MEMORANDUM

Department of Natural Resources

State of Alaska

Division of Mining, Land & Water

TO: Wyn Menefee, Division Operations Manager DATE: MM/DD/YYYY

THRU: Rob Edwardson, SERO Regional Manager
Clark Cox, SCRO Regional Manager
Jeanne Proulx, NRO Regional Manager

FROM: Easements Group

SUBJECT: Follow-up to Merger of Title discussions

Following conversations with John Baker of the Department of Law on 12/19/2015 and 12/31/2015, the Easements Group had additional discussions regarding:

1. Whether an easement issued to a State agency is a "real" easement
2. How DMLW should manage such easements if the answer to #1 is "no"
3. Whether DMLW should define a new type of authorization for State agencies
4. Whether DMLW should use an abbreviated process to adjudicate easements for State agencies

The most important conclusion was that Merger of Title does not apply for public easements issued to State agencies. The reasoning is described in the Order on Summary Judgment of the Offshore Systems-Kenai case[1], issued on 7/9/2009, which states:

> *Public easements, however, differ from private easements in the allocation of interests. Beneficial rights in publicly held easements are split into use and control rights. The right to control and manage the servitude for the benefit of the public is located in the State. The right to use the servitude rests with the public. While control of the benefit includes the right to transfer, terminate or otherwise dispose of the servitude benefit, legal title does not trigger the doctrine of merger for the purposes of a public easement.*

This case does not address the question of private easements issued to State agencies. However we understand that the vast majority of easements issued by DMLW to State agencies are public easements ~~which are legally sound~~for which use and control is divided. Enclosed is a memo to the Attorney General's Office requesting their concurrence with this position.

Although we do not have a clear answer as to the effect of merger of title on private easements issued to State agencies, the group discussed the management of these authorizations if merger applies. We concluded that:

[1] State of Alaska vs. Offshore Systems-Kenai, Kenai Superior Court case no. 3KN-08-00453 CI, subsequently Supreme Court No. S-13994, affirmative opinion No. 6697 issued July 17, 2012.

Commented [WU1]: All-Regions Easement Group? NRO-SCRO-SERO Easements Group?

Commented [WU2]: "will survive disposal of the underlying fee estate, i.e. is a 'real' easement?"

Commented [WU3]: Phrasing change, as no response from AG's yet to concurrence memo.

Commented [WU4]: Understanding or consensus instead of answer? Does the AG's concurrence memo ask this question?

1. As long as the State owns the affected lands, we can ~~manage~~ treat such ~~easements~~ authorizations similarly to any other easements.
2. If the affected lands are conveyed out of State ownership, identifying them as reserved or ~~"S~~subject to~~"~~ the ADL easement in the conveyance document perfects the easement because at this point the ownership of land and easement have separated.
3. Only if the affected lands are conveyed without being expressly named to be reserved or ~~"s~~Subject ~~t~~To~~"~~ ~~the~~ a locatable easement is there a risk that the easement is no longer valid.

The Easement Group believes that current practices (recording of easements, DNR's online records) will make it straightforward to identify such easements prior to conveyance and thus avoid conveying lands without making them "Subject to" private easements issued to State agencies.

Based on these understandings, the Easements Group agreed that it may be in the State's best interest to treat all easements equally, rather than creating an abbreviated process for State-to-State issued easements. Currently, delays in adjudication and issuance are generally not related to the Regions' review process, but to the lack of commitment or ability to follow through on the part of the applying agency (including the Regions themselves). However, the Regions can also make it easier for agencies to follow through by using existing tools in the current adjudication process. In particular, certain as-built survey requirements may not always need to be applied to all cases. Though a survey is almost always beneficial to have, in some cases the cost of acquiring a survey may outweigh the benefit. When these exceptions arise, the Regions need the flexibility to make their own decisions. Therefore while the Easements Group supports current efforts to develop guidance for determining when to require an as-built survey, we request that this determination remain at the discretion of the Regions ~~themselves~~.

The Easements Group deferred discussion of whether a new type of authorization should be created for long-term uses of State land that can be revoked at will. This may be useful for projects like recreational trails.

Commented [WU5]: The Division manages? (i.e. thinking about the potential for a conveyance to a State school trust entity under a future court case, etc.

Commented [WU6]: Perhaps this is a moot point to mention, there seems to be some disagreement within the Division about what subject-to actually means for ADLs on state conveyances, vs. reserved.

Commented [WU7]:

Commented [WU8]:

Commented [WU9]: May not be beneficial to fix an RST, etc.