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MEMORANDUM

May 8, 2023

SUBJECT: Constitutionality of salvage timber sales
(CSHB 104(RES) am; Work Order No. 33-LS0474\U.A)

TO: Representative Tom McKay
Attn: Ed King

FROM: Alpheus Bullard
Legislative Counsel 

You inquired whether CSHB 104(RES)am (HB 104) raises certain constitutional issues.

Section 7 of HB 104, adding sec. 38.05.117, provides authority to the commissioner of natural resources (commissioner) to offer certain timber for sale that has lost, or will lose, substantial economic value if not salvaged within two years—without the commissioner making a written finding under AS 38.05.035(e) that the sale will serve the best interests of the state.

Mr. King asked if exempting these sales from the written best interest finding process established for approving contracts for the sale, lease, or other disposal of available land, resources, property, or interests in them under AS 38.05.035(e) is unconstitutional.¹

A disposal of state resources is subject to constitutional requirements. A disposal of state resources must be noticed, must be in the best interest of the state, and must be consistent with the public trust doctrine.² The written best interest finding process established under

¹ Telephone conversation of May 8, 2023.

² Art. VIII, sec. 1, of the Constitution of the State of Alaska provides:

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.

Art. VIII, sec. 10, provides:

AS 38.05.035(e) is a statutory process established to ensure that a disposal of natural resources by Department of Natural Resources (department) meets these constitutional requirements. The process established by AS 38.05.035(e), is itself not required by the constitution.³

If, under the bill, the commissioner elects to hold a salvage sale under AS 38.05.117, the sale will still have to address constitutional notice, public interest, and public trust concerns. It will be up to the commissioner to ensure that a salvage sale meets these constitutional requirements. The commissioner has broad authority under AS 38.05.020(b)(1) and (4) to adopt regulations, or ensure by other means, that a salvage sale of timber meets these requirements.

No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.

In addition, the common law public trust doctrine and AS 38.05.502 must be considered in relation to any disposal of state resources. The public trust doctrine is a common law principle under which it is recognized that government owes its citizens duties of care with respect to the management of land and natural resources held by the state in trust for the public benefit. *See CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988) (applying doctrine in the context of tidelands).

³ In considering the department's duty to issue a best interest finding at each phase of a multi-phased development, the Alaska Supreme Court held that art. VIII of the Constitution of the State of Alaska does not require written best interest findings.

DNR argues that article VIII of the Alaska Constitution does not require a best interest finding. We agree with DNR. Article VIII, section 2 of the Alaska Constitution gives the legislature the responsibility and discretion to create procedures to meet the policy outlined in article VIII, section 1 to develop Alaska's resources "for the maximum benefit of [the State's] people." The legislature created the best interest finding outlined in AS 38.05.035 to provide DNR with a procedure the agency must follow to ensure that Alaska's resources are developed for the maximum benefit of the people.

It is clear from our case law that the best interest finding requirement created in AS 38.05.035 is purely a creature of the legislature.

Sullivan v. Resisting Env't Destruction on Indigenous Lands (REDOIL), 311 P.3d 625, 632 - 633 (Alaska 2013); *see also Laverty v. Alaska R.R. Corp.*, 13 P.3d 725, 733 (Alaska 2000) (finding that art. VIII notice requirements applied to disposal of land owned by the Alaska Railroad Corporation, even if there was no applicable statutory notice requirement).

Representative Tom McKay

May 8, 2023

Page 3

While exempting salvage sales from the statutory best interest finding process merits caution given the "prescribed by law" language of art. VIII, sec. 10, because these salvage sales are intended to salvage timber that will lose "substantial economic value" if not harvested within a relatively short period of time (and cutting out the written best interest finding will shorten the length of the process), I don't think the exemption on its face is unconstitutional.⁴ Nothing prevents the department from adopting regulations establishing "notice and other safeguards of the public interest" for these salvage sales. These regulations would likely be interpreted as "safeguards of the public interest" that are "prescribed by law."

If you have questions, please do not hesitate to contact me.

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⁴ Note other existing exemptions to the written best interest finding provided by AS 38.05.035(e)(6)(A) - (H).