

## Summary of Comments and Questions

The following is a summary of comments and questions provided by the Office of the Attorney General on the draft conservation easement associated with the proposed Fish River Chain of Lakes Concept Plan.

### Conservation Easement

1. **Superior Property Rights:** Do other entities have rights (easements, mineral rights, licenses, etc.) to the protected property? If so, to what extent and will these rights be subordinated to the conservation easement?
2. **Section 1, Definition of Conservation Values:** Conservation values are defined in part by what is identified in the Baseline Documentation. The purpose of the conservation easement is to provide significant public benefit by protecting in perpetuity the conservation values identified in the easement. The public benefit of the easement depends, in part, on the conservation values it protects. The Commission should have the ability to review and comment on a draft of the Baseline Documentation before it is finalized; this could be provided for in Section 5.2.
3. **Section 1, Definition of Remote Rental Cabin:** Why is the definition of remote rental cabin in the easement different than in Section 10.02 of the Concept Plan?
4. **Section 3.2(a)(i) & (iii):** Ten days prior notice is a very short period of time. A longer notice period and an explicit role for the Holder, should it have questions or concerns about Permitted Construction Materials Removal Activities, would be appropriate. As drafted, the “no unreasonable adverse effect on conservation values” and “no reasonable alternative site” standards have limited meaning if the Holder only has ten days to review and lacks a mechanism provided for in the easement for engaging the Grantor with regard to these activities.
5. **Section 4.1(a)(v):** Is the expectation that structures already existing on the Protected Property will be identified in the Baseline Documentation?
6. **Section 7.1(b):** Will acreage gained become subject to the conservation easement?
7. **Section 8.1, Enforcement and Section 18, Dispute Resolution:** The Holder should have the right to seek any relief available to it at law or equity for violations of the easement. This would include seeking monetary damages and equitable relief, which relief would include restoring the protected property to its pre-violation condition. Additionally, given the public interest that inheres in conservation easements generally, and the public interest in concept plans, disputes over conservation easements should take place in State court where, pursuant to 33 M.R.S. § 478, the Attorney General and relevant political subdivision of the State, may intervene, where the process is open to the public for observation, and where the documents filed, including any final order, are available to the public. The arbitration provisions in this easement would shield enforcement matters from public scrutiny and not allow the action or intervention

contemplated in statute. The arbitration provision in Section 18 of the easement should be removed. Inclusion of a non-binding mediation provision would provide an appropriate form of Alternative Dispute Resolution.

8. **Section 8.1(a)(ii):** The Holder's right to recover costs and fees, including attorney fees, should not subject to the offset provision in Section 8.13.
9. **Section 8.1(a)(v):** Ninety days is a very long cure period (especially if the violation results in an economic benefit). Title 33, Section 478 does not require that the Holder provide any opportunity to cure in the event of violation. Ninety days significantly delays the Holder's ability to timely effectuate a cure, and, therefore, is not in the public interest. A 30-day cure period would be reasonable.
10. **Sections 8.5 and 8.8:** The insurance and indemnity provisions in the draft easement are not typical. As a practical matter, those provisions make assignment much less likely and may well preclude any governmental entity from ever being a Holder. The limitation on assignment would be a significant problem in the event FSM dissolves.
11. **Section 10.2(a), (b), (c):** When are these amounts going to be filled in?
12. **Section 17.1:** Generally speaking, for LUPC purposes, leases are divisions. Is a lease a Division for purposes of Section 7.1(a)?
13. **Section 18:** See discussion of Sections 8.1 and 18 above.
14. **Third Party Rights of Enforcement:** Identifying an entity who will accept third-party enforcement rights, such as a government entity, increases the value to the public of the easement. Also, should the Holder dissolve, the third party enforcer would be able to fulfill the Holder's monitoring and enforcement responsibilities until such time that a new Holder is identified, which could take a considerable amount of time.