

To: Senate Transportation Committee Members
From: Lisa Weissler, Attorney
Date: March 24, 2014
RE: Public Comments – SB 211

The sponsor statement for SB 211 provides a rather innocuous description of the bill, yet the legislation proposes significant changes in state law, some of which raise constitutional issues.

As currently drafted, SB 211 raises many questions and constitutional concerns, and risks creating more complications and uncertainty. Even if there were legally supportable explanations, it would be far better for future regulators and the public if these laws were written so that they are unambiguous. Someone reading these statutes should not have to review the bill file and administration’s testimony to divine their meaning.

The following table illustrates potential constitutional issues with the legislation:

Alaska Constitution	Current Law	SB 211	Constitutional Issues
	Under AS 38.05.030, state land assigned by DNR to DOT&PF must be returned to DNR when the land is no longer needed for the purposes assigned.	Under the proposed legislation, the return of state land to DNR is optional and DOT&PF may dispose of state land under its own authorities.	AS 38.05.030 has been in place at least since before 1984, and possibly as early as 1959. Returning state land to DNR ensures the land is managed or disposed of in a way that meets state constitutional requirements.
Art. 8, Sec. 9: “[T]he legislature may provide for the sale or grant of state lands, or interests therein, and establish sales procedures...”	DNR may sell or otherwise dispose of state land through established statutes (AS 38.05.045 to 38.05.069). There is a specific statute for the sale of right-of-way remnants where DNR may convey remnants to an adjoining landowner for fair market value upon a determination the sale is in the state’s best interests. See AS 38.05.035(b)(7)	DOT&PF may sell state land it no longer needs, including material sites and remnants, under terms, standards and conditions established by the commissioner.	DOT&PF’s current statutory authorities governing the disposal of land are limited to disposing of private land. It is the legislature’s constitutional duty to establish statutes that provide for the sale of state land. Allowing DOT&PF to establish its own terms for disposal of state land violates the constitutional requirement that the legislature establish the law, and may violate the separation of powers doctrine.

Alaska Constitution	Current Law	SB 211	Constitutional Issues
<p>Art. 8, Sec. 10: “No disposals or leases of state land, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.”</p>	<p>Under AS 38.05.035(e), DNR sells, leases, or approves disposals of state land, resources, property, or interests upon a written finding that the disposal is in the state’s best interest; and provides for a comprehensive public notice standard under AS 38.05.945 - .946.</p>	<p>No statutes are proposed regarding the process for DOT&PF’s disposal of state land. DOT&PF is not required to use the comprehensive public notice standard required for the disposal of state land under AS 38.05.945 - .946.</p>	<p>Land transferred from DNR to DOT&PF remains state land subject to constitutional requirements for its disposal to third parties. It is the legislature’s duty to establish the laws regarding the disposal of state land, and these laws must meet constitutional requirements.</p>
<p>Art. 8, Sec. 1: “It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.”</p> <p>Art. 8, Sec. 6. “Lands and interests therein ... not used or intended exclusively for governmental purposes, constitute the state public domain.”</p>	<p>Under AS 38.05.285, the disposal and use of state land shall conform to the state constitution and principles of multiple purpose use consistent with the public interest.</p> <p>Under AS 38.04.070, public domain land is land available for settlement and development.</p>	<p>A transfer of state land vests control of the surface estate in DOT&PF, including rights to extract material and develop the land.</p> <p>The legislation may limit, or even preclude DNR from management of DOT&PF-owned material sites.</p>	<p>In its response to public comments, citing Art. 8, Sec. 6 of the constitution, DOT&PF says it will not manage state land for multiple uses as DNR does because land used for government purposes is not included in the public domain (March 18, page 3).</p> <p>Article 8, section 6 describes lands not set aside for government purposes as public domain – that is, land that is available for private settlement and development. The section does not exempt state land from the other constitutional requirements. Since statehood, DNR has managed land used for governmental purposes in conformance with the constitutional principle of multiple use. There is no basis for DOT&PF to exempt itself from this requirement.</p>

SECTIONS 1, 6, 9 & 3, 5, 8

Sections 1, 6, and 9 give DOT&PF primary authority to manage the surface estate for highway, airport, and public facility lands, though seemingly still subject to DNR’s permitting authority. The proposed language in Sections 1, 6, and 9 indicates DOT&PF will have the discretion to require terms and conditions applicable to DNR permitting requirements.

3/24/14

- How will DOT&PF establish terms and conditions applicable to DNR authorizations? By regulation? Project-by-project? If by project, how will the public be notified of any changes to the terms or conditions of a permitted activity?
- What types of terms and conditions might DOT&PF apply to DNR permits? Are there any limits?
- Since presumably DOT&PF is the permit applicant, how can it be appropriate for them to set the terms and conditions for their own activities?

Sections 3, 5, and 8 convey title of state land to DOT&PF, making DOT&PF the sole owner and land manager of the surface estate for highway, airport, and public facility lands, including the right to extract materials and develop the land for transportation, utility and related purposes.

- Are material extraction and development activities still subject to DNR's permitting authority as indicated by sections 1, 6 and 9 even though control of the surface estate is being vested in DOT&PF and DOT&PF is being given the right to extract materials and develop the land?

Thank you for consideration of my comments.