THE STATE of ALASKA
GOVERNOR SEAN PARNELL

Department of Transportation and Public Facilities

3132 Channel Drive
P.O. Box 112500
Juneau, Alaska 99811-2500
Main: 907.465.3900
Fax: 907.586.8365
dot.state.ak.us

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The Honorable Representative Wilson
Chair, House Transportation Committee
Alaska State Capitol, Room 406
Juneau, Alaska 99801

Dear Representative Wilson:

In response to the March 11, 2014 reading of House Bill 371 by the Senate Transportation Standing Committee members, questions and concerns were presented by past and present Department of Natural Resources (DNR) employees. The following answers are in response to these public comments:

- **What actual land is included in HB 371? Is there a list of parcels or a map showing the land that is included in the bill? How many parcels are involved? How many acres?**

Sections 1, 6, and 9 of the bill recognizes the Department of Transportation and Public Facilities (DOT&PF)'s primary authority over state-owned transportation and public facility properties. We are unaware of any comprehensive list of DOT&PF properties, or any summary of acreage, but the footprint of each DOT&PF facility will neither increase nor decrease upon passage of the bill. The bill calls for the transfer of two maintenance stations and airstrips on the Dalton Highway from DNR to DOT&PF, and those facilities encompass approximately 860 acres combined.

- **What parcels of land included in HB 371 are not currently surveyed? What is DOT&PF's plan for surveying these parcels? What is the expected cost for these surveys?**

There are a number of state-owned transportation and public facility properties that are currently not surveyed. Generally speaking, the more remote a DOT&PF property the more likely the property has not been surveyed. DOT&PF properties are surveyed in conjunction with constructed improvements, so the inventory of surveyed properties grows each year. This bill does not require surveys of currently non-surveyed DOT&PF properties, so there are no expected costs for surveying. Surveys are completed through appropriations for specific projects, so surveys are updated in conjunction with capital improvements.

- **HB 371 requires completion of surveys after title has been conveyed to DOT&PF. Is there any precedent in Alaska for conveying title without a survey already in place? What are the foreseeable issues related to clouded title and uncertainty of land ownership and management?**

The State of Alaska is the owner of DNR managed lands and the owner of DOT&PF managed lands, so there will be no issues of questionable land ownership or clouded title during the post-construction period when DOT&PF is accounting for and closing out an infrastructure project. Survey and platting after construction of state-owned transportation or public facilities is currently standard procedure for DNR and DOT&PF, and will continue to be the standard procedure after passage of the bill.

- **The last paragraph of Section 5 of HB 371 states: "within two years after the completion of construction or the opening of a materials site, the department shall prepare and record a record of survey of the property received by the department." Note that "completion of construction" may take decades to accomplish for material sites. What timeline will DOT&PF be required to follow to obtain surveys for its many unsurveyed material sites?**

The quoted provision requires DOT&PF to prepare a recorded survey within two years of opening any new materials site. In accordance with the newly established law, DOT&PF will record a survey of the newly opened site within two years of opening of a materials site. It is very important for DOT&PF and its contractors to be aware of the material site boundaries to ensure the state does not trespass onto private lands. DOT&PF's standard practice is to perform preliminary surveys, with flagging, if there is any reason to believe a trespass upon private property may occur.

Regarding state-owned material sites without a current survey, the vast majority of existing material sites used for DOT&PF facilities are the state-owned material sites from which DNR issues third-party material sales contracts. DOT&PF surveys these sites with project funds, and maintains environmental permit compliance when the sites are in use. Those non-surveyed sites will remain without a survey until a DOT&PF capital project intends to use the site, DNR considers a third-party material sales contract, or some other condition requires the site to be surveyed.

- **How will HB 371 impact funding for DNR and DOT&PF? Would DNR lose funding from loss of material sale revenue as a result of this bill? Would DOT&PF gain a new funding source from selling material from material sites? Section 13 of the bill states DNR would no longer charge DOT&PF for material. Does "DOT&PF" include DOT&PF contractors? Would DOT&PF start charging their contractors or others for material from state material sites? If so, where would those funds go?**

Our understanding is that revenue generated by DNR for the sales of materials goes into the state general fund. The bill does not eliminate DNR's authority to generate revenue from the sale of material to third parties. We also understand that DNR sells materials to DOT&PF contractors at a reduced rate of $.50 per cubic yard, which is meant to cover DNR's administrative costs to administer the material sales contracts. We expect Section 13 would result in a net savings to the state general fund, as DOT&PF and DNR will no longer have to administratively manage DOT&PF contracts.

DOT&PF has no authority to sell materials to third parties, and will gain no such authority under this proposed bill, so DOT&PF gains no revenue from material sales. Section 13 would allow DOT&PF contractors to extract and use materials from DNR designated sites, without payment to DNR, when the materials are used for the construction or maintenance of a DOT&PF transportation or public facility project. This bill is expected to reduce the cost of state construction contracts due to the fact that DOT&PF will not have to pay its contractors to purchase state owned material from DNR.

- **HB 371 indicates DOT&PF will provide public notice under AS 44.62.175 when it requests title of state land from DNR. How does the public notice DOT&PF would provide differ from the public notice DNR is required to provide for a conveyance under AS 38.05.945?**

Prior to receiving public domain land for incorporation into a state infrastructure project, DOT&PF must provide public notice of its determination that the requested public domain land is "reasonably necessary" for the infrastructure, with diagrams of the properties to be incorporated. DOT&PF's current exemption from the Alaska Land Act procedures for the management of its government use properties, would be extended by Section 11 of the bill to include an exemption for transfers of the reasonably necessary public domain lands for DOT&PF projects. Therefore, DOT&PF's public notice of its determination of reasonable necessity would be in place of the public notice that may have been provided by DNR under its land disposal procedures for the intended transfer of state land to DOT&PF.

- **DNR manages for multiple uses of state land. Will DOT&PF manage state public domain land for multiple uses? If so, what legal authority and processes does DOT&PF have in place for multiple use**

management? How will DOT&PF's management of state public domain land be different from DNR management?

DOT&PF manages its lands in accordance with the legislative purposes of each of DOT&PF's statutory authorities: Title 02 (airports); Title 19 (highways); and Title 35 (public facilities). DOT&PF's legislative authorities require that the transportation and public facility properties be managed for their intended government purpose use; thus, DOT&PF properties are not managed to leave open the availability of potential multiple uses in the same way DNR manages the state public domain.

The Alaska Constitution recognizes that state land used for government purposes is not included in the state public domain, and that the inventory of government purpose lands can change and grow over time:

> Article VIII, Section 6. State Public Domain. Lands and interests therein, including submerged and tidal lands, possessed or acquired by the State, *and not used or intended exclusively for governmental purposes*, constitute the state public domain. The legislature shall provide for the selection of lands granted to the State by the United States, and for the administration of the state public domain.

The drafters of our Constitution recognized that government infrastructure develops over time to serve the people of the state, and wisely excluded state lands *intended* for governmental purposes from the definition of the state public domain. We believe the proposed amendments are in line with the Constitution's definition of the state public domain.

- **Testimony from DOT&PF indicated HB 371 was modeled after a federal law. What law in particular is it modeled after? Does the federal version of the law provide opportunities for other agencies to respond to DOT&PF's request for title to land? What level of public notice and involvement is provided under the federal version of the law?**

The federal authority that provides ready access to federal properties necessary for highway rights-of-way is found at 23 USC 317. Appropriation of federal properties for DOT&PF projects is done within the context of the environmental review and permitting of a project. State and federal law require DOT&PF to involve the public and state and federal agencies in the development and permitting of its construction projects—and the bill has no effect on those existing processes and regulatory requirements. Therefore, the involvement of the public and state and federal agencies will be exactly the same for DOT&PF's appropriation of federal land and the transfer of state public domain land to DOT&PF for incorporation into a state transportation or public facility.

- **DOT&PF circumvented DNR by submitting a bill through the Governor's Office that would do exactly what they could not do by working with the state agencies to find a solution.**

DOT&PF management worked on this bill with DNR management, and the Department of Law sections that advise both agencies, to find a workable solution to the problems caused by the overlapping jurisdiction found in state law. It was through this process that the agencies determined that a clarification in state law is necessary. The bill recognizes DOT&PF's primary authority to manage and control the rights-of-way for the state's transportation and public facility infrastructure. Without the proposed amendments to existing law, DOT&PF's dedicated government purpose properties will retain an overlay of DNR multiple-use management as DOT&PF's properties are and will remain a subset of "state land."

- **HB 371 gives DOT&PF unlimited and unrestricted use of state land for DOT&PF's purposes and DNR shall transfer to DOT&PF "whatever" DOT&PF wants and desires. DOT&PF will have authority to enter onto any state land including legislatively designated areas.**

Sections 3, 5, and 8 of the bill are quite limiting so that DOT&PF may only receive a portion of public domain land upon a written determination that specifically identified properties are "reasonably necessary" for a state transportation or public facility project. The required documentation of the need for inclusion of a portion of public domain land into a state infrastructure project is a far narrower standard than "whatever DOT&PF wants." Additionally, "public domain land" is the subset of "state land" that remains open and available for any number of

multiple uses. "Public domain land" does not include dedicated government purpose properties such as state forests, state parks, critical habitat areas, state wildlife preserves, or any other legislatively designated areas. "Public domain land" also does not include University of Alaska land, Alaska Railroad Corporation land, school trust land, and all other dedicated income producing state land. Therefore, the bill quite specifically limits DOT&PF's access to any state land outside of the state's multiple-use public domain.

- **In order for DOT&PF to divest state property, statutes paralleling DNR's statutes should be set up. But then why create a new process for DOT&PF when DNR has existing authority to dispose property?**

Since statehood, DOT&PF has been empowered to hold, manage, and dispose its properties. DOT&PF's statutory disposal authorities and implementing regulations are specifically geared toward the disposal of no longer necessary infrastructure property and remnants by authorizing adjoining property preferences and authorizing disposals of less than marketable sized properties. DNR's public domain disposal authorities have proved a poor fit for disposal of former infrastructure properties and remnants; DOT&PF can complete the disposal of its excess properties in six to ten months from completion of construction, whereas DNR disposals of similar properties takes years to decades to complete. These substantial and unnecessary delays result in profound inconveniences and monetary consequences to the unfortunate private property owners adjoining the former public domain land who currently must receive the disposal through DNR. These delays in project closeout also place DOT&PF in a position of non-compliance with the requirements of its federal funding agencies.

- **DOT&PF will definitely require additional personnel to properly manage all aspects of HB 371. The survey requirements alone are staggering.**

Aside from the transfer of the Happy Valley and Franklin Bluffs maintenance stations and airstrips, DOT&PF's inventory of transportation and public facilities remain the same before and after passage of the bill. DOT&PF currently has metes and bounds descriptions of the properties, and surveys for these two sites will be completed as these properties are improved. Thus, there are no survey requirements to implement the bill. Likewise, DOT&PF is currently empowered to hold, manage, and maintain all properties within its inventory—and will continue to fulfill its statutory responsibilities with its current staff. The bill's clarification that DOT&PF has primary authority over its properties will not change the workload or personnel needs of DOT&PF to manage these properties.

- **Section 13 of HB 371 allows DOT&PF to extract gravel from any existing gravel pit on state land even if the site was developed by another party for a different purpose and with no protection for existing, valid state gravel sales.**

Section 13 extends DOT&PF's current exemptions from the Alaska Land Act (AS 38.05.030) to include a DOT&PF exemption to DNR's materials sales contract requirements (AS 38.05.550-.565). The exemption in Section 13 would only apply to activities in those gravel pits where DNR is authorized to sell materials to third parties—most of these sites are currently maintained and environmentally permitted by DOT&PF. Sites that were developed by another party for that party's exclusive use are not affected by Section 13, as DNR cannot issue third-party materials sales contracts for exclusive use sites.

DNR and DOT&PF must coordinate with each other every spring with regard to the proposed uses of resources in the construction season (recall, DOT&PF carries the environmental permits and responsibilities on most of the pits from which DNR sells materials). These coordinating activities will continue under the new law. DNR has always fulfilled its third-party materials sales contracts with DOT&PF simultaneously carrying out its seasonal construction and maintenance activities, and DOT&PF anticipates the same extraction rates will continue under the new law.

- **HB 371 ignores and overrides competing land claims, including potentially higher and better uses for the state lands at issue (particularly relevant regarding gravel and material resources).**

Transfers of public domain land under the bill are "subject to valid existing rights," therefore all vested rights and interests are addressed by the bill. Competing claims and other potential uses for public domain lands are thoroughly considered and weighed by the public and permitting agencies during DOT&PF's project development and permitting processes. A DOT&PF project footprint is finalized and permitted only after avoiding and

mitigating impacts to neighboring properties, resources, and other competing interests. The public outreach and user group input in the DNR- Division of Mining Land and Water (DMLW) process for the disposal of state land pales in comparison to the DOT&PF public processes for developing and permitting state infrastructure projects. All competing claims to the land and potential competing uses for the land are heard and vetting during the public and inter-agency processing of the multiple permits and authorizations for a state construction project.

DNR retains its full authority under the bill for third-party sales of material resources. Therefore, there should be no effect to public or private access other DNR's materials sites.

- **HB 371 provides no mechanism to address public concerns with the proposed use, access issues, and conflicts with adjacent land owners and users.**

It is true that DOT&PF will no longer be required to undergo the DNR multiple-use analysis under the Alaska Land Act and its regulations for the "disposal" of state land. However, this does not mean there is no mechanism to hear local concerns. AS 35.30 requires DOT&PF to obtain review and approval of its projects by local planning authorities, including comment from village and community councils, and compliance with all municipal ordinances. This requirement is imposed on DOT&PF construction projects so that project plans and environmental permits may be negotiated and modified to address community concerns. This is just one of the reasons why DNR's Alaska Land Act analysis—following DOT&PF's receipt of all federal, state, and local permits and authorizations—is duplicative when applied to DOT&PF projects. If DNR was to modify a project footprint during its Alaska Land Act processes (there is no institutional memory of this ever happening), DOT&PF would likely have to go back and re-analyze, re-notice, and re-apply for its project permits and authorizations.

- **The provision regarding Reciprocal Easements (Section 16) conveys easements to the US Forest Service on tidelands and submerged lands that are important for public access and appears to do this without the Constitutionally required public notice.**

Under the 2006 agreement between DNR and the U.S. Forest Service (USFS), DNR will only convey an identified reciprocal easement upon the issuance of state's best interest finding and public notice. In order for DNR to even consider a USFS request for the issuance of a reciprocal easement, the USFS must present DNR with a development plan and diagrams of the proposed easement diagrams. The bill would do nothing to alter the requirements under the 2006 agreement. Section 16 is intended to allow the commissioner of DNR to exercise discretion—when in the best interest of the state—to waive any 55 year limitation on any conveyed reciprocal easement.

To clarify that the bill is not directing DNR to take any direct action with regard the reciprocal easements, DOT&PF and DNR have proposed the following language be included in committee substitutes to the companion bills:

> The easements identified on the map numbered 92337 and dated June 15, 2005, and that are part of the reciprocal exchange of easements or rights-of-way and easements enacted into federal law under 119 Stat. 1177, may have a term of years for a period of more than 55 years if the commissioner of natural resources determines the length of the term to be in the best interest of the state.

- **The Zero fiscal notes are unrealistic as HB 371 will significantly add to DNR and DOT&PF's workloads and costs.**

The bill does not anticipate any additional work or costs for either agency. DOT&PF currently has full authority to hold title to and manage its transportation and public facility properties. The bill's Sections 1, 6, and 9 clarify that DOT&PF has primary authority over the surface estate of these properties, and DNR retains regulatory authority over these properties (as a subset of state lands) subject to DOT&PF terms and conditions. DOT&PF, DNR, and the public are fully aware of the location of the state's transportation and public facilities, and most of these facilities have recorded surveys (those that don't have recorded surveys now, will not have recorded surveys

after passage). Thus, DOT&PF and DNR do not anticipate any survey work, title transfer, or any other additional work to implement to the provisions of this bill.

- **To date many parties directly and potentially impacted by HB 371, including private and public operators and users of gravel pits on state land have not been informed of this legislation and how it may impact them.**

As stated above, this bill does not affect third-party operators that hold exclusive lease rights to state land. With respect to third-party users of DNR's publicly accessible materials sites, the bill only exempts DOT&PF from DNR's material sales contracting requirements—the bill does not limit DNR's authority to issue third-party material sales contracts.

I hope these answers help clarify House Bill 371. If you or your committee members have any further questions, please feel free to contact me at 465-3906.

Sincerely,

K. Kim Rice
Deputy Commissioner