

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

PRELIMINARY DECISION
ADL 233975

Proposed Tideland Conveyance to the City of Unalaska
AS 38.05.035(e), AS 38.05.825

RELATED ACTIONS:
None

PUBLIC COMMENT PERIOD ENDS 5:00 PM, WEDNESDAY, FEBRUARY 22, 2023

I. Proposed Action

Preliminary Decision: Proposed Tideland Conveyance to a Municipality ADL 233975

Attachment A: Vicinity Map

Attachment B: Affidavit Acknowledging Conditions of Land and Releasing the State from Related Liability

Attachment C: 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 Unalaska (City), pursuant to Alaska Statute (*AS*) 38.05.825 *Conveyance of Tide and Submerged Land to Municipalities*. The subject parcel encompasses the area required for remodeling and expansion of the Robert Storrs International Small Boat Harbor facility within Iliuliuk Harbor and is 1.2 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 C: 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

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

III. Administrative Record

This tideland conveyance case file (ADL 233975) constitutes the administrative record for this proposed action. Also incorporated by reference are:

- *City of Unalaska Comprehensive Plan 2020;*
- *City of Unalaska Land Use Plan 2015;*
- *City of Unalaska Capital & Major Maintenance Plan FY 20;*
- *City of Unalaska Ordinance 2022-13;*
- *City of Unalaska Resolution 2020-26;*
- *City of Unalaska Resolution 2021-81;*
- *Alaska Department of Fish and Game Catalog of Waters Important for the Spawning, Rearing, or Migration of Anadromous Fishes;* and
- DNR case files: Alaska Tideland Surveys (ATS) No. 808, 1245, and 1360, and Tideland conveyance cases ADL 225790 and ADL 225816.

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 also includes identifying 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 Southcentral Region, on tide and submerged lands within Iliuliuk Harbor, seaward of ATS 808, ATS 1245, and ATS 1360, adjacent to Amaknak Island.

USGS Map Coverage: Unalaska C-2

Municipality: City of Unalaska

Regional Corporation: Aleut Corporation

Federally Recognized Tribe: Qawalangin Tribe of Unalaska

Village Corporation: Ounalashka Corporation

VI. Property Description

Unsurveyed tidelands containing approximately 1.2 acres, more or less, located within protracted Sections 3 and 10, Township 73 South, Range 118 West, Seward Meridian. These tidelands reside within Iliuliuk Harbor, Amaknak Island, Unalaska. The unsurveyed tidelands are adjoining and southerly of Tract A, ATS No. 808, and Tract A and B, ATS No. 1360, and

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adjoining and easterly of Tract A, ATS No. 1245. Please see the Vicinity Map for reference. An ATS will determine the final acreage prior to disposal.

VII. Title

Information from Title Report No. 22403, current as of January 12, 2023, indicates the State of Alaska received title to the affected tide and submerged lands under the Alaska Statehood Act, the Submerged Lands Act of 1953, and under the Doctrine of Equal Footing upon entry of the State into the Union.

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: Iliuliuk Harbor 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

The subject parcel encompasses the area required for the city-owned Robert Storrs International Small Boat Harbor A and B float replacement project. The existing floats will be re-arranged to expand the number of slips and linear dock area available to recreational and small commercial craft. The subject parcel would accommodate the ends of two floating piers, which would feature fresh water, electricity, and sewer hook-ups. The project has received funding through the City of Unalaska Capital & Major Maintenance Plan FY20, approved by the Unalaska City Council as Resolution 2020-26 on May 12, 2020.

On December 28, 2021, the Unalaska City Council approved City of Unalaska Resolution 2021-81, supporting the City's application to acquire tide and submerged land from the State of Alaska. On February 18, 2022, the City applied to LCS for the conveyance of the subject parcel pursuant to *AS 38.05.825*.

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The subject parcel is surrounded by other submerged lands within Iliuliuk Harbor and is currently used for navigation and access to the adjacent small boat harbor and privately-owned docks. The city-owned tide and submerged lands northeast of the subject parcel surveyed as ATS 808 and ATS 1360 were conveyed in 1993 (ADL 225816) and 1994 (ADL 225790) under *AS 38.05.820 Occupied Tide and Submerged Land*. The tide and submerged lands northwest of the subject parcel surveyed as ATS 1245 became privately owned through a quiet title action in 1988.

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. 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. An open channel for navigation will exist between the city-owned tidelands and the harbor improvements.
- 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 a shore fisheries lease.
- Land Classification- The submerged lands are zoned “Developable Tidelands” per the City of Unalaska Ordinance 2022-13. Zoning of Developable Tidelands is reserved for the development of dock space and other intensive uses beyond subsistence gathering. Additionally, the expansion of this harbor is specifically featured in both the 2020 City of Unalaska Comprehensive Plan and a technical memorandum on a port and harbor ten-year plan.
- Municipal Approval of Development- The Unalaska City Council supports the proposed harbor development and this conveyance of tidelands through City of Unalaska Resolution No. 2021-81.

IX. 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.” DNR does not have an area plan covering the subject parcel or the Aleutian Island region of the state, however, the planning requirement of

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AS 38.05.825(a)(5) is met through the compatibility with a land use plan adopted by the municipality.

The municipality has a land use plan and has zoned the tidelands within the subject parcel as “Developable Tidelands.” Zoning is an encompassing land use plan for the municipality. Additionally, the improvement of city dock facilities is listed as a development action in the Unalaska Comprehensive Plan 2020 and a technical memorandum on a Port and Harbor Ten-year Plan. Furthermore, the remodel and expansion of the Robert Storrs International Small Boat Harbor facility project has been endorsed by the city council in the adopted Capital and Major Maintenance Plans starting in 2012 with the FY 2013 - 2017 plan. Lastly, the FY 2020 Capital & Major Maintenance Plan also contains the project.

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 applicant, the 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 for navigation and access to the adjacent small boat harbor and privately-owned docks in the area. 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 C: 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 boat or float plane via Iliuliuk Harbor, a navigable body of water. The water and floats in the adjacent existing harbor are accessible via Pace Setter Way, a public road within the City of Unalaska. 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.

Access To and Along Public or Navigable Waters: In accordance with AS 38.05.127 *Access To Navigable or Public Water*, DNR has determined Iliuliuk Harbor navigable. However, reserving a 50-foot public access easement on this parcel is not necessary to ensure free access to the navigable waterbody of Iliuliuk Harbor as there are no easements reserved on ATS 808 or ATS 1360, and the subject parcel is seaward of both surveyed parcels. The public shall continue to have unobstructed access via boat or float plane to and along the body of water within the subject parcel. 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*.

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

XII. Hazardous Materials and Potential Contaminants

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In 1990, Iliuliuk Harbor was categorized as a category 4A impaired waterbody by the Alaska Department of Environmental Conservation (DEC) for petroleum hydrocarbons, oils, and grease. Category 4A means the waterbody is impaired but has a final/approved completed total maximum daily load. The City is expected to inspect the tide and submerged land 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 of Alaska does not assume any liability, and DNR requires that before issuance of a tideland patent, the City sign an affidavit releasing the State from liability for the removal of hazardous substances, hazardous wastes, contaminants, or pollutants, and for the remediation of the site should such substances ever be identified. See *Attachment B: Affidavit Acknowledging Condition of Lands and Releasing the State from Related Liability*.

XIII. Survey

Upon DNR approval for the conveyance of the parcel, an Alaska Tideland Survey (ATS) performed by an Alaska Registered Land Surveyor under the direction of the DMLW Survey Section will be required at the applicant's expense. The survey will be required before issuing 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 September 30, 2022, through October 20, 2022. 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:
DNR Division of Parks and Outdoor Recreation, DNR Division of Oil and Gas, DNR Division of Geological and Geophysical Surveys, DNR Office of Project Management and Permitting, and Alaska Department of Transportation and Public Facilities.

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

Alaska Department of Fish and Game (ADF&G) comment: ADF&G has no objections to the issuance of this tideland conveyance. This small boat harbor expansion should help increase fishing access in the area.

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

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Alaska Department of Environmental Conservation (DEC) comment: DEC does not have additional information to provide regarding the impaired waterway status of Iliuliuk Harbor. DEC suggested that if the former submarine base in Iliuliuk Harbor is a contaminated site, DNR should coordinate with the DEC contaminated site program to ensure all parties have information.

DNR DMLW LCS response: LCS appreciates your review of the application materials and subject parcel. The former submarine base in Iliuliuk Harbor is not labeled as a contaminated site on the DEC contaminated sites mapper. Additionally, the subject parcel is located on the other side of the peninsula from where the submarine base was located.

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

- Alaska Conservation District;
- Alaska Mental Health Trust Land Office;
- University of Alaska Land Management;
- Alaska Department of Commerce and Economic Development;
 - Division of Community and Regional Affairs;
- Alaska Department of Environmental Conservation; and
- Department of Natural Resources;
 - Division of Parks and Outdoor Recreation, Office of History and Archaeology; and
 - Division of Agriculture.

XV. Submittal of Public Comments

See Attachment C: 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.

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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.

DEADLINE TO SUBMIT WRITTEN COMMENT IS 5:00 PM, WEDNESDAY, FEBRUARY 22, 2023

XVI. Stipulations

If approved for conveyance, applicable conditions, restrictions, and reservations will be imposed upon the 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. As a condition of the conveyance, following the survey of the subject parcel, the City must sign an affidavit acknowledging the condition of the land and releasing the State from liability for the removal of hazardous substances, hazardous wastes, contaminants, or pollutants, and for the remediation of the site should such substances ever be identified. This affidavit must be signed prior to issuance of a tideland patent.
2. 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.
3. Management authority for the approved subject parcel will be transferred to the City when the FFD is effective. When approved, the City may execute leases and permits prior to the issuance of a state conveyance document in accordance with *AS 38.05.825*.
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. 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.
6. A notice to proceed to survey will be issued if no appeals are received, or when appeals are resolved, after the issuance of the FFD. 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.
7. The approved tideland conveyance is subject to the terms and conditions of *AS 38.05.825*, including: 1) Grantee may lease the land, but may not sell it; 2) 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; 3) The municipality shall be required to ensure that reasonable access to public waters and tidelands is provided; 4) 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; and 5) Title to

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the land conveyed under this authority reverts to the State upon dissolution of the municipality.

8. The approved tideland conveyance is subject to valid existing rights, including reservations, easements, and exceptions in the U.S. Patent, or other state or federal conveyance, and in acts authorizing the issue thereof, easements, rights-of-way, covenants, conditions, reservations, notes on the plat, and restrictions of record, if any.
8. 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 1.2-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 subject parcel 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 the 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 City of Unalaska. Facilitating community development activities in Unalaska 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 18, 2023

Date of Signature

signature on file

Approved by: Rachel Longacre
Section Chief
Land Conveyance Section
Division of Mining, Land and Water
Department of Natural Resources
State of Alaska

January 18, 2023

Date of Signature