

# Alaska State Legislature

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## REPRESENTATIVE MIKE CHENAULT SPEAKER OF THE ALASKA STATE HOUSE

February 8, 2012

Chairman Seaton and Chairman Feige:

The House Resources Committee members posed a number of questions regarding HB 9 at a hearing Feb. 6, and requested responses prepared for the next scheduled hearing, Feb. 8. This memorandum is in response to those questions.

- 1. Provide a comparison of the authorities granted to the Alaska Gasline Development Corporation (AGDC) in HB 9 with those granted under the Alaska Gasline Inducement Act (AGIA), and note which, if any, are authorities unique to the AGDC and AGIA projects.***

In a broad sense, AGIA and AGDC are similar in that both projects may exercise eminent domain; AGDC acts as a coordinator of an instate project much as the State Pipeline Coordinator's Office serves as such for an AGIA project; both projects enjoy expedited permitting processes; both provide confidentiality protecting commercial negotiations or proprietary work products; and both limit judicial review claims in an attempt to prevent unwarranted delays in state-sanctioned projects.

This cursory comparison should not be construed as a thorough, legal analysis of AGIA and HB 9. The sponsor would suggest the committee request such a review from parties expert in AGIA and the applicable laws.

- 2. Does HB 9 contain a date or similar benchmark requiring AGDC to return to the Legislature with its findings on planning and developing an instate gasoline?***

HB 9 does not specifically include a date certain by which AGDC must return to the Legislature. However, AGDC is subject to the Executive Budget Act; as a public corporation, AGDC is unable to spend funds without an appropriation. Without a significant appropriation, AGDC would lack the means to sanction a project and proceed with construction.

House Bill 369, which passed in 2010, required AGDC to deliver a project plan to the Legislature by July 1, 2011. AGDC met this schedule. In addition, AGDC provides monthly status reports to the Legislature.

**3. HB 9 grants AGDC the ability to use eminent domain. What does this authority do in practical terms?**

Eminent domain is a power granted under 09.55.240 (see attached), allowing eminent domain to be exercised for most public uses, including uses authorized by governments and, per 09.55.240 (a) (13), “for the location of pipelines for gathering, transmitting, transporting, storing, or delivering natural or artificial gas or oil or any liquid or gaseous hydrocarbons, including, but not limited to, pumping stations, terminals, storage tanks, or reservoirs, and related installations.”

HB 9, in Section 1, Lines 15-16, explicitly ensures AGDC will be able to exercise this power as provided in 09.55.240-460. This legislation does not expand eminent domain.

**4. Section 4, lines 24-25 of HB 9 address duplication of state efforts. Has duplication of efforts, such as ownership of studies, been an issue, or is it anticipated to be an issue?**

AGDC is working diligently to avoid duplicating work funded by other state money. The sponsors believe efficiency with state resources is important, and will offer an amendment to this paragraph retracting the deletion, but keeping the change replacing the “Joint In-State Gasline Development Team” with “Alaska Gasline Development Corporation.”

**5. Would waiving costs or rental fees for a lease or right-of-way provided by the Department of Natural Resources require a fiscal note? If not, how would the costs incurred by the agency be covered?**

Generally, the sponsors suggest that a fiscal note should come from the department affected. However, AGDC is now paying the state Department of Natural Resources \$189,000 per year for a right-of-way lease; Section 6 would eliminate or reduce that charge. Additionally, as discussed in committee on Feb. 6, the sponsors are developing an amendment to Section 6 (g).

**6. Section 6 (e) of HB 9 allows AGDC to enter into confidentiality agreements as needed to acquire or provide information. Information that falls under such an agreement is not subject to disclosure under AS 40.25.110. Is this confidentiality provision also contained in AGIA?**

While AGIA has some confidentiality provisions, the primary function is to protect proprietary information of private interests, provided to the state for informational and not decision-making purposes. Under AGDC, the protection primarily becomes one of protecting AGDC and private parties it engages with in commercial negotiations and other matters. The role of the state is different under AGIA than under AGDC.

Under AGIA, confidentiality is granted for certain information provided in pursuit of the AGIA license:

Sec. 43.90.150. Proprietary information and trade secrets.

(a) At the request of the applicant, information submitted under this chapter that the applicant identifies and demonstrates is proprietary or is a trade secret is confidential and not subject to public disclosure under AS 40.25. After a license is awarded, all information submitted by the licensee, retained under this chapter, and not determined by the commissioners to be a proprietary or trade secret shall be made public.

(b) If the commissioners determine that the information submitted by the applicant is not proprietary or is not a trade secret, the commissioners shall notify the applicant and return the information at the request of the applicant.

And for certain information provided to the commissioners:

Sec. 43.90.220. Records, reports, conditions, and audit requirements.

(a) A licensee shall maintain complete and accurate records of all expenditures and commitments of state money received under this chapter, including receipts and records showing the payment or cost of purchased items and services, the names and addresses of the sellers and service providers, and the dates of service or delivery.

(b) Upon reasonable notice, the commissioners may audit the records, books, and files of the entity receiving the state money or making the expenditures and commitments of money received from the state under this chapter.

(c) The commissioners may do the following with respect to information relating to the project: conduct hearings or other investigative inquiries; compel the attendance of witnesses and production of documents; and require the licensee to furnish information in paper copy or electronic format.

(d) After a license has been issued and until commencement of commercial operations of a natural gas pipeline, the licensee shall allow the commissioners to

(1) have a representative present at all meetings of the licensee's governing body or bodies and equity holders that relate to the project;

(2) receive all relevant notices and information when and as sent to the governing body or bodies and equity holders;

(3) enjoy the same access to information about the licensee as the governing body members and equity owners receive; and

(4) receive relevant reports or information from the licensee that the commissioners reasonably request.

(e) All proprietary information, privileged information, and trade secrets received by the commissioners or their representative under (d) of this section are not subject to public disclosure under AS 40.25.

(f) A licensee shall maintain the records and reports required under this section for seven years from the date the licensee receives state money under this chapter.

**7. *Is there a provision, similar to one in AGIA, that requires a body of work developed under AGDC be remanded to the state in the event a project is not sanctioned or is unable to attract sufficient customers?***

As a state corporation, all work product and assets developed by AGDC belong to the state. Depending on the circumstances, AGIA provides for the transfer of work by the private-sector licensee to the state either at no cost to the state, or at some level of cost, per AS 43.90.200:

Sec. 43.90.200. Certification by regulatory authority and project sanction.

(a) A licensee that is awarded a certificate of public convenience and necessity from a regulatory agency with jurisdiction over the project shall accept the certificate on or before the date the order granting the certificate is no longer subject to judicial review.

(b) If the licensee has credit support sufficient to finance construction of the project through ownership of rights to produce and market gas resources, firm transportation commitments, or government financing, the licensee shall sanction the project within one year after the effective date of the certificate of public convenience and necessity issued by the regulatory agency with jurisdiction over the project.

(c) If the licensee does not have credit support sufficient to finance construction of the project through ownership of rights to produce and market gas resources, firm transportation commitments, or government financing, the licensee shall sanction the project before the later of

(1) two years after the effective date of the certificate of public convenience and necessity issued by the regulatory agency with jurisdiction over the project; or

(2) five years after the close of the first binding open season of the project.

(d) If the licensee fails to sanction the project as required under this section, the licensee shall, upon request by the state,

(1) seek approval from the Federal Energy Regulatory Commission or the Regulatory Commission of Alaska, as applicable, to abandon and transfer the certificate to the state or the state's designee; and

(2) assign to the state or the state's designee all engineering designs, contracts, permits, and other data related to the project that are acquired by the licensee during the term of the license before the date of the abandonment or transfer.

(e) The transfer and assignments under (d) of this section as a result of failure to comply with (a) or (b) of this section are at no cost to the state or the state's designee. A transfer under (c) of this section shall be subject to the state's payment to the licensee of the net amount of expenditures incurred and paid by the licensee that are qualified expenditures for the purposes of AS 43.90.110.

(f) In this section, "effective date of the certificate of public convenience and necessity" means the earlier of the date the order granting the certificate is no longer subject to judicial review, or the date the licensee accepts the certificate.

History - (Sec. 1 ch 22 SLA 2007)

8. *The Alaska Natural Gas Development Authority has engaged in work related to a right-of-way between Glennallen and Palmer. Is there an asset, such as a right-of-way lease, and if so, will that lease be transferred to AGDC upon passage of HB 9?*

Alaska Natural Gas Development Authority assets remain with the Authority. However, under HB 9, the AHFC Board, as directors of ANGDA and AGDC, would have the ability to transfer assets from one subsidiary to another.

The right-of-way lease ANGDA secured is conditional, and as such, may require significant additional time and investment to upgrade to an unconditional lease. Consultation with the State Pipeline Coordinator's Office (SPCO) clarified that a conditional lease does not grant an interest in state land, but is a 'reservation' allowing 10 years to convert to a non-conditional lease. A conditional lease cannot be renewed. In further clarification, ANGDA's conditional lease does not technically follow the Richardson Highway, but begins in Palmer and terminates in Glennallen. ANGDA began work on a further segment between Glennallen and Delta Junction, but to the SPCO's knowledge, never acquired the right to state land for that segment.

9. *What are the potential impacts to the state and local governments if state resources, such as land, water and gravel as specified in Section 6, of HB 9, are provided to an AGDC project at no cost and the gasoline includes commercial gas exports?*

The sponsors expect an amendment under development to Section 6, (g), of HB 9 to address this concern.

10. *Regarding HB9 Section 12, what are the existing timelines for judicial review?*

Judicial review of decisions by commissioners on right-of-way leases is already limited in statute:

Sec. 38.35.200. Judicial review of decisions of commissioner on application.

(a) An applicant or competing applicant or a person who has a direct financial interest affected by the lease who raises objections within 60 days of the publication of notice under AS 38.35.070 are the only persons with standing to seek judicial review of a decision of the commissioner under AS 38.35.100.

(b) The only grounds for judicial review of a decision of the commissioner are

- (1) failure to follow the procedures set out in this chapter; or
- (2) abuse of discretion so capricious, arbitrary, or confiscatory as to constitute a denial of due process.

Sections 12 and 13 in HB 9 work together to add a new subsection (c) incorporating the judicial review process created for the Trans-Alaska Pipeline System. Judicial review is already statutorily limited to 60 days per the Right-of-Way Leasing Act (AS 38.35.200); the new Section 13 (c) defines the jurisdiction for a claim and prohibits a court from issuing injunctive relief that would delay project progress while a claim is heard. Section 13 (c) also specifies a 60-day window for claims to be filed alleging denial of rights under the state Constitution.

**11. *What is the anticipated impact to municipalities associated with Section 6, HB 9, exempting an AGDC project from state and municipal property taxes during construction? What are the anticipated impacts to municipalities during a pipeline construction phase?***

At this point, without final project engineering and costs, it is difficult to determine the potential impacts. Additionally, municipal taxes could change between now and a taxable period. The sponsors have requested a legal opinion on what pipeline project assets and activities are taxable, and will provide additional information to the committee as it becomes available.

**12. *Provide an AGDC analysis of international fiscal systems consultant Pedro VanMeurs' assessment of an Alaska gas export project, as presented in a seminar to legislators in December 2011.***

This request will take additional time, as AGDC was not present at VanMeurs' presentation and has no access to the assumptions that went into the original analysis.

**13. *Be prepared to discuss Section 25 of HB 9, exempting from Regulatory Commission of Alaska review any agreement or amendment to an agreement entered into by AGDC with a public utility, for as long as debt is outstanding on an AGDC pipeline.***

AGDC has indicated it is prepared to discuss this at the committee's pleasure.

Eminent Domain:

Sec. 09.55.240. Uses for which authorized; rights-of-way.

(a) Except as provided in (d) and (e) of this section, the right of eminent domain may be exercised for the following public uses:

(1) all public uses authorized by the government of the United States;

(2) public buildings and grounds for the use of the state and all other public uses authorized by the legislature of the state;

(3) public buildings and grounds for the use of an organized or unorganized borough, city, town, village, school district, or other municipal division, whether incorporated or unincorporated; canals, aqueducts, flumes, ditches, or pipes conducting water, heat, or gas for the use of the inhabitants of an organized or unorganized borough, city, town, or other municipal division, whether incorporated or unincorporated; raising the banks of streams, removing obstructions from them, and widening, deepening, or straightening their channels; and roads, streets, and alleys, and all other public uses for the benefit of an organized or unorganized borough, city, town, or other municipal division whether incorporated or unincorporated, or its inhabitants, which may be authorized by the legislature;

(4) wharves, docks, piers, chutes, booms, ferries, bridges of all kinds, private roads, plant and turnpike roads, railroads, canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming land, and for floating logs and lumber on streams not navigable, and sites for reservoirs necessary for collecting and storing water;

(5) roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines, and sites for reservoirs necessary for collecting and storing water;

(6) private roads leading from highways to residences, mines, or farms;

(7) telephone lines;

(8) fiber-optic lines;

(9) telegraph lines;

(10) sewerage of an organized or unorganized borough, city, town, village, or other municipal division, whether incorporated or unincorporated, or a subdivision of it, or of a settlement consisting of not less than 10 families, or of public buildings belonging to the state or to a college or university;

(11) tramway lines;

(12) electric power lines;

(13) for the location of pipelines for gathering, transmitting, transporting, storing, or delivering natural or artificial gas or oil or any liquid or gaseous hydrocarbons, including, but not limited to, pumping stations, terminals, storage tanks, or reservoirs, and related installations.

(b) The use of water for mining, power, and municipal purposes and the use of pole and power lines for telephone and telegraph wires, for aerial trams, and for the transmission of electric light and electric power, by whomever utilized, are each declared to be beneficial to the public and to be a public use within the provisions of AS 09.55.240 - 09.55.460. Rights-of-way across private property when they are necessary for the operation of the mine or other project in connection with which it is intended to be used may be condemned in the manner as for any other condemnation. The right-of-way may extend only to a right-of-way along, upon, and across the surface of the land to be condemned and to a strip of the land of sufficient width to permit the construction on the land of a ditch, flume, pipeline, canal, or other means of conveying water as is adequate for the purposes intended, for the setting of poles or the construction of towers upon which to string wires for telephone and telegraph lines and lines for the transmission of electric light or power for the operation of aerial trams, and to permit maintaining the lines and keeping them in repair.

(c) [Repealed, Sec. 15 ch 59 SLA 1982].

(d) The power of eminent domain may not be exercised to acquire private property from a private person for the purpose of transferring title to the property to another private person for economic development purposes. This subsection does not apply to transfers of private property to another private person if one or more of the following apply:

(1) the landowner consents, either before or after a condemnation proceeding has been filed, to the use of the property for a private commercial enterprise or other economic development;

(2) the private person has been expressly authorized by statute either to exercise the power of eminent domain or to receive an interest in land acquired by the exercise of eminent domain;

(3) the transferred property is used for a private way of necessity to permit essential access for extraction or use of resources;

(4) the acquisition is used, in part, for leasing property to a private person that occupies a portion of public property or a public facility, including a private business that occupies a portion of an airport, port, or public building;

(5) the property is transferred to a person by oil and gas lease under AS 38.05.180;

(6) the property is transferred to a common carrier.

(e) The power of eminent domain may not be exercised for the purpose of developing a recreational facility or project if the property to be acquired includes an individual landowner's personal residence or recreational structure or that portion of an individual's property attached to and within 250 linear feet of an individual landowner's personal residence or recreational structure unless the landowner consents either before or after a condemnation proceeding has been filed.

(f) Notwithstanding the limitations on the power of eminent domain in (d) and (e) of this section, the legislature may approve the exercise of eminent domain against private property in an Act, the subject of which is limited to the transfer of the property for a purpose otherwise restricted under (d) or (e) of this section.

(g) The power of eminent domain may only be delegated by statute.

(h) In this section,

(1) "common carrier" has the meaning given in AS 04.16.125;

(2) "economic development" means development of property for a commercial enterprise carried on for profit or to increase tax revenue, tax base, or employment;

(3) "personal residence" means a structure that is the dwelling place of an individual that

(A) must be used by the owner or beneficiary of a trust holding legal title to the structure as a dwelling unit, as opposed to a rental, storage, or other commercial space;

(B) must be inhabited by the owner, prior owner, or beneficiary of a trust holding legal title to the structure for at least 90 days during the 12-month period immediately before the date an action for the exercise of the power of eminent domain is filed;

(C) must constitute an ordinary home for general living purposes; and

(D) may not have been constructed, placed, or occupied for the purpose of avoiding eminent domain proceedings;

(4) "private person" means a person that is not a public corporation as defined in AS 45.77.020 or a government as defined in AS 11.81.900;

(5) "recreational facility or project"

(A) means a facility or project, the primary purpose of which is recreational;

(B) includes a park, trail or pedestrian pathway, greenbelt, amusement park, fresh water boat harbor, sports facility, playground, infrastructure, or other facility related to or in support of an indoor or outdoor recreational facility or project;

(C) does not include

(i) a highway, sidewalk, or path within the right-of-way of a highway;

(ii) a path, trail, or lane used as a safe route to a school program;

(iii) a wayside or rest stop;

(iv) a development, the primary purpose of which is not recreational, such as a path, trail, or lane developed to reduce congestion, or to encourage use of an alternate, gas-saving mode of transportation;

(v) a path or trail to or between villages or from a village to a facility or resource;

(vi) a stormwater retention or treatment facility or wetland, habitat, or other acquisition required to obtain a permit for a highway, airport, or other public project;

(vii) a taking under AS 19.05.110, 19.05.120, AS 19.22.020, AS 27.21.300, AS 35.20.040, 35.20.050, or AS 41.35.060;

(viii) a taking not prohibited by law before January 1, 2007, under AS 41.21; and

(ix) a path, trail, road, or site for which no reasonable alternative exists and which is necessary to preserve or establish public access to or along publicly owned land or water, if the use of the path, trail, road, or site itself is for transportation to or to facilitate use of publicly owned land or water;

(6) "recreational structure" means a permanent structure that

(A) is used by the owner or beneficiary of a trust holding legal title to the structure as a dwelling for seasonal recreational purposes, as opposed to a rental, storage, or other commercial space; and

(B) may not have been constructed, placed, or occupied for the purpose of avoiding eminent domain proceedings.