

STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES
Southcentral Regional Land Office

Regional Manager's Decision

ADL 233432
City of Emmonak
Easement Application
AS 38.05.850

REQUESTED ACTION

On June 5th, 2019, the Department of Natural Resources (DNR), Division of Mining, Land, and Water (DMLW), received an application for a public utility easement from the City of Emmonak for a proposed easement on State-owned, DMLW-managed submerged lands near Emmonak, Alaska. The purpose of the proposed easement is to provide authorization for the placement of an intake pipe for the City of Emmonak drinking water supply. The applicant has requested a public easement approximately 900 feet long, 30 feet wide, and 0.6 acres in size.

RECOMMENDED ACTION

Staff recommend that the requested action be modified, and that an easement be created with the following parameters:

- Width: Change from 30 feet to 300 feet
- Length: 900 feet
- Acreage: Change from 0.6 acres to 6.20 acres
- Term: Indefinite
- Grantee: City of Emmonak
- Type of easement: Public utility

Staff's research and recommendations concerning the creation of this easement and any changes from the applicant's request are discussed below.

SCOPE OF DECISION

The scope of this decision is to determine if it is in the State's interest to create an easement for the proposed use. The scope of administrative review for this authorization is limited to (1) reasonably foreseeable, significant effects of the uses to be authorized; (2) applicable statutes and regulations; (3) facts pertaining to the land or resources; and (4) issues that are material to the determination that issuing the authorization is in the interest of the State of Alaska. All other aspects of the applicant's project are outside the scope of this decision.

STATUTORY AUTHORITY

This easement application is being adjudicated pursuant to AS 38.05.850 and the Alaska Land Act as amended, and AS 38.05.127.

ADMINISTRATIVE RECORD

The administrative record for the proposed action consists of the Constitution of the State of Alaska, the Alaska Land Act as amended, applicable statutes and regulations referenced herein, and the casefile for the application serialized by DNR as ADL 233432.

LOCATION INFORMATION

Geographic Location

The applicant has requested that DMLW authorize an easement over state-managed submerged lands underlying Kwiguk Pass of the Yukon River, near Emmonak, Alaska.

Meridian Township Range Section

The applicant has applied to use State-owned, DMLW-managed submerged lands within the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 18, Township 31N, Range 81W, Seward Meridian.

Additionally, staff review finds that the proposed infrastructure will also be located within the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 18, Township 31N, Range 81W, Seward Meridian. Staff recommend that this area is included in the easement if this request is approved.

Other Land Information

Municipality: City of Emmonak.

Regional Corporation: Calista Corp.

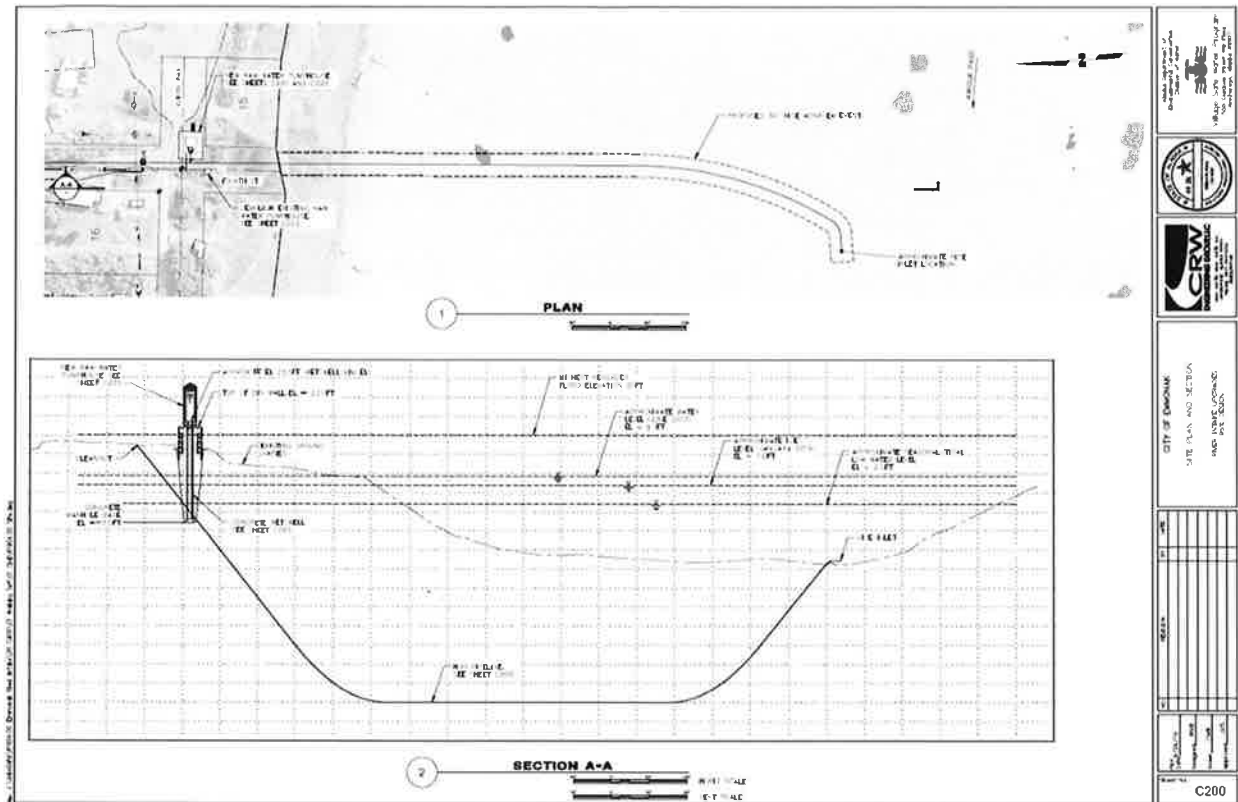
Village Corporation: Emmonak Corp.

Federally Recognized Tribe: Emmonak Village

FIGURE 1 – A map created by DMLW staff that depicts the general area of the requested easement.



FIGURE 2 - A map supplied by the applicant that depicts the location of the water intake pipe.



TITLE

The State of Alaska holds title to lands beneath tidally influenced and navigable waterways within its jurisdiction, including lands underlying Kwiguk Pass in the section(s) referenced above, on the basis of the Equal Footing Doctrine, the Submerged Lands Act of 1953, and AS 38.04.062 (Identification of State Submerged Lands).

THIRD PARTY INTERESTS

The applicant has requested an easement that may impact the following interests. Third party interest notification has been sent to all interest holders noted below.

Third Party Notice Comment & Response

Pursuant to 11 AAC 96.030(c), DMLW provides notice to the directly adjoining upland landowner(s). The City of Emmonak owns all upland property that is directly adjacent to the proposed easement. The City has provided DMLW with non-objection to the proposed authorization through their application considered here-in.

There are no other third-party interests.

PLANNING & CLASSIFICATION

11 AAC 55.040(i)(6) states that:

the granting of a right-of-way or easement for a use that, as part of the determination required by AS 38.05.850(c), the department determines to be minor access for purposes of AS 38.04.065(f), based on the use's insignificant effect on the land and resources; uses that the department may find to constitute minor access include:

- (A) a road or trail less than one mile in length to provide access to a private residence;
- (B) a telephone, electric, or other utility line less than 1,500 feet in length;
- (C) an erosion control project less than one-half mile in length;
- (D) a waterline less than 1,500 feet in length; and
- (E) a sewer outfall line from a single-family residence;

Staff advise that the proposed authorization will have an insignificant effect on DMLW managed land and resources as it is less than 1500 feet in length, and is therefore exempt from department classification and planning requirements¹.

ACCESS

Functional legal access to the state land discussed herein exists via Kwiguk Pass and 4th Street in the City of Emmonak.

Construction of the improvements described herein is contingent on the placement of related infrastructure on adjacent land owned and/or managed by the City of Emmonak. The City has provided DMLW with non-objection to the proposed authorization through their application considered here-in.

The authorization proposed herein will not impair public access; therefore, an easement pursuant to AS 38.05.127 is not necessary to ensure free access to and along any public or navigable waters. DMLW reserves the right to create an easement pursuant to AS 38.05.127 over the authorization proposed herein.

PUBLIC NOTICE & AGENCY REVIEW

Public Notice Summary

Public notice of the application was conducted from October 29th, 2019 to November 30th, 2019. The notice was posted to the State of Alaska Online Public Notice System and was sent to the Alukanuk and Emmonak post offices for display on their notice boards. The notice was also sent to the following recipients:

- Emmonak Sub Regional Clinic
- Emmonak Corporation
- Calista Corporation
- Emmonak Native Village
- City of Emmonak

¹ Per AS 38.04.065(f) and 11 AAC 55.040(i)(6).

Public Notice Comment & Response

No comments were received during the public notice period.

Agency Review Summary

Agency review of the application was conducted from October 29, 2019 to November 30, 2019. The notice was sent to the following recipients:

State of Alaska

- DNR, Division of Parks and Outdoor Recreation, Permitting and Office of History and Archaeology
- DNR, DMLW: Survey Section; Land Sale Section; Realty Services Section; Mining Section; and Water Section
- DNR, Division of Oil and Gas, Permitting; and State Pipeline Coordinator's Section
- DNR, Alaska Mental Health Trust Land Office
- DNR, Division of Agriculture
- Department of Environmental Conservation (DEC), Division of Water, Alaska Pollutant Discharge Elimination System Program
- DEC, Division of Water, Waste Water
- DEC, Division of Environmental Health, Drinking Water Program
- Alaska Department of Fish & Game, Habitat; and Wildlife Conservation, Access Defense
- Alaska Department of Commerce, Community, and Economic Development, Division of Community and Regional Affairs
- Department of Transportation & Public Facilities (DOT&PF), Statewide Right of Way

Federal Agencies

- US Army Corps of Engineers
- Bureau of Land Management Field Office
- National Oceanic and Atmospheric Administration
- U.S. Fish and Wildlife Service

Agency Review Comment & Response

Comment: On October 29th, 2019, BLM submitted the following written response:

“Our BLM office does not have any comments. Just as a heads up: the project area may be in close proximity to a winter-only trail 17b easement (EIN 1 C5, M) which is administered by the USFWS”

Response: Staff acknowledged receipt of the comment. Staff note that 17(b) easements do not attach over navigable waters, so EIN 1 C5, M is not a third party interest.

Comment: on October 31st, 2019 The Alaska Mental Health Trust Land Office commented that they had no concerns with the proposed easement.

Response: Staff acknowledged receipt of the comment.

Comment: on October 30th, 2019 The Alaska Department of Environmental Conservation, Division of Environmental Health, Drinking Water Program, commented that due to the project areas proximity to several active, registered public water sources the applicant follow the “Recommendations For General Construction Projects”.

Response: Staff acknowledged receipt of the comment and forwarded the “Recommendations For General Construction Projects” to the applicants project agent, CRW Engineering.

Comment: on November 27th, 2019 The Alaska Department of Fish and Game, Division of Wildlife Conservation, Access Defense Program commented that Kwiguk Pass had been identified in ADF&G’s Anadromous Waters Catalog (AWC #334-10-10970) as fish bearing. The applicant applied for and received a Fish Habitat Permit (FH19-II-0146) for the installation and operation of the water intake pipeline that includes stipulations to mitigate impacts to anadromous fish. ADF&G did not have any other concerns.

Response: Staff acknowledged receipt of the comment.

Comment: on December 2nd, 2019 The Alaska Department of Fish and Game, Yukon Drainage Sportfish Management Biologist commented that they had no concerns regarding the project.

Response: Staff acknowledged receipt of the comment.

No other comments were received.

ENVIRONMENTAL CONSIDERATIONS

Staff evaluate environmental factors directly related to the authorization of use of state lands, specifically whether the approval of the authorization is in the State’s interest. The purpose of this consideration is to identify any associated mitigation measures or other requirements necessary to protect the public interest, while informing the overall decision of whether or not to approve the authorization.

Environmental contamination risk associated with this proposed easement is minimal. Staff recommend that fuel, lubricants, and other hazardous materials be restricted to those necessary and be contained within tools and vehicles when equipment is necessary for construction and maintenance activities. Staff further recommend that no fuel or other hazardous materials are authorized to be stored on site. There are no other known environmental considerations or constraints in this location.

ECONOMIC BENEFIT & DEVELOPMENT OF STATE RESOURCES

In accordance with AS 38.05.850, DMLW considers if the requested authorization will provide the greatest economic benefit to the State and development of its natural resources. Specifically, staff assess both direct and indirect economic benefits and whether the proposed authorization encourages the development of the State's resources.

The proposed easement facilitates the expansion of the public utility system which will promote conditions for economic development, thus providing an indirect benefit to the state. In consideration of these factors, and because there are no competing requests for authorization, approval of this easement will provide the greatest economic benefit to the State.

DISCUSSION

Staff recommend that an easement 300 feet in width and 900 feet in length be created in order to encompass the proposed improvements and allow for replacement intake lines to be placed within this easement should the need arise due to the high sediment load in Kwiguk Pass rendering the infrastructure unusable.

Staff recommend that the authorization considered herein be a public utility easement granted to the City of Emmonak because the applicant is a government body and operation of the proposed infrastructure is within the scope of the activities the body is authorized to conduct by its governing statutes. Easements created by DMLW are non-exclusive unless described otherwise.

Staff recommend that the easement considered herein be granted for an indefinite term from the effective date of this decision as the need for this easement can be expected to exist as long as the adjoining community requires access to drinking water. Easements created by DMLW may be terminated when the Grantor determines that the easement is abandoned, no longer in use for the purpose(s) authorized, or the easement is revoked as a result of violation of the terms and conditions.

DMLW authorizations may not be transferred or assigned without written approval from DMLW. DMLW reserves the right to amend the terms, conditions and/or stipulations of the easement prior to assignment. Following termination, whether by abandonment, revocation, or any other means, the applicant shall rehabilitate the site(s) to a condition that is acceptable to DMLW.

PERFORMANCE GUARANTY

A performance guaranty is intended to incentivize compliance with the terms and conditions of the entry authorization and easement. It also provides a mechanism for the State to ensure that the applicant shares in the financial burden in the event of noncompliance (including fee payment, survey, etc.), restoration (interim and final), and any associated costs after termination or expiration of the easement. In consideration of the low risk associated with the proposed authorization and the applicant's known history of compliance, staff recommend that a performance guaranty not be required at this time. DMLW reserves the right to require a performance guaranty during the terms of either the entry authorization and/or the easement.

INSURANCE

In consideration of the low risk associated with the proposed authorization and the applicant's known history of compliance, staff recommend that insurance not be required at this time. DMLW reserves the right to require insurance during the term of the easement.

SURVEY

A DMLW approved as-built survey is unnecessary for the creation of an easement, as the legal description may be tied to the adjoining survey(s) by a metes and bounds description. However,

staff recommend that any survey data currently held or subsequently acquired by the applicant that describes the location of project improvements installed on DMLW managed lands be provided to DMLW.

FEES


Per 11 AAC 05.020(b), staff recommend that interim and one-time issuance fee(s) for this authorization are waived as the request is in the public interest. However, the applicant will be required to pay the appropriate recording fees to have the easement recorded by DMLW.

ENTRY AUTHORIZATION

The entry authorization is an interim authorization that is issued when a survey is necessary prior to easement issuance. Staff recommend waiving the entry authorization as the easement can be located by a metes and bounds description.

RECOMMENDATION

Based upon the information provided by the applicant, as well as review of relevant planning documents, statutes, and regulations related to this application, it is the recommendation of staff to issue an easement as described above, on the condition that all stipulations are followed as described in the attached authorization.



Evan Weinzirl, NRS II
DMLW, Southcentral Regional Land Office


2-26-20

Date

REGIONAL MANAGER'S DECISION

When adjudicating an easement authorization pursuant to AS 38.05.850, DMLW seeks to responsibly develop Alaska's resources by making them available for maximum use and benefit consistent with public interest. In consideration of all events and criteria listed above, I hereby determine that the authorization to be granted by this decision are consistent with DMLW's mission, that this project is consistent with the overall classification and management intent for this land, and that issuance of an authorization as described above is in the interest of the State of Alaska. The Department assumes no responsibility for maintenance or liability for injury or damages attributable to this authorization.

This decision may be rescinded by written notification if, after 60 days from the effective date of this decision, the applicant has not completed all requirements outlined in this decision for issuance of the authorization. Additional time may be allotted to complete these requirements; however, this will not extend the total term of the authorizations issued under this decision.


for Clark Cox, Regional Manager
DMLW, Southcentral Regional Land Office

4/8/2020
Date

Attachments

- Draft Easement Document

APPEAL

A person affected by this decision may appeal it in accordance with 11 AAC 02. Any appeal must be received within 20 calendar days after the date of "issuance" of this decision, as defined in 11 AAC 02.040(c) and (d) and may be mailed or delivered to the Commissioner, Department of Natural Resources, 550 W. 7th Avenue, Suite 1400, Anchorage, Alaska 99501; faxed to 1-(907) 269-8918, or sent by electronic mail to dnr.appeals@alaska.gov. Under 11 AAC 02.030, appeals and requests for reconsideration filed under 11 AAC 02 must be accompanied by the fee established in 11 AAC 05.160(d)(1)(F) which has been set at \$200 under the provisions of 11 AAC 05.160 (a) and (b).

If no appeal is filed by the appeal deadline, this decision becomes a final administrative order and decision of the department on the 31st calendar day after issuance. An eligible person must first appeal this decision in accordance with 11 AAC 02 before appealing this decision to the Superior Court. A copy of 11 AAC 02 may be obtained from any regional information office of the Department of Natural Resources.