384°N, Longitude 134.647°W, and includes tidelands previously surveyed as ATS 758² at Statter Harbor and a portion of tidelands previously surveyed as ATS 1362³ in Auke Bay, approximately 12 miles north of Juneau, Alaska.⁴

Municipality: City and Borough of Juneau

Native Corporation: Sealaska Corporation

Tribal Contact: Central Council Tlingit and Haida Indians of Alaska, Douglas Indian Association

Water Bodies:

The parcel is located in Statter Harbor in Auke Bay, and is a navigable body of water. There is one anadromous fish stream, Bay Creek, that flows into Auke Bay. Bay Creek has been catalogued in the Alaska Anadromous Waters Catalog by the Alaska Department of Fish and Game (ADFG) as stream no. 111-50-10390, noting the presence of pink salmon and coho salmon. The requested conveyance includes state owned land below ordinary high water, including land within the Bay Creek intertidal zone.

Title:

Acquisition Authority: The State of Alaska received title to the affected tide and submerged lands under the Submerged Lands Act of 1953, and the Alaska Statehood Act, Public law 85-508, the Submerged Lands Act, Public law 31, and under the Doctrine of Equal Footing upon entry of the state into the Union.⁵

Title Restrictions: Pursuant to AS 38.05.825, a municipality receiving land under the statute, including CBJ, may lease the land but may not sell it; title to and management authority for the conveyed land reverts to the State upon dissolution of the municipality; and the municipality takes management authority and title to the tide and submerged lands subject to the rights of the public under the Public Trust Doctrine.

Reservations: A conveyance of land to CBJ will be 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 ATS 758 was issued under ADL 37123 and pertained to a lease which was canceled in July 1974.

³ ATS 1362 was issued under ADL 103825 and the survey was filed in 1991; it pertained to a now defunct real estate project.

⁴ See Attachment A.

⁵ Title Report RPT 4244, DMLW Realty Services, 1/30/2013.

2. Reservation of public access easements under AS 38.05.127.⁶
3. Reservation of Mineral Estate: As required by AS 38.05.125, the State expressly saves, excepts and reserves out of the grant those resources specified by statute. These include, but are not limited to, all oils, gases, coal, ores, minerals, fissionable materials, geothermal resources, and fossils of every name, kind or description, including the right to explore the same.

Background:

Since 2001, CBJ has acquired approximately 253 acres of tide and submerged lands from the Division in accordance with AS 38.05.825. On September 9, 2009, CBJ applied for the conveyance of 160 acres of State tide and submerged lands in Statter Harbor in Auke Bay for construction and operation of a recreational launch ramp facility. Auke Bay is a large open bay approximately twelve miles north of downtown Juneau, and it supports a wide variety of public, private, commercial, and institutional developments. Auke Bay is the site of heavy recreational and commercial boating use, a public and two private marinas and a public boat launch ramp. Auke Bay is also the source of salt water research conducted at the National Marine Fisheries Service (NMFS) laboratory and University of Alaska research facilities. The area has high scenic value and provides habitat for aquatic wildlife. Constraints include the congested road bordering the bay and inadequate upland space for vehicle parking related to the marinas and launch ramp.⁷

CBJ has been working to expand the launch ramp for several years. Currently commercial boats, recreational motorboats, and kayaks share a deteriorated two-lane boat launch in a congested area, which creates unsafe conditions and results in waiting times. The Statter Harbor project was approved by majority vote in two municipal election ballots in 2005 and 2007. In September 2012, CBJ provided DMLW with an updated development plan significantly reducing the amount of acreage needed for the Statter Harbor project from 160 acres to approximately 3.34 acres (see Attachment A). Construction is anticipated to begin April 2014 and be completed by July 2015. The project has state, federal and CBJ funding. The U.S. Department of Interior, Fish and Wildlife Service issued a Finding of No Significant Impact in December 2012, the Corps of Engineers issued a permit in September 2012⁸, and the Alaska Department of Environmental Conservation issued a State Water Quality Certification on August 15, 2012. Finally, CBJ has obtained a permit from the Alaska Department of Fish and Game issued on January 16, 2013.⁹

The Statter Harbor project has environmental consequences. Fill placement would eliminate approximately 4.1 acres of estuarine habitat, including .11 acres of eelgrass beds and .95 acres of mud flats.¹⁰ Eelgrass has been identified as important habitat for other fish, including juvenile salmon and Pacific herring.¹¹ The fill

⁶ A public utility easement with CBJ was issued on August 20, 1972, establishing a 20 foot right of way on the tidelands adjacent to Tract A, Lot 2, U.S. survey 3819 (ADL 51648). If conveyed, this easement is no longer necessary as it pertains to the conveyed parcel.

⁷ Juneau State Land Plan, 3-73 through 3-74. The JSLP is available online:

<http://dnr.alaska.gov/mlw/planning/areaplans/juneau/pdf/>

⁸ POA-2008-782.

⁹ Fish Habitat Permit FH13-I-0001.

¹⁰ See The U.S. Department of Interior, Fish and Wildlife Service issued a Finding of No Significant Impact, December 2012, pp.5-7.

¹¹ See The U.S. Department of Interior, Fish and Wildlife Service issued a Finding of No Significant Impact, December 2012, pp.5-7; see also NOAA Technical Memorandum NMFS-AFSC-182, Eelgrass Habitat and Faunal Assemblages in the City and Borough of Juneau, Alaska (March 2008).

footprint would extend into a relatively small portion of Bay Creek's existing channel complex. The project will install an armored slope and marine seawall minimizing the project's impact on Bay Creek. According to DOI's Finding, the project will have little if any impact effect on intertidal spawning of Bay Creek Salmon and post-development will have no impact on anadromous fish populations in the harbor.¹²

A cultural Resources Report was prepared in May 2009 for CBJ and assessed the impact of the project on any important cultural resources near and in Auke Bay.¹³ The thirty-six page report concluded that the project would cause no effect on historic properties in the area.

Planning and Classification:

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."

The proposed development currently is compatible with the Juneau State Land Plan (JSLP) since the parcel is classified "Wd," Waterfront Development. The 2003 JSLP provides the classifications, parcel designations and management intent of the parcel. The Statter Harbor project parcel is within Unit 3e14 in the JSLP and the unit is described as follows:

Unit 3e14: Head of Auke Bay, Designated Ha, Hv, Sh, Wd with one beach access point.¹⁴ Auke Bay supports a wide range of uses for its size. This site currently provides salmon sport fishing; herring spawning and overwintering; boat harbor; anchorage; marinas; public and private docks. Because of the many uses, authorizations in this area should take into a consideration the high values of the area for public institutions, commercial uses-both marine and others, public use, and habitat and research values. This area should be managed to support activities consistent with uses allowed within the JCMP Special Waterfront Areas, ensure continued research use of the bay, and allow expanded boat harbor facilities. The bay should be managed for commercial uses and, in special cases, for mixed uses including residential and recreation. Fill may be authorized consistent with the Juneau Coastal Management Plan. Uses should be water-dependent and water-related. Because there is little public access on the west side of Auke Bay, Subunit 3e14 should be managed to maintain public access to the tidelands from the CBJ-owned uplands.

Consistent with the JSLP intent for Unit 3e14, the expansion of the harbor facilities would promote marine commercial use and public use. Finally, CBJ's zoning district as set forth in its Comprehensive Plan classifies the Statter Harbor parcel as Waterfront Commercial (Wc). The Juneau Comprehensive Plan defines Waterfront Commercial in part as: "Land to be used for water-dependent commercial uses such as marinas/boat harbors, marine vessel and equipment sales and repair services, convenience goods and

¹² See The U.S. Department of Interior, Fish and Wildlife Service issued a Finding of No Significant Impact, December 2012, pp. 6-8.

¹³ Statter Harbor Improvements Project Cultural Resources Report, May 29, 2009, HDR Alaska, Inc.

¹⁴ Designations: "Ha" is Habit; "Hv" is Fish and Wildlife Harvest; "Sh" is Shoreline Use; and "Wd" is Waterfront Development. See JSLP 3-5 through 3-6 for complete definitions.

services for commercial and sport fishing, marine recreation and marine tourism activities.”¹⁵ The Statter Harbor development plan is consistent with this goal.

Access, including access to and along public waters:

Statter Harbor’s parking lot and boat launch facility are on the Juneau road system and open to the general public. The proposed land transfer and land use would occur in Auke Bay which is navigable water per 11 AAC 51.035. Pursuant to AS 38.05.825, the conveyance and associated development project cannot unreasonably interfere with public access and CBJ must provide reasonable access to public waters and tidelands. The parcel may be accessed from the water by boat, by adjacent State-owned tidelands to the north, or by the existing paved road known as Glacier Highway. Also, AS 38.05.128 maintains that use and free passage of navigable waters shall not be obstructed with certain special exceptions.

In addition, before a disposal of State land, 11 AAC 51.045 and AS 38.05.127 require a determination by DMLW regarding the reservation of specific public access easements to and along these waters. In the final decision on this proposed land transfer, DMLW will determine whether this disposal of State interest will reserve a public access easement pursuant to AS 38.05.127(a)(2) seaward of mean high water (MHW) along CBJ’s fill for the cargo staging and private parking area. Pursuant to 11 AAC 51.045, DMLW will consider comments and evidence provided by the Alaska Department of Fish and Game (ADF&G), other agencies, the public and CBJ during the public notice and review period in making this determination. DMLW intends to determine, based on comments and supporting information, whether the easement is necessary to ensure public access, or whether regulating or limiting public access is necessary for other beneficial uses or public purposes, such as public safety or security.

However, unless comments and other information submitted to DMLW provide justifiable and convincing evidence to the contrary, DMLW intends to reserve a platted 50 foot public access easement “to” mean high water through the project’s parking lot and “along” the project’s fill area, seaward of MHW.

Hazardous Materials and Potential Contamination:

It is DMLW’s management responsibility to protect the overall public interest if there is a reasonable expectation that a hazardous condition, or hazardous, toxic or radiological material or contamination from such material exist or is known to exist on the land proposed for disposal. No hazardous material or contamination from hazardous material is known to exist on the land proposed for conveyance. Environmental risk associated with this proposed conveyance should be minimal.¹⁶

Survey and Appraisal:

The parcel has not been surveyed. An Alaska Tideland Survey (ATS) will be required at CBJ’s expense prior to issuance of a State tideland patent. There is an existing survey, ATS 1362, which relates back to a now-defunct project from the 1980s. CBJ’s current development plan extends into a portion of ATS 1362. If a final decision is issued conveying the tidelands parcel to CBJ, ATS 1362 will be re-platted. A new ASL would be issued with two Tracts, Tract A and Tract B. Tract A will be comprised of the CBJ

¹⁵ Juneau Comprehensive Plan (revised 2008), p. 187.

¹⁶ See also Alaska Department of Environmental Conservation, State Water Quality Certification, August 15, 2012.

project, including that portion of ATS 1362 within the new boundary. Tract B would be the remainder parcel of the old ATS 1362. Appraisal is not required for an AS 38.05.825 conveyance as the land is conveyed without charge.¹⁷

Public Notice and Comment and Agency Review:

State agency review for this conveyance decision will be conducted concurrently during the public review for this Preliminary Decision. CBJ has obtained the following current permits and approvals: the ADF&G Fish Habitat Permit (FH13-I-0001); the U.S. Department of the Interior, Fish and Wildlife Service's Finding of No Significant Impact; the Department of the Army Permit (POA-2008-782); and the Alaska Department of Environmental Conservation (DEC) Certificate of Reasonable Assurance. Regarding further review, the agencies to be contacted by DMLW will include ADF&G; DEC; the Department of Transportation and Public Facilities (DOT&PF); and the State Historic Preservation Office (SHPO). See the final page for details regarding the public notice process and preservation of appeal rights.

DISCUSSION AND ALTERNATIVES:

Compliance with Qualifications under AS 38.05.825:

Unless it is found that the public interest in retaining State ownership clearly outweighs CBJ's interest, AS 38.05.825 (a) requires DMLW to convey to CBJ tide and submerged lands that are occupied or suitable for occupation and development when requested by CBJ providing that:

- the land is within or contiguous to the boundaries of CBJ;
- the use would not unreasonably interfere with navigation or public access;
- CBJ has applied for conveyance;
- the land is not subject to a shore fisheries lease under AS 38.05.082;
- the land is classified for waterfront development or for another use consistent or compatible with a land use plan adopted by CBJ; and
- the land
 - is required for the accomplishment of a public or private development approved by CBJ; or
 - is the subject of a lease from the State to CBJ; or
 - has not been approved for lease to CBJ.

In addressing each of the above statutory qualifications under AS 38.05.825(a), DMLW determines the following:

Public Interest- From its analysis thus far, it appears to DMLW that conveying the Statter Harbor parcel to CBJ would accommodate development of municipal facilities for public use. To-date, DMLW has not received any comments from the public or agencies concerning the State's public interest in retaining the requested parcel. At this time, DMLW believes that there are no other overriding State interests. Adjacent land owners include CBJ, James Dehart, Neil Taylor, and the State of Alaska. Following the public review

¹⁷ There is an existing ATS, ATS 758, within the parcel which was never recorded as a plat. ATS 758 will not be identified as a separate tract.

and comment period, DMLW will conclude as to whether or not the public interest in retaining the land in State ownership outweighs CBJ's interest in owning and managing the land.

Location- The land is within CBJ.

Navigation- The proposed development for this land transfer would not unreasonably interfere with navigation and in fact would enhance it. CBJ has obtained its permit from the U.S. Army Corps of Engineers.

Public Access- The proposed land use would not unreasonably interfere with public access (see the section above discussing access for further discussion regarding public access).

Application- CBJ submitted an original application for conveyance of this parcel on September 9, 2009.

Shore Fisheries Leasing- The land is not subject to any shore fisheries leases.

Land Classification- As discussed above, the existing land designation and classification in the JSLP for Unit 3e14 is consistent with intent of the Statter Harbor project.

Municipal Approval of Development- The land is required for the accomplishment of a public development project and was approved by majority vote in two municipal election ballots in 2005 and 2007. On June 27, 2013, CBJ's Planning Commission approved the Conditional Use Permit requested by CBJ Docks and Harbors to conduct the project.¹⁸

Alternatives considered:

1. Approve the proposed conveyance. CBJ has the ability to manage the land and the public launch ramp. The project is of local, public interest and the development is needed to accommodate high demand by boat and kayak users in Statter Harbor. The project would provide economic development to the State.
2. Deny the proposed conveyance. DMLW would continue to manage the parcel and CBJ would need to acquire authorization for development of the site under a lease from DMLW or CBJ would need to alter its development plans to exclude the requested parcel of tidelands.

Preferred Alternative: Alternative No. 1 is the preferred alternative and supports the economic development of CBJ and the State. 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 Juneau. Facilitating community development activities in Juneau indirectly provides economic benefit to the State by encouraging settlement and related economic activity. Additionally, CBJ has obtained the requisite permits and has taken steps to minimize adverse marine habitat impacts, and the project meets the intent of the JSLP. DMLW believes that the parcel complies with the requirements of AS 38.05.825. Unless public and agency review demonstrates that the parcel or portions of the parcel do not qualify for conveyance

¹⁸ Because the parcel is required for a public development project, the alternative requirements set forth in the statute pertaining to a lease do not apply here. See AS 38.05.825(a)(6)(A) & (B).

under AS 38.05.825, or that the public interest in retaining the parcel clearly outweighs the municipality's interest in retaining the parcels, DMLW intends to convey the requested Statter Harbor parcel to CBJ subject to completion of an ATS.

RECOMMENDATIONS:


DMLW recommends conveyance of land described herein to CBJ subject to the following conditions:

1. Pursuant to AS 38.05.825(c), land management authority shall be granted upon the effective date of the Final Finding and Decision unless an appeal is appropriately filed. If an appeal is appropriately filed, the decision is stayed pending the outcome of the appeal(s).
2. The conveyance shall be subject to valid existing rights, all required easements and the following conditions: (1) CBJ may lease the conveyed parcel but not sell it; (2) title to and management authority for the parcel conveyed under this authority reverts to the State upon dissolution of the municipality; and (3) CBJ takes management authority and title to the tide and submerged lands subject to the rights of the public under the Public Trust Doctrine.
3. State patent will not be issued until completion of the required ATS for the parcel. ATS 1362 will be replatted. A new ASL will be issued with two Tracts, Tract A and Tract B. Tract A will be comprised of the CBJ project, including that portion of ATS 1362 within the new boundary. Tract B would be the remainder parcel of the old ATS 1362. Tract A will be conveyed to CBJ.
4. Survey costs shall be borne by CBJ.
5. Pursuant to AS 38.05.125 the mineral estate shall not be conveyed to CBJ.
6. Pursuant to AS 38.05.127, the parcel shall be subject to a public access easement, fifty feet in width, along the mean high water line and an easement through the project leading to the mean high water line.

Following the public and agency review for this Preliminary Decision, DMLW will issue a Final Finding and Decision which will incorporate changes justified by comments during the agency and public review process. Those interested in how this issue is decided should submit written comments regarding this issue and read the final decision that follows. DMLW will provide notice of the final decision and appeal rights to

only those persons who submit written comments during the public notice and review period.

Prepared by:



Anne L. Johnson
Natural Resource Manager



Date

The preliminary decision presented above has been reviewed and considered. I find that the recommended action may be in the State's best interest and is hereby approved to proceed to public notice.



David L. Kelley
Southeast Regional Manager



Date

PUBLIC NOTICE, FINAL DECISION AND APPEAL PROCESS:

In accordance with the provisions of AS 38.05.945, public notice seeking comments on this preliminary decision will be given to CBJ, adjacent landowners, Southeast Conservation Council, Seaalaska Corporation, Kootznoowoo, Inc., Goldbelt, Inc., Douglas Indian Association, and the Aukquan Traditional Council. Additionally, both post offices located near Auke Bay will be requested to post the notice, and it will be available on the Internet at the Alaska Online Public Notice System website, which can be accessed at www.state.ak.us (click on "Notices" at the top of the page).

The public is invited to comment on this preliminary decision. Comments must be received in writing by the DNR Division of Mining, Land and Water by mail at 400 Willoughby Avenue, P.O. Box 111020, Juneau, AK 99811-1020, by fax at 907-465-3886, or by electronic mail at anne.johnson1@alaska.gov by September 5, 2013 in order to ensure consideration. Please include your mailing address and telephone contact. In order to establish appeal rights regarding this decision, you are required by law to meaningfully participate in the decision process by commenting in writing on the decision prior to the comment deadline. Following this deadline, all timely written comments will be considered, and DNR may modify this decision based on public comments received.

If DNR determines that public comments in response to this notice of the preliminary decision indicate the need for significant changes to the decision, additional public notice will be given. If no significant changes are required, the preliminary decision, after any necessary minor changes, will be issued as a final decision. A copy of the final decision, along with instructions on filing an appeal, will be sent to all persons who comment on the preliminary decision. Persons who do not submit written comments during the comment period will have no legal right to appeal the final decision.

ATTACHMENT A

STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF LANDS

ADL No. 51648

RIGHT-OF-WAY PERMIT

THIS AGREEMENT made and entered into this 24th day of July, 19 70, by and between the STATE OF ALASKA, acting by and through the Department of Natural Resources, Division of Lands, hereinafter referred to as the grantor and E. L. McNabb, Jr. hereinafter referred to as the permittee.

WITNESSETH, that in accordance with the provisions of Sec. 38.05.330, A.S. and the rules and regulations promulgated thereunder, the permittee having filed an application for a right-of-way for: sewage treatment plant effluent line.

with the Division of Lands together with a map showing the definite location thereon of the line of right-of-way which the permittee has adopted and agrees to be the specific and definite location of the aforesaid right-of-way, and

WHEREAS, it is understood and agreed by the permittee herein that, as a condition to the granting of the right-of-way applied for, the land covered by said right-of-way shall be used for no purpose other than the location, construction, operation and maintenance of the said right-of-way over and across the following described State lands, to wit:

As shown and described on the survey plat attached hereto and made a part hereof and identified as TRWP No. 17.

running 657 feet in length and/or containing 0.308 acres, more or less and shall extend a width of 20 feet.

TO HAVE AND TO HOLD the same until the above described land shall no longer be used for the above-mentioned purpose and subject to conditions and reservations elsewhere set forth herein.

The sketch map revealing the right-of-way granted herein shall be attached hereto and made a part hereof.

In the event that the right-of-way herein granted shall in any manner conflict with or overlap a previously granted right-of-way the permittee herein shall use this right-of-way in such a manner as not to interfere with the peaceful use and enjoyment of the previously issued right-of-way and no improvements shall be constructed by the permittee herein upon the overlapping area unless the consent therefor has first been obtained from the permittee under the pre-existing right-of-way.

The permittee in the exercise of the rights and privileges granted by this

2-27-70

14-70



indenture shall comply with all regulations now in effect or as hereafter published by the Division of Lands and all other Federal, State or municipal regulations or ordinances applicable to the area herein granted.

Upon abandonment, termination, revocation or cancellation of this indenture, the permittee shall within 90 days remove all structures and improvements from the area herein granted, except those owned by the grantor, and shall restore the area to the same or similar condition as the same was upon the issuance of this permit. Should the permittee fail or refuse to remove said structures or improvements, within the time allotted, they shall revert to and become the property of the grantor. However, the permittee shall not be relieved of the cost of the removal of the structures, improvements and/or the cost of restoring the area. Provided further, however, that the grantor, in his discretion, may alter or modify the requirements contained in this provision if it is to the best interest of Alaska to do so.

The permittee shall utilize the lands herein granted consistent with the purposes of the proposed use, as revealed by the application therefor, and shall maintain the premises in a neat and orderly manner and shall adopt and apply such safety measures as shall be necessary, proper and prudent with respect to the use to which the land is subjected.

The permittee shall take all reasonable precaution to prevent and suppress brush and forest fires. No material shall be disposed of by burning in open fire during the closed season unless a permit therefor has first been obtained from the agency empowered by law to issue such permits.

Prior to any construction or development that will use, divert, obstruct, pollute or utilize any of the waters of the State, the permittee shall first obtain approval therefor from the Commissioner of the Department of Fish and Game and file an image copy thereof with the grantor.

Any lands included in this permit which are sold under a contract to purchase shall be subject to this permit. Upon issuance of title to the purchaser, this permit shall remain in effect until its date of expiration.

In case the necessity for the right-of-way shall no longer exist, or the permittee should abandon or fail to use the same, then this permit shall terminate.

The State of Alaska shall be forever wholly absolved from any liability for damages which might result to the permittee herein on account of this permit having been cancelled, forfeited, or terminated prior to the expiration of the full time for which it was issued.

NOW THEREFOR, in accordance with the provisions of Sec. 38.05.330, A.S. and the rules and regulations promulgated thereunder and in accordance with the conditions heretofore set forth or attached hereto and made a part hereof, the permittee herein is hereby authorized to locate, construct, operate and maintain said right-of-way over and across the lands herein described.

IN WITNESS WHEREOF, the said grantor has caused these presents to be signed in duplicate and the permittee herein has hereunto affixed his signature on the

day and year first above written.

STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES

By: Dean J. Nation
Chief, ~~XXXXXXXXXXXX~~ Water Resources Section
Division of Lands

L. H. McMahon

Permittee

UNITED STATES OF AMERICA)
State of Alaska) ss.

This is to certify that on the 14th day of October, 19 70,
before me, the undersigned Notary Public, personally appeared Dean J. Nation
Nation known to me and known by me to be the Chief Water Resources Sec.
of the Division of Lands of the Department of Natural Resources, and acknowledged
to me that he executed the foregoing instrument for and on behalf of said State,
freely and voluntarily for the use and purposes therein set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official
seal, the day and year in this certificate first above written.

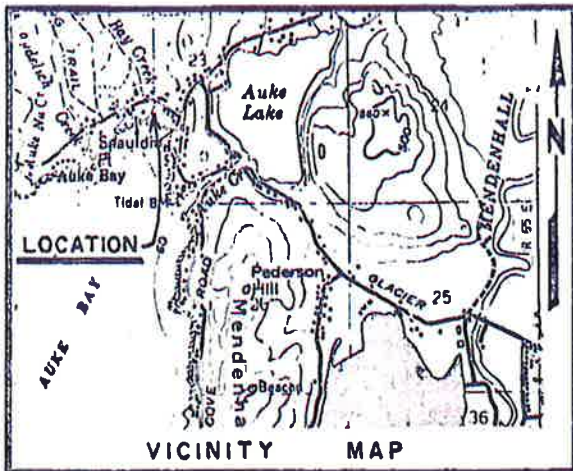
Patricia Lee Ockenbult
Notary Public in and for the State
of Alaska
My commission expires May 6, 1974

UNITED STATES OF AMERICA)
State of Alaska) ss.

This is to certify that on this 8th day of September, 19 70,
before me, the undersigned Notary Public, personally appeared C. L. McHabb-
_____ to me personally known to be one of the persons described in and
who executed the within instrument and the said C. L. McHabb-
acknowledged to me that he signed and executed the same freely and voluntarily
for the uses and purposes therein mentioned.

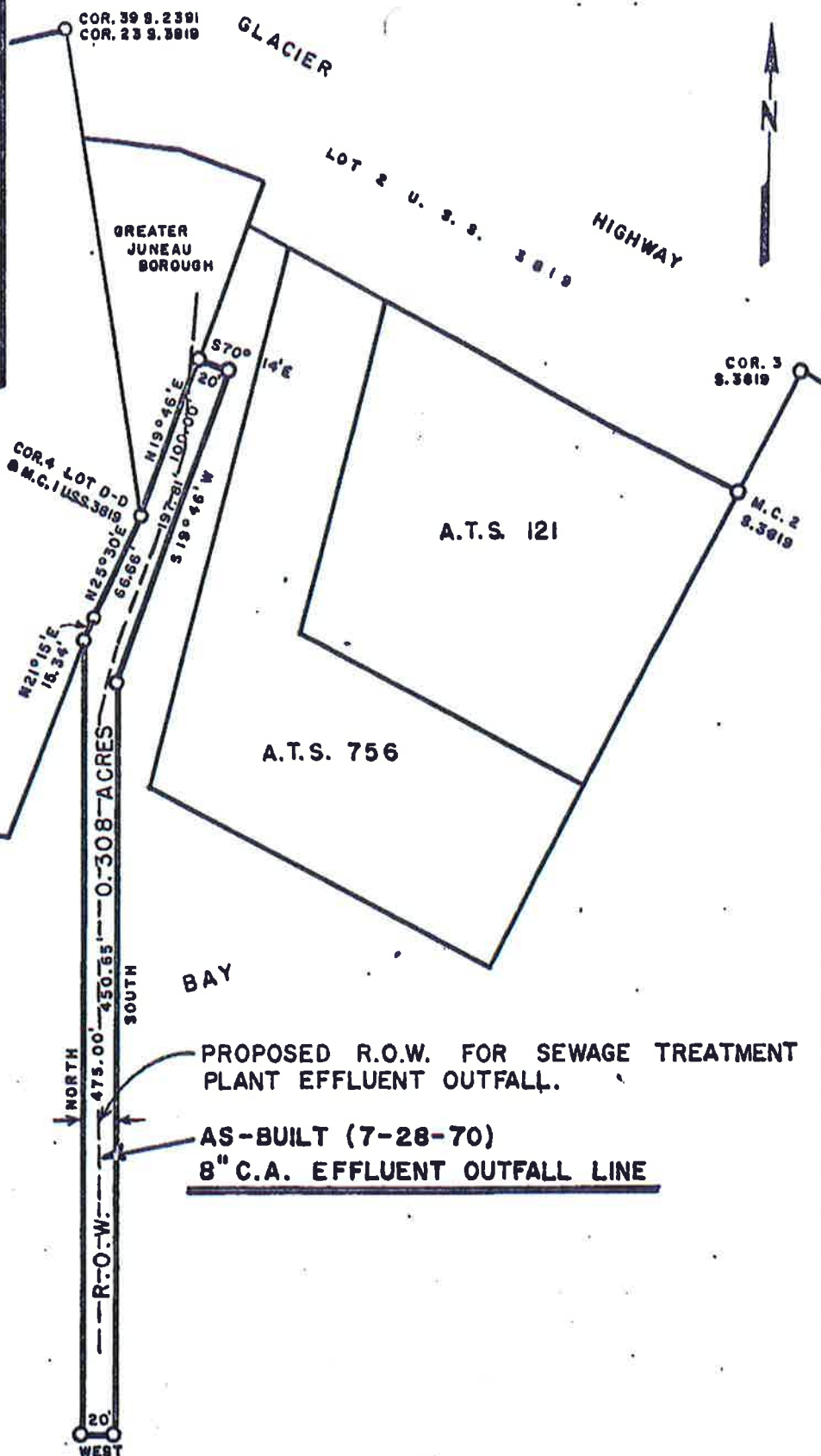
IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official
seal, the day and year in this certificate first above written.

Maureen O'Brien
Notary Public in and for the State
of Alaska
My commission expires 10-17-71



VICINITY MAP

LOT D-D
U.S.S. 2391



RIGHT OF WAY SKETCH

TIDELANDS ADJACENT TO U.S.S. No. 2391

AUKE BAY, ALASKA

Scale: 1" = 100'

6/22/70

Applicant: McNabb Construction Co.

FIRST AMENDMENT to that certain Right-of-Way Permit serialized ADL 51648 for the construction, operation and maintenance of a sewage treatment plant effluent line located within protracted Section 22, Township 40S, Range 65E, Copper River Meridian, is hereby amended to read:

FROM: "The undersigned E. L. McNabb, Jr. residing at Juneau, Alaska"

TO: "The undersigned City and Borough of Juneau residing at 155 S. Seward, Juneau, Alaska 99801"

The aforementioned relinquishment from E. L. McNabb, Jr. to the City and Borough of Juneau is attached hereto and made a part hereof.

and FROM: "Right of Way 20 feet in width and 657 feet in length"

TO: "Right of Way 20 feet in width and 807 feet in length"

The aforementioned increase in the length of right-of-way is described on the plat attached hereto and made a part hereof.

All other terms and conditions of the Contract will remain as written. This Amendment is attached to and made a part of ADL 51648 this date.

DATE: August 20, 1973

PERMITTEE:

Ronald L. Usher
City and Borough of Juneau

GRANTOR:

State of Alaska

Dean J. Nation
Dean J. Nation, Chief
Water Resources Section

UNITED STATES OF AMERICA)
State of Alaska) ss.

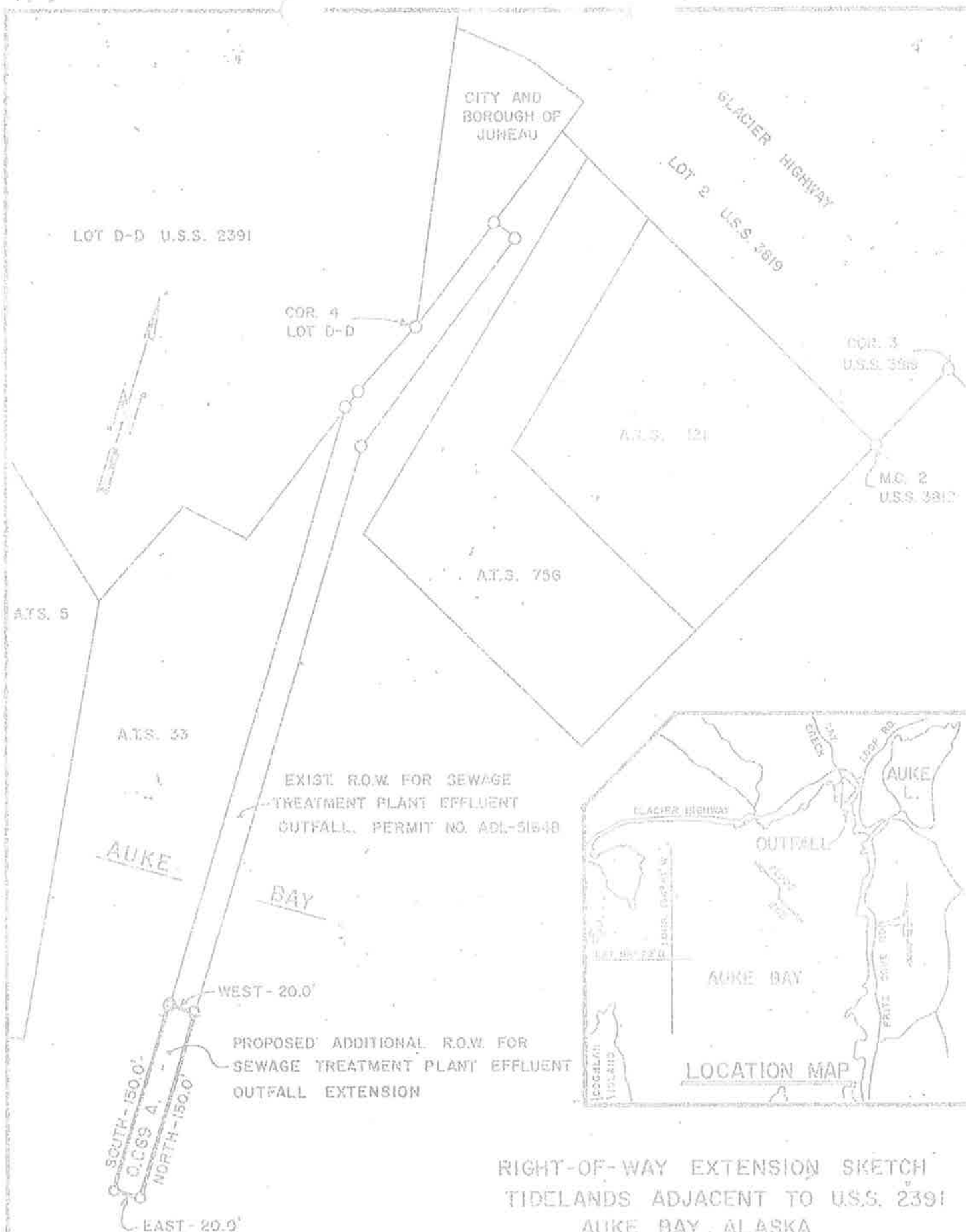
THIS IS TO CERTIFY that on this 20th day of August, 1973, before me, the undersigned, a Notary Public in and for Alaska duly commissioned and sworn, personally appeared Ronald L. Usher, Manager,
(Name) (Title)

City and Borough of Juneau, to me personally known to be the person described in and who executed the within instrument and acknowledged to me that he signed and executed the same freely and voluntarily for the uses and purposes therein mentioned.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Patricia Kraft
Notary Public in and for the State of Alaska
My Commission expires: 4-19-75

8-26-73
8-26-73
8-26-73



RIGHT-OF-WAY EXTENSION SKETCH
TIDELANDS ADJACENT TO U.S.S. 2391
AUKE BAY, ALASKA
SCALE: 1"=100' DWN:J.C. AUG 10 73
APPLICANT: CITY & BOROUGH OF JUNEAU