

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

**Preliminary Decision**

**AS 38.05.035(e)**

**ADL 107544**

**Proposed Tideland Lease to Niblack Mining Corporation**

**PROPOSED ACTION:**

The Southeast Region Office of the Alaska Department of Natural Resources (DNR), Division of Mining, Land and Water (DMLW), proposes to issue a 10 year lease to Niblack Mining Corporation for approximately 1.61 acres of State tide and submerged land. The parcel is within the unorganized borough and is located at Niblack Anchorage in Moira Sound on the southeast side of Prince of Wales Island. The purpose of the proposed lease is to develop a marine terminal consisting of a barge landing ramp, dock, seaplane float and camp barge. See Attachment A for the proposed development and operations plan.

The Department of Natural Resources, Office of Project Management and Permitting is simultaneously coordinating review and public comment for all State permits for this project, including an Alaska Coastal Management Program consistency review and determination.

**The public is invited to comment on the Preliminary Decision. The deadline for comments is May 23, 2006. See Page 13 for details on how and where to send comments.**

**AUTHORITY:**

Alaska Statutes 38.05.035(e), AS 38.05.075(c), and Alaska Administrative Code 11 AAC 55, 11 AAC 58 and 11 AAC 62.690-700. The Director of the Alaska Department of Natural Resources, Division of Mining, Land and Water is authorized by AS 38.05.035(a)(6) to act on behalf of the State in this matter. The Director has delegated this authority under AS 38.05.035(b)(1) to the Regional Manager of the Southeast Region Office.

**ADMINISTRATIVE RECORD:**

Case file ADL 107544 is the administrative record for this case. Also incorporated by reference are the Prince of Wales Area Plan (October 1998), and the *Niblack Property, Prince of Wales Island, Alaska: Eelgrass Survey*, (March 2007, HDR Alaska, Inc).

**SCOPE OF DECISION:**

The scope of administrative review under AS 38.05.035(e)(1)-(2) for this proposed lease is limited to (1) reasonably foreseeable, significant effects of the uses proposed to be authorized, (2) applicable statutes and regulations, (3) the facts pertaining to the land or resources, and (4) issues that are material to the determination that the proposed lease will best serve the interests of the State. The scope of this review does not take into account activities that are generally allowed uses under 11 AAC 96.020 or development and use of the adjacent uplands.

## **DESCRIPTION:**

### **Location:**

**Geographic:** Niblack Anchorage in Moira Sound, adjacent to Prince of Wales Island within Section 34, Township 78 South, Range 88 East, Copper River Meridian.

**Borough/Municipality:** Unorganized

**Native Corporation:** Sealaska Corporation

**Village Corporation:** Haida Corporation

**Federally Recognized Tribes:** Hydaburg Cooperative Association, Metlakatla Indian Community and Native Village of Saxman IRA

**Alaska Coastal District:** none

### **Water Bodies:**

The proposed lease is located in Niblack Anchorage, which is a navigable body of water.

### **Title:**

**Acquisition Authority:** Statehood/Submerged Lands Act. The State of Alaska received title to the affected tide and submerged lands under the Alaska Statehood Act (Public Law 85-508), the Submerged Lands Act (Public Law 31) and the Doctrine of Equal Footing upon entry of the State into the Union. Management is subject to the Public Trust Doctrine.

**Title Restrictions:** None

### **Planning and Land Use Classification:**

The State land in the vicinity of the proposed lease is subject to the Prince of Wales Island Area Plan (POWIAP), adopted October 1998. The site is located within management unit 14b – Moira Sound in an area which is co-designated as crucial habitat (Ha) and mining access (m). These designations result in a co-classification of wildlife habitat land and settlement land.

The relevant area wide land management policies for developing floating facilities within crucial habitat areas include the following:

- When better information becomes available through additional studies, site inspections or other means, that information should be used to correct the habitat information in this plan.
- If crucial habitat areas are co designated within mining activity the DNR policy is to either make mining compatible with crucial habitat through appropriate design, siting and operating stipulations, or, if the use is of sufficient importance or lacks such feasible alternatives, allow the use if it sufficiently meets the State's mitigation and coastal management policies.
- Floating facilities must be consistent with U.S. Corps of Engineer authority and regulations, federal and state water quality standards, coastal zone standards and habitat protection standards.

The management intent for this unit states that lands will be co-managed for mining access and to avoid conflicts with anadromous fish habitat. Applicable management guidelines require the following:

- Before mineral access or development of support facilities will be authorized within crucial habitat the applicant must demonstrate that there is no feasible alternative and will be subject to the following stipulations:
  - The activity will have no adverse impact on stream, estuarine or marine habitats, or upon the anadromous fish these habitats support.
  - There will be no surface disturbance within the crucial habitat.
  - A project plan for work within the crucial habitat area must be approved by DNR in consultation with the Office of Habitat Management and Permitting and Alaska Department of Fish and Game.

New information in the form of an eelgrass survey (HDR, 2007) has been provided that shows the proposed activity does not affect crucial habitat; therefore, the proposed development of a marine terminal for mining access is considered to be compatible with the crucial habitat designation through appropriate design and siting criteria. Because the marine access facility avoids crucial habitat, the requirement to demonstrate that there are no feasible alternatives and the requirement to meet the special stipulations described above are unnecessary. Lease conditions shall require that the proposed use and development are consistent with all federal and State requirements. The proposed lease is considered compatible with the State's planning and classification requirements.

#### **Mineral Orders:**

A mineral closure order (MO) or a leasehold location order (LLO) is not considered necessary or appropriate in this circumstance.

#### **Local Planning:**

The proposed lease is not subject to local planning and zoning ordinances.

#### **Traditional Use Finding:**

Pursuant to AS 38.05.830, and after due consideration, DNR finds that the proposed lease is likely to have little or no effect on the density of the population in the immediate vicinity and that there is little potential for conflict with the known traditional uses of the land. If, through public review of the preliminary finding, DNR becomes aware of traditional uses with the potential for conflicts with the lease, DNR will, if necessary, modify the lease decision or develop a plan to resolve or mitigate the conflicts.

#### **Coastal Zone Management:**

The proposed lease is within the coastal zone and requires an individual consistency determination through the Alaska Coastal Management Program. That review is being conducted simultaneously with the review of this preliminary decision.

#### **State Agency Review:**

Agency review and comments will be solicited during the public notice period as described below. Comments will be addressed in the final finding and decision.

## **Public Notice:**

Public review and comments regarding this proposed lease will be solicited in accordance with AS 38.05.945. The public will be notified as described below and comments will be addressed in the final finding and decision.

## **Access:**

***Physical and Legal Access:*** The physical access to the proposed lease is via tide and submerged lands associated with Niblack Anchorage and Moira Sound; there is no road access to the Niblack Mine site. There is no other legal access to the proposed lease site.

***Access To and Along Public Waters:*** Pursuant to AS 38.05.126(a), the public has a constitutional right to free access to, and use of, navigable or public waters of the State. Under AS 38.05.127, DNR is required to determine whether to reserve specific public access easements to and along these waters.

In the final decision on this proposed action, DNR will determine whether to reserve from this disposal of State interest a public access easement along the shoreline pursuant to AS 38.05.127(a)(2). Pursuant to 11 AAC 51.045, DNR will consider comments and evidence provided by the Department of Fish and Game and from a municipality or other person during the public notice and review period in making this determination.

Public notice of this decision constitutes notice that DNR 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.

Unless comments and other information submitted to DNR provide justifiable and convincing evidence of the latter case, this disposal of State interest will reserve a platted 50-foot public access easement seaward of the line of mean high water.

Those interested in how DNR decides this issue should submit written comments regarding this issue and read the final decision that follows. DNR will provide notice of the final decision to all persons who submit written comments during the public notice and review period.

## **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 exists or is known to exist on the land being disposed of. No hazardous material or contamination from hazardous material is known to exist on the land proposed for conveyance. No sewer facilities or outfalls are planned to be located at the site. Fuel proposed to be stored within the lease area consist of 50 gallons of gasoline used for the outboard engine on the skiff and 5,000 gallons of diesel stored within the camp barge and contained in a tank that is enclosed within the bulkhead of the barge capable of containing 110% of the tank capacity All fuel transfers across the marine terminal will be conducted using self contained isotainers and in accordance with approved plans, best management practices and applicable regulations. Environmental risk associated with this proposed tideland lease is expected to be minimal.

### **Lease Compensation, Appraisal and Sublease:**

AS 38.05.840(a) provides in part that "Land may not be sold or leased for less than the approved, appraised market value...." AS 38.05.075(a) provides, in part, that "The lease compensation method shall be designed to maximize the return on the lease to the State and shall be a form of compensation set out in AS 38.05.073(m)". AS 38.05.073(m) states that "The compensation to be paid to the State for a lease ...may include, in the discretion of the commissioner, (1) a percentage of annual gross receipts as reported to the United States Internal Revenue Service; (2) a guaranteed annual minimum rent or a percentage of gross receipts, whichever is greater; (3) the fair market rental value; (4) a fixed annual rent that is not less than the fair market rental value of the land; (5) a fee for each user; (6) other compensation acceptable to the commissioner; or (7) a combination of the above." By approving this decision, the Regional Manager finds that it is in the State's best interest and the public interest that lease compensation shall be at a level which is commensurate with the growing success and rewards derived by the business' beneficial use of these public lands. It is recommended that this lease shall be offered with the following compensation provisions:

**Annual Compensation:** As authorized under AS 38.05.073(m)(7), the annual rental charge shall, at the State's discretion, be the greater of:

- (1) an amount equal to 2.5% of the annual gross receipts from the business or businesses deriving income from the lease facility, as reported to the Internal Revenue Service;
- (2) an amount equal to the fee that would be charged for this use under DNR's current land use permit fee schedule;
- (3) an amount determined by DNR according to a remote leasing appraisal schedule, or a DNR approved fair market value appraisal provided by the Lessee,
- (4) an amount that is not less than the fair market rental value of the land, or
- (5) a minimum amount established under 11 AAC 58.410(b).

Because gross receipt records are not available to assist in determining the initial annual compensation as a percentage of gross revenue, and because DNR does not have an appraisal schedule which applies to this location and use, the applicant must provide a DNR approved fair market value appraisal of the lease site. The annual compensation for the initial 5 year period shall be the greater of

- (1) the fair market value as determined by the approved appraisal; or
- (2) the minimum lease amount established under 11 AAC 58.410(b), currently \$1,000.00 per year.

**Appraisal:** DNR believes that the fair market value of this proposed lease parcel may be greater than the minimum lease rental fee under 11 AAC 58.410(b) and will request a review by the DMLW Chief Appraiser before determining whether an appraisal will be required. The final finding and decision for the proposed lease will indicate whether a fair market value appraisal will be required. If a fair market value appraisal is not required, the initial lease rental fee will be determined under 11 AAC 58.410(b).

**Annual Report:** DNR may, in the future, require the Lessee to furnish written annual reports. If so, annual reports will be due to DNR on or before May 1 of each year with all of the information that DNR determines to be necessary in order to obtain a clear and detailed understanding of the commercial operations occurring on, or being facilitated by, the lease. At a minimum, the report shall include the following information:

- (1) A certified statement, by a certified public accountant, of the gross amount of annual business revenue as reported to the Internal Revenue Service for the business or businesses which derive income from the lease parcel.

(2) Any other information that DNR determines to be necessary in order to obtain a clear and detailed understanding of the commercial operations occurring on, or being facilitated by, the lease parcel. This may include, but is not limited to, copies of all brochures and promotional materials, the total number of employees residing on the lease site, the total number of paying clients, the number of days each client utilized the lease site, the total number of non-paying clients; the maximum number of employees and clients on the lease site at any given time; and the retail sales price charged for services. The Lessee shall immediately make all necessary financial records available, and shall fully cooperate with an independent State audit if the Lessor determines that an audit is necessary.

Information gathered during the first 4 years of each 5 year period of the lease may be averaged and used to determine the annual rental at the next periodic rent adjustment period as required under the section below. The annual reporting requirement may be initiated, adjusted, suspended, or reinstated at the discretion of the Lessor.

**Compensation Adjustment:** AS 38.05.105 requires that the annual lease compensation be reevaluated and adjusted at five year intervals. The adjusted annual rent shall not be less than the greater of

- (1) the minimum lease rental established under 11 AAC 58.410(b), or
- (2) the appraised fair market value rent.

The adjusted annual rent shall be designed to maximize the return on the lease to the State. At an adjustment interval, the Lessor, at its discretion, may adjust the amount and method of determining compensation. To determine the adjusted lease compensation, DNR may

- (1) require the Lessee to provide an acceptable current market appraisal of the lease parcel, with the appraiser and appraisal subject to the review and approval of DNR and the cost of appraisal borne by the Lessee;
- (2) adjust the annual compensation based on an appropriate DNR lease fee schedule in effect at that time;
- (3) require compensation based on a percentage of gross business revenues, up to 2.5% of the annual gross receipts from the business or businesses deriving income from the lease facility as reported to the IRS;
- (4) require compensation based on a per client amount or other method equivalent to (3) above;
- (5) require an amount equal to the fee that would be charged for this use under DNR's current permit fee schedule, or
- (6) use a combination of these or other methods stated in AS 38.05.073(m).

Adjustment of the amount of annual lease compensation is not limited to the appraised fair market rental value of the land, but shall be not less than this value.

**Sublease and Rental Agreements:** The lease shall be subject to a provision which allows the Lessor the right to require an increased annual compensation as a condition of a sublease approval. Said increase shall be determined by negotiation between the Lessee and Lessor, but shall not be less than 25% of all compensation paid annually to the Lessee by the Sub-lessee. Neither the terms of this sublease provision nor any actual compensation derived from a sublease shall have any effect upon a determination of appraised market value pertaining to AS 38.05.840 and or this lease parcel. Sublease shall be defined to include any lease, rental, storage or accommodation agreement between the Lessee and another individual, business or corporation utilizing or benefiting from the lease parcel. Sub-lessee shall be defined to mean any individual, business or corporation executing an agreement, as above, with the Lessee. The amount of sublease compensation shall be subject to change at the same time as the lease compensation adjustment discussed in the section above, and whenever the terms or conditions of the agreement between the Lessee and sub-lessee change. Approval of a sublease shall also be conditioned upon:

- (1) submission by the Lessee of a signed copy of the agreement(s) which govern the relationship and compensation provisions between the Lessee and the Sub-lessee;
- (2) submission by the Lessee of a complete plan of operations and development for the subleased area and, if necessary, an amended plan of operations and development for the entire lease area; and
- (3) a Lessor best interest finding and amendments to the lease contract as necessary, if significant changes to the use and development are proposed.

### **Performance Guarantees and Insurance:**

It is DMLW policy that any authorization for State land use, except land sold by fee title, requires the consideration of a performance guarantee and insurance. This policy is necessary to defray costs that may be incurred as a result of legal action, broken contracts, or activities on State land that would not otherwise be covered by standard fee arrangements. Oil or hazardous material spills, industrial accidents, and other problems that result in injury to persons or resources can be very costly to remedy, and could result in millions of dollars in costs to the State. Performance guarantees and insurance protect the State from these burdensome costs, and provide incentive for users of State land to preserve State resources and protect human health.

***Performance Guarantee:*** Performance Guarantees assure performance and provide a means to pay for corrective action if the Lessee fails to comply with the requirements set forth in the lease document. They are also used to protect State land from damage and to ensure that improvements are removed and the land returned to usable condition upon termination of the lease. Performance guarantees may also be referred to as bonds or surety bonds. Performance guarantees should equal the possible costs the State would incur to terminate an agreement authorizing the use of State land, and return the land to a marketable and environmentally sound condition. If appropriate, performance guarantees should also include the amount required on a large deductible for an insurance policy. Performance guarantees should allow for periodic adjustments to be made during the term of the authorization to address increases or decreases in the costs of rectifying problems and rehabilitating State land due to inflation, changes in the level or nature of development, or other appropriate factors.

The improvements located on State land consist of a 5-foot by 60-foot pile-supported walkway, a 5-foot by 70-foot ramp and a 10-foot by 225-foot float held in place by twelve piles. The barge and landing craft ramp will be approximately 24-foot by 60-foot and will require approximately 500 yards of fill, and a 50-foot by 150-foot camp barge will be attached to the float. DNR has determined that a performance guarantee of \$30,000.00 will be required to help defray the cost of site restoration should the Lessee not abide by the terms of the lease.

***Insurance:*** Insurance protects the State from liability incurred through the use of State property, or from damage to State property as a result of accidents or catastrophic events. This type of protection is necessary if an accident or negligence occurs in connection with activities conducted on State land, or if the State is named in a lawsuit as a result of an accident or negligence. DNR and the Division of Risk Management, Department of Administration have determined that in order to protect the State from the potential liability resulting from the lease operation, it is in the State's best interest that the Lessee be required to:

- (1) Consult, as appropriate, with an insurance professional licensed to transact the business of insurance under Alaska Statute Title 21, in order to determine the type and level of insurance adequate to protect the Lessee and the Lessor (the State, its officers, agents and employees) relative to the liability exposure of the Lessee's commercial operation.

(2) Secure or purchase, at the Lessee's expense, and maintain in full force at all times during the term of the lease, the insurance coverage as determined above, and acceptable to the Lessor. The Lessor will require, at a minimum, the following coverage:

Commercial General Liability Insurance: The policy shall be written on an "occurrence" form and shall not be written as a "claims-made" form unless specifically reviewed and agreed to by the Division of Risk Management, Alaska Department of Administration.

Workers' Compensation Insurance: The Lessee shall provide and maintain, for all its employees, Workers' Compensation Insurance as required by AS 23.30.045. Where applicable, coverage must comply with any other statutory obligations, whether federal (U.S.L.H., Jones Act) or other State laws, for employees engaged in work on the leased premises. The insurance policy must contain a waiver of subrogation clause in favor of the State of Alaska.

(3) Ensure that the State of Alaska, Department of Natural Resources is included as an additional insured on all liability policies held by the Lessee that provide coverage for liability connected to the operations of the Lessee on, or in conjunction with, the leased premises referred to as ADL 107544.

(4) Provide proof of insurance to the Lessor on a yearly basis. The certificate must provide for a 30-day prior notice to the State of Alaska in the event of cancellation, nonrenewal or material change in conditions. Failure to furnish satisfactory evidence of insurance, or a lapse in the policy, is a material breach of the lease contract and shall be grounds, at the option of the Lessor, for termination of the lease agreement. Generally, the Lessor will rely upon the best professional judgment of the licensed insurance agent and, at renewal, the agent's annual reassessment of the insured's liability exposure for determination of adequate levels of coverage. The Lessor will reserve the right in the lease to require additional coverage if, in its discretion, it determines that it may be warranted. Any changes in the approved lease development and operations plan, or the existence of significant claims against the liability coverage, would warrant examination of the insurance by the State to determine adequacy.

(5) Notify, and provide documentation and full disclosure to, the Lessor within 20 days after the Lessee becomes aware of a claim against any of its liability coverage.

Certificates of Insurance must be furnished to the Leasing Officer prior to lease execution and leasehold occupancy. All insurance policies shall comply with, and be issued by, insurers licensed to transact the business of insurance under Alaska Statute Title 22.

### **Survey:**

The applicant will be required to complete a lease diagram prepared by a registered land surveyor to Division standards prior to issuance of the lease. All survey costs shall be borne by the applicant. The area shown on Attachment A is the basis for the survey. The boundary of the lease area will be drawn so that access to the adjacent uplands will not be impeded and all constructed improvements and the entire moorage area will be located within the lease area.

### **Temporary Entry and Use Authorization:**

Entry onto State land for site development and beneficial use prior to lease execution is a privilege that DNR will consider granting only to applicants willing to commit to a reasonable timeframe for delivery of the final survey and appraisal products, thus allowing the lease to be issued by the end of the entry permit period. Past experience with expired entry permittees who lacked completed survey and appraisal

products at permit expiration has resulted in the need for an appropriate incentive to encourage applicants to complete the survey and appraisal requirements in a timely manner. A monetary penalty for late delivery has been established for that purpose. An entry permit allows entry onto the project site for the purpose of continued use of the facility and time to complete the survey, appraisal and execution of the lease. In addition to the standard State land use permit conditions, approval of an entry permit is subject to the following conditions:

**Term:** The term of the entry permit shall be 24 months.

**Survey Commitment:** The applicant shall submit to DNR, prior to the permit beginning date, a statement from the applicants surveyor who is registered to practice in the State of Alaska that they understand the deadline outlined in Attachment B for submittal of the final lease diagram of the proposed lease area (within 15 months of entry authorization). The Attachment B deadlines are designed to ensure that all tasks necessary to execute the lease are completed prior to the expiration of the entry permit. The cost of the survey shall be borne by the applicant.

**Appraisal Commitment:** Applicant shall submit to DNR, prior to the permit beginning date, a copy of a signed contract or letter of intent between the applicant and a firm appearing on the DNR Current List of Appraisers who is qualified to appraise State tidelands. The contract or letter shall indicate that the appraiser has read the DNR General Appraisal Instructions, is qualified and willing to complete and submit the required fair market value appraisal within the deadline shown in Attachment B (within 17 months of entry authorization). The cost of the appraisal shall be borne by the applicant.

**Rent:** Payment of rent shall be equal to the fair market rental value of the proposed lease parcel. The initial rent amount shall be based upon the Director's estimate of fair market rent, determined in this case to be \$1,000.00 per year for a total of \$2,000.00 for the 24 month term of the entry permit. Payment for the full term of the permit shall be required prior to issuance of the entry permit. If the appraised fair market rent for the term of the permit exceeds this amount, the applicant shall be required to pay the difference. If the appraised fair market rent is less than this amount, the difference will be credited or refunded to the applicant.

**Performance Guarantee and Insurance:** The entry permit shall be subject to the performance guarantee and insurance provisions as described above. The applicant shall submit the performance guarantee and proof of liability insurance coverage to DNR prior to issuance of the entry permit.

**Default Penalty:** The applicant shall submit a \$5,000.00 cash deposit to DNR prior to issuance of the entry permit. This deposit will be used as a guaranteed default penalty to be assessed if, by the expiration date of the entry permit, the applicant has not completed all survey and appraisal requirements, made all required payments, and returned a signed lease contract to DNR. In assessing a penalty DNR shall, in its discretion, make allowance for circumstances beyond the control of the applicant, its agent or contractor.

The penalty for failure to complete these requirements prior to entry permit expiration shall be as follows:

- (1) In the event that the requirements are not met by the deadlines stated in Attachment B, resulting in the failure of the applicant to enter into a lease contract prior to the expiration date of the entry permit, the applicant shall agree as a condition of the entry permit to the following penalty schedule:
  - (a) Automatic forfeiture of 50% (\$2,500.00) of the cash deposit to DNR for failure to submit a signed lease contract by the date of expiration of the entry permit.
  - (b) Automatic forfeiture of the remaining 50% (\$2,500.00) of the cash deposit to DNR for failure to submit a signed lease contract by the end of the 30th day following expiration of the entry permit.

(2) If all requirements are met and the lease agreement is signed, notarized and submitted to DNR prior to expiration of the entry permit, the cash deposit will be released to the applicant.

If the applicant fails to meet the requirements of the entry permit within 30 days after expiration of the entry permit, in addition to the penalty described above, the Regional Manager may, in his or her discretion, terminate the entry permit and close the lease application case file. Upon such termination and closure, the applicant shall immediately cease all use of the site and remove all improvements from the site within 60 days. Failure to remove all improvements within 60 days shall result in an automatic transfer of ownership of any remaining improvements, the performance guarantee, and any remaining fees and deposits to the State of Alaska. As an alternative to the above action, the Regional Manager may, in his or her discretion, agree to an extension of time in order to complete the lease requirements, and may require an additional cash deposit to ensure performance.

***DNR Timeframes:*** DNR will track and record the time it takes to issue survey instructions, review drafts, review and approve the survey and appraisal, and prepare and deliver the lease agreement to applicant, and shall commit to taking no longer than 9 months to accomplish its role in the process. This time period assumes that two reviews of the draft plats will be required. Attachment B contains a proposed 24 month timeline indicating reasonable target deadlines for the steps needed to deliver a signed lease prior to the entry permit expiration date. Any additional time needed by DNR survey staff beyond 9 months to review submitted products shall be credited to the permittee in determining the deadlines for the penalty assessments described above.

**DUE TO THE PENALTIES FOR FAILURE TO MEET ALL SURVEY AND APPRAISAL REQUIREMENTS WITHIN A TIMEFRAME THAT ALLOWS EXECUTION OF THE LEASE PRIOR TO EXPIRATION OF THE ENTRY PERMIT, PLEASE BE ADVISED OF THE FOLLOWING:**

In order to allow adequate time for DNR to complete the final survey approval, prepare and send the applicant the lease contract two weeks prior to the permit expiration, it will be necessary for the final signed survey plat to be submitted to DNR no later than 15 months following the starting date of the entry permit. Likewise, the appraisal report valuing the land depicted in the approved plat must be submitted to DNR no later than 17 months after the starting date of the entry permit. Failure to adhere to these time frames may result in failure to execute the lease within the term of the entry permit and result in the substantial penalties stated above.

#### **DISCUSSION AND ALTERNATIVES:**

The Niblack Mine consists of a series of patented mining claims at the head of Niblack Anchorage. Niblack was actively mined at the turn of the century. Over the past 30 years exploration has led to discovery of five massive sulphide zones. The applicant, Niblack Mining Corporation, acquired the property in 2005 and completed additional drilling, which has led to the currently proposed Niblack Underground Exploration Project. Niblack Mining Corporation proposes to develop an initial 6,000 feet of underground tunneling from a single adit entry. The purpose of the underground work is to provide access for additional exploration drilling, bulk sampling of ore and characterization of underground conditions to determine if the site can be developed into a full-production mine.

Issuance of a 10-year lease to Niblack Mining Corporation for approximately 1.61 acres of State tide and submerged land would allow development of a marine access facility consisting of a barge landing ramp, dock, seaplane float and camp barge, which is necessary in order to proceed with the currently proposed project.

Niblack Mining Corporation prefers to keep the marine access terminal in place beyond the two year underground exploration project in order to provide continued access to the mine site following that project and because it is more economical to continue and maintain a marine access facility than to reclaim and restore the site and then have to build a new access facility in the future.

**Alternatives Considered:**

1. Authorize the proposed use with a 10-year lease
2. Authorize the proposed use with a land use permit
3. Authorize a longer term lease
4. Deny the proposed use

***Alternative 1 (Preferred):*** Alternative No. 1 is the preferred alternative. DMLW believes that issuance of a ten year lease is in the best interest of the State. A ten year lease would allow Niblack Mining Corporation to develop a marine access facility to support underground exploration activities. It would allow the Niblack Mining Corporation the ability to continue and maintain access after exploration and thus protect the considerable investment necessary to develop the marine access facility. A lease also provides a limited property right which can be assigned to future interests.

***Alternative 2:*** This alternative is not preferred. A land use permit is not an appropriate authorization for the development of long term improvements that include piles and fill. Land use permits are revocable and non transferable, and therefore do not provide the certainty which the applicant desires.

***Alternative 3:*** This alternative is not preferred. A lease term longer than ten years would require a competitive lease process and an Alaska Tideland Survey which adds more uncertainty and cost to the project. If the mine were to expand into full production in the future, a larger marine terminal for mine access and ore transport could be necessary; this would require an additional best interest finding and lease decision and could provide for a longer term if needed. If exploration results in the mine not expanding into full production, a long term lease may not be required.

***Alternative 4:*** This alternative is not preferred. Denying the lease would prevent sufficient access to the mine necessary to allow for the underground exploration project.

**RECOMMENDATION:**

DMLW recommends issuance of the lease described herein to Niblack Mining Corporation subject to the following conditions:

1. The tideland lease shall be subject to the standard DNR Division of Mining, Land and Water Lease Agreement, form 102-111, as revised (last revised September 25, 2001). This agreement is available upon request.
2. The tideland lease and entry permit shall contain modifications and/or provisions that are justified by public comment.
3. The term of the lease shall be 10 years.
4. The tideland lease shall be subject to a requirement that the Lessee complies with the stipulations contained in the Alaska Coastal Management Program Conclusive Consistency Determination and all other government agency requirements and permits.

5. The lease shall be issued subject to a 50 feet public access easement seaward of the line of mean high water.
6. The lease agreement shall be subject to the compensation, appraisal, annual reporting, compensation adjustment, sublease and rental provisions specified in this decision.
7. The tideland lease and early entry authorization shall be subject to the insurance and performance guarantee provisions specified in this decision.
8. The applicant shall complete a lease diagram as specified in this decision.
9. Limits of Development. The lease agreement shall limit the Lessee's right to occupy, develop and use the lease area to that described in the approved plan of operation and development (Attachment A). Use of the lease area for purposes other than those specified in the approved plan of operation and development, or any use of State land outside the lease area, is a violation of the lease contract. Before any change in use or development occurs, including starting new operations, making any additional improvement or constructing any new structure, the Lessee must propose revisions to the approved plan of operation and development and the revised plan must be approved in writing by the Lessor. The lease must be utilized for the purpose described in the approved plan. Failure to make substantial use of the land consistent with the approved plan within five years will, in the Lessor's discretion, constitute grounds for termination of the lease contract. Any change to the approved development plan may require commensurate adjustment to the performance guarantee and insurance coverage authorized by a lease amendment.
10. Approval of early entry is recommended subject to the terms and conditions stated in the Temporary Entry and Use Authorization section of this decision.

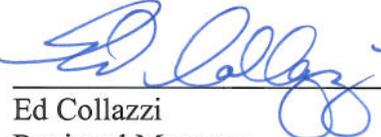
**PRELIMINARY FINDING AND DECISION:**

Prepared by:

  
 \_\_\_\_\_  
 Brady Scott  
 Natural Resource Manager

4-13-2007  
 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.

  
 \_\_\_\_\_  
 Ed Collazzi  
 Regional Manager

4/16/2007  
 Date

AS 38.05.035(e) to Commissioner DNR to  
Director To Regional Manager SERO  
 Delegated Authority

April 15, 1981  
 Date

## **PUBLIC NOTICE, FINAL DECISION AND APPEAL PROCESS:**

The State of Alaska, Office of Project Management and Permitting and the U.S. Army Corps of Engineers (ACOE) are providing public notice of applications, draft permits, and preliminary decisions relating to the Niblack Underground Exploration Project. This preliminary decision will be a part of that public notice process and will meet or exceed the provisions of Alaska Statute 38.05.945.

The Niblack Underground Exploration Project public notice process will meet or exceed Alaska Statute 38.05.945 as follows:

The public notice will seek comments through publication in the Island News, Juneau Empire, and the Ketchikan Daily News. Notice will also be given to Sealaska and Haida Corporation under AS 38.05.945 (c): to federally recognized tribes including: Hydaburg Cooperative Association, Metlakatla Indian Association, and the Native Village of Saxman IRA; and to the United States Forest Service who has an interest in the adjacent land. In addition, the Ketchikan, Hydaburg, Metlakatla, Thorne Bay, Craig, Klawock, Hollis Substation Post Offices 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](http://www.state.ak.us) (click on "Notices" at top of page).

The public is invited to comment on this preliminary decision. Comments must be received in writing by the DNR Office of Project Management and Permitting by mail at 3700 Airport Way, Fairbanks, Alaska 99709, by fax at 907-451-2703, or by electronic mail at [bob\\_tsigonis@dnr.state.ak.us](mailto:bob_tsigonis@dnr.state.ak.us) by May 23, 2007 in order to ensure consideration. Please use the subject line *Niblack Public Comment* in your message and 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 on the decision, in writing, prior to the comment deadline. Following the 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 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.

### **ATTACHMENTS:**

Attachment A: Proposed Development and Operations Plan  
Attachment B: Tentative Timeframes for Early Entry Authorization

Attachment A  
Proposed Development and Operations Plan  
ADL 107544

**DEVELOPMENT PLAN**

*for the*

**Niblack Exploration Project  
Marine Dock and Barge Landing Facilities**

*Submitted For:*

***Niblack Mining Corporation  
Darwin Green, V.P. Exploration  
Suite 615 – 800 West Pender St.  
Vancouver, B.C.  
Canada, V63 2V6***

*Submitted By:*

***RTR Resource Management  
1109 Main St - Suite 480  
Boise, Idaho  
83702  
(208) 343-8727***

**March, 2007**

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    Sheet 3 Marine Facility Diagram, Detailed Site Plan

    Sheet 4 Marine Facility Diagram, Section A-A'

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    Sheet 6 Marine Facility Diagram, Section C-C'

## **SECTION 1. INTRODUCTION**

This Development Plan is part of the Tidelands Lease Application for a proposed barge and landing craft ramp and a mooring terminal for the Niblack construction and exploration project located within Niblack Anchorage on Prince of Wales Island. The project is located approximately 24 miles southwest of Ketchikan (Sheet 1).

The Niblack construction and exploration project is currently permitting for future activities associated with the ongoing evaluation of the mineral potential at this property. The proposed marine dock and barge landing facility is required to provide a means of delivering equipment and supplies to the project, primarily to complete an underground tunnel required to further define the mineral resource. The overall project siting arrangement is shown in Sheet 2 and 3. Construction activities are being permitted and overseen by the Alaska Department of Natural Resources Large Mine Project Team (ADNR-LMPT). The team also involves the Alaska Department of Environmental Conservation (ADEC), and the Alaska Department of Fish and Game (ADF&G).

## **SECTION 2. CONSTRUCTION DETAILS**

The Tidelands Lease Application Form is presented in Appendix B. Niblack Mining Corporation (NMC), a Vancouver, British Columbia, Canada corporation has proposed the construction/exploration project, including those components which require a Tideland Lease Development Plan.

There are presently no marine facilities to allow for docking of barges or landing craft at the Niblack project. It is planned to construct a new marine terminal that will accommodate the 20-foot tide variance and allow heavy equipment to be unloaded safely. A 500 ton bulk mining sample will also be mined and shipped off-site for metallurgical testing. The dock and barge load-out are needed for these activities.

The barge and landing craft ramp will consist of a 10-foot high bulkhead constructed from cement blocks at the toe of the facility, which will then be backfilled with quarried rock to a 5% grade back to the access road. The structure will be approximately 24 feet wide and have an overall length of approximately 60 feet. This facility will be constructed between the 0 elevation contour and the 17 foot contour, just above the mean high water mark of 14.5 feet for this area. It is estimated that approximately 500 yards of fill will be required to construct the facility. The location of the proposed ramp is shown on Sheet 2 and 3, and a cross-section of the proposed facility is shown on Sheet 6.

The proposed location of the mooring facility is also shown on Sheet 3, and cross-sections are provided in Sheets 4 and 5. The mooring facility consists of a 5 ft x 100 ft pile supported walkway that is connected to 10 ft x 225 ft float with a 5 ft x 70 ft ramp. Total area of the walkways and float is 3100 square feet. The facility will include a total of twelve 16 inch diameter piles, and will accommodate mooring of a floating camp barge on its east side, and transient equipment and supply barges on its west side. Float plane and small craft mooring is also provided. The structures will be constructed of galvanized steel and timbers. The piles will be made of galvanized steel with a galvanized steel pile cap. Installation will be with a vibratory hammer. Pressure-preservative treated timbers will be used for the stringers, cross beams, and the decking. The bullrails, handrails, and rubstrips will also be made of timber. The struts will be made of galvanized steel pipe.

At a mean low low tide (0 foot elevation), approximately 30 feet of the mooring piles will be exposed above the water level. There is no fill, other than the mooring dolphins, associated with the construction of this facility.

The barge landing ramp and mooring facility will be designed to facilitate minimal disturbance of areas below high tide levels. To protect important eelgrass habitat in the lower intertidal and offshore areas, propulsion systems will not be used on landing craft, tugs, self-propelled barges or other craft using the barge landing site when tidal stage is less than half mean high water (7.6 foot contour).

Minor supply needs and emergency requirements will be provided by floatplane or by boat. These smaller vessels will utilize a floating dock secured to the floating camp to provide safe, unencumbered access. The float plane dock will be 10 ft x 50 ft (500 sq ft), and is included in the overall 10 ft x 225 ft float described above.

The marine landing facilities have been designed to minimize the amount of excavation and construction in the intertidal and beach areas. The dock/landing facility construction will create a barge landing fill ramp and a small laydown yard for handling of cargo. Construction of the marine terminal facilities will involve approximately 500 cubic yards of fill within a footprint of approximately 1440 square feet. Essentially all of the fill volume will occur below the mean high water line on lands administered by the ANDR.

### SECTION 3. OPERATIONS

Access to the marine dock/landing area will be via the portal access road. Staging at the marine facility is a necessary function of barging activities. A modest (50 foot by 50 foot) staging and storage area will be located at the marine facilities. The site is not in delineated wetlands. Appendix C, *Niblack Wetlands Delineation* (HDR, Alaska, 2006), is provided for easy reference. This will provide for temporary storage and staging of materials and containers, as well as spill response equipment and sorbent booms.

All of the associated utilities for these new facilities will be provided by the camp barge which will be moored adjacent to this area. No water, sewer, or other utilities are planned to be located at the site. Portable toilets may be provided in the laydown area.

Landing craft will transfer freight and equipment across the gravel ramp. Moorage will be temporary, while loading and unloading occurs. Vehicles will traverse the ramp and approach fill to get to the uplands staging and parking areas.

The camp barge will breast against the mooring dolphins. Barge operators will secure mooring lines to the dolphins. The transfer bridge will be lowered onto the barge. Supplies for the camp will be transferred across the transfer bridge or across a floating dock tied off to the camp barge.

All fuel transfers will be conducted in accordance with the specific requirements of the approved plans for applicable federal, state, and local regulations. Material delivery will be via isotainers (fuel) or other appropriate packaging as required by the Alaska Department of Transportation (ADOT). These supplies will be unloaded in a similar manner to other cargo. Fuel isotainers will be temporarily placed at the laydown areas in contained bermed storage areas. Forklifts will be utilized to remove containers from the barges and deliver them to storage areas or onto transfer vehicles for transport to the site working areas. Cargo will be containerized and palletized as required by ADOT and the respective cargo transport service.

#### 3.1 Construction Best Management Practices

The Best Management Practices (BMPs) that would be followed during the construction phase of the marine dock/landing area facility include those listed below:

- Hydraulic equipment used on barges will use vegetable oil or another biodegradable fluid rather than petroleum based oils.
- Refueling of construction equipment will be conducted on shore in a designated area with containment (liner and berming).

- Fuel transfers will incorporate level sensors, drip pans, and other precautionary measures, as appropriate.
- Oil spill response equipment will be readily available to respond to and contain any oil spills (NMC, Revised Plan of Operations, 2007). Spill response equipment will include absorbent materials, containment booms, and appropriate personal protective equipment. Personnel that are trained in responding to spills will be at the scene during all operations that could result in a spill.
- Spills into coastal waters will be reported to the appropriate agency immediately (ADEC, EPA, Coast Guard). Oil absorbent booms/socks will be placed around the spill sheen to contain it and to absorb as much of the petroleum product as possible.
- Reportable spills on land will be immediately cleaned up and reported to the appropriate agency.
- Upland disposal sites for waste cleanup will have silt curtains placed around the disposal area. Straw bales will be placed in drainage swales at periodic intervals to contain and filter muddy waters.

The following (BMPs) would be incorporated during the construction and operation of the ancillary facilities:

- Runoff from the laydown areas, any topsoil stockpiles, and other ancillary construction sites and/or facilities will be filtered by silt fences, hay bales, or other appropriate methods. Sediment traps would be regularly inspected, cleaned, and maintained.
- The laydown areas and access roads will be surfaced with crushed gravel, to limit erosion.
- Boat or other vehicle maintenance activities would not allowed in the vicinity of the marine dock/landing area.
- Natural vegetation will be left in place along the shoreline wherever possible. Disturbed and exposed soils would be revegetated as soon as practicable. Runoff would be diverted around exposed soils to heavily vegetated areas in the forest.

### 3.2 Operational Best Management Practices

The following operational BMPs were taken from a compilation of recommended BMPs for Alaska Harbors by Neil Ross Consultants and Concepts Unlimited, 1995.

### **Solid Waste**

- Trash containers will be provided on shore at the marine terminal.
- Waste receptacles will be placed on docks and secured, to prevent accidental spillage into the water.

### **Liquid Waste**

- Spill absorbent pads and booms would be readily available in the event of a spill.
- Propylene glycol based antifreeze (orange color) will be used in place of ethylene glycol based antifreeze (green color) wherever possible, because it is less toxic.

### **Petroleum Leaks and Spills**

- An oil Spill Response Plan (SRP) would be developed for the marine docking/landing facility.
- Adequate spill response equipment will be easily accessible and located at a clearly marked site. Phone numbers and directions on reporting spills would also be clearly posted at the same location.
- Used spill response equipment will be properly disposed of.
- Biological cleaners, which consume and digest petroleum pollutants, will be used to ensure complete remediation of spill waste material, wherever appropriate.

### **Bilge Water**

- Prior to discharging bilge water, the discharge will be inspected to ensure that no oil or fuel has been spilled into the bilge. Bilge water would not be discharged if it has a sheen or if it contains solvents, detergents or other additives.
- An oil/water separator will be installed in the bilge and in the bilge water pump discharge line. The separator will be maintained regularly.
- Niblack will recommend that oil-absorbing materials be used in bilge areas of boats that have inboard engines.
- Non-alkaline, biodegradable bilge cleaners will be used at the construction site.

### 3.3 Monitoring

#### **Baseline**

Niblack will collect pre-project environmental baseline marine water quality samples, consistent with the site-wide water quality monitoring plan in the vicinity of the dock/barge ramp landing area. These water quality conditions are summarized in a separate document. *Niblack Water Quality Monitoring and Baseline Plan, Knight Piesold Consulting, January, 2007.* This would include at least one set of chemical parameters and polycyclic aromatic hydrocarbons (PAH) from one to three sites, which can be indicative of pre-existing diesel fuel spills.

#### **Operational**

A similar set of samples will be collected and analyzed during the construction period. This will document any impacts related to construction activities and/or fueling.

#### **Reporting and Data Review**

This information will be submitted to the ADEC and ADNR as part of the annual monitoring report. The *Niblack Water Quality Monitoring Plan (January, 2007)* is presented in a separate document.

### 3.4 Maintenance of the Dock and Barge Landing Facilities

The facilities will be constructed of materials that will require relatively little maintenance. All necessary maintenance will be performed by Niblack personnel or their contractors. Floats and walkways will be cleaned periodically. The galvanized coatings will also be maintained periodically. Cathodic protection systems will be installed and repaired when required. The ramp foundation will be inspected after major storm events, to ensure that the backfill rubble material was not displaced by large waves. Timbers will be inspected once per year. Damaged or rotten timbers will be repaired or replaced as necessary. When treatment is required, tarps and other means will be used as appropriate to prevent any hazardous substances from entering the water.

#### **SECTION 4. CLOSURE/ RECLAMATION PLAN**

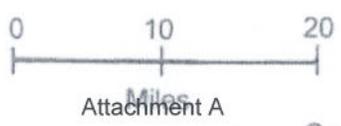
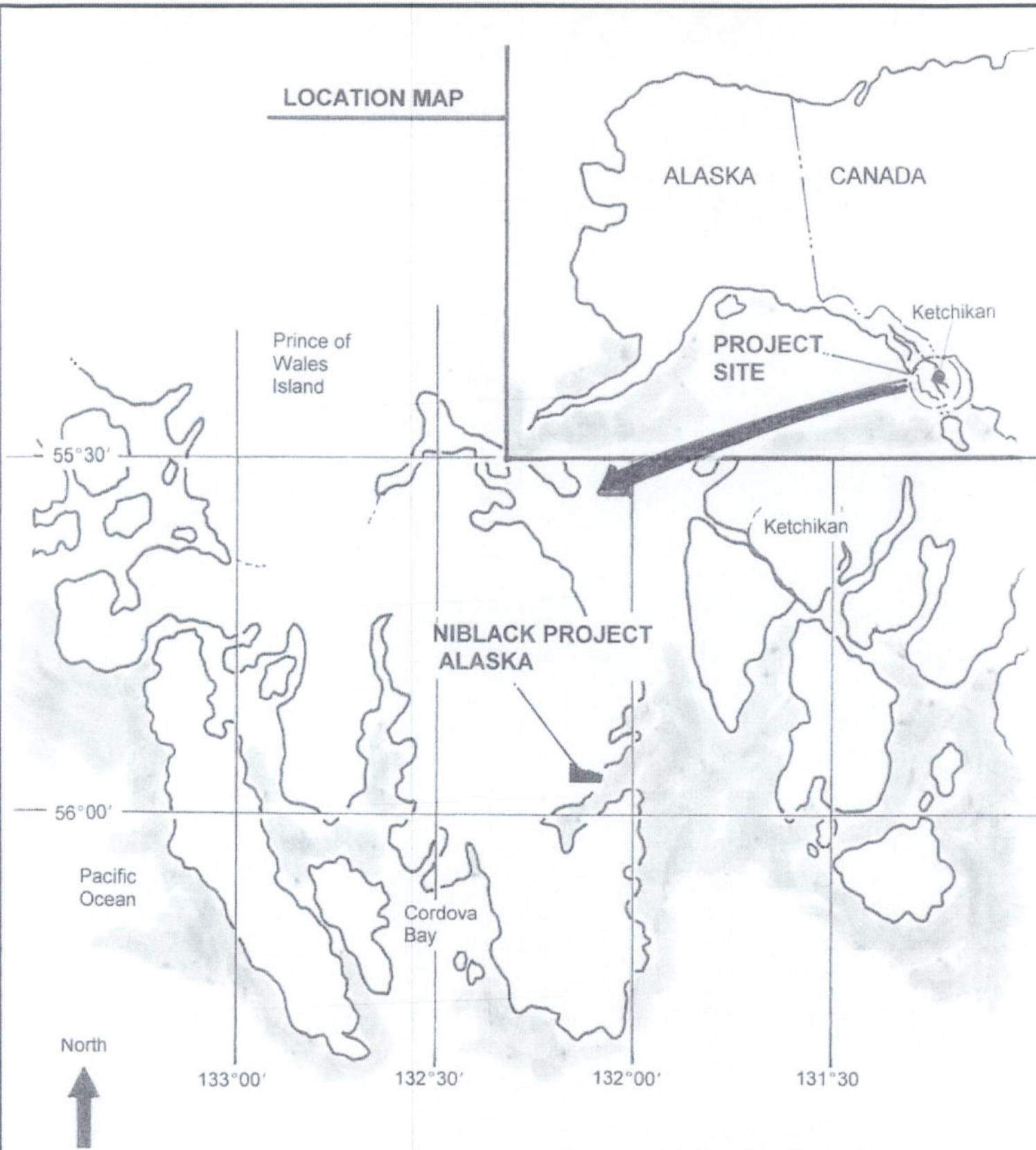
All constructed facilities would be removed from the docksite area as part of the closure and reclamation activities. Scrap or demolition materials from the marine facilities will be disposed off-site. The fill in the landing approach would be removed and disposed of at the non-acid generating (NAG) waste rock storage site. The laydown area would be regraded and scarified. Any disturbed areas would then be seeded with approved vegetation.

## **SECTION 5. REFERENCES**

1. Neil Ross Consultants and Concepts Unlimited. 1995. *BMP Examples for Alaska: Compilation and Assessment for Harbor, Marina, boat Operations, Repair and Maintenance.*
2. RTR Resource Management, Inc. 2006. *Niblack Mining Corporation Lookout Unit Storm Water Pollution Prevention Plan.*
3. Knight Piesold Consulting. 2007. *Water Quality Baseline and Monitoring Plan, Niblack Construction and Exploration Project*
4. Niblack Mining Corporation. 2007. *Revised Niblack Construction/Exploration Plan of Operations*

**Appendix A**  
**Niblack Drawing Sheets**

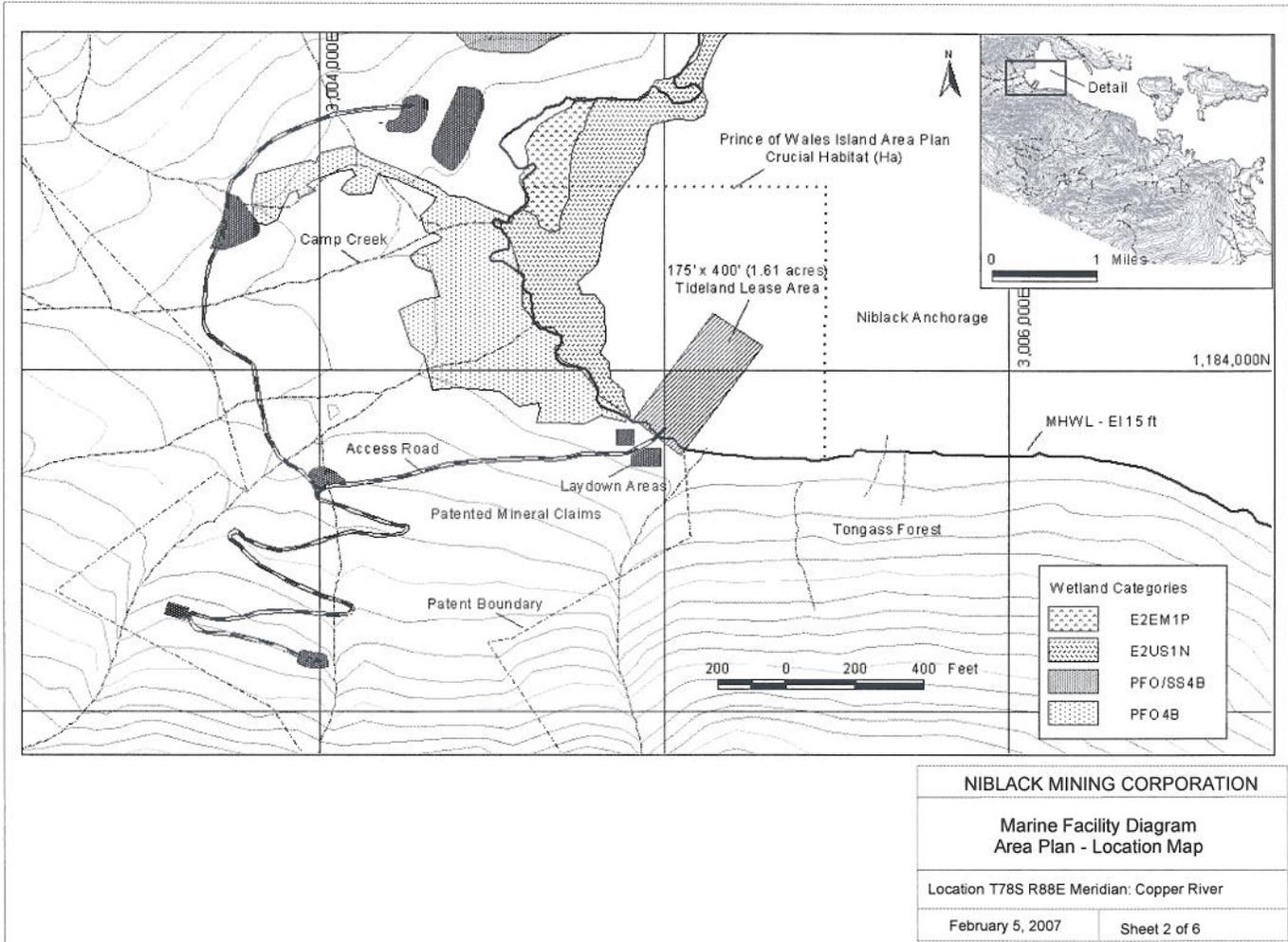
**LOCATION MAP**

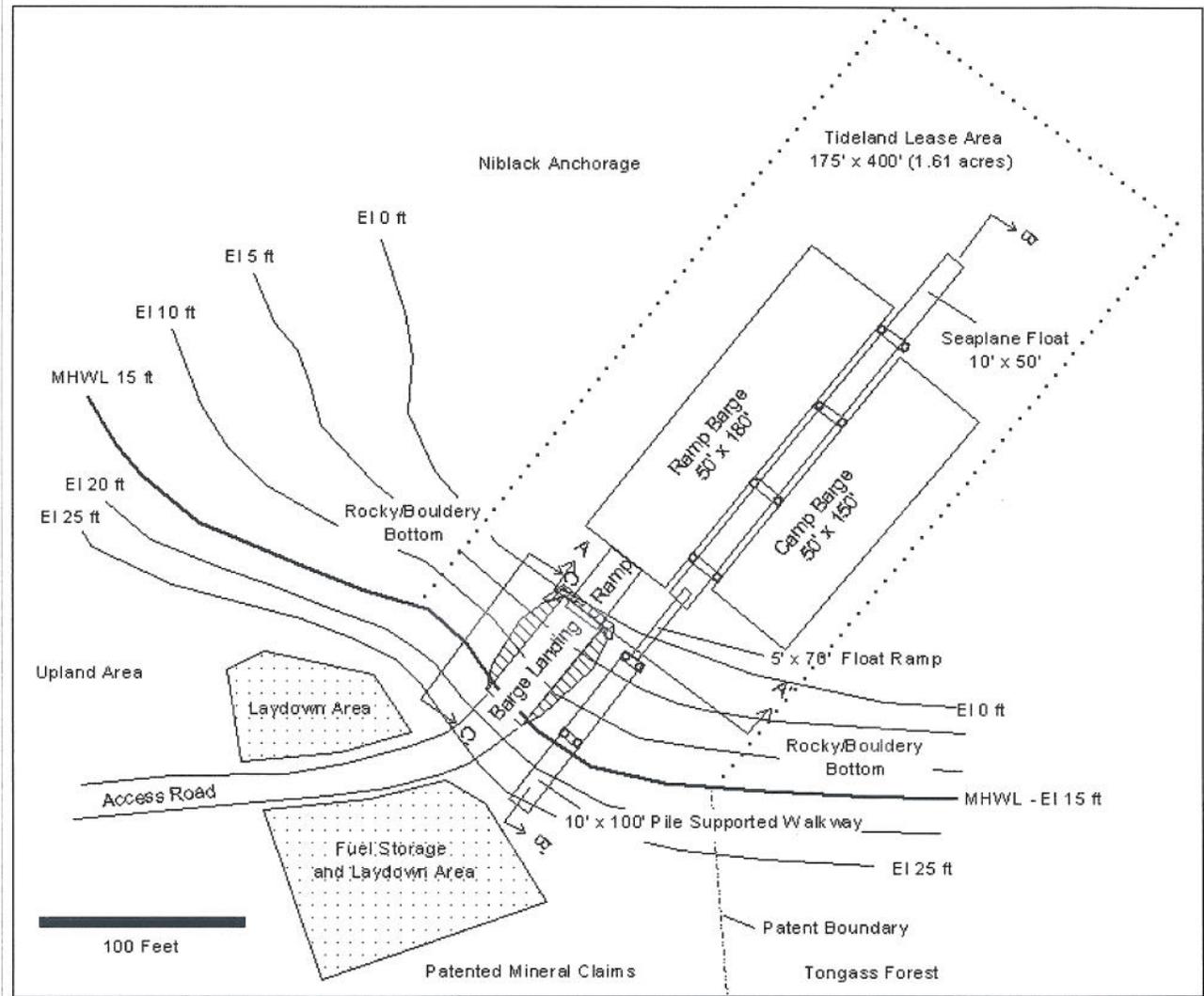


Attachment A

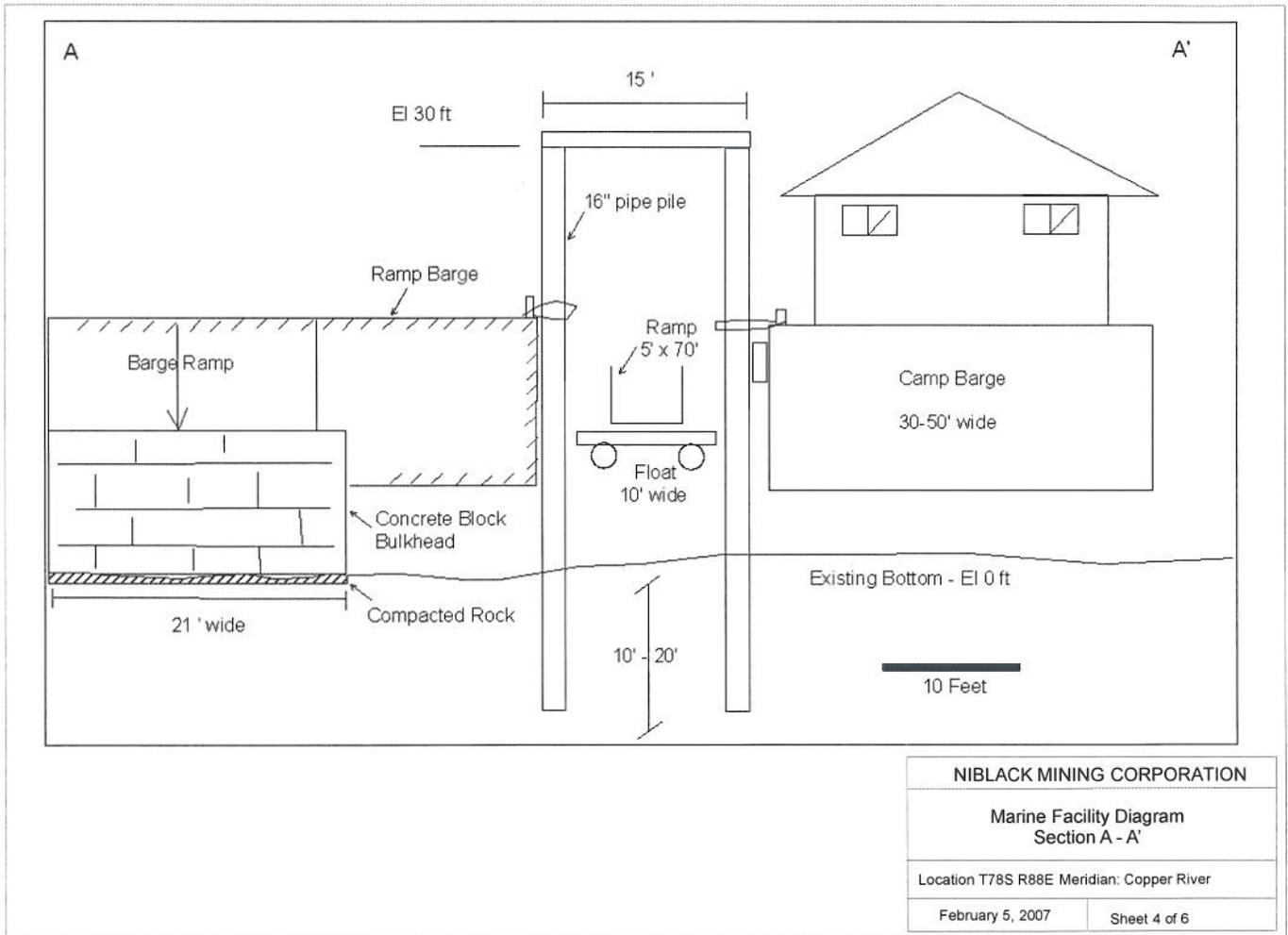
Scale noted

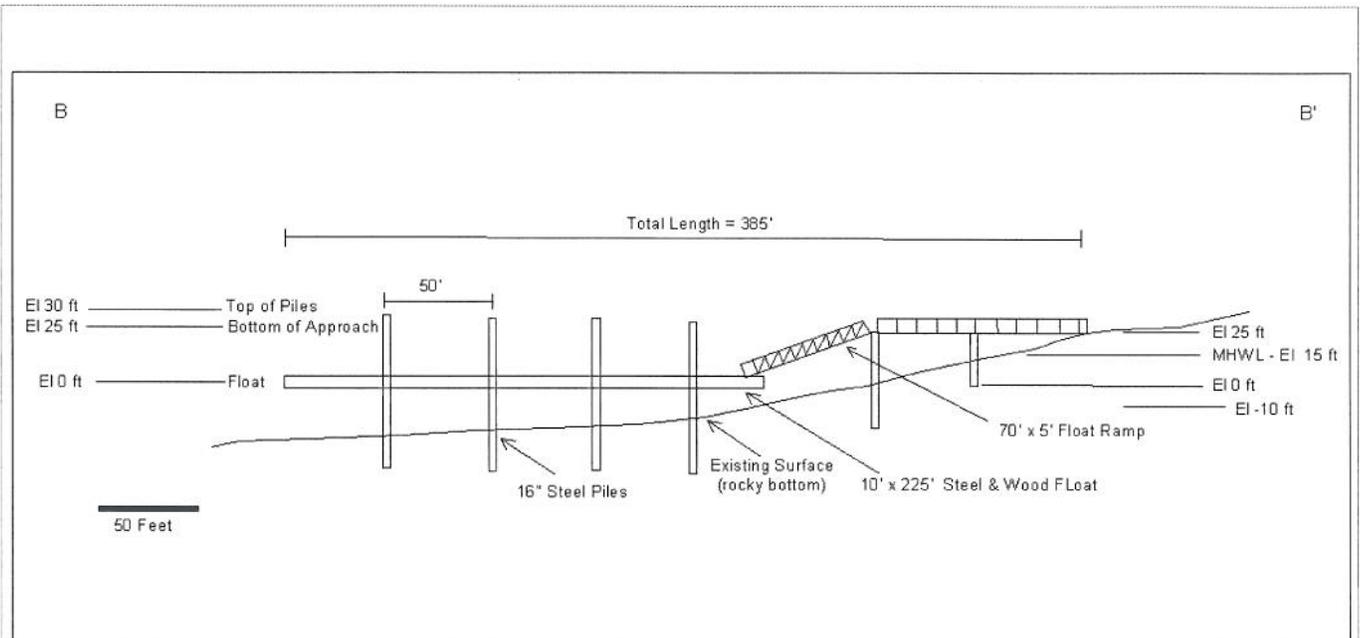
<b>NIBLACK MINING CORP</b>	
<b>PROPOSED EXPLORATION PROGRAM</b>	
ADL 107544	Page 13
<b>NIBLACK PROPERTY PROJECT LOCATION</b>	
LOCATION T78S R88E MERIDIAN: COPPER RIVER	Sheet 1



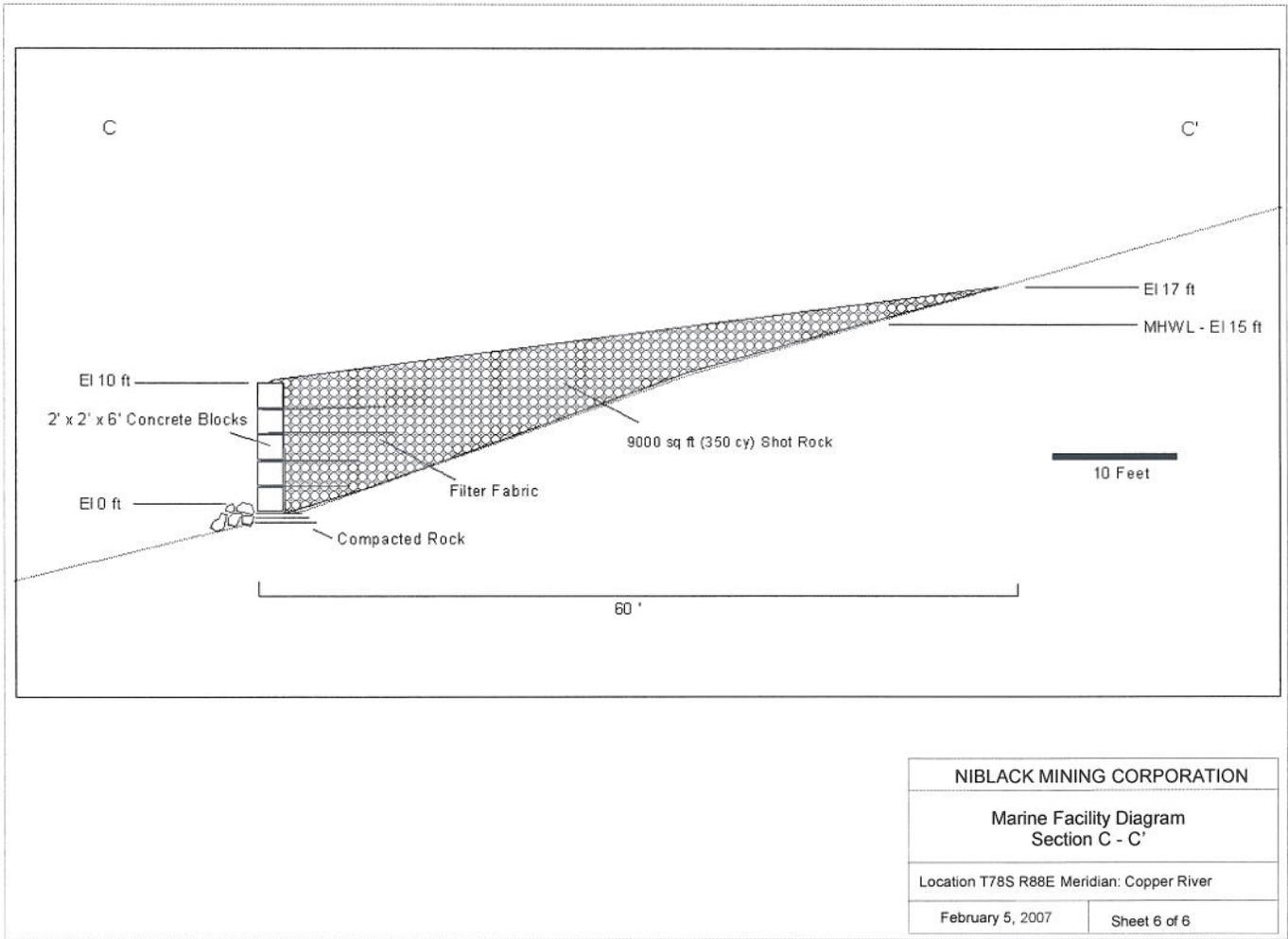


<b>NIBLACK MINING CORPORATION</b>	
<b>Marine Facility Diagram Detailed Plan</b>	
Location T78S R88E Meridian: Copper River	
February 5, 2007	Sheet 3 of 6





NIBLACK MINING CORPORATION	
Marine Facility Diagram Section B - B'	
Location T78S R88E Meridian: Copper River	
February 5, 2007	Sheet 5 of 6



**Tentative timeframes needed to accomplish executed lease agreement without penalties**

<b>month #</b>	<b>Done by end of month</b>
<b>0*</b>	<b>Deadline for applicant to submit: 1) commitment from surveyor to meet these timeframes. 2) signed letter of intent from qualified appraiser.</b>
<b>1</b>	<b>Construction Period</b>
<b>2</b>	
<b>3</b>	
<b>4</b>	
<b>5</b>	
<b>6</b>	
<b>7*</b>	<b>Deadline for surveyor to complete field survey, draft platting work, and submit 1st draft of lease diagram to DNR for review.</b>
<b>8</b>	
<b>9</b>	Deadline for DNR to complete review of lease diagram and return comments /instructions to surveyor. Second draft may/ may not be needed. (60 days)
<b>10</b>	
<b>11*</b>	<b>Deadline for surveyor to complete all changes corrections in draft lease diagram and submit 2nd draft lease diagram to DNR for review.</b>
<b>12</b>	
<b>13</b>	Deadline for DNR to complete review of 2nd draft lease diagram and return comments / instructions to surveyor. (60 days)
<b>14</b>	
<b>15*</b>	<b>Deadline for surveyor to complete final lease diagram with signatures and submit to DNR for final review, and approval.</b>
<b>16</b>	
<b>17*</b>	<b>Absolute latest deadline for appraiser to start appraisal assuming it can be completed and submitted to DNR within 30 days.</b>
<b>18*</b>	<b>Deadline to submit completed appraisal report to DNR for review and approval.</b>
<b>19</b>	
<b>20</b>	
<b>21</b>	
<b>22</b>	Deadline for DNR to complete appraisal review. (120 days)
<b>23</b>	Deadline for DNR to get lease agreement to applicant. (30 days)
<b>24*</b>	<b>End of month is deadline for lessee to return signed lease agreement with first year rent, document handling - recording fees, corporate resolution.</b>
<b>* = Requirement of the applicant or applicant's agents</b>	