

**ALASKA STATE LEGISLATURE**  
**SENATE TRANSPORTATION STANDING COMMITTEE**

March 11, 2014

1:36 p.m.

**MEMBERS PRESENT**

Senator Dennis Egan, Chair  
Senator Fred Dyson, Vice Chair  
Senator Anna Fairclough  
Senator Click Bishop  
Senator Hollis French

**MEMBERS ABSENT**

All members present

**COMMITTEE CALENDAR**

SENATE BILL NO. 211

"An Act providing for the Department of Transportation and Public Facilities to hold the surface estate of certain state land; relating to the transfer of certain state land and materials; relating to the lease, sale, or disposal by the Department of Transportation and Public Facilities of rights-of-way, property interests, or improvements; relating to the grant of certain easements over submerged state land to the federal government; relating to the conveyance of land for right-of-way purposes from the Alaska Railroad Corporation to the Department of Transportation and Public Facilities; and providing for an effective date."

- HEARD & HELD

SENATE BILL NO. 178

"An Act relating to the application of the passenger vehicle rental tax; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

**PREVIOUS COMMITTEE ACTION**

BILL: SB 211

SHORT TITLE: STATE LAND AND MATERIALS

SPONSOR(S): TRANSPORTATION

03/07/14           (S)           READ THE FIRST TIME - REFERRALS

03/07/14 (S) TRA  
03/11/14 (S) TRA AT 1:30 PM BUTROVICH 205

#### **WITNESS REGISTER**

DANA OWEN, staff to the Senate Transportation Committee  
Alaska State Legislature  
Juneau, Alaska

**POSITION STATEMENT:** Presented SB 211.

JOHN BENNET, Chief  
Northern Region Right of Way  
Department of Transportation and Public Facilities (DOTPF)  
Juneau, Alaska

**POSITION STATEMENT:** Answered questions about SB 211.

SEAN LYNCH, Attorney  
Department of Law (DOL)  
Juneau, Alaska

**POSITION STATEMENT:** Answered question about SB 211.

DICK MYLIUS, representing himself  
Anchorage, Alaska

**POSITION STATEMENT:** Urged the committee to reject or significantly revise SB 211 as this legislation does not protect the public interest on state lands.

#### **ACTION NARRATIVE**

[1:36:29 PM](#)

**CHAIR DENNIS EGAN** called the Senate Transportation Standing Committee meeting to order at 1:36 p.m. Present at the call to order were Senators Dyson, Fairclough, Bishop, French, and Chair Egan.

#### **SB 211-STATE LAND AND MATERIALS**

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**CHAIR EGAN** announced SB 211 to be up for consideration.

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DANA OWEN, staff to the Senate Transportation Committee, Alaska State Legislature, Juneau, Alaska, explained that they were asked by the Department of Transportation and Public Facilities (DOTPF) and Department of Natural Resources (DNR) to introduce a bill to clarify ambiguity in AS 02, AS 35, and AS 38. The first two put DOTPF in charge of state lands for transportation

infrastructure and public facilities; Title 38 puts DNR in charge of state lands generally.

He said this bill intends to clear up perceived conflicts between the different titles and to improve efficiency without sacrificing any public input. It also clarifies the rules for disposals when DOTPF no longer needs a piece of land for public purposes. The map he passed out to each of them was the map reference in the SAFT-LU Act of 2005, which details all of the parcels affected by section 16 of this bill.

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JOHN BENNET, Chief, Northern Region Right of Way, Department of Transportation and Public Facilities (DOTPF), Juneau, Alaska, explained that SB 211 changes the relationship between the DOTPF and the DNR with respect to the acquisition, management and disposal of lands they require for airports, highways, and public facilities. Considering that 30 percent of the land in Alaska is owned by the state, one can imagine that they often need to acquire them for the materials for building public facilities and other projects. He said the bill repeats itself three times because they are essentially applying the same three primary provisions to all of their authorities.

Essentially the first major provision clarifies that the DOT holds the primary authority to manage the surface estate of its facilities. This relates to the existing rights-of-way for highways, airports and public facilities, which clears up an ambiguity in the law that broadened the question sometimes: who had the lead management role of Alaska lands: the DOTPF or DNR.

The second primary provision of the bill is that three separate statutes across their authorities deal with the disposal of lands that have been deemed excess to the department's needs, but they all have slightly different language and in some cases result in unintended consequences. So, this bill will provide uniform language across the three different authorities.

He explained that the combination of the first two provisions, the disposals and the one that vests surface estate in DOTPF, will actually go to solve some problems that adjoining land owners have had when they have accidentally encroached into the state's right-of-way. For example, some structure was built in a highway easement that DOTPF manages and owns; so they said it could be resolved by vacating the easement, but then they found out that DNR owns the underlying fee estate. So, effectively all they have done is transfer the problem to DNR, and sometimes

their rules make it difficult to resolve. With the two provisions, DOTPF would be able to unilaterally deal with resolving these types of problems.

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The third general provision goes to the acquisition of new lands from DNR for airports, highways, and public facilities. This is modeled on their existing procedure for acquisition of federal lands (BLM and Forest Service lands) for the state's federal aid highway projects. The process provides that Federal Highways has the authority to appropriate BLM and Forest Service lands that are necessary for these projects. They give the agencies four months to comment, and if they haven't made the transfer in that time they will execute the deed to the state of Alaska, a very efficient process for acquisition of lands. That is what they want their relationship with DNR to be.

Beyond that there is another DNR provision in that they also need to acquire materials (sand and gravel) for virtually all of their projects. The process now is complex in that the DOTPF contracts with DNR to acquire the materials (paying for them) currently. The contracts have limited terms and limited quantities; the result is that they are constantly lapsing, requiring reauthorizations that delay their projects. This new provision will recognize that the state-owned materials are appropriate to be used on state-owned infrastructure by a state-owned entity like DOTPF. It makes sense to allow DOTPF to access these state material sites without going through the contracting process.

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MR. BENNET said the bill has a few other provisions; one has to do with the Alaska Railroad (ARRC). From time to time, primarily on large capital improvement projects (CIP), DOTPF needs to acquire a piece of land from the ARRC and they need to acquire it in fee. It cannot transfer title without legislative approval. They believe this to be an unintended consequence in that while the legislature may have wanted to have controls on the Railroad divesting its interests, they did not intend to delay public projects by having a transfer to DOTPF fall under the same umbrella. So, this provision would just allow this transfer of title from the Railroad to DOTPF for public transportation projects and would not require approval of the legislature for that transfer.

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Another section transfers the Happy Valley and Franklin Bluffs Camps, the old TAPS properties from DNR to DOTPF. DOTPF applied for these sites 20 years ago recognizing they were needed for the maintenance and operations of the Dalton Highway and in anticipation of enhanced resource development and construction of the gas pipeline. They have been unsuccessful in obtaining the transfer of these lands because they were also selected by the North Slope Borough as part of the Municipal Entitlement Program. But because of competing interests, neither party has received title to the lands.

Their point of view is that these lands are public lands necessary for public purposes, and that should have priority over competing municipal entitlements. He estimated a third to a half of the municipal entitlement lands will remain available for transfer to the North Slope Borough.

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The final provisions have to do with reciprocal easements between the State of Alaska and the Forest Service in Southeast.

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SEAN LYNCH, Attorney, Department of Law (DOL), Juneau, Alaska, explained that the reciprocal easements in the two federal highway bills back Section 44.07 of SAFT-LU enacts a reciprocal exchange of easements: the State of Alaska received 19 highway and utility easements across the Tongass National Forest and in exchange the federal government received just over 100 submerged land easements for log transfer facilities, to their recreational sites and trail heads. The state and federal government have since exchanged easements, but because of DNR's present regulations, the state easements that were transferred to the federal government have a 55-year limitation. So, the Forest Service has placed a 55-year limitation on the state's highway and utility easements. The state is preparing to develop, and some are close to construction, and the Forest Service has assured us if we removed our 55-year limitation on their state easement over submerged lands they will do the same. So, Section 16 would allow the DNR commissioner to remove the 55-year limitation upon his finding that it's in the best interests of the state.

SENATOR DYSON asked what questions he anticipates critics could raise about this.

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MR. BENNET answered the one provision that had the most concern was the one to transfer the Happy Valley and Franklin Bluffs sites to DOTPF, even though he believes strongly that it is most important they are reserved for public purposes. Clearly they are competing with the North Slope Borough for those lands and so, he would expect some concern on their part.

Also, the focus of bill is on relationship with DNR. He had a hard time understanding why they have such a complex process that allows the state to use state-owned property for state-owned facilities. He wasn't sure where they would get criticism for creating efficiency.

SENATOR DYSON said folks think of DNR as the steward of a lot of public land and public resources and here they are transferring land to the organization that builds things. So, they perhaps taking land from a more protected source and putting it into the exploiters and that it is a backdoor way to getting at mining a lot of gravel and a lot of the public process gets missed. And who knows if the feds will reciprocate on the 55-year deal. Somebody will think their ox got gored, and where was the public hearing process. In streamlining, you've cut the public out of the deal. Does the North Slope Borough know this bill is going through?

MR. BENNET answered he didn't think so.

SENATOR DYSON said it would seem that they would be interested.

MR. LYNCH said the reason this bill was introduced so late is because they worked through every possible angle with DNR. He was right that DNR at its heart is a conservation department, and its decision to do nothing is a safe decision. But for one thing this bill only addresses the transfer of public domain land - the general multi-purpose lands of the State of Alaska. DNR also manages school lands, Mental Health Trust lands, preserves, critical habitat areas, all of which are single purpose government sites, and none of those lands are affected and none of them could be transferred under this bill. This bill would only transfer the multiple use sites.

Most of DOTPF's work is modifying existing facilities: lengthening airports, straightening curves on roads, and that type of thing. Most of the acquisitions are small strips of land, including most of its disposals. When they are done lengthening an airport and need to dispose the other end of the airport, there are small parcel disposals.

People might be concerned about the large projects like the road to Nome. In large parcels this act only exempts DOTPF from the Alaska Lands Act, 38.05, provisions. DNR does its land classifications through 38.04. So, any type of new designation - the road to Nome is a great example - if the DOTPF wants to plan a road to Nome it has to go through that land classification with DNR. So, there is still an entire public process in that classification to set up that right-of-way. Once the legislature has funded construction is when they can go through this acquisition process. Even the exchange of land under this bill, the four-month exchange does have a public notice provision. It becomes a DOTPF engineering decision; they basically set the center line of their ports or highways and the right-of-way parameters are set by regulation or law. DOTPF posts that on the public notice system, like any other state decision and it's open to challenge. These aren't secret no public process deals.

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SENATOR FRENCH asked if this bill changes any permitting requirements for activities to take place on the involved land.

MR. BENNET asked if he was referring to the case of the Happy Valley and the Franklin Bluff transfer where there are existing leases and permits.

SENATOR FRENCH answered that he meant more globally.

SENATOR DYSON interrupted to clarify his point saying that permitting for DNR is pretty tough. The land and the responsibility come to DOTPF and their reduced permitting process.

SENATOR FRENCH said this bill became controversial because it has a huge effect on permitting and they are being sensitive to that. Are there some lurking issues around permitting?

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MR. BENNET said it's different. All the permitting regulations and statutes that DNR operate under once they transfer the land won't apply to DOTPF, because DOTPF has its own authorities for permitting within highways and airports and such, and in most respects, those permitting constraints are through the federal funding agencies and they really crack the whip with compliance. Permitting processes are available for those for different types of things: in highways it may be signs and driveways, at certain

encroachments. DOTPF has permitting processes but they are just different.

MR. LYNCH said Mr. Bennet just explained the DOTPF permitting; the DNR permitting (addressed in section 1, the airport provision that repeats itself in highways and public facilities in sections 6 and 9. Page 2, line 3, clearly states that DNR retains its entire permitting authority upon the terms and conditions of DOTPF. So, if there is a mineral exploration or an oil and gas exploration lease and it goes for an entire tract that includes part of the airport, that permit will stay. Nothing in this Act would change that permit, but if they wanted to drill at the end of the runway, under this Act, now DOTPF has primary authority for the end of the runway, so they need DOTPF height restrictions for operations of the airport, and DOTPF would condition the permit in that way.

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SENATOR BISHOP said they have to permit highways with federal funds the same way as always and there are over 40 permits, both federal and state, that DOTPF has to jump through before they can execute the project. So, that's a load right there. It's interesting that we are copying federal law for a change. The TAPS corridor material sites will have to be extended, and this bill would streamline that?

MR. BENNET answered yes; this bill would streamline the process for material sites on DNR lands.

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SENATOR BISHOP said he was familiar with Happy Valley and Franklin Bluffs and he knew there were operators working out of there with aircraft and guide pack horses and would they be afforded the same courtesies they have now?

MR. BENNET answered yes; they recognize the existing DNR permits and leases there and the bill provides that those will be transferred over to the airport leasing program who are very familiar with permitting those types of activities.

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DICK MYLIUS, representing himself, Anchorage, Alaska, urged the committee to reject or significantly revise SB 211 as this legislation does not protect the public interest on state lands and section 16 may be unconstitutional. As background he said he had worked in the DNR's Division of Mining, Land and Water for 29 years where he dealt with many of the issues in this bill and

agreed that state land should be used whenever possible to meet the transportation facility needs of Alaskans and that the process to transfer state land from DNR to DOTPF is sometimes cumbersome. He was also aware that DOTPF is sometimes troubled by DNR decisions regarding land and the conditions DNR may attach to the land.

However, this legislation removes any discretionary ability by DNR to address public concerns, competing resource interests, and even some valid claims by other parties to the land in question. The bill says what DOTPF wants DOTPF gets: if DOTPF asks the commissioner of DNR to transfer a parcel of state land for an airport, road, gravel pit, or other use, DNR will transfer the land within four months. The language in Sec. 3, 5 and 8 all say DNR "shall" transfer these lands that are selected by DOTPF. This includes gravel or other materials on state land. This a problem because state land isn't just for transportation uses, and sometimes sites selected by DOTPF have prior competing land claims or public interests.

MR. MYLIUS said the North Slope Borough has existing selections at Happy Valley and Franklin Bluffs and existing selections on gravel pits near the airport at Dead Horse. The legislation directs DNR to transfer these parcels to DOTPF if they ask for them. Even if the intent of DNR or the legislature is to reject those municipal selections of these lands, four months (in the bill) is not adequate time for DNR to issue a decision to reject the North Slope Borough selection, allow for the required public notice and comment, and resolve likely appeals from the municipal government. The state has obligations to fulfill municipal entitlements of other municipalities as well, including some that have interests in lands that DOTPF has an interest in. For example, the Municipality of Anchorage has outstanding rights to certain state lands in an agreement that was reached between DNR and the Municipality many years ago. Some of these parcels are adjacent to the Anchorage International Airport that are not currently available to the Municipality but someday could be. This bill could potentially override some of those provisions.

In addition to these concerns, under the existing process DNR looks at adjacent land uses and access concerns prior to transferring land to DOTPF. This bill would eliminate this process. For example DOTPF applied to DNR for a gravel pit at Coldfoot that was adjacent to a residential area, and DNR worked with them to either find a better site or had the option of conditioning the use of the gravel pits by requiring DOTPF to

retain buffers or restrict hours of use for the site. DOTPF was not particularly receptive to these concerns, but because DNR was the land manager and had to go through a public process, it was able to deal with the local resident's concerns.

Under the existing process, DNR can reserve easements for public use through DOTPF sites to ensure that access is not blocked by public facilities or even condition transfers to DOTPF with the requirement to provide alternative access. Under SB 211 it is doubtful that DNR could attach such conditions to the land transfer.

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Finally, section 16 requires special attention by the committee. Mr. Mylius said the reciprocal easements referred to stem from a little-known provision in the SAFT-LU bill Section 16 referred to MAP 92337; this map shows approximately 135 public access and log transfer sites on state tidelands that were to be transferred to the Forest Service in return for a number of transportation and corridor easements across Tongass National Forest lands. Several years ago, DNR, DOTPF, and the Forest Service agreed on a public process to establish the easements that would be transferred from the state to the Forest Service. To date, according to DNR 66 of the 135 sites have been approved but another 67 have not.

Many of these easements that have not been processed are potential facilities, and some of these are important public access sites that should remain in the state's hands and have Forest Service management. Also, the process required the Forest Service to submit an actual application to DNR to better define the area they wanted as MAP 92337, and they have not applied to DNR for these 67 unprocessed sites. His concern about the constitutionality is that this legislation appears to transfer those remaining 67 sites to the Forest Service with no public notice as required by Article 8, Section 10 of the Constitution.

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Finally, Mr. Mylius said this legislation has two zero fiscal notes but it is hard to believe there is no cost to issue these envisioned land transfers, especially the easements under Section 16. DNR has been trying to reduce its backlog of work and this adds a bunch of work with no additional resources to address it.

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SENATOR DYSON said he was in favor or what he was trying to do and guessed that Mr. Bennet would have some good answers.

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MR. BENNET responded that this bill protects all valid existing rights with regard to existing permits, leases, and existing rights issued by DNR. With regard to reducing the administrative overhead, they are saying that DNR by virtue of transferring these public domain lands to single purpose government purposes - these transportation uses - they are not required to go through this multiple use management process, and this is the point he differed from Mr. Mylius on.

MR. LYNCH pointed out that section 3 on page 2, lines 29-30, states the title that is being transferred from DNR to DOTPF is subject to valid existing rights, and that is repeated in the other sections.

On the constitutionality issue of the easements or the workload of the easement transfers, DNR representatives could talk to the easements that have been issued, but Mr. Lynch said he understood that the easements that were transferred with the log transfer facilities required a written recorded easement, but a DNR determination was made years back that trailheads and cabins were public access easements and the Forest Service needed to record an easement for them. That's why half are recorded and half are not. So, the exchange of easements has actually been completed and this would allow the DNR commissioner to remove the 55-year limitation.

CHAIR EGAN found no questions for Ed Fogels.

SENATOR FAIRCLOUGH asked why the state put a 55-year limitation and why it is not valid today.

MR. LYNCH explained that the Alaska Lands Act envisions the transfer of interests from the state to a third party, which is really this bill's broader purpose, and the Alaska Lands Act is a poor fit for interagency land transfers. That 55-year limitation is so the state does not divest its interest, because there may be another future use that is required under the sustainable yield concept in the Constitution. The reason it does not work in this instance is because of the limitation it puts on the state. If we build roads and utility lines connecting Ketchikan to Shelter Cove, the life of the road could exceed 55 years, so a longer interest is needed for those infrastructure improvements.

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SENATOR FAIRCLOUGH said another piece of legislation was circling that had to do with Native land allotments - so, subject to "valid existing rights" - page 2, line 29 & 30. She was an amend on that bill because it says "all" and she was worried about mandating something they couldn't follow through on and this is just another layer on top of those transfers.

SENATOR DYSON said regarding the 55-year provisions on easements that DNR is working on establishing historic trails and he hears anecdotally but consistently that it is the state's burden to prove to the feds that those existing right-of-ways are there. The feds seem to not be sympathetic in granting them and are more than zealous in forcing the state to go a long ways in establishing them. Do any of these easements fall into that category?

MR. LYNCH answered the easements on the map in their packets have been enacted by Congress. The odd quirk is they told the Forest Service you "shall" give these easements to the state and Congress did not place a 55 year limitation on them. The reciprocal easement was a Forest Service determination based on what Congress granted. But the state's answer is no.

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SENATOR FRENCH asked why just exempt just DOTPF in section 14, the Railroad provision that exempts DOTPF from needing legislative approval of land transfers.

MR. LYNCH explained that the purpose of this provision is when the legislature directs DOTPF to improve the Fairbanks airport, for instance, there is an appropriation and a direction tied to it. And DOTPF requires fee title because of the FAA's security requirements. DOTPF had to purchase it from the Railroad and the Railroad had to come to the legislature and get that conveyance of land authorized. He didn't know of another other state agency that is in the same position with the legislature directing them to deliver a project.

SB 211 was held in committee.

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CHAIR EGAN thanked everyone for their work and adjourned the Senate Transportation Standing Committee at 2:22 p.m.