

HOUSE BILL NO. 336

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE KOHRING

Introduced: 5/5/95

Referred: Transportation, Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to grade crossings of the Alaska Railroad; amending Alaska
2 Rule of Civil Procedure 65(c); amending Alaska Rules of Appellate Procedure
3 204(c) and (d), 602(d), and 603(a)(2); and providing for an effective date."

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 * **Section 1.** AS 09.50.250 is amended to read:

6 Sec. 09.50.250. ACTIONABLE CLAIMS AGAINST THE STATE. A person
7 or corporation having a contract, quasi-contract, or tort claim against the state may
8 bring an action against the state. A person who may present the claim under AS 44.77
9 may not bring an action under this section except as set out in AS 44.77.040(c). A
10 person who may bring an action under AS 36.30.560 - 36.30.695 may not bring an
11 action under this section except as set out in AS 36.30.685. However, an action may
12 not be brought under this section if the claim

13 (1) is an action for tort, and is based upon an act or omission of an
14 employee of the state, exercising due care, in the execution of a statute or regulation,

1 whether or not the statute or regulation is valid; or is an action for tort, and based
2 upon the exercise or performance or the failure to exercise or perform a discretionary
3 function or duty on the part of a state agency or an employee of the state, whether or
4 not the discretion involved is abused;

5 (2) is for damages caused by the imposition or establishment of a
6 quarantine by the state;

7 (3) arises out of assault, battery, false imprisonment, false arrest,
8 malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or
9 interference with contract rights; [OR]

10 (4) arises out of the use of an ignition interlock device certified under
11 AS 33.05.020(c); or

12 **(5) arises out of the participation of a state agency or an employee**
13 **of a state agency in a review conducted under AS 42.40.420 or out of the**
14 **implementation by a state agency of the terms of a permit issued by the Alaska**
15 **Railroad Corporation under AS 42.40.420.**

16 * Sec. 2. AS 09.65.070(d) is amended to read:

17 (d) An action for damages may not be brought against a municipality or any
18 of its agents, officers, or employees if the claim

19 (1) is based on a failure of the municipality, or its agents, officers, or
20 employees, when the municipality is neither owner nor lessee of the property involved,
21 **to**

22 (A) [TO] inspect property for a violation of any statute,
23 regulation, or ordinance, or a hazard to health or safety;

24 (B) [TO] discover a violation of any statute, regulation, or
25 ordinance, or a hazard to health or safety if an inspection of property is made;
26 or

27 (C) [TO] abate a violation of any statute, regulation, or
28 ordinance, or a hazard to health or safety discovered on property inspected;

29 (2) is based upon the exercise or performance or the failure to exercise
30 or perform a discretionary function or duty by a municipality or its agents, officers,
31 or employees, whether or not the discretion involved is abused;

1 (3) is based upon the grant, issuance, refusal, suspension, delay, or
2 denial of a license, permit, appeal, approval, exception, variance, or other entitlement,
3 or a rezoning;

4 (4) is based on the exercise or performance during the course of
5 gratuitous extension of municipal services on an extraterritorial basis;

6 (5) is based upon the exercise or performance of a duty or function
7 upon the request of, or by the terms of an agreement or contract with, the state to meet
8 emergency public safety requirements; [OR]

9 (6) is based on the exercise or performance of a duty in connection
10 with an enhanced 911 emergency system and is not based on an intentional act of
11 misconduct or on an act of gross negligence; or

12 **(7) arises out of the participation of a municipality or an employee**
13 **of a municipality in a review conducted under AS 42.40.420 or out of the**
14 **implementation by a municipality of the terms of a permit issued by the Alaska**
15 **Railroad Corporation under AS 42.40.420.**

16 * Sec. 3. AS 42.40.420 is repealed and reenacted to read:

17 Sec. 42.40.420. RAILROAD GRADE CROSSINGS. (a) The corporation
18 may issue a permit for construction or modification of a grade crossing on railroad
19 utility corridors as provided under this section. A person, other than the corporation,
20 may not construct or modify a grade crossing on a railroad utility corridor without a
21 permit issued by the corporation under this section. The corporation may not construct
22 or modify a grade crossing across a public highway without the permission of the
23 appropriate highway authority.

24 (b) Upon a request made of the corporation by a highway authority, or upon
25 request made of a highway authority by the corporation, for permission to construct
26 a new grade crossing across tracks of the corporation or the modification of an existing
27 grade crossing across tracks of the corporation, the corporation shall review the
28 proposed project and the physical condition and safety needs of the grade crossing.
29 The review shall be conducted by a review team composed of knowledgeable persons
30 who are familiar with the principles of railroad crossing safety management. The
31 corporation shall appoint members of the review team from among the staff of the

1 corporation and governmental agencies and other persons responsible for maintenance
2 and operation of a public highway. The review must consider and address existing
3 highway and railroad traffic volumes, traffic speeds, funding for the project,
4 responsibility for completion of each portion of the project, scheduling of each portion
5 of the project, other matters in the public interest affecting the safety of the grade
6 crossing, and reasonable issues raised by an interested party to the review. The
7 corporation shall adopt rules governing the procedures for a review conducted under
8 this section, including the provision of a reasonable opportunity for an interested party
9 to obtain or provide information that is useful and relevant to the review.

10 (c) The corporation shall provide written notice to interested parties 30 days
11 in advance of a meeting of the review team. An interested party that seeks to
12 participate in a meeting of the review team shall be represented by a knowledgeable
13 person authorized to make agreements on behalf of the interested party and shall
14 provide information requested in the notice of the meeting.

15 (d) Within 15 days after the initial meeting of a review team, an interested
16 party may request in writing that the corporation hold a public hearing on the subject
17 of the review. If the corporation agrees to the request for a public hearing, the
18 corporation shall publish a notice of the hearing in a paper of general circulation in the
19 area of the proposed project at least once a week for two consecutive weeks preceding
20 the public hearing. The public hearing shall be conducted by the review team. The
21 findings of the public hearing shall be incorporated into the report of the review team.

22 (e) The review team shall seek to reach a consensus among team members and
23 interested parties regarding the proposed project. The review team shall approve a
24 proposed project if the proposed project is in the public interest, is within the financial
25 capacity of the highway authority, and will provide a safe grade crossing. The
26 approval of the project by the review team may be made contingent upon compliance
27 with reasonable conditions, including timely completion of the proposed project,
28 installation of traffic control devices, availability of funds for the proposed project, and
29 other matters related to the completion of the proposed project in an efficient and safe
30 manner. The review team shall prepare its decision in writing and shall include in the
31 decision a description of the proposed project and the factors considered by the review

1 team in making its decision to approve or disapprove the proposed project.

2 (f) Unless the corporation finds that the decision of the review team is
3 inconsistent with this section or was developed contrary to the rules governing the
4 procedures for the review, the decision of the review team shall be adopted by the
5 corporation as the decision of the corporation. If the corporation does not adopt the
6 decision of the review team, the corporation shall provide for a new review of the
7 proposed project.

8 (g) If the review team does not reach a decision, the team shall prepare a
9 written report of the issues considered by the review team and the issues that could not
10 be resolved by the team. The corporation shall adopt its own written decision
11 regarding approval or disapproval of the proposed project within 30 days after
12 receiving the report of the review team.

13 (h) Upon adoption of the decision by the corporation, the highway authority
14 that initiated the request shall submit detailed construction plans for the project to the
15 corporation. The corporation shall issue a permit for the proposed project if the
16 construction plans are consistent with the decision adopted by the corporation.

17 (i) An interested party may obtain judicial review of the decision of the
18 corporation by bringing an action for declaratory relief in the state superior court. The
19 court shall uphold the decision of the corporation unless the court finds by a
20 preponderance of the evidence that the decision of the corporation was not made in
21 substantial compliance with applicable law, without substantial compliance with rules
22 adopted by the corporation governing procedures for a review conducted under this
23 section, or failed to reasonably consider issues raised during the review process by the
24 party seeking judicial review. An action for review of the decision of the corporation
25 under this section may be brought by an interested party, and declaratory or injunctive
26 relief may be requested of, or granted by, the court, without the posting of a bond,
27 including a bond for costs on appeal or supersedeas bond, or other security. A party
28 to an action brought under this subsection may appeal the decision of the superior
29 court without the posting of a bond, including a bond for costs on appeal or
30 supersedeas bond.

31 (j) If the corporation or a highway authority seeks to construct or modify, or

1 agrees to participate in the construction or modification of, a grade crossing, the
2 corporation and the highway authority shall each make a good faith effort to obtain
3 funds for its portion of the project, first from federal funds available for that purpose
4 and then to state funds available for that purpose. The corporation shall pay the cost
5 of constructing a new grade crossing across an existing public highway and the direct
6 costs incurred by the highway authority for inspection of the work performed by the
7 corporation. The highway authority seeking to build a new grade crossing across
8 existing tracks of the corporation shall pay the cost of the grade crossing and the direct
9 costs incurred by the corporation for the inspection of the work performed by the
10 highway authority. If the corporation requests a highway authority to modify an
11 existing grade crossing in conjunction with the construction or modification of railroad
12 tracks or the railbed, the corporation shall pay the costs of the highway authority
13 unless the parties otherwise agree and shall provide sufficient information to the
14 highway authority so that the highway authority can perform the modifications in
15 conjunction with the corporation. If a highway authority requests the corporation to
16 modify an existing grade crossing in conjunction with the construction or modification
17 of a public highway, the highway authority shall pay the costs of the corporation
18 unless the parties otherwise agree, and shall provide sufficient information to the
19 corporation so that the corporation can perform the modifications in conjunction with
20 the highway authority.

21 (k) Temporary grade crossings shall be constructed, maintained, and removed
22 at the cost of the party requesting the grade crossing.

23 (l) The construction cost of installing, altering, or modernizing active traffic
24 control devices shall be borne equally by the corporation and the highway authority.
25 The highway authority shall bear the cost of installing and maintaining passive traffic
26 control devices on public highways approaching grade crossings. The corporation shall
27 annually provide recommendations to the appropriate highway authorities regarding
28 grade crossings where warning or railroad crossing signs and other passive traffic
29 control devices should be installed.

30 (m) If the tracks through a grade crossing are abandoned by legal proceedings
31 or are no longer needed by the corporation, the corporation shall, as part of routine

1 railroad maintenance, remove the tracks and active traffic control devices installed at
2 the crossing and restore the road surface in a manner satisfactory to the highway
3 authority. If a public highway across railroad tracks is abandoned by legal proceedings
4 or is no longer necessary for public use, the highway authority shall, as part of routine
5 maintenance, remove the roadway and passive traffic control devices. Traffic control
6 devices removed from a discontinued grade crossing may be retained by the party that
7 installed the device.

8 (n) The corporation shall construct and maintain at its expense railbed, track,
9 culverts within the right-of-way of a public highway that crosses a railroad utility
10 corridor and roads and sidewalks located between the rails and outside of the rails to
11 one foot beyond the ends of the railroad ties. The highway authority shall maintain
12 those portions of the public highway and sidewalks within a railroad utility corridor
13 that are outside of the area maintained by the corporation. The corporation shall
14 maintain at its expense active traffic control devices associated with a grade crossing.
15 The highway authority shall maintain at its expense all passive traffic control devices
16 associated with a grade crossing. The corporation and the highway authority shall
17 cooperate in the establishment of clear vision areas for vehicular traffic approaches to
18 grade crossings. The highway authority shall maintain clear vision areas by removal
19 of vegetation and by grading of the ground surface. The corporation shall pay one-half
20 of the direct cost of maintaining clear vision areas.

21 (o) If the corporation or a highway authority initiates a request to construct or
22 modify a grade crossing, the other party may require the initiating party to obtain
23 liability insurance coverage in a reasonable amount appropriate to both the nature of
24 the liability risks associated with the project and the affordability of the insurance by
25 the party responsible for the construction. The party responsible for performing
26 construction activity may be required to hold harmless and indemnify the other party,
27 to the extent permitted by law, for liability claims, judgments, and reasonable costs and
28 expenses incurred in defending the other party from liability claims and judgments
29 arising from tangible personal injury or tangible property damage claims related to the
30 construction activities associated with the project.

31 (p) Nonconstruction uses of grade crossings, such as performance of

1 maintenance or other nonconstruction use of the public highway, may not be subject
2 to contractual hold harmless or indemnification agreements between the corporation
3 and a highway authority. The corporation may not require as a condition of a
4 contract or a permit issued under this section that a highway authority agree to
5 contractual indemnity for the corporation for claims arising from the general
6 maintenance performed by the highway authority. This subsection does not prohibit
7 or limit either the corporation or a highway authority from seeking

8 (1) contractual indemnity for claims arising from the construction or
9 modification of a grade crossing as part of an agreement or permit for the construction
10 or modification of a grade crossing; or

11 (2) a judicial determination of the noncontractual liability of the other
12 party in the event of claims arising from the use, maintenance, or other
13 nonconstruction activities of the other party at a grade crossing.

14 (q) In this section,

15 (1) "active traffic control device" means a traffic control device, such
16 as a flashing light or a crossing gate, located in the immediate vicinity of a grade
17 crossing that operates automatically or manually to warn persons of the approach or
18 presence of a train at the grade crossing;

19 (2) "construction cost" means the direct cost of constructing or
20 modifying a roadbed, railbed, track structure, grade crossing surface, pavement, traffic
21 control devices, and drainage, and associated material, labor, and services, design
22 expenses, insurance, and project administration; "construction cost" does not include
23 the cost of maintenance;

24 (3) "grade crossing" means the location where a public highway
25 intersects railroad tracks within the railroad utility corridor of the corporation;

26 (4) "highway authority" means a state, federal, or municipal agency
27 responsible for the construction, operation, or maintenance of a public highway;

28 (5) "interested party" means the corporation, a highway authority, or
29 a state, federal, or municipal agency or a person who has an ownership interest in land
30 or a right-of-way utilized for a grade crossing that is the subject of a review under this
31 section;

1 (6) "modification" includes repair, renovation, modernization,
2 improvement, or discontinuance of use;

3 (7) "nonmotorized trail" means a publicly owned or maintained trail that
4 is restricted to use by pedestrians, equestrians, bicyclists, and other nonmotorized
5 modes of transportation;

6 (8) "passive traffic control device" means a traffic control device
7 located at or in advance of a grade crossing that indicates the presence of a grade
8 crossing but does not change aspect upon the approach or presence of a train;

9 (9) "public highway" means a highway, road, street, or nonmotorized
10 trail that has been dedicated and constructed in accordance with law and that is
11 maintained by a highway authority.

12 * **Sec. 4.** AS 42.40.420(i), added by sec. 3 of this Act, has the effect of amending Alaska
13 Rule of Civil Procedure 65(c) by providing that security is not required of a person seeking
14 a restraining order or preliminary injunction to restrain an act authorized or required under
15 AS 42.40.420.

16 * **Sec. 5.** AS 42.40.420(i), added by sec. 3 of this Act, has the effect of amending Alaska
17 Rule of Appellate Procedure 204(c) and (d) by providing that a person appealing a decision
18 of a superior court relating to an issue arising under AS 42.40.420 is not required to post a
19 bond for costs on appeal or a supersedeas bond to stay the decision of the superior court on
20 appeal.

21 * **Sec. 6.** AS 42.40.420(i), added by sec. 3 of this Act, has the effect of amending Alaska
22 Rule of Appellate Procedure 602(d) by providing that a person appealing an action of the
23 Alaska Railroad Corporation under AS 42.40.420 is not required to post a bond for costs on
24 appeal.

25 * **Sec. 7.** AS 42.40.420(i), added by sec. 3 of this Act, has the effect of amending Alaska
26 Rule of Appellate Procedure 603(a)(2) by providing that a person appealing an action of the
27 Alaska Railroad Corporation under AS 42.40.420 is not required to post a supersedeas bond
28 to stay the action of the corporation on appeal.

29 * **Sec. 8.** To the extent that a highway authority accedes to the change of a provision of
30 a contract, permit, or agreement issued or entered into under AS 42.40.420 before January 1,
31 1996, regarding the indemnification or liability of the Alaska Railroad Corporation for claims

1 arising from the construction or modification of a grade crossing, the Alaska Railroad
2 Corporation shall modify that provision before July 1, 1996, so that the contract, permit, or
3 agreement is consistent with AS 42.40.420(p), as added by sec. 3 of this Act. The decision
4 of a highway authority to accede to a change of a provision of a contract, permit, or
5 agreement under this section is within the sole discretion of the highway authority. The
6 modification of a provision of a contract, permit, or agreement by a highway authority under
7 this section shall be made without payment of additional compensation by the highway
8 authority and may be made without discussion or negotiation with the Alaska Railroad
9 Corporation.

10 * **Sec. 9.** To the extent that a highway authority accedes to the change of a contract,
11 permit, or agreement regarding a grade crossing that is in effect before the effective date of
12 this Act, AS 42.40.420, as amended by sec. 3 of this Act, supersedes the terms of the
13 contract, permit, or agreement between the Alaska Railroad Corporation and a highway
14 authority that were executed before January 1, 1996, and that contradict or are inconsistent
15 with AS 42.40.420. The decision of a highway authority to accede to a change of a contract,
16 permit, or agreement under this section is within the sole discretion of the highway authority.
17 The change of a contract, permit, or agreement by a highway authority under this section shall
18 be made without payment of additional compensation by the highway authority and may be
19 made without discussion or negotiation with the Alaska Railroad Corporation.

20 * **Sec. 10.** This Act takes effect January 1, 1996.