

Chapter 38.35. RIGHT-OF-WAY LEASING ACT

Cross References -

For Alaska Gasline Inducement Act, see AS 43.90.

Administrative Code -

For pipeline right-of-way leasing, see 11 AAC 80.

Decisions -

Applied in ARCO Pipeline Co. v. 3.60 Acres, More or Less, 539 P.2d 64 (Alaska 1975).

Sec. 38.35.010. Legislative declaration of policy.

(a) The natural resources of this state in crude oil and natural gas and in its land for transportation of these resources and their products by pipeline toward markets both in and out of the state are capable of making a significant contribution to the general welfare of the people of this state. It is the policy of this state that the development, use, and control of a pipeline transportation system be directed to make the maximum contribution to the development of the human resources of this state, the increase in the standard of living for all of its residents, the advancement of existing and potential sectors of its economy, the strengthening of free competition in its private enterprise system, and the careful protection of its incomparable natural environment.

(b) The State of Alaska reserves unto itself all rights, powers, privileges, and immunities not preempted by federal interstate commerce laws and regulations in the right-of-way leasing of any state land for pipeline construction, transmission, or operation within its boundaries.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 1 ch 3 FSSLA 1973)

Collateral Refs -

63C Am. Jur. 2d, Public Lands, Sec. 37, 53 to 55, 74, 111.

73B C.J.S., Public Lands, Sec. 94-98.

Sec. 38.35.015. Powers of the commissioner.

The commissioner has all powers necessary and proper to implement the policy, purposes, and provisions of this chapter, so as to subserve, as the exercise of reasoned discretion determines, the public interest, convenience and necessity, including but not limited to

- (1) granting leases of state land for pipeline right-of-way purposes;
- (2) leasing, purchasing, or otherwise acquiring (including condemning by declaration of taking) easements or other interests in land in this state for the purpose of utilizing or granting leases of the land, easements, or interests for pipeline right-of-way purposes;
- (3) purchasing interests in pipelines in accordance with options included in right-of-way leases;
- (4) investigating any matters concerning any lessee with a view to assuring compliance by it with its right-of-way lease, this chapter, and any other applicable state or federal law;
- (5) developing from time to time and maintaining a comprehensive master plan for pipeline transportation development;
- (6) developing and promoting programs to foster efficient, economical, and safe pipeline transportation services in the state;
- (7) coordinating the activities of the commissioner under this chapter with the transportation and other relevant activities of other public agencies and authorities;
- (8) constructing, extending, enlarging, improving, repairing, acquiring, operating, or engaging in transportation, service, or sale by any pipeline or providing for these by contract, lease, or other arrangement on those terms that the commissioner may consider necessary, convenient, or desirable with any agency, corporation, or person, including but not limited to any carrier or any state agency, when the commissioner determines that a lessee carrier is not willing to undertake and complete the action within a reasonable time, and to sell, lease, grant, and dispose of any property constructed or acquired in the exercise of this power.

History -

(Sec. 3 ch 72 SLA 1972; am Sec. 25 - 27 ch 3 FSSLA 1973; am Sec. 38 ch 127 SLA 1974)

Revisors Notes -

Formerly AS 38.05.020(c). Renumbered in 1984.

Decisions -

Construction of state lease provision reserving right to grant right-of-way. - Provision in a lease issued by the State of Alaska, division of lands, expressly reserving the right to grant an easement or right-of-way across the leased property was construed to include an interagency transfer of a right-of-way to the Department of Transportation and Public Facilities. *Wessells v. State, Dep't of Hwys.*, 562 P.2d 1042 (Alaska 1977).

Sec. 38.35.017. Limitation on leases in or adjacent to the Beaufort Sea.

(a) Consistent with and in furtherance of the statements of general state policy guiding resource development set out in art. VIII, sec. 1, Constitution of the State of Alaska, that the resources of the state be developed "by making them available for maximum use consistent with the public interest" and in art. VIII, sec. 2, Constitution of the State of Alaska, directing that provision shall be made by the legislature for "the utilization, development, and conservation of all natural resources belonging to the State . . . for the maximum benefit of its people," and consistent with and in furtherance of the general legislative declaration of policy for this chapter set out in AS 38.35.010, it is the policy of this state that the overall strategy for development, use, and control of a pipeline or pipelines to develop the state's substantial North Slope natural gas resources be directed

(1) to enhance the standard of living of state residents by

(A) ensuring that, in conjunction with out-of-state market driven commercial demand for North Slope natural gas, state residents and businesses will have access, directly or indirectly, to that portion of the gas that will meet the reasonably foreseeable in-state demands for it, including substitution of the North Slope natural gas for depleting gas reserves in Southcentral Alaska in order to maintain a vital domestic and industrial energy source, and ensuring that the pipeline or pipelines for the transportation of North Slope natural gas will be designed and located to be responsive to these requirements;

(B) making the maximum contribution to the development of job opportunities in this state by

(i) providing direct short-term construction and long-term operation- and maintenance-related employment on the pipeline or pipelines, to the end that the resources be developed with qualified contractors and firms in this state for work to be performed, including the fabrication and installation of required facilities, and that state residents be employed, consistent with law; for purposes of this sub-subparagraph, a person is considered a resident if the person is physically present in the state with the intent to remain in the state indefinitely and has a home in the state, and a contractor or firm is considered as qualified if the contractor or firm qualifies as an Alaska bidder under AS 36.30.170(b); and

(ii) providing necessary support services; and

(C) adding significant long-term property value to the tax base of the state and local governments, thereby providing the means to support public education, public health, transportation, and other essential state and local government projects and services;

(2) to ensure that the design, location, and construction of a pipeline or pipelines for delivery of North Slope natural gas to North American markets through connection to the North American natural gas pipeline network enhance opportunities for implementing gas deliveries using alternative technologies and the construction of other pipelines to deliver North Slope natural gas to foreign and domestic markets; and

(3) to ensure construction of the pipeline or pipelines consistent with careful protection of the state's natural environment, with minimum environmental degradation, to the greatest extent possible, and with protection of fish, wildlife, and biotic resources for the use of persons who depend upon them

by using available transportation infrastructure to initiate and complete project construction and maintenance and by avoiding duplication of facilities.

(b) Consistent with the legislative policy and goals set out in (a) of this section, the commissioner may not grant a lease across state land that is in or adjacent to the Beaufort Sea for pipeline right-of-way purposes to authorize construction and operation of a natural gas pipeline following a "northern" or "over-the-top" route running east from the North Slope to Canada's Mackenzie River Valley, then south to link to existing pipeline networks to transport North Slope natural gas to North American markets.

(c) The limitation on leasing set out in (b) of this section does not apply on and after the date on which a natural gas pipeline following a "southern" route that parallels the Trans Alaska Pipeline System and the Alaska Highway to transport North Slope natural gas to North American markets or Alaska tidewater for delivery to foreign and domestic markets has been completed and has begun operation.

History -

(Sec. 1 ch 29 SLA 2001)

Sec. 38.35.020. Grant of right-of-way lease.

(a) Rights-of-way on state land including rights-of-way over, under, along, across, or upon the right-of-way of a public road or highway or the right-of-way of a railroad or other public utility, or across, upon, over, or under a river or other body of water or land belonging to or administered by the state may be granted by noncompetitive lease by the commissioner for pipeline purposes for the transportation of oil, products, or natural gas under those conditions prescribed by law or by administrative regulation. Except to the extent authorized by an oil and gas lease, a gas only lease, or an oil and gas or gas only unit agreement approved by the state, no person may engage in any construction or operation of any part of an oil, products, or natural gas pipeline, which in whole or in part is or is proposed to be on state land unless that person has obtained from the commissioner a right-of-way lease of the land under this chapter.

(b) The commissioner may by regulation exempt the construction or operation of field gathering lines or any reasonable classification of them from the requirement of a right-of-way lease under this chapter.

(c) The commissioner may provide in a lease issued under this section that a lessee may, with the approval of the commissioner, use materials from state land when necessary to protect state land and resources from the dangers or hazards resulting from damage caused by a pipeline disaster or emergency. If the commissioner approves the use of state materials under this subsection, the materials remain the property of the state until the material is sold to the lessee in accordance with the provisions of the lease. However, the approval does not transfer responsibility for clean up of the materials to the state.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 2 ch 3 FSSLA 1973; am Sec. 2 ch 119 SLA 1986; am Sec. 47 ch 49 SLA 2004)

AG Opinions -

The lease conversion provisions enacted by 1977 legislation (Sec. 12, 13, ch. 138, SLA 1977, as amended by Sec. 21, ch. 182, SLA 1978) applied only to those leases entered into under the substantive statutory provisions which were amended by the 1977 legislation. Hence, substantive amendments to AS 38.05 could not be applied to a lease which was not authorized by the leasing provisions of AS 38.05, but rather by the leasing provisions of this chapter, and the state was not estopped from challenging the validity of the terms of a wrongfully converted lease. December 10, 1985, Op. Att'y Gen.

Sec. 38.35.030. Abandonment, reduction, or impairment of service of pipeline.

A lessee may not abandon any portion of a pipeline that is subject to a lease granted under this chapter, or operation or transportation, service, or sale by it, or reduce or impair service, except in accordance with the terms of the lease or AS 38.35.040.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 3 ch 3 FSSLA 1973)

Sec. 38.35.040. Temporary or emergency service or temporary abandonment, reduction, or impairment of service by lessee.

The commissioner may, either upon a request made in the form required by regulation, or in the exercise of discretion without request, authorize or require temporary or emergency rendering of service or temporary or emergency abandonment, reduction, or impairment of service by a pipeline of a lessee without compliance with AS 38.35.050 - 38.35.100. Nothing in this section prevents a carrier from temporarily suspending operations in the event of an emergency which threatens public health or safety; however, notice shall be given the commissioner as soon as possible.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 4 ch 3 FSSLA 1973)

Sec. 38.35.050. Applications for right-of-way leases.

(a) A person or persons desiring to own a pipeline which is proposed to be located in whole or in part on state land, shall apply for a noncompetitive right-of-way lease of the state land.

(b) Applications under (a) of this section shall be made in a form and manner prescribed by regulation, and shall include any and all data, information, plans, and exhibits which the commissioner determines are necessary to prepare the analysis required by AS 38.35.080 and to make a decision under AS 38.35.100.

(c) Any amendment to an application filed under this section that constitutes a substantial change in the application is subject to all provisions of this chapter applying to an original application. For purposes of this subsection,

(1) an amendment constitutes a substantial change in the application only if the amendment proposes

(A) a net increase in the amount of state acreage to be leased for the right-of-way that exceeds by at least 10 percent the amount of the acreage in the applicant's original application;

(B) a change in the design of the pipeline that would use less effective environmental or safety mitigation measures or less advanced technology than proposed in the original application; or

(C) a fundamental change in the general route, which would include the origin or terminus, as set out in the original application;

(2) in calculating the percentage increase in acreage under (1)(A) of this subsection, each of the following must be excluded:

(A) the acreage attributable to an amendment of a right-of-way originally issued by the federal government, whether administered by the state or the federal government; and

(B) land subject to an existing federal right-of-way grant held by the applicant that is transferred to the state for its administration.

(d) All persons owning or planning to own an interest in a pipeline or proposed pipeline subject to a lease must join in the application under (a) of this section. Any person employed by the lessee in operating the pipeline is bound by the covenants of the lease applicable to functions within the scope of employment as if the person were an applicant under the lease and the state may enforce any breach of a covenant directly against an operator who is not in compliance with the covenant.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 5 ch 3 FSSLA 1973; am Sec. 1 ch 26 SLA 2001)

Sec. 38.35.060. Application for certificate to abandon or diminish service. [Repealed, Sec. 6 ch 3 FSSLA 1973].

Repealed or Renumbered

Sec. 38.35.070. Notice of application.

Upon receiving an application under AS 38.35.050, the commissioner shall

(1) cause notice of it to appear in a daily newspaper of general circulation published in the vicinity of the location of the proposed pipeline, the notice to include:

(A) a general description of the land involved;

(B) a summary of the substance of the application;

(2) file copies of the application with each coordinate agency;

(3) furnish at cost copies of a notice or application to persons requesting them; and

(4) provide other publication and notice the commissioner considers reasonable and appropriate to inform the public of the application.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 7 ch 3 FSSLA 1973)

Sec. 38.35.080. Analysis and public hearing.

(a) The commissioner shall, within a reasonable time after receiving the application, prepare an analysis of the application or of the matter of which the commissioner was notified, including a proposal for action if feasible; a proposed lease and a general statement of the basis and purpose of the commissioner, if favorable action is proposed; or, when a proposal for action is not feasible before a hearing, a description of the subjects and issues involved.

(b) Upon completion of the analysis but not less than 30 days before the date set for hearing an application or an amendment to an application that, under AS 38.35.050(c), constitutes a substantial change in the application, the commissioner shall publish notice, and make copies available as provided in AS 38.35.070.

(c) The commissioner shall set all applications for public hearing as soon as practicable, if a public hearing on an application is requested by any person within 30 days of publication of notice under AS 38.35.070(1) or if the proposed action being considered involves a substantial public interest. The commissioner shall set the application for public hearing and publish notice of the time and place of the public hearing at least 30 days before the hearing.

(d) The provisions of the Administrative Procedure Act (AS 44.62) do not apply to hearings held under this section.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 8 ch 3 FSSLA 1973; am Sec. 2 ch 26 SLA 2001)

Sec. 38.35.090. Multiple applications for same lease.

When the commissioner receives within a 30-day period two or more applications relating to the same or substantially the same subject matter, the commissioner shall consider the applications upon a comparative basis. The commissioner may extend the time within which a carrier may submit an application for consideration upon a comparative basis with a previously filed application.

History -

(Sec. 1 ch 72 SLA 1972)

Sec. 38.35.100. Decision on application.

(a) The commissioner shall promptly determine, in a written finding, on an application filed under AS 38.35.050, whether the applicant is fit, willing, and able to perform the transportation or other acts proposed in a manner that will be required by the present or future public interest. In making a determination the commissioner shall consider whether or not

(1) the proposed use of the right-of-way will unreasonably conflict with existing uses of the land involving a superior public interest;

(2) the applicant has the technical and financial capability to protect state and private property interests;

(3) the applicant has the technical and financial capability to take action to the extent reasonably practical to

(A) prevent any significant adverse environmental impact, including but not limited to erosion of the surface of the land and damage to fish and wildlife and their habitat;

(B) undertake any necessary restoration or revegetation; and

(C) protect the interests of individuals living in the general area of the right-of-way who rely on fish, wildlife, and biotic resources of the area for subsistence purposes;

(4) the applicant has the financial capability to pay reasonably foreseeable damages for which the applicant may become liable on claims arising from the construction, operation, maintenance, or termination of the pipeline;

(5) the applicant has agreed that in the construction and operation of a pipeline within the right-of-way the applicant will comply with, and require contractors and their subcontractors to comply with, applicable and valid laws and regulations regarding the hiring of residents of the state then in effect or that take effect subsequently.

(b) If the commissioner makes the determinations under (a) of this section favorably to the applicant, then the commissioner may grant the whole or part of the application. If the commissioner makes the determinations under (a)(1) - (5) of this section favorably to the applicant but determines that the applicant is not then fit, willing, and able to perform under the application, the commissioner may grant the application under a conditional lease subject to conditions established by the commissioner that will ensure that the applicant will, within a prescribed period of time not exceeding 10 years, establish that the applicant is fit, willing, and able, under (a) of this section, to perform the transportation or other acts that will be required by the present or future public interest. An applicant is not entitled to a notice or authorization to proceed to construction, or its equivalent, under a conditional lease until the commissioner determines in writing that the applicant has satisfactorily established that the applicant is then fit, willing, and able to perform under (a) of this section. Otherwise, the commissioner shall deny the application.

(c) The commissioner may offer the applicant a lease or a conditional lease under this section. If the applicant does not accept a lease offered under this section within 30 days, the lease offered is withdrawn.

(d) The commissioner shall include in a conditional lease each requirement and condition of the covenants established under AS 38.35.120. The commissioner may also require that the lessee agree to additional conditions that the commissioner finds to be in the public interest. In place of the covenant established under AS 38.35.120(a)(9), the commissioner shall require the lessee to agree that it will not transfer, assign, pledge, or dispose of in any manner, directly or indirectly, its interest in a conditional right-of-way lease or a pipeline subject to the conditional lease, unless the commissioner, after considering the public interest and issuing written findings to substantiate a decision to allow the transfer, authorizes the transfer. The commissioner shall also require the lessee to agree not to allow the transfer of control of the lessee without the approval of the commissioner; as used in this subsection, "transfer of control of the lessee" means the transfer of 30 percent or more, in the aggregate, of ownership interest in the lessee in one or more transactions to one or more persons by one or more persons.

(e) The commissioner shall require a conditional lessee to agree that

(1) in the absence of the approval of the commissioner, a transfer may not relieve the lessee of an obligation assumed under the lease;

(2) a transfer, including the transfer of lessee, that occurs without the approval of the commissioner is ineffective to transfer interests in and obligations under the lease; and

(3) a transfer constitutes a default under the lease.

(f) In an application for the approval under (d) of this section of a transfer of an interest, the commissioner shall consider whether the proposed transferee will be fit, willing, and able to perform the transportation or other acts proposed under the conditions established in the conditional lease and whether the transfer is in the public interest. In approving the transfer of an interest under (d) of this section and this subsection, the commissioner may impose any condition on the transfer that the commissioner considers in the public interest.

(g) If, during the term of a conditional lease, the commissioner determines under (a) of this section that the applicant is fit, willing, and able to perform the transportation or other acts proposed in a manner that will be required by the present or future public interest, the commissioner may amend the conditional right-of-way lease to insert the covenant established in AS 38.35.120(a)(9) in place of the covenant against a transfer established under (d) and (e) of this section.

(h) The issuance of a conditional lease does not prevent the commissioner from issuing other conditional or unconditional leases for the same right-of-way. A conditional lease may be revoked at any time that the commissioner determines that the applicant or conditional lessee will not be fit, willing, and able to perform during the term of the lease or when another applicant or conditional lessee is determined to be fit, willing, and able to perform under an application or lease for all or part of the right-of-way. An applicant or conditional lessee accrues no rights, including preference or priority rights, to a particular right-of-way until the commissioner makes a determination that the applicant or conditional lessee is then fit, willing, and able to perform the transportation or other acts proposed under (a) of this section.

(i) The commissioner shall insert a provision implementing the requirements of (a)(5) of this section into each agreement entered into by the commissioner for the construction and operation of a pipeline within the state.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 9 ch 3 FSSLA 1973; am Sec. 1, 2 ch 51 SLA 1987)

Sec. 38.35.110. Term of lease; continuation.

(a) Each lease of state land for pipeline right-of-way purposes must contain a provision that the lease shall run for a specified term of not greater than 30 years, and shall be renewable for additional periods of up to 30 years each, so long as the lessee is in commercial operation and is in full compliance with all state law, including but not limited to state law pertaining to regulation and taxation of the pipeline facility, and is in compliance with all terms of the lease. In making this determination, the

commissioner shall take into consideration the cost of the proposed pipeline, its useful life, and the probable financing requirement for the proposed pipeline.

(b) If the lessee has timely requested and is pursuing renewal and the determination on the renewal has not been issued before expiration of the existing lease term, the commissioner shall continue the lease subject to the terms and conditions that were applicable to the lease in effect at the time of expiration of the lease's term until the commissioner issues a final determination on the renewal.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 10 ch 3 FSSLA 1973; am Sec. 1, 2 ch 18 SLA 2001)

Sec. 38.35.120. Covenants required to be included in lease.

(a) A noncompetitive lease of state land for a right-of-way for an oil or natural gas pipeline valued at \$1,000,000 or more may be granted only upon the condition that the lessee expressly covenants in the lease, in consideration of the rights acquired by it under the lease, that

(1) it assumes the status of and will perform all of its functions undertaken under the lease as a common carrier and will accept, convey, and transport without discrimination crude oil or natural gas, depending on the kind of pipeline involved, delivered to it for transportation from fields in the vicinity of the pipeline subject to the lease throughout its route both on state land obtained under the lease and on the other land; it will accept, convey, and transport crude oil or natural gas without unjust or unreasonable discrimination in favor of one producer or person, including itself, as against another but will take the crude oil or natural gas, depending on the kind of pipeline involved, delivered or offered, without unreasonable discrimination, that the Regulatory Commission of Alaska shall, after a full hearing with due notice to the interested parties and a proper finding of facts, determine to be reasonable in the performance of its duties as a common carrier; however, a lessee that owns or operates a natural gas pipeline

(A) subject to regulation either under the Natural Gas Act (15 U.S.C. 717 et seq.) of the United States or by the state or political subdivisions with respect to rates and charges for the sale of natural gas, is, to the extent of that regulation, exempt from the common carrier requirement in this paragraph;

(B) that is a North Slope natural gas pipeline (i) is required to operate as a common carrier only with respect to the intrastate transportation of North Slope natural gas, as that term is defined in AS 42.06.630, and (ii) is not required to operate as a common carrier as to a liquefied natural gas facility or a marine terminal facility associated with the pipeline, and is not otherwise required to perform its functions under the lease as a common carrier; for purposes of this subparagraph, "North Slope natural gas pipeline" means all the facilities of a total system of pipe, whether owned or operated under a contract, agreement, or lease, used by a carrier for transportation of North Slope natural gas, as defined by AS 42.06.630, for delivery, for storage, or for further transportation, and including all pipe, pump, or

compressor stations, station equipment, tanks, valves, access roads, bridges, airfields, terminals and terminal facilities, including docks and tanker loading facilities, operations control centers for both the upstream part of the pipeline and the terminal, tanker ballast treatment facilities, fire protection system, communication system, and all other facilities used or necessary for an integral line of pipe, taken as a whole, to carry out transportation, including an extension or enlargement of the line;

(2) it will interchange crude oil or natural gas, depending on the kind of pipeline involved, with each like common carrier and provide connections and facilities for the interchange of crude oil or natural gas at every locality reached by both pipelines when the necessity exists, subject to rates and regulations made by the appropriate state or federal regulatory agency;

(3) it will maintain and preserve books, accounts, and records and will make those reports that the state may prescribe by regulation or law as necessary and appropriate for purposes of administration of this chapter;

(4) it will accord at all reasonable times to the state and its authorized agents and auditors the right of access to its property and records, of inspection of its property, and of examination and copying of records;

(5) it will provide connections, as determined by the Regulatory Commission of Alaska under AS 42.06.340, to facilities on the pipeline subject to the lease, both on state land and other land in the state, for the purpose of delivering crude oil or natural gas, depending on the kind of pipeline involved, to persons (including the state and its political subdivisions) contracting for the purchase at wholesale of crude oil or natural gas transported by the pipeline when required by the public interest;

(6) it shall, notwithstanding any other provision, provide connections and interchange facilities at state expense at such places the state considers necessary if the state determines to take a portion of its royalty or taxes in oil or natural gas;

(7) it will construct and operate the pipeline in accordance with applicable state laws and lawful regulations and orders of the Regulatory Commission of Alaska;

(8) it will, at its own expense, during the term of the lease,

(A) maintain the leasehold and pipeline in good repair;

(B) promptly repair or remedy any damage to the leasehold;

(C) promptly compensate for any damage to or destruction of property for which the lessee is liable resulting from damage to or destruction of the leasehold or pipeline;

(9) it will not transfer, assign, or dispose of in any manner, directly or indirectly, or by transfer of control of the carrier corporation, its interest in a right-of-way lease, or any rights under the lease or any pipeline subject to the lease to any person other than another owner of the pipeline (including subsidiaries, parents, and affiliates of the owners), except to the extent that the commissioner, after

consideration of the protection of the public interest (including whether the proposed transferee is fit, willing, and able to perform the transportation or other acts proposed in a manner that will reasonably protect the lives, property, and general welfare of the people of Alaska), authorizes; the commissioner shall not unreasonably withhold consent to the transfer, assignment, or disposal;

(10) it will file with the commissioner a written appointment of a named permanent resident of the state to be its registered agent in the state and to receive service of notices, regulations, decisions, and orders of the commissioner; if it fails to appoint an agent for service, service may be made by posting a copy in the office of the commissioner, filing a copy in the office of the lieutenant governor, and mailing a copy to the lessee's last known address;

(11) the applicable law of this state will be used in resolving questions of interpretation of the lease;

(12) the granting of the right-of-way lease is subject to the express condition that the exercise of the rights and privileges granted under the lease will not unduly interfere with the management, administration, or disposal by the state of the land affected by the lease, and that the lessee agrees and consents to the occupancy and use by the state, its grantees, permittees, or other lessees of any part of the right-of-way not actually occupied or required by the pipeline for the full and safe utilization of the pipeline, for necessary operations incident to land management, administration, or disposal;

(13) it will be liable to the state for damages or injury incurred by the state caused by the construction, operation, or maintenance of the pipeline and it will indemnify the state for the liabilities or damages;

(14) it will procure and furnish liability and property damage insurance from a company licensed to do business in the state or furnish other security or undertaking upon the terms and conditions the commissioner considers necessary if the commissioner finds that the net assets of the lessee are insufficient to protect the public from damage for which the lessee may be liable arising out of the construction or operation of the pipeline.

(b) For a right-of-way lease granted under this chapter for an oil or natural gas pipeline valued at \$1,000,000 or more to be valid and of legal effect, it must contain the terms required to be inserted under the provisions of AS 38.35.110 - 38.35.140. An oil or natural gas pipeline right-of-way lease granted under this chapter that does not contain the required terms is null and void and without legal effect and does not vest any interest in state land or any authority in the carrier granted the lease.

(c) The commissioner may insert in any right-of-way lease other reasonable provisions and conditions required by the public interest.

(d) The lease will also contain terms and conditions that are reasonably necessary to obligate the lessee, to the extent reasonably practicable, to

(1) prevent conflicts with other existing uses of the land involving a superior public interest;

(2) protect state and private property interests;

(3) prevent any significant adverse environmental impact, including but not limited to the erosion of the surface of the land, and damage to fish and wildlife and their habitat;

(4) restore and revegetate during the term and at termination of the lease; and

(5) protect the interests of individuals living in the general area of the right of way who rely on the fish, wildlife, and biotic resources of the area for subsistence purposes.

(e) In the event the commissioner proposes to offer a lease or leases to two or more lessees for the same pipeline, the commissioner may include terms in the lease or leases which establish the limit of the obligations and liabilities of each lessee arising under this chapter or under the lease or leases.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 11 ch 3 FSSLA 1973; am Sec. 2, 3 ch 110 SLA 1981; am Sec. 69 ch 59 SLA 1982; am Sec. 1 ch 56 SLA 2000; am Sec. 15 ch 22 SLA 2001)

Revisors Notes -

Former (f) of this section was renumbered as AS 38.35.122 in 1984.

In 1999, in paragraphs (a)(1), (a)(5), and (a)(7) "Regulatory Commission of Alaska" was substituted for "Alaska Public Utilities Commission" in accordance with Sec. 30(a), ch. 25, SLA 1999.

Sec. 38.35.122. Products pipeline leases.

The commissioner has discretion to include any or all of the terms set out in AS 38.35.120 in leases of state land for products pipeline right-of-way purposes.

History -

(Sec. 11 ch 3 FSSLA 1973)

Revisors Notes -

Formerly AS 38.35.120(f). Renumbered in 1984.

Sec. 38.35.130. Right-of-way easements or leases acquired from others.

(a) The lessee may, if the commissioner delegates the function to it, condemn, by declaration of taking, under AS 09.55.420 - 09.55.450, real property and acquire leases of or easements or rights-of-

way on land in the state required for right-of-way purposes for a pipeline subject to the lease on behalf of and as agent for the state in which title to or interest in the land shall vest.

(b) The lease shall contain a covenant that the land, right-of-way, or easement acquired under this section is or will form part of the land leased to the lessee.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 12 ch 3 FSSLA 1973)

Decisions -

Effect of failure to initiate eminent domain proceedings. - Although pipeline company could, upon delegation from state, exercise power of eminent domain through declaration of taking or otherwise, its statutory authority does not extend so far as to immunize it from liability for trespass if it has not initiated eminent domain proceedings. *Ostrem v. Alyeska Pipeline Serv. Co.*, 648 P.2d 986 (Alaska 1982).

If pipeline company's entry on to land was pursuant to easement it had purchased, rather than pursuant to specific delegation of right to condemn, actions which exceeded its rights under that easement, constituted trespass. *Ostrem v. Alyeska Pipeline Serv. Co.*, 648 P.2d 986 (Alaska 1982).

Quoted in *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Stated in *Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440 (9th Cir. 1987).

Cited in *Heffle v. State*, 633 P.2d 264 (Alaska 1981).

Collateral Refs -

Elements and measure of compensation for oil or gas pipeline through private property. 38 ALR2d 788; 23 ALR4th 631.

Sec. 38.35.140. Payment of rental and costs.

(a) The lease price for a right-of-way lease shall be the annual fair market rental of the state land included in the right-of-way based on the appraised fair market value of the land. The lease price is payable annually in advance on or before the anniversary of the lease. The appraised fair market rental value shall be adjusted at five-year intervals and charges or adjustments shall be based on a reappraised annual rental value. Rental may not be charged for any land acquired by the lessee under AS 38.35.130(b) and conveyed without cost to the state.

(b) The lease applicant or lessee shall reimburse the state for all reasonable costs incurred in processing an application filed under AS 38.35.050 and in monitoring the construction, operation, maintenance, and termination of the pipeline on the right-of-way. The commissioner shall use best

efforts to reach agreement with the lessee addressing the details of cost reimbursement under this subsection and shall provide the lessee with an annual estimate of the projected costs and scope of the work.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 13 ch 3 FSSLA 1973; am Sec. 16 ch 182 SLA 1978; am Sec. 67 ch 152 SLA 1984; am Sec. 56 ch 138 SLA 1986; am Sec. 51 ch 36 SLA 1990; am Sec. 3 ch 18 SLA 2001; am Sec. 1 ch 76 SLA 2001)

Sec. 38.35.145. Agreement to provide for payment of preapplication costs.

(a) To accommodate preliminary work in advance of the receipt of an application for a lease under this chapter, the department may enter into an agreement with a prospective lessee desiring to own an oil or natural gas pipeline that is proposed to be located in whole or in part on state land. The agreement must provide that the prospective lessee reimburse the department for the reasonable costs of work incurred in preparing for activities before receipt of an application.

(b) Expenditure of amounts received by the department under (a) of this section is subject to appropriation by the legislature. Appropriations made to satisfy the requirement of (a) of this section may be made by general appropriations of program receipts conditioned on compliance with the program review provisions of AS 37.07.080(h).

(c) [Repealed, Sec. 1 ch 21 SLA 2004].

History -

(Sec. 2 ch 76 SLA 2001; am Sec. 1 ch 21 SLA 2004)

Sec. 38.35.150. Additional provisions of lease. [Repealed, Sec. 14 ch 3 FSSLA 1973].

Repealed or Renumbered

Sec. 38.35.160. Transfer of right-of-way lease, certificates, or pipeline. [Repealed, Sec. 15 ch 3 FSSLA 1973].

Repealed or Renumbered

Sec. 38.35.170. Forfeiture of lease.

Failure to begin construction of the pipeline facility within a reasonable time of the granting of a right-of-way lease under this chapter for reasons within the control of the lessee or failure of an owner of an interest in the granted right-of-way substantially to comply with the terms of the right-of-way shall be grounds for forfeiture of the right-of-way interest of the lessee or owner in an action brought by the commissioner in the superior court. Before the commencement of any action for forfeiture of an interest in a right-of-way under this section, the commissioner shall give the lessee or owner of the interest notice in writing of the alleged default and shall not commence the proceeding unless the lessee or owner of the interest has failed to initiate good faith efforts to cure the default within 60 days of the notice of the alleged default.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 16 ch 3 FSSLA 1973)

Sec. 38.35.180. Suits to enjoin or recover damages for defaults.

(a) When in the judgment of the commissioner a person has violated or is about to violate a provision of this chapter or an obligation, condition, or provision of a right-of-way lease, the attorney general, on advice of the commissioner, shall seek a prohibition or mandatory injunction from the superior court to remedy the violation.

(b) A penalty imposed by the provisions of a right-of-way lease issued under this chapter may be enforced in the superior court by proceedings in personam against the lessee carrier, or, in the case of a lien, by proceedings in rem against any of the lessee carrier's property.

(c) Neither this section nor the state's obtaining an injunction or recovering penalties extinguishes any civil cause of action arising out of a violation of this chapter or the provisions of a right-of-way lease.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 17 ch 3 FSSLA 1973)

Sec. 38.35.190. Application of the Administrative Procedure Act.

(a) AS 44.62.010 - 44.62.320, 44.62.640 and 44.62.950 apply to regulations adopted by the commissioner under the authority of this chapter.

(b) [Repealed, Sec. 18 ch 3 FSSLA 1973].

(c) [Repealed, Sec. 18 ch 3 FSSLA 1973].

(d) [Repealed, Sec. 18 ch 3 FSSLA 1973].

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 18 ch 3 FSSLA 1973)

Revisors Notes -

In 1998, "AS 44.62.950" was substituted for "AS 44.62.650" in subsection (a) to reflect the 1998 renumbering of AS 44.62.650.

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.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 19 ch 3 FSSLA 1973)

Sec. 38.35.205. Lease savings clause.

A judicial finding that any term or condition of a right-of-way lease issued under this chapter is unlawful or invalid may not operate to invalidate the lease or any other term or condition of the lease.

History -

(Sec. 23 ch 3 FSSLA 1973)

Sec. 38.35.210. Delegation of commissioner's authority.

The commissioner may delegate to an employee of the Department of Natural Resources or the Department of Law the authority granted under this chapter, except for the authority to execute leases.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 20 ch 3 FSSLA 1973)

Sec. 38.35.220. Continued operation of certain carriers.

(a) Natural gas carriers that operate as public utilities holding easements, rights-of-way, or permits for pipelines on state public land on May 20, 1972, are unaffected by this chapter within the scope of their existing operations, normal expansions, and extensions thereof so long as their original or present purpose and function remains unchanged. This exemption does not apply to a natural gas pipeline constructed outside of the

- (1) Southcentral region of the state;
- (2) Matanuska-Susitna Borough;
- (3) Kenai Peninsula Borough;
- (4) Municipality of Anchorage;
- (5) Chugach Regional Educational Attendance Area; or
- (6) Copper River Regional Educational Attendance Area.

(b) Subject to (a) of this section, if an existing right-of-way is revocable or for a term of years, then upon revocation or expiration this chapter applies.

(c) Applications for pipeline permits which have been filed with the division of lands before May 20, 1972, shall be considered as filed under this chapter but this does not otherwise restrict the authority of the commissioner in acting on these applications under this chapter; however, if the division of lands has, before May 20, 1972, granted right-of-entry to an applicant or issued a letter of no-objection to an applicant, and the applicant thereafter fully complies with all of the terms and conditions originally specified by the division of lands or other agency, these applications are existing valid permits or easements on May 20, 1972.

(d) [Repealed by Sec. 21 ch 3 FSSLA 1973].

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 21 ch 3 FSSLA 1973; am Sec. 5 ch 7 SLA 2010)

Cross References -

For division of lands, see AS 38.05.005.

Amendment Notes -

The 2010 amendment, effective April 27, 2010, in the introductory language in (a), added "that operate as public utilities" following "Natural gas carriers", added "This exemption does not apply to a natural gas pipeline constructed outside of the", and added (a)(1) through (a)(6).

Sec. 38.35.225. Binding effect of covenants.

By entering into a lease under this chapter, the lessee is bound by all the covenants provided for in the lease to the full extent of the power of the state to impose those covenants under its authority as owner of the land to be leased or under its police or regulatory powers or otherwise; provided that the right of the lessee to challenge the power of the state to require such a covenant as owner of the land to be leased or under its police or regulatory powers or otherwise is preserved until such time as action to enforce the covenant is taken by the state.

History -

(Sec. 23 ch 3 FSSLA 1973)

Sec. 38.35.230. Definitions.

In this chapter,

(1) "commissioner" means the commissioner of natural resources;

(2) "coordinate agencies" includes Department of Labor and Workforce Development, Department of Transportation and Public Facilities, Department of Environmental Conservation, and the Regulatory Commission of Alaska;

(3) "lease" means the instrument or extension of an instrument issued under this chapter granting a leasehold interest in state land for pipeline right-of-way purposes to a person and authorizing the construction or operation of, or transportation, service or sale by a pipeline for crude oil, natural gas, or products;

(4) "lessee" means a person or persons holding a valid lease issued by the commissioner;

(5) "natural gas" includes all hydrocarbons produced at the wellhead not defined as oil;

(6) "oil" includes crude petroleum oil and other hydrocarbons regardless of gravity which are produced at the wellhead in liquid form and the liquid hydrocarbons known as distillate or condensate recovered or extracted from gas, other than gas produced in association with oil and commonly known as casinghead gas;

(7) "pipeline" or "pipeline facility" means all the facilities of a total system of pipe, whether owned or operated under a contract, agreement, or lease, used by a carrier for transportation of crude

oil, natural gas, or products for delivery, for storage, or for further transportation, and including all pipe, pump or compressor stations, station equipment, tanks, valves, access roads, bridges, airfields, terminals and terminal facilities, including docks and tanker loading facilities, operations control center for both the upstream part of the pipeline and the terminal, tanker ballast treatment facilities, and fire protection system, communication system, and all other facilities used or necessary for an integral line of pipe, taken as a whole, to effectuate transportation, including an extension or enlargement of the line;

(8) "product" means refined crude oil, crude tops, topped crude, processed crude petroleum, residue from crude petroleum, cracking stock, uncracked fuel oil, fuel oil, treated crude oil, residuum, gas oil, casinghead gasoline, natural gas gasoline, naphtha, distillate, gasoline, kerosene, benzine, wash oil, waste oil, blended gasoline, lubricating oil, blends or mixtures of petroleum and any liquid product or by-product derived from crude petroleum oil or natural gas;

(9) "state land" means

(A) "state land" as defined in AS 38.05.965;

(B) public land of the United States selected by the state under sec. 6 of the Alaska Statehood Act of 1958 (P.L. 85-508; 72 Stat. 399), as amended, and real property of the United States transferred to the state under secs. 21, 35, and 45 of the Alaska Omnibus Act of 1959 (P.L. 86-70; 73 Stat. 141), as amended;

(C) any interest owned by the state in land if the interest is sufficient to permit the state to lease it under the authority of this chapter;

(10) "transportation" means the shipment or carriage by a pipeline of crude oil, natural gas, or products from an upstream terminus in one or more fields or points of production or supply of the minerals to a downstream terminus in one or more points for delivery of the minerals to a purchaser or consignee, for storage, or for further carriage or shipment, including shipment or carriage within the state that may be classified as interstate or foreign transportation to the extent that the transportation may constitutionally be subjected to the provisions of this chapter, as well as all services necessary to effectuate shipment or carriage, including, among other things, the receipt, storage, processing, handling, transfer in transit, forwarding, and delivery of the minerals.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 22 ch 3 FSSLA 1973; am E.O. No. 39, Sec. 11 (1977); am Sec. 70 ch 59 SLA 1982; am Sec. 4 ch 18 SLA 2001)

Revisors Notes -

In 1999, in paragraph (2) "Regulatory Commission of Alaska" was substituted for "Alaska Public Utilities Commission" in accordance with Sec. 30(a), ch. 25, SLA 1999. In 1999, in this section,

"Department of Labor" was changed to read "Department of Labor and Workforce Development" in accordance with Sec. 90, ch. 58, SLA 1999.

Sec. 38.35.260. Short title.

This chapter may be cited as the Alaska Right-of-Way Leasing Act.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 47 ch 53 SLA 1973)