

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
2 THIRD JUDICIAL DISTRICT AT KENAI

3 PATSY RUTH TIMPERLEY (nka  
4 PATSY RUTH SHAW) in her personal  
5 capacity and as TRUSTEE of the SHAW  
TRUST, dated March 2, 2018,

6 Plaintiff,

7 vs.

Case No. 3KN-19-00797 CI

8 KENAI KEYS HOMEOWNERS  
9 ASSOCIATION, INC., an Alaska  
10 non-profit corporation,

11 Defendant.

12 **KRKPOA’S REPLY TO PLAINTIFF’S OPPOSITION TO**  
13 **MOTION FOR SUMMARY JUDGMENT**

14 Defendant KENAI KEYS HOMEOWNERS ASSOCIATION, INC. (“KRKPOA”)  
15 hereby replies to the Plaintiff’s opposition to KRKPOA’s motion for summary judgment.

16 Defendant KRKPOA will address the arguments of Plaintiff in the order they were  
17 presented. In summary, the Plaintiff appears to agree that the KRKPOA has no authority to  
18 terminate the Sockeye Lane Extension easement and no interest in that easement that could  
19 be terminated. Notwithstanding this lack of interest in the matter being litigated - whether  
20 the easement should be terminated - the Plaintiff seeks to use the KRKPOA as a defendant  
21 of convenience, rather than joining the real parties in interest. The Plaintiff, in essence,  
22 claims that it can deprive the holders of the easement interests of their due process rights by  
23 litigating with the KRKPOA the factual issue of what use can actually be made of the  
24 easement, rather than what uses are allowed. It claims that the KRKPOA needs to be a party  
25 because of its involvement with enforcement of easement uses.<sup>1</sup> Once this inquiry into the

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27 <sup>1</sup> The KRKPOA deals with uses that are allowed and has no role in determining  
28 what are the actual uses to which the easement may be put, which appears to be the focus of

1 use of the easement is concluded, Plaintiff then wants the Court to decide the future of the  
2 easement without involving those that hold the interest in that easement. This is wrong. This  
3 Court cannot deprive property owners of their property rights without giving them adequate  
4 notice and opportunity to be heard. As a result, a judgment terminating the easement in the  
5 litigation would only be binding between the Plaintiff and KRKPOA and not the other lot  
6 owners. It would accomplish nothing. This Court should not continue a litigation in which  
7 nothing can be accomplished. The other arguments presented are likewise without merit, but  
8 those issues should not be reached in this case.

9 For the reasons stated herein, summary judgment dismissing the KRKPOA should be  
10 granted.

11 **1. THAT WHICH IS, AND IS NOT, AT ISSUE.**

12 Plaintiff wholly failed to address the issue of whether the mediation agreement was  
13 a full resolution of all remaining issues in the case. Plaintiff's sole response to this argument  
14 advanced by the KRKPOA was to claim it was a misrepresentation. It was not. The  
15 mediation agreement did state that it was a resolution of all remaining issues. What other  
16 possible interpretation can be given to an agreement that begins with "IN RESOLUTION OF  
17 THE ABOVE-CAPTIONED MATTER..."? If the litigation is resolved, what issues can  
18 remain? Plaintiff gives the Court no other possible interpretation.<sup>2</sup> Plaintiff may not want

19 \_\_\_\_\_  
20 the Plaintiff's inquiry.

21 <sup>2</sup> Plaintiff has previously alluded to the fact that the title of the document was:  
22 "STATEMENT OF SCOPE OF CHANNEL EASEMENT" and that the title of the first  
23 page, which was "STATEMENT OF SCOPE OF EXISTING CHANNEL EASEMENT  
24 AND ACKNOWLEDGMENT OF LIMITATION OF ROAD EASEMENT  
25 ENCUMBERING LOT 11, BLOCK 05 KENAI RIVER KEYS SUBDIVISION," was only  
26 identified as a cover sheet and should be ignored. This distinction appears to be an argument  
27 that, because the document only referenced the channel easement, it only resolved that issues  
28 related to the channel easement and not any other issues that Plaintiff may have wanted to  
raise. While the KRKPOA would dispute that the title of the cover sheet is of no  
consequence, especially since the Plaintiff recorded the document with that title of the cover

1 this to be an issue. Plaintiff may choose to ignore this as an issue. But, the intent and effect  
2 of the mediation agreement was clear - the case was fully resolved by its express terms.

3 The Plaintiff failed to present evidence, or even argument, establishing that the  
4 mediation agreement was not intended to be a final resolution of the litigation.<sup>3</sup> Summary  
5 judgment should issue against the Plaintiff on this issue, and this case against KRKPOA  
6 should be finally dismissed.

7 Instead of addressing the intent of the mediation agreement, Plaintiff takes issue with  
8 the use by KRKPOA's counsel of the term "dedicated" as applied to the Sockeye Lane  
9 Extension. Perhaps the Plaintiff is correct in her criticism of that term, but the distinction  
10 actually illustrates the problem with the Plaintiff's claim to the land underlying the Sockeye  
11 Lane Extension, which has not yet been resolved as between Plaintiff and the adjacent non-  
12 party landowners or any other prospective claimant.

13 An easement is granted by the owner of the property over which it may pass. Here,  
14 the developers created the Sockeye Lane Extension in the 1974 plat, two years after Plaintiff  
15 had received title to her property. The 1974 plat did not change the Plaintiff's lot lines, nor  
16 did she sign it as an owner whose lot lines were being affected. The Plaintiff did not grant  
17 an easement to anyone. Assuming the roadway was not intended to be dedicated to the

18 \_\_\_\_\_  
19 sheet as the apparent title of the document, it is not the title to the document which is being  
20 referred to as "the above-captioned matter." The caption referenced is the case caption. This  
21 argument is nothing more than an after the fact attempt to avoid the express and plain  
22 language of the document. If it was the Plaintiff's intent in using the term "above-captioned  
23 matter" to only be referring to the issue surrounding the channel easement, this would be an  
24 unprecedented use of that term, and one which the Plaintiff could not have reasonably  
25 expected the KRKPOA to have understood (or this Court for that matter). If this is the  
26 Plaintiff's argument, it does not withstand scrutiny.

25 <sup>3</sup> The KRKPOA notes that the draft mediation agreement did expressly except  
26 resolution of pedestrian use from its terms. This exception was eliminated during  
27 negotiations and was not in the final version, as was entered by this Court as a final  
28 judgment. Failure to expressly reserve that claim was a resolution of it in the mediation.

1 public, then the implication is that either the developers retained title to the land underlying  
2 the roadway or it became owned by Lots A-1 and A-2, the adjacent lots in the replat that  
3 created the roadway.<sup>4</sup> Fortunately for the KRKPOA, they are not a party that is claiming  
4 ownership of the property that underlies the Sockeye Lane Extension, and the actual  
5 ownership as between the neighboring lot owners is not an issue that has or can be decided  
6 in this case.

7 Defendant KRKPOA had asserted in its motion for summary judgment that it was not  
8 the proper party in an action to vacate the easement. While the Plaintiff does not directly  
9 address this argument, she claims that the KRKPOA is still properly a party to decide the  
10 following issue:

11 What uses of Sockeye Lane Road Extension were intended by the developers  
12 when the easement was created, and is it still possible as a practical matter to  
13 use that easement for that or those purposes?  
14 This is the open and pending question.<sup>5</sup>

15 However, the pedestrian use of the roadway is merely an issue in the litigation, not a claim  
16 or cause of action against the KRKPOA. While the KRKPOA may be a witness as to its  
17 opinion as to the intent of the developers, and its interpretation of the documents governing  
18 the use of the easements (i.e. plat, covenants, etc.), that does not make it the real party in  
19 interest. The claim that Plaintiff is asserting is for a termination of the easement, an  
20 easement in which the KRKPOA holds no legal interest.

21 As an analogy, the victim of a car crash does not sue the state because the state  
22 establishes and enforces the rules about who has the right of way at intersections; the victim  
23 sues the other driver against whom the victim is seeking its remedy. The issue of who has

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24 <sup>4</sup> If the grant contained in the notes of the plat that landowners own to the middle  
25 of adjacent roadways and channels are applied to those lots already existing, then there are  
26 other possible outcomes that would include the owners of Lots 19 and 20 of Block 4.

27 <sup>5</sup> *Plaintiff's Opposition to Defendant's Motion for Summary Judgment*, dated  
28 November 3, 2021, p. 3.

1 the right of way may require testimony of a state employee, but that does not justify naming  
2 the state as a party. Thus, it is in this case. The Plaintiff is seeking a remedy (termination  
3 of the easement) against all the other lot owners in the subdivision. It should be prosecuting  
4 its case against those lot owners, not the KRKPOA.

## 5 **2. FASHIONING A REMEDY AND BY WHOM.**

6 The Plaintiff alleges that it is the KRKPOA who misunderstands the Plaintiff's  
7 request and applicable law. The KRKPOA would respectfully submit that it has a clear  
8 understanding of the Plaintiff's request and applicable law, and that it is the Plaintiff that is  
9 suffering from a misunderstanding.

10 The Plaintiff claims to be merely asking the Court to assess to what use, if any, can  
11 the Sockeye Lane Extension be put, viewed in the light of the developers' intent when they  
12 created the easement. Thus, it claims the KRKPOA can be kept a party in a settled litigation  
13 while the Plaintiff uses the Court to undertake a factual inquiry. This inquiry, for which the  
14 KRKPOA is allegedly needed as a party, is apparently just to get the lay of the land and not  
15 in furtherance of some request for particular relief that would not be available against the  
16 KRKPOA. Then, according to Plaintiff, based upon what the evidence produces, this Court  
17 will, perhaps *sua sponte*, determine the future of the easement in the absence of the real  
18 parties in interest, the other lot owners who are the users of the easement. It remains entirely  
19 unexplained how the involvement of the KRKPOA will somehow allow this Court to  
20 terminate an easement and have that be binding on any of the 121 lot owners that have a right  
21 to use that easement.

22 In response to KRKPOA's claim that it has no power to vacate or terminate the  
23 easement, the Plaintiff only responds that it is not asking the KRKPOA to vacate the  
24 easement, but doesn't explain why the KRKPOA needs to remain a party in absence of  
25 authority over the easement. Yet, here we are, with the KRKPOA continuing to be held  
26 hostage in a case in which no claim for relief is being asserted against it.

1 While previously claiming it is merely seeking a factual inquiry into the uses to which  
2 the Sockeye Lane Extension may be put, the Plaintiff admits to asking the Court to declare  
3 Sockeye Lane Extension terminated by reason of impossibility of purpose. Certainly, the  
4 Court in a proper case against proper parties may decide this issue. However, without an  
5 interested party against whom that decision might be binding, there is no case or controversy  
6 here.

7 To justify proceeding against the KRKPOA alone, the Plaintiff baldly claims without  
8 explanation that the KRKPOA represents the interests of all the subdivision lot owners:

9 In short, as flag bearer for the use of the easement within the Kenai River  
10 Keys, KRKPOA is the real party in interest on the question of whether the  
11 easement continues, as a practical matter, to be capable of effectuating those  
12 uses originally contemplated by the platting developers.<sup>6</sup>

12 Where the Plaintiff gets the idea that “flag-bearer” is the standard for determining  
13 whether a party is the real party in interest is also not explained. Nor is how the KRKPOA  
14 might be considered to be the “flag-bearer” regarding the lot owners right to use that  
15 easement. The KRKPOA cannot speak for every lot owner in the subdivision on this issue.  
16 It has been delegated no authority to act on behalf of the lot owners with respect to their  
17 ownership rights to that easement. The KRKPOA is not the real party in interest, the  
18 individual lot owners are.

19 If the Plaintiff wants to terminate the easement, she should litigate with the parties that  
20 hold the right to use the easement. For this reason, summary judgment should be granted  
21 dismissing this action as to Defendant KRKPOA.  
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26 <sup>6</sup> *Plaintiff's Opposition to Defendant's Motion for Summary Judgment*, dated  
27 November 3, 2021, p. 4.

1 **3. TERMINATING A PRIVATE “GENERAL PLAN” EASEMENT - WHO MUST BE**  
2 **JOINED?**

3 **A. The Restatement Does Not Authorize the Substitution of the KRKPOA for the Lot**  
4 **Owners**

5 Plaintiff claims that the *Restatement (Third) of Property (Servitudes)* does not require  
6 joinder of all the lot owners. That every owner must be joined may or may not be true as  
7 applied to the present case,<sup>7</sup> but that does not make the KRKPOA a proper party to this  
8 litigation.

9 Nothing in *Restatement (Third) of Property (Servitudes)* §7.10 provides that a  
10 homeowners association, that does not hold any easement rights, can be sued for termination  
11 of the easement, while ignoring all the lot owners that actually hold the easement. Nor does  
12 this particular section of the *Restatement (Third) of Property (Servitudes)* explicitly excuse  
13 joinder of every holder of the dominant easement interest. It is silent on the subject, which  
14 implies that the standard rules for joining interested parties would continue to apply.

15 There is one section of the *Restatement (Third) of Property (Servitudes)* that does  
16 explicitly address the issue of joinder in relation to the termination of an easement on  
17 property. That section, which deals with easements in gross, is Section 7.13, which states:

18 **§7.13 Modification and Termination of Easements in Gross**

19 If it has become impossible or impracticable to locate the beneficiaries of a  
20 servitude held in gross, a court may modify or terminate the servitude with the  
21 consent of the beneficiaries who can be located, subject to suitable provisions  
22 for the protection of the interests of those who have not been located.

23 The comments clarify the rule with respect to judicial termination of easements in gross:

24 In a contested proceeding, the doctrine of virtual representation should  
25 ordinarily be applicable to permit adjudication of the interests of beneficiaries  
26 of servitudes in gross that cannot be located.

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27 <sup>7</sup> The KRKPOA continues to believe it does, but whether the Court should  
28 decide that only a limited number of property owners must be joined is irrelevant to the  
issues in this motion.

1 While the easements here are not easements in gross (those easements where the dominant  
2 interest is not tied to ownership of a particular piece of property), a comparison of the ease  
3 of locating and joining the holder of an easement appurtenant, such as in the present case,  
4 versus that of an easement in gross, would indicate that the requirements of joinder should  
5 be greater in the former case, not less. This serves as further confirmation that the  
6 *Restatement (Third) of Property (Servitudes)* does not authorize terminating easements  
7 without joining all, or even a single one, of the holders of those interests, as the Plaintiff is  
8 intending to do here.

9 Thus, *Restatement (Third) of Property (Servitudes)* it must be concluded to require the  
10 Plaintiff to join all lot owners. As for the KRKPOA being a party to this ongoing litigation,  
11 the Plaintiff cites nothing in the *Restatement (Third) of Property (Servitudes)* which purports  
12 to justify, authorize or require the KRKPOA to continue as a party to this litigation. It  
13 certainly does not authorize the Court to deputize an unwilling homeowners association to  
14 represent those interests as an alternative to joining the real parties in interest.

15 In responding to the argument in this section of the Plaintiff's brief, it should be noted  
16 that the Kenai River Keys is a general plan development, but not because of any supposed  
17 reciprocal easements.<sup>8</sup> It is a general plan development because it has covenants and  
18 restrictions that guide the development and use of the properties within the subdivision. In  
19 reading the comment quoted by the Plaintiff, the Court should be mindful that the term  
20 "servitudes" as used in §7.10 also includes covenants and restrictions. A typical example  
21 would be such covenants as a prohibition on commercial development of a lot. This allows  
22 the termination of the servitude where either the general plan development and/or the

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24 <sup>8</sup> The roadway easements are not reciprocal easements because one lot owner's  
25 right to use a roadway is not dependent upon its grant of easement access to another.  
26 Plaintiff may wish to acknowledge this as she is seeking to terminate a roadway easement.  
27 If this were reciprocal easement, then she would lose her right to use all other roadways in  
28 the subdivision upon its termination.



1 surrounding area has changed from a residential to a commercial use, where continuing to  
2 enforce the non-commercial requirement would become inequitable because of those  
3 changed conditions.

4 As applied to this case, the changed conditions rationale seems to have limited  
5 application as conditions have not changed appreciably since 1974. One assumes that if the  
6 conditions today are similar to those when the easement was created, they would still serve  
7 the intended purpose. The Plaintiff's sole argument of changed circumstances is that  
8 regulatory changes have made it impossible to use the roadway for its intended purpose. This  
9 issue will be addressed later in this briefing.

10 The KRKPOA does feel compelled to address the factual allegation by the Plaintiff  
11 that Lot 11 was "meandered." The implication of this allegation is that Lot 11 abutted the  
12 channel at the time of its creation. This is factually not true and is unsupported by the record.  
13 One needs only to look at the photograph Plaintiff attached to her *Complaint* to see that there  
14 was significant uplands between her lot and the channel waters at the time of her purchase.  
15 Those uplands were at least equivalent to those present today. It is also noted that the 1972  
16 plat referenced the temporary roadway easement between Lot 11 and the channel. That  
17 portion of Tract A was explicitly established as a roadway in the replat in 1974. If Lot 11  
18 were ever adjacent to a channel easement, it would have been one evidenced by the 1974  
19 plat. There is nothing in the written record to suggest that the Developers intended to create  
20 a "channel easement" under the roadway easement of Sockeye Lane Extension, and nothing  
21 that would identify its boundaries.

22 As set forth above, the *Restatement (Third) of Property (Servitudes)* §7.10 does not  
23 excuse joinder of interested parties and does not make the KRKPOA a proper party to this  
24 litigation. Summary judgment dismissing the KRKPOA should be granted.

1 **B. State Law Does Not justify Continued Litigation Against the KRKPOA.**

2 Plaintiff cites the Klutina Road RS2477 case between the State of Alaska and Ahtna  
3 as instructive on how this Court should view joinder in the present case. That case is not  
4 even remotely on point. In that case the State sought to establish the prior existence of a  
5 public right of way across the lands of Ahtna. Since the right of way was important to other  
6 private lots to whom access was dependent upon the existence of the trail, they were  
7 considered indispensable parties. In order to get complete relief, and to not be required to  
8 potentially relitigate these issues again between the non-party landowners and the Ahtna or  
9 the state, Judge Guidi required joinder of the other landowners in the area for whom the trail  
10 was access.

11 If this litigation was to establish the existence of the Sockeye Lane Extension  
12 easement, then perhaps Judge Guidi's analysis would be useful and Plaintiff would be correct  
13 - only the owners of Lots A-1, A-2, Lot 11, and perhaps the owners of Block 4, Lots 19 and  
14 20 would need be joined as Defendants. However, it is the owner of Lot 11 that is seeking  
15 affirmative relief against all the other lot owners in the subdivision to terminate their use of  
16 the easement - so in this case they are all necessary parties. Additionally, the Ahtna case said  
17 nothing about litigating against a homeowners association in lieu of litigation against the lot  
18 owners. It does not support keeping the KRKPOA as a party to this litigation, when there  
19 is no affirmative relief sought against it.

20 Plaintiff discusses *B.B.P. Corporation v. Carroll, et al.*,<sup>9</sup> a case cited by the KRKPOA  
21 in its motion for summary judgment. First, the Plaintiff chooses to slander the KRKPOA by  
22 asserting it is acting with moral turpitude by suggesting that, if Plaintiff wants to terminate  
23 the easement, she needs to join the appropriate parties to do so. Apparently, Plaintiff thinks  
24 she will have to incur a \$65 service fee for each of 121 owners. At the risk of doing  
25 Plaintiff's counsel's work for him, there are other ways to effect service in cases with large

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27 <sup>9</sup> *B.B.P. Corporation v. Carroll*, 760 P.2d 219 (Alaska 1988).

1 numbers of prospective defendants - Alaska Civil Rule 5 allows service by certified mail.  
2 While that is about \$8 per person, Plaintiff could also merely write emails or letters and  
3 request the lot owners sign and return a disclaimer of interest if they do not object to closing  
4 of the easement or, if they do object, file an appearance in the case voluntarily without being  
5 served. This could further reduce the certified mailings required. There may ultimately be  
6 only a handful of parties that would need to be joined in the litigation and served by a process  
7 server. If it is not worth the trouble resolving all the lot owners claims to the easement, then  
8 one is forced to wonder why the Plaintiff is undertaking to do so.

9 To further simplify matters, the Plaintiff could pursue extrajudicial resolution of the  
10 ownership to the real property underlying the easements to resolve that issue going forward  
11 as well. This would result in a much cleaner case concerning the easement if an agreement  
12 can be reached. The answer is not pursuing a judgment against the KRKPOA who has no  
13 interest in the easement to extinguish.

14 As to the *B.B.P. Corp.* case itself, the Plaintiff is absolutely correct that it stands for  
15 the proposition that in an action in which a party is alleging abandonment of a covenant in  
16 a subdivision, all the lot owners need not be joined. However, the court acknowledges that  
17 this could cause inconsistent results because those lot owners not joined would not be bound  
18 by the decision of the court.<sup>10</sup> In other words, if this Court in this case were to enter a  
19 decision vacating the easement without joining the lot owners, the easement would still exist  
20 for those lot owners. The court in the *B.B.P. Corp.* case also acknowledged the general rule  
21 that "an owner of property must be joined as an indispensable party in any action that may  
22 adversely affect her interest in the property."<sup>11</sup> The KRKPOA would submit that an easement  
23 right in a roadway is a substantial property interest and, absent some compelling reason, the  
24 lot owners should be joined. Applying the rationale in *B.B.P. Corp.*, a decision here

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25 <sup>10</sup> *Id.* at 525.

26 <sup>11</sup> *Id.*

1 terminating the easement as between it and the KRKPOA would accomplish nothing for the  
2 Plaintiff.

3 As the Plaintiff has offered no authority or argument or facts supporting the existence  
4 of a claim against the KRKPOA for termination of the easement, summary judgment should  
5 be granted, and the action against the KRKPOA dismissed.

6 **IV. OTHER MATTERS RAISED BY DEFENDANT’S MOTION**

7 **A. Whether the easement should be vacated.**

8 As the KRKPOA noted above, its role is not to defend the dominant easement holders  
9 (the lot owners) or to support the owners of the serviant easement estate in a dispute over the  
10 continued existence of the easement. It has nevertheless been required to attempt to put forth  
11 a defense because, while the Plaintiff is represented by counsel and seeking relief, there will  
12 be no one to protect the interests of lot owners if the Court will not compel joinder of the  
13 appropriate parties. While the KRKPOA feels compelled to inform the Court of arguments  
14 against termination, there may be additional arguments that the lot owners would advance  
15 of which the KRKPOA is not aware. The KRKPOA is not, and should not be considered by  
16 this Court, the representative of all the subdivision lot owners in this case.

17 If this matter is to go forward, in evaluating the claim for termination, the Court  
18 should keep in mind the restraint that is to be exercised in such cases.

19 Because servitudes create property interests that are generally valuable, courts  
20 apply the changed conditions doctrine with caution. Of the many changed  
21 conditions cases that produced appellate decisions, few result in modification  
22 or termination of a servitude. The test is stringent: relief may be granted only  
23 if the purpose of the servitude can no longer be accomplished. When  
24 servitudes are terminated under this rule, it is usually clear that the continuance  
25 would serve no useful purpose and would create unnecessary harm to the  
26 owner of the serviant estate.<sup>12</sup>

27 So, in this case, the Plaintiff needs to prove that (1) the purpose of the servitude (easement)  
28 can no longer be accomplished and serves no useful purpose, (2) that the Plaintiff is the

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27 <sup>12</sup> *Restatement (Third) of Property (Servitudes)* §7.10, comment (a).

1 owner of the servient estate, and (3) that continuing the easement causes unnecessary harm  
2 to the Plaintiff. The KRKPOA had stipulated that Plaintiff meets the second criteria in the  
3 mediation agreement.<sup>13</sup> The Plaintiff has not really explained the harm it will suffer,  
4 especially in light of the terms of the mediation agreement.

5 **1. Launch Area Not Affected.** Plaintiff claims that the launch area would not be  
6 affected by termination of the easement. This is not supported by the record.<sup>14</sup>

7 The 1974 replat of Tract A specifically reserves a roadway 50 feet in width continuing  
8 on from Sockeye Lane. There is no channel easement shown on that plat in the location of  
9 the roadway easement, nor is there any notes on that plat which would indicate that the  
10 channel and roadway easements coexisted. As stated above, Plaintiff's characterization of  
11 her eastern property line as being "meandered" is a mischaracterization - it was just a platted  
12 lot line bordering Tract A. Given that the roadway easement is open for vehicular and foot  
13 travel, its use by vessels is not viewed as inconsistent with the scope of that easement. Any  
14 termination of the roadway easement could result in a claim that there is no remaining  
15 easement in the affected area. If the channel easement is to be viewed as coextensive with  
16 the roadway easement up to the easterly boundary of Plaintiff's lot, as one would be led to  
17 believe by Plaintiff, then the question becomes what hardship could Plaintiff avoid by  
18 terminating the coextensive roadway easement if landowner access is allowed within the  
19 channel easements.

20 Since there are uplands within the boundary of the area reserved for the boat launch,  
21 motorized vehicles and trailers will be required to operate in that reserved area. If the launch  
22 would not be affected by termination of the roadway easement, then it must follow that

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24 <sup>13</sup> It should be noted that this stipulation would not be binding on the lot owners  
who may challenge that proposition, as they were not parties to this litigation.

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26 <sup>14</sup> In fact, the Court only need look at the lot overlay attached as an exhibit to the  
mediation agreement to see that there are significant uplands between the channel and the  
27 original Sockeye Lane easement abutting the launch area.

1 vehicles and trailers are permitted to operate within the channel easements as well. Again,  
2 if the trailer launch is not affected by the termination, this begs the question of what harm is  
3 resulting from the existence of the roadway easement and why does it need to be terminated.

4 **2. Ownership Is Not Affected.** The Plaintiff misconstrues this Court’s decision  
5 quieting title. First, it does not resolve any claims to title other than between the Plaintiff and  
6 the KRKPOA because there are no other parties to this litigation. Secondly, even if one is  
7 inclined to completely disregard the due process rights of other potential claimants, as  
8 Plaintiff seems want to do, the language used by the trial court merely adopts a standard to  
9 be applied in determining title. It does not determine in whom does title to any specific  
10 property actually vest. Basically, the Court merely recognized the Sockeye Lane Extension  
11 as a private roadway and indicated that:

12 Ms. Shaw is the lawful title holder to all of Lot 11, as depicted in Plat 72-62,  
13 as well as to the center of the easement upon which it fronts.<sup>15</sup>

14 Plaintiff may think it “nonsense,” but that reads to counsel for the KRKPOA like a finding  
15 that the Plaintiff’s real property interest is dependent upon the existence of the easement to  
16 which it fronts.

17 Lot 11 fronted no easement in 1972, when she purchased the property. It fronted  
18 Tract A. The easement was created in the 1974 plat and was the Sockeye Lane Extension  
19 roadway easement. There was never a channel easement depicted as fronting Lot 11. Thus,  
20 the 1974 replat created her property interest in the real property underlying one-half of the  
21 Sockeye Lane Extension easement. She, nor the developers, as her predecessors in interest  
22 to Block 5, Lot 11, granted an easement where the Sockeye Lane Extension now exists prior  
23 to the 1974 plat. So, the question to be resolved is, if the Sockeye Lane Extension roadway  
24 easement is vacated, to whom does the property revert? This question cannot be decided in

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27 <sup>15</sup> *Quiet Title Decision*, dated January 25, 2021, p. 5.

1 the present case by or between Plaintiff and the KRKPOA, but it will become an issue if the  
2 easement is terminated.

3 **3. Skipping Stones and Water Play.** Plaintiff cites a case involving a right of way  
4 established pursuant to federal law across what was at the time federal land, specifically an  
5 RS2477 right of way, as defining what the scope of the roadway easements should be in the  
6 Kenai River Keys subdivision. That reliance is misplaced.

7 In the Klutina Road RS2477 case cited by Plaintiff, the scope of the easement was an  
8 issue, specifically whether the easement could include launch facilities and other access  
9 points to the river. The court limited the scope of the RS2477 right of way to ingress and  
10 egress over the road. This was based upon the legislation defining the scope of use of a  
11 public right-of-way.<sup>16</sup> The easements in the Kenai River Keys are private easements, not  
12 public right-of-ways created pursuant to RS 2477.

13 There is no statute describing the scope of the easement in this case. Kenai River  
14 Keys began as a recreational development for those that wanted close access to the Kenai  
15 River for the fishing and other opportunities it provided. It was largely a family oriented  
16 place, which meant that there were children and spouses that were not always interested in  
17 being on the river. As a result, the roadways have been used for taking walks, jogging, bike  
18 riding, ATV riding, puddle jumping, even horse riding, and just about any other activity that  
19 can be conducted on a gravel road for fun by both children and adults. The roadways have  
20 even been used for boating at times of serious flooding, These uses have been traditionally  
21 allowed in the subdivision on the roadways since its inception. This cannot really be  
22 disputed. The allowable scope of use for the roadways has never been intended to be just for  
23 ingress and egress by motor vehicle from the lot you may own. It is disingenuous for  
24 Plaintiff to even suggest that the intended scope of the easement is so limited.

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25  
26 <sup>16</sup> See *Ahtna v. State of Alaska Depart. of Nat. Res.*, Opinion No. 7508 (March  
27 12, 2021), pp. 14-19.

1 The roadway in question is capable of all those uses. It also fronts a channel and gives  
2 those residents on Sockeye Lane, most of the residents that don't have water access from  
3 their lot, a place to go interact with the water in some way. This can be by skipping stones  
4 or watching the ducks or checking to see if there are any fish moving in the channels. There  
5 is no genuine issue of material fact here - the Sockeye Lane Extension roadway easement still  
6 serves its intended purpose.

7 **4. Utility and Emergency Usage.**

8 Plaintiff ignores the express language of the 1972 covenants and restrictions in which  
9 it is stated:

10 Easements for roadways are reserved for the exclusive use of the landowners,  
11 ...the Kenai Peninsula Borough,... and the utility companies, which shall have  
the right of access for the installation and maintenance of utilities.<sup>17</sup>

12 The roadways were clearly and expressly intended for police, fire and utility use, and remain  
13 useful for those purposes as a matter of law.

14 **5. Interaction with Dolly Way.**

15 Plaintiff starts off by stating that the Sockeye Lane Extension was created by plat in  
16 1972, which is not supported by the record in this case. That roadway was shown as a part  
17 of Tract A, and was created when Tract A was subdivided in 1974.<sup>18</sup> This should be  
18 undisputed.

19 The Plaintiff then makes a similar leap of logic to state that "in 1974, whether by  
20 mistake or design, that route along Dolly Way Channel was mistakenly referenced as  
21 Sockeye Lane Extended. Describing their plan to develop and subdivide Tract A into 6 Lots,  
22 the Developers told the Borough: "[a]ccess to this area is by the Channel Easement or private

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23  
24 <sup>17</sup> *Reservations and Restrictive Covenants for Kenai River Keys Subdivision*,  
25 recorded on November 3, 1972, at Book 68, Pages 299-302, of the Kenai Recording District  
at pp. 299-300.

26 <sup>18</sup> See Plat 74-85, recorded September 26, 1974, records of the Kenai Recording  
27 District.



1 roadway easement via Sockeye Lane Extended... and Declaration of Easements, dated  
2 November 27, 1972.”<sup>19</sup> This was not a mistaken reference - there was potential access by  
3 three different routes - the channel, Sockeye Lane Extended and the Dolly Way driveway.

4         Unfortunately, by the time that the 1974 plat was approved, the Developers had sold  
5 all the lots along the Dolly Way Channel and could not grant an easement through those lots  
6 to Tract A.<sup>20</sup> So, when the developers created another private driveway easement along the  
7 Dolly Way Channel on the Tract A lots, those lot owners had to rely on the owners of Lots  
8 12-20, Block 5 granting them permission to cross their lots to get to the Tract A driveway  
9 easement. At the time the developers created this Tract A driveway easement, the only way  
10 they could have created legally enforceable access to all six Tract A lots would have been  
11 to extend the driveway easement from the Sockeye Lane Extension across Lot A-1 and/or A-  
12 2 to the Tract A driveway easement. The mistake of the Developers would appear to have  
13 been the failure to have done this as a part of the driveway easement on Tract A before the  
14 sale of those lots. As a result, they left Lots A-3 through A-6 without legal roadway or  
15 driveway access.<sup>21</sup>

16         Plaintiff claims that the Developers extended Dolly Way by recording the declaration  
17 of easements in 1974. That may be true from a physical standpoint, and it may be true from  
18 the practical standpoint, when considering how that easement has been used with permission  
19  
20  
21

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22             <sup>19</sup>

23             <sup>20</sup>         The initial Dolly Way easement is a private driveway easement which grants  
24 only a right to ingress and egress to the lot owners that live further down the driveway. For  
25 example only Plaintiff (Lot 11, Block 5) has an easement to cross Lot 12, Block 5. Compare  
this to a roadway easement on the plat which is open to all lot owners to use.

26             <sup>21</sup>         Under the principles for creating an easement by implication, the implied  
27 easement would be across Lots A-1 and/or A-2, not through Lots 12-20, Block 5.

1 of the landowners through which it runs. But it is not true as a legal matter - the owners of  
2 the Tract A lots do not hold any driveway easement outside of that granted within Tract A.<sup>22</sup>

3 If the Court should decide to vacate the roadway easement for Sockeye Lane  
4 Extension, it is basically saying to the owners of Lots 12-20, Block 5, that the Court is  
5 forcibly granting an easement across their property to accommodate Plaintiff's desire to be  
6 able to exclude other lot owners from land that was never within her platted lot lines, and was  
7 platted as a roadway. The Court is telling those lot owners that they now have no choice but  
8 to continue to allow the Tract A lots access across their property over what was never a  
9 platted roadway, and that this access must continue forever regardless of whether the Tract  
10 A lot owners abuse that right. The Plaintiff, by its proposal that the Court recognize an  
11 easement by implication across those lots, wants the Court to do this without Plaintiff even  
12 being required to go to the trouble of joining the Dolly Way lot owners as parties to this case.  
13 The KRKPOA respectfully submits that doing so would not be appropriate either legally or  
14 equitably, as it would be a violation of the Dolly Way lot owners due process rights at a  
15 minimum.

16 It is appreciated that the Plaintiff agrees that there was a flaw in the 1974 easement  
17 declaration in providing legal access to the Tract A lots. The Plaintiff then goes on to argue  
18 that this flaw justifies the discontinuance of the platted Sockeye Lane Extension roadway  
19 because that mistake prevents that roadway from presently serving its purpose. So, in  
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21  
22 <sup>22</sup> Plaintiff is apparently claiming the existence of a cul-de-sac at the end of the  
23 Sockeye Lane Extension evidenced an intent by the Developers that it would not serve as  
24 access to Lots A-3 through A-6. Plaintiffs read far more into that than is justified. Nothing  
25 prohibits the extension of a driveway easement from the cul-de-sac, as has been done  
26 elsewhere in the subdivision. Further, the absence of any other platted roadway to Tract A  
27 would indicate the opposite - that this was intended to be the primary legal access. The  
28 problem was that the developers forgot to include driveway access along the shared property  
line between Lots A-1 and A-2 when it drafted the driveway easement document for the  
Tract A lots.

1 essence, the Plaintiff is taking the position that, even though the Tract A lot owners have no  
2 possible legal access along Dolly Way, the Court should terminate one possibility for legal  
3 access to the Tract A lots, rather than retain it as a possible means of correcting the  
4 developers' mistake. This brings us to the last issue.

5 **B. Speculative Use.**

6 There has been no application for development of a driveable surface on the Sockeye  
7 Lane Extension roadway easement. Neither the River Center nor Corps of Engineers has  
8 issued any proclamations that categorically approve or disapprove such a development. The  
9 refusal to allow the dumping of fill without additional restoration is not dispositive of  
10 whether a roadway could be constructed. The fact is that development in the riparian zone  
11 of the Kenai River is possible if one has the creativity and the funds available to do it in a  
12 manner that has negligible or even a positive effect on the riparian habitat. Plaintiff has not  
13 and cannot offer evidence that it is impossible to develop vehicle access through this lot.<sup>23</sup>  
14 In fact, regulatory difficulty should rarely, if ever, be a basis for terminating an easement  
15 because regulations and their interpretation can change, and design and technology can  
16 resolve issues previously thought difficult or impossible.

17 The fact is that this use of the roadway as a vehicular access to Tract A is and will  
18 hopefully remain speculative because that will mean that the Dolly Way lot owners continue  
19 to allow access across their parcels and the need to develop a driveable roadway has not  
20

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21  
22 <sup>23</sup> Plaintiff criticizes the characterization of counsel's arguments as improper  
23 expert opinion. However, his argument is based upon hearsay from personnel at the River  
24 Center and elsewhere. It was not based upon any testimony or sworn affidavits from River  
25 Center and Corps of Engineers to form the basis of the argument. Instead, he asks the Court  
26 to accept his interpretation of the statements from the River Center and the regulations, and  
27 his opinion of what that means for the prospects of development. If the Plaintiff is going to  
submit such opinion, it should be by expert testimony as the Court, to KRKPOA's  
knowledge, has no expertise in how the River Center or Corps of Engineers may apply the  
regulations to evaluate an application for a permit.

1 arisen. It will also mean that the KRKPOA will not have to bear the expense of engineering  
2 and building a driveable surface that meets those requirements that may be established by the  
3 River Center and Corps of Engineers. And finally, it means that Plaintiff will have the use  
4 and enjoyment of that easement without having to contend with the traffic a developed road  
5 would bring. Just because the KRKPOA has been able to avoid this expense through the  
6 cooperation of the Dolly Way lot owners does not deprive the easement of its continued  
7 purpose as a roadway. The KRKPOA would also note that this access may have importance  
8 should any of the Tract A lot owners seek bank financing or seek to sell their lot.<sup>24</sup> Legal  
9 road access, even if not developed, could prove important to those lot owners in that  
10 circumstance.

11 The evidence cited by Plaintiff of prior interactions with the regulatory authorities and  
12 the opinions/argument of its counsel that this easement will be practically impossible to  
13 develop does not create a genuine issue of fact. That evidence does not show impossibility  
14 of use, such as would justify termination of the easement. If the Court reaches this issue,  
15 then it should summarily dismiss the Plaintiff's claim for termination of the Sockeye Lane  
16 Extension roadway easement, as there is no genuine issue of fact that the roadway remains  
17 useful for development as a roadway and for other uses permitted upon the roadways within  
18 the subdivision.

19 **V. CONCLUSION.**

20 The Plaintiff attempts to justify the continued litigation against the KRKPOA as  
21 necessary to conduct an investigation into the proposed uses of the Sockeye Lane Extension.  
22 Then, even though the KRKPOA has no interest in the easement, after that determination is  
23 made, the Court can consider whether to terminate that easement. Apparently, the Plaintiff  
24

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25 <sup>24</sup> It may require an astute purchaser of banker to catch such an issue, although  
26 the Residential Real Property Disclosure Act does require disclosure of any such access  
27 issues and would open the seller to liability if he or she fails to disclose the issue.

1 sees the Court as a kind of grand jury for easements on the Kenai Peninsula - it can  
2 apparently be asked conduct investigations and then on its own accord remove what it finds  
3 to be useless easements without the hassle of having to conduct a litigation between the  
4 parties to that easement.

5 The fact, and it is apparently not disputed by the Plaintiff, is that the KRKPOA has  
6 no interest in this easement. So, whether or not the mediation agreement was to be a final  
7 resolution of the entire case, it was a resolution of the case as a practical matter. Just like the  
8 mediation agreement stated, it resolved the above-captioned matter and there is no issue left  
9 to be tried. The balance of this case, to the extent there is one, should be dismissed.

10 Difficulty in joining the actual holders of the easement does not justify disregarding  
11 their legal rights. Nor does it justify requiring the KRKPOA to stay in this litigation as their  
12 representative, when it has no legal authority to act as such.

13 If The KRKPOA is somehow considered the appropriate party, it would argue that  
14 there is no genuine issue of material fact as to whether the easement continues to be useful.  
15 It does, and despite Plaintiffs to attempt to argue it has no usefulness because of regulatory  
16 issues, that is not true. And, if there is a regulatory issue with building a roadway, the myriad  
17 of uses made of the other roadways in the subdivision can still be made of the Sockeye Lane  
18 Extension.

19 Defendant KRKPOA respectfully requests this Court enter an order granting summary  
20 judgment and dismissing the above-captioned matter.

21 DATED this 10<sup>th</sup> day of November, 2021.

22 LAW OFFICES OF ROBERT K. REIMAN  
23 Lawyer for Defendant KRKPOA

24 By: 

25 Robert K. Reiman  
26 Alaska Bar No. 8310145