

# SB 26: LAND DISPOSALS/EXCHANGES; WATER RIGHTS

## BRIEFING PAPER

FOR THE SENATE FINANCE COMMITTEE • FEBRUARY 20, 2013

In 2010, the Governor of Alaska and the Department of Natural Resources (DNR) embarked on an initiative to improve the State of Alaska's permitting processes in order to advance the public interest by ensuring projects are permitted in a timely, predictable and efficient manner while safeguarding the environment.

During the 2012 Legislative session, the Governor introduced HB 361, which included the highest priority changes related to leasing and disposal programs that would help reduce the permitting burden on the applicant and free more time for staff to work on processing applications. The Division of Mining, Land and Water (DMLW) in DNR has identified additional statutory changes that would help streamline permitting requirements for the public to use and enjoy Alaska's land and resources.

### **The bill would accomplish the following primary objectives:**

- 1) Gives the Commissioner the ability to issue a general permit for activity on state land if the activity is unlikely to result in significant and irreparable harm to state land or resources. (Section 1)
  - Standardizes the permitting of certain types of activities on state land so that the agency may issue individual permits for that activity without being required to adjudicate each permit separately.
  - Although there is arguably the authority in statute to do general permits, it is not explicitly called out.
  - As part of the Governor's Permitting Efficiency Initiative, the department will be doing general permits for certain activities that can have standardized authorizations.
- 2) Give the Division more flexibility in its authority to exchange land or interests in land when it is in the best interest of the State. (Sections 22, 23, 24, 25, 27 and 43)
  - Enables DNR to resolve land management issues with other entities, such as a government agency, a native corporation or other organization, on a timelier basis.
  - Currently, the process for a land exchange takes years to occur and is rarely successful due to the complexity of the current process, the long lead times to complete some of the current statutory requirements, and unique timing requirements involving public noticing, survey, and appraisal. Continuation of the current approach will result in unresolved land ownership patterns and the inability to make state land patterns more efficient.

- Existing statutes (AS 29.65.090) include a land exchange provision between DNR and boroughs and municipalities, which takes only months and have always been successful. This change in statute is patterned after this approach.
- 3) Amend statutes to allow all land and property sales to be purchased by contract instead of payment in full up-front. (Sections 7, 8 and 9)
- Currently, DMLW issues contracts for any customer requesting financing for any purchase of state land; however, this practice could be subject to a legal challenge because the law only mentions sales at auction. If successful, a challenge would force DMLW to require all land purchases, except for those by auction, to be paid in full at the time of purchase, which would significantly lower land sales as most people would be unable to fully finance the cost up-front. An estimated one-third of all land sold is by auction. This puts two-thirds of the state's sales at risk if the state cannot finance the purchase. The monetary loss is estimated at over \$2 million a year.
  - This revision clarifies DMLW's ability to issue installment contracts to a majority of land sales sold through preference right cases; Public and Charitable cases; Initial Over-the-Counter Sales; Over-the Counter sales; and Remote Recreation Cabin Sites.
- 4) Allow the director of the Division of Mining, Land and Water to extend, one-time, for a period of up to two years in duration, an existing land or tidelands lease if it is determined to be in the best interest of the state. (Sections 10 and 16)
- Allows leases to remain active for two years while DMLW adjudicates a request to purchase the leased land under a preference right under AS 38.05.102 or where the lessee plans to substantially change the operation to the point where a new best interest finding and decision must be issued under AS 38.05.035(e).
  - Preserves the lessee's rights from being extinguished while the state is actively working to issue a new lease or move to a purchase contract.
  - This statute change covers both regular leasing (e.g. shoreland, tideland, or submerged land) and aquatic farm and hatchery site leases.
- 5) Allow the director of the Division of Mining, Land and Water to renew, one-time, for a period of up to ten years in duration, an existing aquatic farm lease if it is determined to be in the best interest of the state. (Sections 15 and 16)
- Allows leases to be renewed for up to another ten years if the lease operations remain the same and the lessee is in good standing with the state.
  - Preserves the lessee's rights from being extinguished at the end of the lease and provides the department with the flexibility to maintain a productive aquatic farm in place rather than having to offer a new lease through a competitive process.

6) Clarify that the commissioner may issue one or more new temporary water use permits for the same project. (Section 42)

- Under current statutes, a Temporary Water Use Authorization (TWUP) permit may be authorized “...for a period of time not to exceed five consecutive years...”
- The proposed change would clarify that successive Temporary Water Use Authorizations may be applied for, adjudicated and issued for the same project beyond the initial five year period of the project.
- TWUPs are not permanent water rights. The division may change or revoke TWUP as necessary to protect water right holders or the public interest, and TWUPs are mainly used by exploration projects and construction projects that are not conducive to permanent water rights because the water use is of a temporary nature and because water sources, water uses, water use quantities and water use locations frequently change.

7) Amend water reservation statutes to limit the application for reservations of water related to maintaining instream flow to federal, state public agencies or political subdivisions of the state and reduces the mandate to re-evaluate water reservations (Section 40 and 41)

- This revision would prevent non-agency entities from being able to apply for the reservation of water; this does not affect holders of, or applicants for, standard water rights, temporary water use permits or water removals
- No other state allows private persons to reserve and hold reservations to public water;
- A “person” was added to the statute to allow miners to apply for and receive a water reservation for sanitary and water quality purposes; usually associated with mixing zones. However, no applications for these reservations have ever been filed. Mining interests can still receive TWUPs or water rights for sanitary and water quality purposes from the department;
- The removal of the word “person” does not preclude an organization or individual from working with a municipal government, state or federal agency, so that the agency can apply for a reservation. In this manner, the appropriate policy level review and criteria for each agency or governmental entity are used. In addition, these agencies will be able to identify the funding and technical expertise needed to perfect these applications;
- As of December 31, 2012, there were 371 applications pending for instream water reservations. Out of those, 35 are applications that have been applied for by a “person” (non-agency). Within one year, if requested by an applicant who is no longer authorized to apply, DNR shall transfer pending applications to an entity identified by a state, Federal agency or a political subdivision of the state. If, within, two years, DNR does not receive notice that an entity intends to pursue the same or smaller reservation, then the application and fee will be returned to the original applicant. If a certificate of reservation is issued, the certificate will carry the priority date of the original application.

- Of the 61 issued certificates for Water Reservations, all are issued to government entities (DNR, ADF&G, and BLM). No certificates for Water Reservations have ever been issued to “persons” in the state of Alaska.
  - The commissioner is currently required to review all reservations of water every ten years to determine whether the statutory purpose for which the reservation was issued still apply to the reservations. Due to the number of existing and future reservations, and the limited resources available to the department, this is beyond the capacity of the department.
- 8) Allow people to carry small quantities of water from one hydrologic unit to another without violating the law. (Section 34)
- Currently there is no de minimis amount of water that is exempt from the provisions of AS 46.15.035 and thus any person that transports water out of a hydrologic unit without returning the water back to that same hydrologic unit would be in violation of statute.
  - Amends the statute to prevent a technical violation of the statute governing water removal from a hydrologic unit for even small amounts of water while still maintaining a requirement for an application for water rights or temporary water use for a significant amount of water. The phrase “significant amount of water” is already defined in Alaska Administrative Code section 11 AAC 93.035.
- 9) Amends various statutes related to appeals, requests for reconsideration and best interest findings to clarify administrative review process and rights to allow only a person who is substantially and adversely affected, rather than aggrieved, to appeal or request reconsideration of a decision, and establishes a requirement that an appellant must demonstrate their standing to appeal or request reconsideration. (Sections 4, 5, 11, 13, 14, 29, 30, 31, 32, 33, 38 and 39)
- Aims to allow only appellants who have a vested interest or who will be harmed by a decision to appeal and prevent the public from using appeals as a method to block permitting of projects on what is later found to be groundless claims or casual objection.
  - Allows the department to require a person’s participation in the public review process in order to be eligible to appeal or request reconsideration.
  - Amends the statute so that failure of the commissioner to act on the request for reconsideration for a decision not made under AS 38.05.035(e) within 30 days is a denial of the request and would stand as a final administrative decision for purpose of appeal to the superior court.
  - Clarifies that review procedures under the coal regulatory program (Alaska Surface Mining Control and Reclamation Act – ASMACRA) are not subject to AS 44.37.011.

10) This bill clarifies that all mineral orders and leasehold location orders are subject to public notice requirements of AS 38.05.945 not just mineral closing orders. (Section 19)

- Amends the statute to reflect the need for the public to be aware of actions that limit the use of the mineral estate on state lands. This is inclusive of both closing and opening of areas and limitations placed through leasehold location orders.

11) This bill revises statutes to eliminate public notice for alterations of platted boundaries if owners approve and no public easements or rights-of-way are affected. (Section 28)

- For example, if a person owns two lots and wishes to remove the boundary line or change the configuration of the two lots, the re-platting process with public notice is required, which adds months to the subdivision process without any added benefit or effect on the public.
- This will save at least 30 days of review and speed up adjudication of plat reviews in the unorganized borough.

12) Clarify the definition of “public auction” to include public oral outcry auction and public on-line auctions. (Section 21)

- Addition of this definition of “public auction” in statute would verify that outcry auctions and online competitive auctions are “public auctions” under the state’s land sale statutes;
- Allow DMLW to use a web auction process that would accelerate and simplify the process for over the counter land sales;
- DMLW anticipates creating an “eBay-style” process for selling land, making it easier for the public to bid on land thus enhancing land sales and creating more income for the Land Disposal Income Fund (LDIF).

13) Amend AS 38.05.035(e) (Best Interest Finding) and AS 38.05.945(a) (Public Notice) to clarify that the director of the Division of Mining, Land and Water has the authority and discretion to issue preliminary decisions and public notice for non-oil and gas related decisions. (Sections 3, 17, 18 and 19)

- Clarifies how preliminary decisions can be used for non-oil and gas related decisions in order to have consistency between several portions of the bill.

14) Miscellaneous minor statutory revisions (Sections 2, 3, 6, 12, 20, 35, 36, and 37)

- Provides minor wording revisions to make statutes more readable and understandable.
- Provides clarification of statutory intent.