SB
546

"An Act relating to the power of eminent domain."

COMMITTEE REPORT

3/3/76 HOUSE

Mr. Speaker: Date 3/16/76

The Committee on JUDICIARY has had SB 696 under consideration. A Majority of the members of the Committee

( ) recommends it DO PASS

( ) recommends it DO NOT PASS

( ) recommends it DO PASS WITH ATTACHED AMENDMENT(S)

( ) recommends it BE REPLACED WITH CS FOR _____ AND THAT CS FOR _____ DO PASS

( ) "and" recommends it BE REFERRED TO THE _____ COMMITTEE

( ) reports it back WITHOUT RECOMMENDATION

( ) "other"

Members signing the Majority report:

_____ _____ _____

_____ _____ _____

_____ _____ _____

_____ _____ _____

Members NOT concurring in the Majority report:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

_____ Chairman

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August 29, 1975

Senator Chancy Croft
425 G Street, Seventh Floor
Anchorage, AK 99501

Dear Senator:

I just read Arco Pipeline Company, et al. v. 3.60 Acres, More or Less, etc.; Jackie J. Stewart, et al., Opinion No. 1177 dated August 1, 1975. It holds that when a declaration of taking is utilized, the court is not authorized to inquire into the necessity of the taking.

I have been on both sides of the condemnation procedures repeatedly, and I believe this opinion is incorrect and will produce unjust results. Specifically, I believe A.S. §09.55.280 requiring that the project be located in a manner which will be most compatible with the greatest public good and the least private injury, etc., should be made applicable to all takings including those through the exercise of a declaration of taking by the so-called "quick take" method.

Historically, the State of Alaska and all other agencies to my knowledge utilizing the quick take declaration of taking procedures have always scheduled a "A and N" hearing as soon as possible following the filing of the declaration and taking and deposit of estimated just compensation. This hearing on authority and necessity always entailed testimony by the condemning agency's engineers that it was necessary to locate the project in this particular place, and take this amount of land, etc. We all seem to have been able to function with proving this requirement in the past.

Incidentally, although the engineers have testified as to the absolute necessity of a particular take location and area in proceedings in which I have participated, on several occasions I have later found that they have changed their mind and requested an amended declaration of taking because they desired for one reason or another to relocate the particular project. I only mention this because the condemning agency has engineers who will invariably testify to justify their work product even under the past procedures where necessity had to be proven in connection with the declaration

of taking. The landowner is then forced to employ an engineer to review and analyze the project location at considerable expense in order to combat this testimony. However, the option of combating it at least prevents that type of abuse which seems to sometimes flow from minds trained in engineering principles without regard to broader considerations than the construction of a particular project.

While our Supreme Court has distinguished between the powers exercised through a declaration of necessity and a regular slow take proceeding, the fact of the matter is the impact on a property owner is the same. He loses his property whether he wants to or not. Why should there be a distinction requiring the condemning agency to prove necessity on the one hand, and not have to prove it on the other hand, when the property owner who is the object of the safeguard bleeds the same color and quantity of blood regardless of which knife is used.

The Court's decision finds a conflict between the provisions of A.S. §09.55.280 and the declaration of taking provisions. I strongly disagree with the Court's reasoning but even more strongly object to the result which prevents a property owner from even enlisting the court's aid in curbing an abuse. Recent years have seen the United States Supreme Court severely restrict the right of one party to interfere with another party's property prior to the court review of the claimant's rights, particularly in the prejudgment attachment cases. Yet here, our State Supreme Court capitulates to any condemning authority the absolute right to take another person's property without any provision for review as to the necessity of the taking.

It may be that our condemnation laws are in need of wholesale revision. I fear that such revision would be strongly influenced by the State's Attorneys to the detriment of property owners. It seems to me that attorneys representing government agencies in condemnation somehow develop a paranoia and want the scales tilted far in their favor. Because of that, I would suggest that any revision be carefully reviewed. I would also suggest that steps be taken to neutralize the effect of the Arco Pipeline Company case decision.

Very truly yours,

Burton C. Biss

House Judiciary Committee
March 26, 1976

The meeting was called to order by Chairman Gardiner at 3:00 p.m. Members present were Cr ten, Specking, Bradley and Gardiner.

SB 546 EMINENT DOMAIN

SB 546

Richard Kerns, AG' office (Highways):

Determination for right of way must be made before can go to contract. The court room is not the place to decide right of way, that is for the agency (dept. of highways) to decide. Eminent domain and "quick take" is a proper authority for dept. of highways to have but nor for private corporations, like Alyeska or ARCO. State wants exemption from court room determination. Agency wants to make decision of what route to take before court room appearance. Expensive and time consuming. Department of Highways can make a better decision of right of way than a judge.

Richard Winning, Anchorage municipal attorney:

Suggests deletion of "greatest public good" as any public project could be scrutinized after completion as not being in the greatest public good and therefore must pay back the original owner.

The meeting was adjourned at 4:30 p.m.

House Judiciary Committee
April 7, 1976

The meeting was called to order by Chairman Gardiner at 1:25. Present were Cotten, Bradley, Parr and Gardiner.

HB 823 CREDIT UNIONS HB 823

Joe McKinnon, sponsor

Went through Humphrey's amendments and Motley's amendments as changes from Commerce CS to Judiciary Cs.

Mr. Parr moved that charter conversion be approved by members like merger. No objection.adopted.

Deleted any reference of wages as collateral for loan.

Bradley moved new CS by Judiciary out of committee.

SB 546 EMINENT DOMAIN SB 546

Mr. Brown moved am to sec 2(a) on line 20-21. No objection, adopted.

Mr. Brown moved page 1, line 25 add "or possession". No objection, adopted.

Mr. Brown moved CS out of committee.

HB 634 EMPLOYMENT OF MINORS HB 634

Page 2, line 14-15 reads as if minor should give notice. Drafting error. Rewrite so that employer must give notice.

Sec. 6 should read "and 23.10 340(b).

Mr. Specking moved CS out. No objection.

HB 600 DETERMINATE SENTENCING HB 600

A new CS by Pat Conheady of Dept. of Law.

2(a) and 3(a) are specific minimum terms of confinement.

Sec. 5: Good time is vested after accumulation of 30 days.

Page 5, line 16 to read: "shall inquire of the accused person whether or not he is..."

The meeting was adjourned at 3:20.

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER / POUCH M — JUNEAU 99811

January 5, 1976

The Honorable Chancy Croft
Suite 710
425 G Street
Anchorage, Alaska 99501

Dear Chancy:

Earlier, Bill McQuire sent along a copy of your proposed Senate Bill relating to the power of eminent domain, along with a request that we take a look at it here.

I have circulated the draft for comments, and have found no general problems with the legislation. I should point out that this Department has far less to do with eminent domain than does the Department of Highways, and therefore probably does not appreciate the complexities regarding the use of this law.

Generally speaking, the intent of the bill seems to be good, and the only change that anyone recommended in our Department is that in Section 460(b) the words "or purpose" be substituted for the words "for a project located." The thought here is that project tends to be associated with development and it may be that the eminent domain power may be exercised for a public use that may not require development. I would be interested in seeing comments of the Department of Highways on this.

Best regards,

Guy R. Martin
Commissioner

THE SUPREME COURT OF THE STATE OF ALASKA

ARCO PIPELINE COMPANY, et al., Petitioners, v. 3.60 Acres, more or less, etc.; JACKIE J. STEWART, et al., Respondents.	File No. 2419
	O P I N I O N
	[No.1177 - August 1, 1975]

Petition for Review from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Warren W. Taylor, Judge.

Appearances: Karl L. Walter, Jr., of Groh, Benkert & Walter, Anchorage, for Petitioners. Jackie J. Stewart, Delta Junction, Respondent, in propria persona.

Before: Rabinowitz, Chief Justice, Connor, Erwin, and Burke, Justices. (Boochever, Justice, not participating.)

ERWIN, Justice.

Petitioners are the owners and constructors of the Trans-Alaska Pipeline. In order to facilitate the prompt completion of this monumental and historic project, the State of Alaska in AS 38.35.130 authorized a delegation of its power of eminent domain and permitted thereby the use by petitioners of a declaration of taking to condemn real

property in the state for right-of-way purposes.[1] Pursuant to this grant, on July 15th, 1974, petitioners filed an eminent domain complaint and a declaration of taking seeking to condemn a 3.6 acre right-of-way and easement -- 100 feet wide and approximately 1400 feet long -- across the 80 acre homestead of respondent Stewart in the area of Delta Junction. The sum of $700.00 was deposited in the court as estimated compensation for the taking. Respondent Stewart answered and asserted that condemnation of the respondent's property was not necessary since petitioners had public lands available to them which were suitable for the pipeline construction.

A consolidated hearing concerning this as well as other parcels in the same area was conducted on September 20 and November 1, 1974. At the hearing petitioners offered expert testimony on the subjects of route selection and design criteria and the necessity of the taking of respondent's property. The testimony revealed that in the opinion of the pipeline company the route selected was optimal in satisfying design and construction criteria and maintained

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1. AS 38.35.130 of the Right-of-Way Leasing Act provides in part:

> (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 lands 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.

the straightest line possible, one having the fewest number of angles detrimental to the proper flow of crude oil. The expert testimony further indicated that core drilling of the property had revealed that the soil was suitable for burying the pipeline. Respondent, on the other hand, offered no testimony questioning the efficacy of the route selected, but provided instead evidence that there were state and university lands north of respondent's property over which the pipeline could be constructed.

After hearing the testimony and after additional briefing the trial court denied the taking, concluding that petitioners had failed to demonstrate that they had considered routing the line over public lands and thereby avoid private injury. The court ruled that where the option of alternative routing over public land exists petitioners have the burden of submitting convincing evidence that they have at least considered the alternative routing across state land to avoid private injury, and that they must give cogent reasons for their ultimate selection.

Following the decision a petititon for review was filed in the Supreme Court and an order granting such review was entered on February 18, 1975.

Before discussing the issues raised in this review, it should be pointed out that the trial court specifically found that petitioners have been given statutory authority by the state of Alaska to take property for

the construction of the Trans-Alaska Pipeline; it also apparently found that petitioners had been properly delegated this power and had otherwise complied with the applicable statutes governing the exercise of the power of condemnation by way of declaration of taking. These conclusions are supported on the record[2] and have not been contested herein by respondent. They are therefore not at issue in this Petition for Review.

The specific issue presented here for review is whether or not the trial court was correct in its determination that for purposes of the exercise of the power of condemnation by way of a declaration of taking petitioners have the burden of showing consideration of possible alternate pipeline routes and of providing sufficient proof of the necessity of the particular route selected. The resolution of this question necessarily entails an analysis of the statutes governing the use of a declaration of taking by petitioners and, correlatively, an inquiry into the question of the proper scope of judicial review in such proceedings.

AS 09.55.420-09.55.450,[3] governing the use of a

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2. We note that the record reveals that on July 2, 1974, the Commissioner of the Department of Natural Resources executed a Delegation of Authority under the statute and specifically authorized thereby petitioners' use of a declaration of taking to condemn the Stewart property.

3. The pertinent provisions of these statutes read as follows:

Sec. 09.55.420. Declaration of taking by state or municipality. (a) Where a

declaration of taking in this state, constitute the authority

3. Cont'd

proceeding is instituted under §§ 240-460 of this chapter by the state, it may file a declaration of taking with the complaint or at any time after the filing of the complaint, but before judgment. . . .

Sec. 09.55.430. Contents of declaration of taking. The declaration of taking shall contain

(1) a statement of the authority under which the property or an interest in it is taken;

(2) a statement of the public use for which the property or an interest in it is taken;

(3) a description of the property sufficient for the identification of it;

(4) a statement of the estate or interest in the property;

(5) a map or plat showing the location of the property;

(6) a statement of the amount of money estimated by the plaintiff to be just compensation for the property or the interest in it.

Sec. 09.55.440. Vesting of title and compensation. (a) Upon the filing of the declaration of taking and the deposit with the court of the amount of the estimated compensation stated in the declaration, title to the estate as specified in the declaration vests in the plaintiff, and that property is condemned and taken for the use of the plaintiff, and the right to just compensation for it vests in the persons entitled to it. The compensation shall be ascertained and awarded in the proceeding and established by judgment. . . .

Sec. 09.55.450. Right of entry and possession. (a) Upon the filing of the

for petitioners' taking in this case.[4] In Bridges v. Alaska Housing Authority, 349 P.2d 149 (Alaska 1959), the only case in which this court has engaged in a comprehensive analysis of the general import of these provisions in the context of the exercise of eminent domain in this state, it was observed that

> [a] declaration of taking enlarges the rights of the condemning authority and reduces those of the landowner. Upon the filing of the declaration and a deposit of the amount of compensation estimated to be due, title to the real property vests in the condemning agency and "such real property * * * shall be deemed to be condemned and taken for the use of the condemning agency * * *." And then, without the necessity of awaiting the report of the commissioners and assessment of damages, the court is given the power "to fix the time within which and the terms upon which

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3. Cont'd

> declaration of taking and the deposit of the estimated compensation, the court may, upon motion, fix the time during which and the terms upon which the parties in possession are required to surrender possession to the petitioner. However, the right of entry shall not be granted the plaintiff until after the running of the time for the defendant to file an objection to the declaration of taking. . . .
>
> . . .
>
> (c) The right to take possession and title in advance of final judgment where a declaration of taking is filed is in addition to any other rights to take possession provided in §§ 240-460 of this chapter.

4. Note 1 supra.

> the parties in possession shall be required to surrender possession" to the condemning authority. 5

The Court further concluded that

> [i]t apparently was not intended that the declaration of taking power should merely supplement the procedural aspects of the then existing statutory provisions on eminent domain. . . . The declaration of taking is a power of eminent domain, and not only a manner of exercising a power otherwise conferred. More than procedure is involved; substantive rights are affected. 6

We take this opportunity to observe that changes in the language of the declaratic of taking provisions since Bridges have been -- at least for purposes of this review -- minor, and we consequently recognize the applicability of the Bridges analysis to the case at hand. In Bridges, however, we were not called upon to consider the effect of the declaration of taking provisions in light of other statutes which govern eminent domain proceedings in general. It is this interrelationship which is at the crux of this review.

The trial court, in holding that petitioners were obliged to demonstrate in convincing terms the necessity of selecting one route as opposed to other alternatives which might arguably minimize private injury, premised its ruling upon the conclusion that the petitioners' action was governed by the same rules which apply to any governmental exercise

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5. 349 P.2d at 153-54 (footnote omitted).

6. Id. at 153.

of the power of eminent domain. Obviously looking to such statutes as AS 09 55.260 through 09.55.280, and 09.55.300,[7]

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7. These sections provide in pertintent part:

Sec. 09.55.260. Private property subject to be taken. The private property which may be taken under §§ 240-460 of this chapter includes

. . .

(5) all rights-of-way for any of the purposes mentioned in § 240 of this chapter, and the structures and improvements on the rights-of-way, and the lands held and used in connection with them shall be subject to be connected with, crossed, or intersected by another right-of-way or improvements or structures on them; they shall also be subject to a limited use, in common with the owner, when necessary; but the uses, crossings, intersections, and connections shall be made in the manner most compatible with the greatest public benefit and least private injury;

. . .

Sec. 09.55.270. Prerequisites. Before property can be taken, it shall appear that

. . .

(2) the taking is necessary to the use;

. . .

Sec. 09.55.280. Entry upon land. In all cases where land is required for public use, the state, the public entity, or persons having the authority to condemn, or its agents in charge of the use may enter upon the land and make examination, surveys, and maps and locate the boundaries; but it shall be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of § 300 of this chapter. . . .

Sec. 09.55.300. Powers of court. (a) The

the court quite reasonably concluded that it was therefore

> the province of the court to require the condemnor to prove to the satisfaction of the court that the selected route is consistent with the greatest public benefit and to the least private injury.

However, a consideration of the clear legislative intent that the prompt completion of the pipeline be facilitated under the Right-of-Way Leasing Act,[8] our reading and analysis of certain critical provisions governing the effect of the use of a declaration of taking, and the continued recognition and validation of the approach we adopted in Bridges lead us to the conclusion that the court erred in concluding

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7. Cont'd

> court has power
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> (1) to regulate and determine the place and manner of making the connections and crossings or of enjoying the common uses mentioned in § 260(5) of this chapter . . . .
>
> (2) to limit the amount of property sought to be condemned if, in its opinion, the quantity sought to be condemned is not necessary.
>
> . . .

8. AS 38.35.010 et seq. See, for example, the October 17, 1973, letter from Governor William A. Egan to Hon. Terry Miller, President of the Senate, which accompanied the bill which (as later modified and adopted) substantially amended the original Right-of-Way Leasing Act of 1972. With respect to the subject of condemnation, the Governor observed that

> . . . a modified form of eminent domain has been restored so that construction of pipelines may proceed promptly.

House Journal and Senate Journal of Alaska, Special Session 1973, at 8.

that in a proceeding for condemnation by way of a declaration of taking the court is empowered to require the condemnor to prove the necessity of a given taking.

Our declaration of taking statutes were patterned upon the language of 40 U.S.C. §258a[9] which governs "quick take" eminent domain proceedings by the United States. Decisions interpreting this federal statute may consequently be considered persuasive for purposes of construing the analogous provisions of our own statutes.[10]

A review of such decisions reveals that it has been consistently recognized that the effect of the language of §258a is that once a declaration of taking is filed title to the property is transferred to the condemning authority subject only to the right of the property owner to challenge the validity of the taking as not being for an authorized public purpose or as having been made capriciously or in bad faith.[11] It has, for example, been held that absent bad

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9. There is, regrettably, a dearth of legislative history available concerning the adoption of our declaration of taking statutes. To the effect that they were originally taken almost word for word from 40 U.S.C. § 258a, however, see 1960 Op. Alaska Att'y Gen., No. 15.

10. See Russian Orth. Greek Cath. Church of N. America v. Alaska State Housing Auth., 498 P.2d 737 (Alaska 1972), where this Court looked to decisions under the federal act for guidance in construing the effect of AS 09.55.420 to 09.55.440. See also Alaska Transp. Comm'n v. Alaska Airlines, Inc., 431 P.2d 510, 512 (Alaska 1967).

11. Wilson v. United States, 350 F.2d 901, 906-07 (10th Cir. 1965); United States v. Threlkeld, 72 F.2d 464, 465 (10th Cir. 1934); see Berman v. Parker, 348 U.S. 26, 99 L. Ed. 27 (1954); United States ex rel T.V.A. v. Welch, 327

faith, if the use is a public one the necessity of a given taking is not a question for judicial determination;[12] that once the declaration of taking is filed and the estimated compensation is deposited, neither the condemnee nor the court has the power to question the condemnor's determination of the necessity of a particular taking;[13] and that as the judicial role in examining such condemnation proceedings does not extend to determining whether the land sought is actually necessary to the project, the court's review power is limited to those cases where there has been some clear abuse of administrative discretion -- where the officials making the administrative decisions have acted in bad faith or so capriciously and arbitrarily that their action was

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11. Cont'd

U.S. 546, 90 L. Ed. 843 (1946); United States v. Carmack, 329 U.S. 230, 91 L. Ed. 209 (1946); United States v. New York, 160 F.2d 479 (2d Cir. 1947); United States v. 1,278.83 Acres of Land, 12 F.R.D. 320 (E.D. Va. 1952). See also 6A J. Sackman, Nichols' The Law of Eminent Domain § 27.26, at 27-80 (rev. 3d ed. 1974) where it is stated that

> [s]ince the wisdom and expediency of a condemnation are not matters for judicial review, defenses relating to the necessity for acquisition of property, the necessity for resorting to eminent domain to acquire it, the extent or amount of property to be taken, the choice of the tract, the wisdom or feasibility of the project, the kind of property or the nature of the estate to be acquired, are not proper. (footnote omitted)

12. Wilson v. United States, 350 F.2d 901, 907 (10th Cir. 1965).

13. United States v. Mischke, 285 F.2d 628 (8th Cir. 1961); United States v. 6.74 Acres of Land, 148 F.2d 618 (5th Cir. 1945).

without adequate determining principle or was unreasoned.[14]

Such an approach is in keeping with what would appear to be the general rule that the scope of review of any taking in eminent domain is extremely limited; that questions of necessity and expediency are largely beyond the reach of the court, which ought generally to limit its inquiry to the question of the existence of a proper public purpose and the absence of any abuse of the power of condemnation.[15] It is consequently recognized that it is no defense in a condemnation proceeding that some other location for the taking might reasonably have been selected or some other suitable property obtained.[16]

As against this proposition, however, Alaska is among the minority of jurisdictions which statutorily call

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14. United States v. Certain Land in Borough of Manhattan, 233 F. Supp. 899 (S.D.N.Y. 1964), aff'd, 336 F.2d 1021. See also United States v. 80.5 Acres of Land, 448 F.2d 980 (9th Cir. 1971); United States v. 2,606.84 Acres of Land, 432 F.2d 1286 (5th Cir. 1970), cert. denied, 402 U.S. 916, 28 L. Ed. 2d 658, reh. denied, 403 U.S. 912, 29 L. Ed. 2d 690.

15.

> The overwhelming weight of authority makes clear beyond any possibility of doubt that the question of the necessity or expediency of a taking in eminent domain lies within the discretion of the legislature and is not a proper subject of judicial review. (footnote omitted)

1 J. Sackman, Nichols' The Law of Eminent Domain §4.11, at 4-138 (rev. 3d ed. 1974).

16. 6A id. §27.26, at 27-80.

for judicial inquiry into the question of necessity in eminent domain proceedings.[17] AS 09.55.270, for example, specifically requires for a showing that the taking "is necessary to the use" before property can be taken. The resultant conflict between this provision and the concept of judicial review developed under the language of 40 U.S.C. § 258a -- which may be presumed to have been intended to apply to our declaration of taking provisions[18] -- seems clear. Recognizing our duty to construe statutes covering the same subject matter in pari materia,[19] and to adopt where possible a reasonable construction of each which realizes leglislative intent and avoids conflict or inconsistency with the other,[20] we

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17. See Ariz. Rev. Stat. §12-1112 (1956); Smith-Hurd Ill. Ann. Stat. ch. 47, §2.2(c) (1969); 7 Rev. Codes Mont. 1947, §93-9905 (1964).

We note that though we could find no explicit legislative recognition of this fact, the editors of our own Alaska Statutes 1962 have indicated in their annotations to AS 09.55.270 that this section was derived from an almost identical provision in the Montana Statutes. See 7 Rev. Codes Mont. 1947, § 93-9905 (1964). This fact would appear to offer much in the way of explanation for the trial court's reliance upon Montana precedent when it concluded that "when the condemnor fails to consider the question of the least private injury between alternate routes, its action is arbitrary and amounts to an abuse of discretion." Citing Montana Power Co. v. Bokma, 457 P.2d 769, 775 (Mont. 1969).

18. Cf. Nicholson v. Sorensen, 517 P.2d 766, 770 (Alaska 1973); Gray v. State, 463 P.2d 897, 902 (Alaska 1970). See also p. 10 & note 10 supra.

19. See, e.g., Stewart & Grindle, Inc. v. State 524 P.2d 1242 (Alaska 1974); Smalley v. Juneau Clinic Bldg. Corp., 493 P.2d 1296 (Alaska 1972); United States v. Hardcastle, 10 Alaska 254 (1942).

20. Gordon v. Burgess Const. Co., 425 P.2d 602 (Alaska 1967).

nevertheless find the concept of judicial review embodied in our general eminent domain statutes to be inconsistent with and inappropriate to proceedings under a declaration of taking.

The conclusion seems inescapable that there exists a clear functional distinction between proceedings in condemnation under a declaration of taking and those under a complaint seeking condemnation and an order for possession. Under the former title passes immediately upon filing and deposit -- at which time, under AS 09.55.440, the property is deemed to be "condemned and taken for the use of the plaintiff."[21] Under the latter no such vesting occurs; title does not vest, nor does "condemnation" actually occur until the final award is determined and an order and judgment of condemnation is entered by the court.

As recognized in Bridges,[22] as well as later cases, the difference in the nature of these two proceedings is not merely procedural; the almost summary quality of the former bespeaks the grant of an additional substantive power of condemnation which considerably reduces the rights of the landowner to contest the taking.[23] Consequently, reading AS 09.55.420 to 09.55.450 in this light, we are lead to the

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21. See note 3 supra.

22. See City of Anchorage v. Lot 1 in Block 68 of Orig. Town., 409 P.2d 609 (Alaska 1966).

23. See p.6-7 & note 5 supra.

conclusion that the intent of these provisions was to bring, in summary fashion, statutory finality to the questions of title and right to possession even though litigation continues with respect to the ultimate amount of compensation to be paid. If such finality is to be given any meaningful effect, we conclude that such vesting must be subject only to the rather limited right of the owner to contest the validity of the taking as not being statutorily authorized or as having been capriciously or arbitrarily exercised.[24] To permit the owner to challenge the necessity of the particular taking without an initial showing on his part that it is the result of some clear abuse of discretion is to give the concept of a declaration of taking no more effect than that of a complaint in any condemnation proceeding; such an interpretation would render the language of AS 09.55.440 noted above essentially meaningless.

We would note at this juncture that although the enabling legislation under which petitioners are empowered to use a declaration of taking does not refer to or incorporate it -- and we consequently do not find it wholly dispositive of the case at hand -- AS 09.55.460(b) provides in part that

> [t]he plaintiff may not be divested of a title acquired except where the court finds that the property was not taken for a public use.

We find that this express declaration of legislative intent

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24. Cf. 6A J. Sackman, Nichols' The Law of Eminent Domain § 27.25, at 27-61 to -62 (rev. 3d ed. 1974).

as to the scope of judicial review in such proceedings lends considerable support for the conclusion we reach today.

Our decision that the question of necessity under a declaration of taking is not one for initial judicial consideration as in the case of other condemnation proceedings is also buttressed by several other factors. There is evidence, for example, that the legislature was at least well aware of the substantive differences in the two types of proceedings when it considered the use of eminent domain powers for pipeline right-of-way acquisition. Prior to the adoption of the present AS 38.35.130 an amendment was offered to the bill which would have authorized for pipeline purposes the exercise of eminent domain powers only under AS 09.55.240-09.55.410, the general eminent domain provisions.[25] Such an approach was rejected, however, and the present version allowing the use of a declaration of taking was adopted instead.

It must next be recognized that the Montana case law upon which the trial court apparently founded at least part of its decision[26] is from a statutory scheme which

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25. See the amendment offered by Senator Croft to the committee substitute for the original senate bill amending AS 38.35.130 which would have inserted after "condemn" the words "by eminent domain under AS 09.55.240-09.55.410." House Journal and Senate Journal of Alaska, Special Session 1973, at 99. Although this amendment passed the senate, the failure of both houses to concur on this as well as other amendments to the Right-of-Way Leasing Act resulted in a Free Conference Committee substitute which, as finally approved, provided the present version.

26. See discussion, note 17 supra.

does not recognize at all the concept of a declaration of taking or any other such "quick take" proceeding.[27] Moreover, there is evidence that the courts of Montana have themselves not been entirely consistent on the subject of judicial review of administrative determinations of necessity. In State Highway Commission v. Crossen-Nissen Co., 410 P.2d 283, 285 (Mont. 1965), for example, it was held that although (in a normal eminent domain action) the plaintiff has the initial burden of making some sort of prima facie showing of necessity, it is

> incumbent upon the defendant to show fraud, abuse of discretion or arbitrary action in order to defeat the action of the [plaintiff].

The court went on to hold that

> even when necessity has been challenged on the ground of arbitrariness or excessiveness of the taking, there is left largely to the discretion of the condemnor the location, route, and area of the land to be taken. There rests upon the shoulders of one seeking to show that the taking has been excessive or abritrary, a heavy burden of proof in the attempt to persuade the court to substitute its judgment for that of the condemnor. . . . "[Such] proof should be made clear and convincing; otherwise no location could ever be made."

Assuming arguendo that such an evidentiary rule is wholly appropriate for proceedings under the same general eminent domain provisions in this state (a question we need not reach in this case), we find it difficult to square this

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27. See 7 Rev. Codes Mont. 1947, §§ 93-9901 et seq. (1964).

analysis of burdens of proof with the ruling upon which the trial court based its decision -- that the condemnor is under a burden of demonstrating ab initio its consideration of alternative routes and of justifying the ultimate route selected. The mandate of a prima facie showing of "necessity," even in Montana, has been held to require only a showing that the particular property taken is "reasonably requisite and proper for the accomplishment of the purpose for which it is sought."[28] Notwithstanding the difficulty involved in reconciling these positions, or Montana case law, we are persuaded that no such burden of proof as was imposed by the trial court was ever intended to apply to proceedings under a declaration of taking in this state.

The final touchstone leading us to the conclusion that AS 09.55.420-09.55.450 were clearly intended to authorize a more summary and less judicially dependent exercise of the power of eminent domain is found in the original act under which the declaration of taking proceeding was authorized.

Sections 1 through 8 of chapter 90, SLA 1953, authorized the use of a declaration of taking as a special supplemental proceeding "to provide for obtaining possession of lands taken for public highway purposes by eminent domain." Prior to 1953 no such proceeding was recognized under Alaskan

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28. State Highway Comm'n v. Crossen-Nissen Co., 400 P.2d 283, 284 (Mont. 1965); accord, State Highway Comm'n v. Yost Farm Co., 384 P.2d 277, 279 (Mont. 1963); State ex rel. Livingston v. District Court, 300 P. 916 (Mont. 1931).

law. Although now no longer limited to public highway purposes, the state being authorized to use the proceeding for any purpose for which the right of eminent domain may be exercised,[29] the original 1953 Act is otherwise in almost every respect identical to the present provisions. The 1953 Act, however, contained a severability clause which specifically provided in addition that

> [a]ll laws or portions of laws inconsistent with the policy and provisions of this Act are hereby repealed to the extent of such inconsistency in their application to the declaration of taking procedure authorized by this Act.[30]

This provision, though not incorporated in the original 1962 codification of the Alaska Code of Civil Procedure,[31] not only clearly reflects a legislative recognition of the substantive difference between the use of this special power and that of eminent domain in general, but it also evidences in its express repealer language an intent that the exercise of this power should not be

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29. We note that the historical development of these provisions reflects the adoption of increasingly less restrictive limitations on the use of this power. See § 1, ch. 90, SLA 1953 (use by the Territory for public highway purposes); § 1, ch. 138, SLA 1955 (use by the Territory "for any purpose for which the Territory is authorized the power of eminent domain"); §§ 1-5, ch. 146, SLA 1959 (extending the use of the declaration to the state, public utility and school districts); §§ 13.19-13.23, ch. 101, SLA 1962 (extending the power to first-class cities); § 2, ch. 122, SLA 1966 (adopting the language presently appearing in AS 09.55.420).

30. Section 7, ch. 90, SLA 1953.

31. Sections 13.19-13.23, ch. 101, SLA 1962.

restricted by limitations, otherwise applicable to eminent domain, which are inconsistent with the policies of immediate vestiture of title and the limited power of the court to divest such title once acquired (as is reflected in the present AS 09.55.460 noted supra). A judicial recognition of these policies appears at least by implication in our opinion in Bridges.

After consideration of the foregoing, we are of the opinion that in proceedings in eminent domain by way of a declaration of taking under AS 09.55.420-09.55.450, the court is without authority, either by virture of the express mandate of AS 09.55.460(b) or by implication from the legislative history and policy evidenced in AS 09.55.440, to review the question of the necessity of a particular taking absent a clear showing of fraud, bad faith, arbitrariness or an abuse of discretion in exercise of the power of condemnation by the condemning authority. Once an authorized public use for the taking is established by the condemnor, and statutory and procedural requirements are otherwise satisfied,[32] that the particular taking is reasonably requisite to the realization of that use shall be presumed. Notwithstanding such provisions as AS 09.55.270(2), judicial

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32. It is clear, for example, that the failure of a declaration of taking to satisfy the specific requirements of AS 09.55.430 would constitute a proper defense to the condemnation. See note 3 supra. It is also manifest that a taking may properly be challenged on the ground that the condemnor's action is not in compliance with such specific restrictions on the exercise of the power as may appear in the commissioner's delegation of authority or the lease itself.

inquiry into such necessity or the condemnor's determinations with respect thereto is not appropriate unless and until the condemnee has presented clear and convincing evidence that the condemnor has acted in bad faith or so capriciously and arbitrarily as to indicate the absence of any reasonable determining principle.

In this case it is clear that the use intended is public and statutorily authorized. Petitioners have, moreover, presented unrebutted evidence to the effect that the design and construction criteria for the pipeline are most feasibly satisfied by the route across the property of respondent. The fact that some other available routing might suffice or even be more desirable in some respects is not sufficient in this case to raise a proper defense to the declaration of taking. Consequently, it cannot be said that petitioner is under any duty to initially submit evidence that it has considered such alternate routing; nor can the failure to make such showing under the circumstances justify a finding of arbitrariness or an abuse of discretion. Only specific allegations of fraud, bad faith, or some gross abuse of discretion in locating the pipeline can raise issues sufficient to permit judicial review of the necessity of the taking.[33] No such allegations haye been made herein. The determination of the location of the pipeline must

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33. No challenge on constitutional grounds has been raised in this case and we do not reach such issue in this review.

therefore be left to the agency charged with carrying out its completion.[34]

The order of the superior court is vacated and the case is remanded for further proceedings in conformity with this opinion.

VACATED and REMANDED.

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34. See Williams v. Transcontinental Gas Pipe Line Corp., 89 F. Supp. 485, 488-89 (W.D.S.C. 1950).

CHAIRMAN'S REPORT
FOR
HCS SB 546

The House Judiciary Committee received testimony that the addition of the proposed new language in AS 09.55.460 (b) would allow for an interpretation of that statute enabling a person to bring a collateral action for damages as a result of the taking after the normal time for a hearing on "just compensation" and "necessity compatable with the greatest public good and the least private harm."

It is the Committee's opinion, relying on the opinion of counsel at the Legislative Affairs Agency, that such a construction of AS 09.55.460 (b) would be extremely strained. It is the intent of the Judiciary Committee that the aforementioned language not be utilized in a manner which would allow an individual to bring a collateral action in a court of law other than to defend a taking as set out in AS 09.55.450 (a).

Terry Gardiner

Terry Gardiner, Chairman
House Judiciary Committee

Wiring Amendments

Introduced: 1/19/76
Referred: Resources

IN THE SENATE BY CROFT

SENATE BILL NO. 546

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the power of eminent domain."

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

* Section 1. AS 09.55.430 is amended by adding a new paragraph to read:

(7) a statement that the property is taken by necessity for a project located in a manner which is most compatible with the greatest public good and the least private injury.

* Sec. 2. AS 09.55.450(a) is amended to read:

(a) Upon the filing of the declaration of taking and the deposit of the estimated compensation, the court may, upon motion, fix the time during which and the terms upon which the parties in possession are required to surrender possession to the petitioner. However, the right of entry shall not be granted the plaintiff until after ~~the hearing of any objection to the declaration of taking made by the defendant, or~~ the running of the time for the defendant to file an objection to the declaration of taking (or until after the hearing on any objection to the declaration of taking if the objection is made in the time allowed by law). Where the party in possession withdraws any part of the award and remains in possession, the court may fix a reasonable rental for the premises to be paid by that party to the plaintiff during such possession.

* Sec. 3. AS 09.55.460(b) is amended to read:

(b) The plaintiff may not be divested of a title (or possession) acquired except where the court finds that the property was not taken ~~by necessity~~ for a public use ~~or purpose in a manner compatible with the greatest public good and the least private injury~~ or purpose. In the event of that finding, the court shall enter the judgment necessary to (1) compensate the persons

entitled to it for the period during which the property was in the possession of the plaintiff, [and] (2) recover for the plaintiff any award paid to any person, and (3) order the plaintiff to restore the property to the condition in which it existed at the time of the filing of the declaration of taking unless such restoration is impossible, in which case the court shall award damages to the proper persons as compensation for any diminution in the value of the property caused by the plaintiff's wrongful possession.

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Referred: Resources

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or until after the hearing on any objection to the declaration of taking if the objection is made in the time allowed by law.

* Sec. 3. AS 09.55.460(b) is amended to read:

(b) The plaintiff may not be divested of a title or possession acquired except where the court finds that the property was not taken by necessity for a public use or purpose in a manner compatible with the greatest public good and the least private injury. In the event of that finding, the court shall enter the judgment necessary to (1) compensate the persons

entitled to it for the period during which the property was in the possession of the plaintiff, [AND] (2) recover for the plaintiff any award paid to any person, and (3) order the plaintiff to restore the property to the condition in which it existed at the time of the filing of the declaration of taking unless such restoration is impossible, in which case the court shall award damages to the proper persons as compensation for any diminution in the value of the property caused by the plaintiff's wrongful possession.

3-26-71
#15B546

Declaration of taking = Quick Taking

takes about 85 days for a quick taking today

Curran claims there is a public hearing on routs before any condemnation. What if we write into bill a presumption in favor of public necessity and convinience?

Steward v Greendal 1971 ?

title vests at the time of the filing of the condemnation but right of ent. does not vest until court order aft. hearing or default.

SB546

Richard P. Kerns - Highways Sections

Against - Need to show "necessity"
only have to show "purpose"
Uses "Quick Taking"

Conduct 4 design hearings

Alternative to show necessity by plaintiff

Winning from City of AUC

Section 3 could require review of completed
Projects

ARCO PIPELINE COMPANY et al., Petitioners,

v.

3.60 ACRES, MORE OR LESS, etc., and Jackie J. Stewart, et al., Respondents.

No. 2419.

Supreme Court of Alaska.

Aug. 1, 1975.

Proceeding was brought by the owners and constructors of the Trans-Alaska pipeline to condemn 3.60-acre right-of-way and easement. The Superior Court, Fourth Judicial District, Fairbanks, Warren W. Taylor, J., denied taking, and petitioners appealed. The Supreme Court, Erwin, J., held that in proceeding in eminent domain by way of declaration of taking under power delegated by state, court is without authority to review question of necessity of particular taking absent clear showing of fraud, bad faith, arbitrariness or abuse of discretion in exercise of power of condemnation by condemning authority, that fact that some other available routing might suffice or even be more desirable in some respects was not sufficient to raise proper defense to declaration of taking, and that where no specific allegations of bad faith, fraud, or gross abuse of discretion in locating pipeline raised issue sufficient to permit judicial review of necessity of taking, determination of location of pipeline was required to be left to agency charged with carrying out completion.

Order of superior court vacated and case remanded.

1. Eminent Domain ⇐167(2)

Although recognizing duty to construe statutes covering same subject matter in pari materia, and to adopt where possible reasonable construction of each in order to realize legislative intent and avoid conflict or inconsistency with other, Supreme Court nevertheless found concept of judical review embodied in general eminent domain statute to be inconsistent with and inappropriate to declaration of taking proceedings. AS 09.55.270, 09.55.440.

2. Eminent Domain ⇐320

In condemnation proceeding under declaration of taking, title passes immediately upon filing of complaint and deposit to party seeking condemnation at which time property is deemed to be condemned and taken for use of party seeking condemnation. AS 09.55.440.

3. Eminent Domain ⇐320

Under complaint seeking condemnation and order for possession, title does not vest, nor condemnation actually occur until final award has been determined and ordered and judgment of condemnation entered by court.

4. Eminent Domain ⇐166

Almost summary quality of proceeding in condemnation under declaration of taking bespeaks grant of additional substantive power of condemnation which considerably reduces rights of landowner to contest taking in question. AS 09.55.440.

5. Eminent Domain ⇐198(1)

In proceedings in eminent domain by way of declaration of taking, court is without authority to review question of necessity of particular taking absent clear showing of fraud, bad faith, arbitrariness or abuse of discretion in exercise of power of condemnation by condemning authority. AS 09.55.440.

6. Eminent Domain ⇐196

Once authorized public use for taking under declaration of taking is established by condemnor, and statutory and procedural requirements otherwise satisfied, that the particular taking is reasonably requisite to realization of that use shall be presumed. AS 09.55.440.

7. Eminent Domain ⇐171

Where intended use of property sought to be condemned by owners and constructors of the Trans-Alaska pipeline under declaration of taking was public and was statutorily authorized, and unrebutted

evidence was presented to effect that design and construction criteria for pipeline would be most feasibly satisfied by route across property sought to be condemned, fact that some other available route might suffice or even be more desirable in some respects was not sufficient to raise proper defense to declaration of taking. AS 09.55.440.

8. Eminent Domain ⇐68

Where intended use of property sought to be condemned by owners and constructors of the Trans-Alaska pipeline under declaration of taking was public and was statutorily authorized, and property owner made no specific allegations of fraud, bad faith, or gross abuse of discretion on part of owners and constructors in exercise of their condemnation powers or in locating pipeline, determination of location of pipeline was left to agency charged with carrying out completion. AS 09.55.440.

Karl L. Walter, Jr., of Groh, Benkert & Walter, Anchorage, for petitioners.

Jackie J. Stewart, in pro. per.

Before RABINOWITZ, C. J., and CONNOR, ERWIN, and BURKE, JJ.

OPINION

ERWIN, Justice.

Petitioners are the owners and constructors of the Trans-Alaska Pipeline. In order to facilitate the prompt completion of this monumental and historic project, the State of Alaska in AS 38.35.130 authorized a delegation of its power of eminent domain and permitted thereby the use by petitioners of a declaration of taking to condemn real property in the state for right-of-way purposes.[1] Pursuant to this grant, on July 15th, 1974, petitioners filed an eminent domain complaint and a declaration of taking seeking to condemn a 3.6 acre right-of-way and easement—100 feet wide and approximately 1400 feet long—across the 80 acre homestead of respondent Stewart in the area of Delta Junction. The sum of $700.00 was deposited in the court as estimated compensation for the taking. Respondent Stewart answered and asserted that condemnation of the respondent's property was not necessary since petitioners had public lands available to them which were suitable for the pipeline construction.

A consolidated hearing concerning this as well as other parcels in the same area was conducted on September 20 and November 1, 1974. At the hearing petitioners offered expert testimony on the subjects of route selection and design criteria and the necessity of the taking of respondent's property. The testimony revealed that in the opinion of the pipeline company the route selected was optimal in satisfying design and construction criteria and maintained the straightest line possible, one having the fewest number of angles detrimental to the proper flow of crude oil. The expert testimony further indicated that core drilling of the property had revealed that the soil was suitable for burying the pipeline. Respondent, on the other hand, offered no testimony questioning the efficacy of the route selected, but provided instead evidence that there were state and university lands north of respondent's property over which the pipeline could be constructed.

After hearing the testimony and after additional briefing the trial court denied the taking, concluding that petitioners had failed to demonstrate that they had considered routing the line over public lands and

1. AS 38.35.130 of the Right-of-Way Leasing Act provides in part:

(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 lands 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.

thereby avoid private injury. The court ruled that where the option of alternative routing over public land exists petitioners have the burden of submitting convincing evidence that they have at least considered the alternative routing across state land to avoid private injury, and that they must give cogent reasons for their ultimate selection.

Following the decision a petition for review was filed in the Supreme Court and an order granting such review was entered on February 18, 1975.

Before discussing the issues raised in this review, it should be pointed out that the trial court specifically found that petitioners have been given statutory authority by the state of Alaska to take property for the construction of the Trans-Alaska Pipeline; it also apparently found that petitioners had been properly delegated this power and had otherwise complied with the applicable statutes governing the exercise of the power of condemnation by way of declaration of taking. These conclusions are supported on the record[2] and have not been contested herein by respondent. They are therefore not at issue in this Petition for Review.

The specific issue presented here for review is whether or not the trial court was correct in its determination that for purposes of the exercise of the power of condemnation by way of a declaration of taking petitioners have the burden of showing consideration of possible alternate pipeline routes and of providing sufficient proof of the necessity of the particular route selected. The resolution of this question necessarily entails an analysis of the statutes governing the use of a declaration of taking by petitioners and, correlatively, an inquiry into the question of the proper scope of judicial review in such proceedings.

AS 09.55.420–09.55.450,[3] governing the use of a declaration of taking in this state,

2. We note that the record reveals that on July 2, 1974, the Commissioner of the Department of Natural Resources executed a Delegation of Authority under the statute and specifically authorized thereby petitioners' use of a declaration of taking to condemn the Stewart property.

3. The pertinent provisions of these statutes read as follows:

Sec. 09.55.420. *Declaration of taking by state or municipality.* (a) Where a proceeding is instituted under §§ 240–460 of this chapter by the state, it may file a declaration of taking with the complaint or at any time after the filing of the complaint, but before judgment. . . .

Sec. 09.55.430. *Contents of declaration of taking.* The declaration of taking shall contain

(1) a statement of the authority under which the property or an interest in it is taken;

(2) a statement of the public use for which the property or an interest in it is taken;

(3) a description of the property sufficient for the identification of it;

(4) a statement of the estate or interest in the property;

(5) a map or plat showing the location of the property;

(6) a statement of the amount of money estimated by the plaintiff to be just compensation for the property or the interest in it.

Sec. 09.55.440. *Vesting of title and compensation.* (a) Upon the filing of the declaration of taking and the deposit with the court of the amount of the estimated compensation stated in the declaration, title to the estate as specified in the declaration vests in the plaintiff, and that property is condemned and taken for the use of the plaintiff, and the right to just compensation for it vests in the persons entitled to it. The compensation shall be ascertained and awarded in the proceeding and established by judgment. . . .

Sec. 09.55.450. *Right of entry and possession.* (a) Upon the filing of the declaration of taking and the deposit of the estimated compensation, the court may, upon motion, fix the time during which and the terms upon which the parties in possession are required to surrender possession to the petitioner. However, the right of entry shall not be granted the plaintiff until after the running of the time for the defendant to file an objection to the declaration of taking. . . .

. . . . . .

(c) The right to take possession and title in advance of final judgment where a declaration of taking is filed is in addition to any other rights to take possession provided in §§ 240–460 of this chapter.

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5. 349 P.2d at

6. *Id.* at 153.

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constitute the authority for petitioners' taking in this case.[4] In *Bridges v. Alaska Housing Authority*, 349 P.2d 142 (Alaska 1959), the only case in which this court has engaged in a comprehensive analysis of the general import of these provisions in the context of the exercise of eminent domain in this state, it was observed that

> [a] declaration of taking enlarges the rights of the condemning authority and reduces those of the landowner. Upon the filing of the declaration and a deposit of the amount of compensation estimated to be due, title to the real property vests in the condemning agency and "such real property * * * shall be deemed to be condemned and taken for the use of the condemning agency * * *." And then, without the necessity of awaiting the report of the commissioners and assessment of damages, the court is given the power "to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession" to the condemning authority.[5]

The Court further concluded that

> [i]t apparently was not intended that the declaration of taking power should merely supplement the procedural aspects of the then existing statutory provisions on eminent domain. . . . The declaration of taking is a power of eminent domain, and not only a manner of exercising a power otherwise conferred. More than procedure is involved; substantive rights are affected.[6]

We take this opportunity to observe that changes in the language of the declaration of taking provisions since *Bridges* have been—at least for purposes of this review—minor, and we consequently recognize the applicability of the *Bridges* analysis to the case at hand. In *Bridges*, however, we were not called upon to consider the effect of the declaration of taking provisions in light of other statutes which govern eminent domain proceedings in general. It is this interrelationship which is at the crux of this review.

The trial court, in holding that petitioners were obliged to demonstrate in convincing terms the necessity of selecting one route as opposed to other alternatives which might arguably minimize private injury, premised its ruling upon the conclusion that the petitioners' action was governed by the same rules which apply to *any* governmental exercise of the power of eminent domain. Obviously looking to such statutes as AS 09.55.260 through 09.55.280, and 09.55.300,[7] the court quite reasonably concluded that it was therefore

4. Note 1 *supra*.

5. 349 P.2d at 153-54 (footnote omitted).

6. *Id.* at 153.

7. These sections provide in pertinent part:
Sec. 09.55.260. *Private property subject to be taken.* The private property which may be taken under §§ 240-460 of this chapter includes
. . . . . .
(5) all rights-of-way for any of the purposes mentioned in § 240 of this chapter, and the structures and improvements on the rights-of-way, and the lands held and used in connection with them shall be subject to be connected with, crossed, or intersected by another right-of-way or improvements or structures on them; they shall also be subject to a limited use, in common with the owner, when necessary; but the uses, crossings, intersections, and connections shall be made in the manner most compatible with the greatest public benefit and least private injury;
. . . . . .
Sec. 09.55.270. *Prerequisites.* Before property can be taken, it shall appear that
. . . . . .
(2) the taking is necessary to the use;
. . . . . .
Sec. 09.55.280. *Entry upon land.* In all cases where land is required for public use, the state, the public entity, or persons having the authority to condemn, or its agents in charge of the use may enter upon the land and make examination, surveys, and maps and locate the boundaries; but it shall be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of § 300 of this chapter. . . .

the province of the court to require the condemnor to prove to the satisfaction of the court that the selected route is consistent with the greatest public benefit and to the least private injury.

However, a consideration of the clear legislative intent that the prompt completion of the pipeline be facilitated under the Right-of-Way Leasing Act,[8] our reading and analysis of certain critical provisions governing the effect of the use of a declaration of taking, and the continued recognition and validation of the approach we adopted in *Bridges* lead us to the conclusion that the court erred in concluding that in a proceeding for condemnation by way of a declaration of taking the court is empowered to require the condemnor to prove the necessity of a given taking.

Our declaration of taking statutes were patterned upon the language of 40 U.S.C. § 258a[9] which governs "quick take" eminent domain proceedings by the United States. Decisions interpreting this federal statute may consequently be considered persuasive for purposes of construing the analogous provisions of our own statutes.[10]

A review of such decision reveals that it has been consistently recognized that the effect of the language of § 258a is that once a declaration of taking is filed title to the property is transferred to the condemning authority subject only to the right of the property owner to challenge the validity of the taking as not being for an authorized public purpose or as having been made capriciously or in bad faith.[11] It has, for example, been held that absent bad faith, if the use is a public one the necessity of a given taking is not a question for judicial determination;[12] that once the

Sec. 09.55.300. *Powers of court.* (a) The court has power

(1) to regulate and determine the place and manner of making the connections and crossings or of enjoying the common uses mentioned in § 260(5) of this chapter

. . . .

(2) to limit the amount of property sought to be condemned if, in its opinion, the quantity sought to be condemned is not necessary.

. . . . . .

8. AS 38.35.010 *et seq.* See, for example, the October 17, 1973, letter from Governor William A. Egan to Hon. Terry Miller, President of the Senate, which accompanied the bill which (as later modified and adopted) substantially amended the original Right-of-Way Leasing Act of 1972. With respect to the subject of condemnation, the Governor observed that

> . . . a modified form of eminent domain has been restored so that construction of pipelines may proceed promptly.

House Journal and Senate Journal of Alaska, Special Session 1973, at 8.

9. There is, regrettably, a dearth of legislative history available concerning the adoption of our declaration of taking statutes. To the effect that they were originally taken almost word for word from 40 U.S.C. § 258a, however, see 1960 Op. Alaska Att'y Gen., No. 15.

10. *See Russian Orth. Greek Cath. Church of N. America v. Alaska State Housing Auth.*, 498 P.2d 737 (Alaska 1972), where this Court looked to decisions under the federal act for guidance in construing the effect of AS 09.55.420 to 09.55.440. *See also Alaska Transp. Comm'n v. Alaska Airlines, Inc.*, 431 P.2d 510, 512 (Alaska 1967).

11. *Wilson v. United States*, 350 F.2d 901, 906-07 (10th Cir. 1965); *United States v. Threlkeld*, 72 F.2d 464, 465 (10th Cir. 1934); *see Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954); *United States ex rel. T.V.A. v. Welch*, 327 U.S. 546, 66 S.Ct. 715, 90 L.Ed. 843 (1946); *United States v. Carmack*, 329 U.S. 230, 67 S.Ct. 252, 91 L.Ed. 209 (1946); *United States v. New York*, 160 F.2d 479 (2d Cir. 1947); *United States v. 1,278.83 Acres of Land*, 12 F.R.D. 320 (E.D.Va.1952). *See also* 6A J. Sackman, Nichols' The Law of Eminent Domain § 27.26, at 27-80 (rev. 3d ed. 1971) where it is stated that

> [s]ince the wisdom and expediency of a condemnation are not matters for judicial review, defenses relating to the necessity for acquisition of property, the necessity for resorting to eminent domain to acquire it, the extent or amount of property to be taken, the choice of the tract, the wisdom or feasibility of the project, the kind of property or the nature of the estate to be acquired, are not proper. (footnote omitted)

12. *Wilson v. United States*, 350 F.2d 901, 907 (10th Cir. 1965).

declaration of taking is filed and the estimated compensation is deposited, neither the condemnee nor the court has the power to question the condemnor's determination of the necessity of a particular taking;[13] and that as the judicial role in examining such condemnation proceedings does not extend to determining whether the land sought is actually necessary to the project, the court's review power is limited to those cases where there has been some clear abuse of administrative discretion—where the officials making the administrative decisions have acted in bad faith or so capriciously and arbitrarily that their action was without adequate determining principle or was unreasoned.[14]

Such an approach is in keeping with what would appear to be the general rule that the scope of review of any taking in eminent domain is extremely limited; that questions of necessity and expediency are largely beyond the reach of the court, which ought generally to limit its inquiry to the question of the existence of a proper public purpose and the absence of any abuse of the power of condemnation.[15] It is consequently recognized that it is no defense in a condemnation proceeding that some other location for the taking might reasonably have been selected or some other suitable property obtained.[16]

[1] As against this proposition, however, Alaska is among the minority of jurisdictions which statutorily call for judicial inquiry into the question of necessity in eminent domain proceedings.[17] AS 09.55.270, for example, specifically requires for a showing that the taking "is necessary to the use" before property can be taken. The resultant conflict between this provision and the concept of judicial review developed under the language of 40 U.S.C. § 258a—which may be presumed to have been intended to apply to our declaration of taking provisions[18]—seems clear. Recognizing our duty to construe statutes covering the same subject matter in pari materia,[19] and to adopt where possible a reasonable construction of each which realizes legislative intent and avoids conflict or inconsistency with the other,[20] we nev-

13. *United States v. Mischke*, 285 F.2d 628 (8th Cir. 1961); *United States v. 6.74 Acres of Land*, 148 F.2d 618 (5th Cir. 1945).

14. *United States v. Certain Land in Borough of Manhattan*, 233 F.Supp. 809 (S.D. N.Y.1964), *aff'd*, 336 F.2d 1021 (2 Cir.). *See also United States v. 80.5 Acres of Land*, 448 F.2d 980 (9th Cir. 1971); *United States v. 2,606.84 Acres of Land*, 432 F.2d 1280 (5th Cir. 1970), *cert. denied*, 402 U.S. 916, 91 S.Ct. 1368, 28 L.Ed.2d 658, *reh. denied*, 403 U.S. 912, 91 S.Ct. 2203, 29 L.Ed.2d 690.

15. The overwhelming weight of authority makes clear beyond any possibility of doubt that the question of the necessity or expediency of a taking in eminent domain lies within the discretion of the legislature and is not a proper subject of judicial review. (footnote omitted)

1 J. Sackman, Nichols' The Law of Eminent Domain § 4.11, at 4-138 (rev. 3d ed. 1974).

16. 6A *id.* § 27.26, at 27-80.

17. *See* Ariz.Rev.Stat. § 12-1112 (1956); Smith-Hurd Ill.Ann.Stat. ch. 47, § 2.2(c) (1969); 7 Rev.Codes Mont.1947, § 93-9905 (1964)

We note that though we could find no explicit legislative recognition of this fact, the editors of our own Alaska Statutes 1962 have indicated in their annotations to AS 09.55.270 that this section was derived from an almost identical provision in the Montana Statutes. *See* 7 Rev.Codes Mont.1947, § 93-9905 (1961). This fact would appear to offer much in the way of explanation for the trial court's reliance upon Montana precedent when it concluded that "when the condemnor fails to consider the question of the least private injury between alternate routes, its action is arbitrary and amounts to an abuse of discretion." Citing Montana Power Co. v. Bokma, 153 Mont. 390, 457 P.2d 769, 775 (1969).

18. *Cf. Nicholson v. Sorensen*, 517 P.2d 766, 770 (Alaska 1973); *Gray v. State*, 463 P.2d 897, 902 (Alaska 1970). *See also* p. 10 & note 10 *supra*.

19. *See, e. g., Stricart & Grindle, Inc. v. State*, 524 P.2d 1242 (Alaska 1974); *Smalley v. Juneau Clinic Bldg. Corp.*, 493 P.2d 1206 (Alaska 1972); *United States v. Hardcastle*, 10 Alaska 254 (1942).

20. *Gordon v. Burgess Const. Co.*, 425 P.2d 602 (Alaska 1967).

ertheless find the concept of judicial review embodied in our general eminent domain statutes to be inconsistent with and inappropriate to proceedings under a declaration of taking.

[2, 3] The conclusion seems inescapable that there exists a clear functional distinction between proceedings in condemnation under a declaration of taking and those under a complaint seeking condemnation and an order for possession. Under the former title passes immediately upon filing and deposit—at which time, under AS 09.55.440, the property is deemed to be "condemned and taken for the use of the plaintiff."[21] Under the latter no such vesting occurs; title does not vest, nor does "condemnation" actually occur until the final award is determined and an order and judgment of condemnation is entered by the court.

[4] As recognized in *Bridges*, as well as later cases,[22] the difference in the nature of these two proceedings is not merely procedural; the almost summary quality of the former bespeaks the grant of an additional substantive *power* of condemnation which considerably reduces the rights of the landowner to contest the taking.[23] Consequently, reading AS 09.55.420 to 09.55.450 in this light, we are lead to the conclusion that the intent of these provisions was to bring, in summary fashion, statutory finality to the questions of title and right to possession even though litigation continues with respect to the ultimate amount of compensation to be paid. If such finality is to be given any meaningful effect, we conclude that such vesting must be subject only to the rather limited right of the owner to contest the validity of the taking as not being statutorily authorized or as having been capriciously or arbitrarily exercised.[24] To permit the owner to challenge the necessity of the particular taking without an initial showing on his part that it is the result of some clear abuse of discretion is to give the concept of a declaration of taking no more effect than that of a complaint in any condemnation proceeding; such an interpretation would render the language of AS 09.55.440 noted above essentially meaningless.

We would note at this juncture that although the enabling legislation under which petitioners are empowered to use a declaration of taking does not refer to or incorporate it—and we consequently do not find it wholly dispositive of the case at hand—AS 09.55.460(b) provides in part that

> [t]he plaintiff may not be divested of a title acquired except where the court finds that the property was not taken for a public use.

We find that this express declaration of legislative intent as to the scope of judicial review in such proceedings lends considerable support for the conclusion we reach today.

Our decision that the question of necessity under a declaration of taking is not one for initial judicial consideration as in the case of other condemnation proceedings is also buttressed by several other factors. There is evidence, for example, that the legislature was at least well aware of the substantive differences in the two types of proceedings when it considered the use of eminent domain powers for pipeline right-of-way acquisition. Prior to the adoption of the present AS 38.35.130 an amendment was offered to the bill which would have authorized for pipeline purposes the exercise of eminent domain powers only under AS 09.55.240-09.55.410, the general eminent domain provisions.[25]

21. *See* note 3 *supra*.

22. *See City of Anchorage v. Lot 1 in Block 68 of Orig. Town.*, 409 P.2d 669 (Alaska 1966).

23. *See* p. 6-7 & note 5 *supra*.

24. *Cf.* 6A J. Sackman, Nichols' The Law of Eminent Domain § 27.25, at 27-61 to -62 (rev. 3d ed. 1974).

25. See the amendment offered by Senator Croft to the committee substitute for the original senate bill amending AS 38.35.130 which would have inserted after "condemn" the words "by eminent domain under AS 09.55.240-09.55.410." House Journal and Senate Journal of Alaska, Special Session

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Such an approach was rejected, however, and the present version allowing the use of a declaration of taking was adopted instead.

It must next be recognized that the Montana case law upon which the trial court apparently founded at least part of its decision[26] arises from a statutory scheme which does *not* recognize at all the concept of a declaration of taking or any other such "quick take" proceeding.[27] Moreover, there is evidence that the courts of Montana have themselves not been entirely consistent on the subject of judicial review of administrative determinations of necessity. In *State Highway Commission v. Crossen-Nissen Co.*, 145 Mont. 251, 400 P.2d 283, 285 (1965), for example, it was held that although (in a normal eminent domain action) the plaintiff has the initial burden of making some sort of prima facie showing of necessity, it is

> incumbent upon the defendant to show fraud, abuse of discretion or arbitrary action in order to defeat the action of the [plaintiff].

The court went on to hold that

> even when necessity has been challenged on the ground of arbitrariness or excessiveness of the taking, there is left largely to the discretion of the condemnor the location, route, and area of the land to be taken. There rests upon the shoulders of one seeking to show that the taking has been excessive or arbitrary, a heavy burden of proof in the attempt to persuade the court to substitute its judgment for that of the condemnor. . . . "[Such] proof should be made clear and convincing; otherwise no location could ever be made."

Assuming arguendo that such an evidentiary rule is wholly appropriate for proceedings under the same general eminent domain provisions in this state (a question we need not reach in this case), we find it difficult to square this analysis of burdens of proof with the ruling upon which the trial court based its decision—that the condemnor is under a burden of demonstrating ab initio its consideration of alternative routes and of justifying the ultimate route selected. The mandate of a prima facie showing of "necessity," even in Montana, has been held to require only a showing that the particular property taken is "reasonably requisite and proper for the accomplishment of the purpose for which it is sought."[28] Notwithstanding the difficulty involved in reconciling these positions, or Montana case law, we are persuaded that no such burden of proof as was imposed by the trial court was ever intended to apply to proceedings under a declaration of taking in this state.

The final touchstone leading us to the conclusion that AS 09.55.420-09.55.450 were clearly intended to authorize a more summary and less judicially dependent exercise of the power of eminent domain is found in the original act under which the declaration of taking proceeding was authorized.

Sections 1 through 8 of chapter 90, SLA 1953, authorized the use of a declaration of taking as a special supplemental proceeding "to provide for obtaining possession of lands taken for public highway purposes by eminent domain." Prior to 1953 no such proceeding was recognized under Alaskan law. Although now no longer limited to public highway purposes, the state being authorized to use the proceeding for any

1973, at 99. Although this amendment passed the senate, the failure of both houses to concur on this as well as other amendments to the Right-of-Way Leasing Act resulted in a Free Conference Committee substitute which, as finally approved, provided the present version.

26. See discussion, note 17 *supra*.

27. *See* 7 Rev. Codes Mont.1947, §§ 93-9901 *et seq.* (1961).

28. *State Highway Comm'n v. Crossen-Nissen Co.*, 145 Mont. 251, 400 P.2d 283, 284 (1965); *accord*, *State Highway Comm'n v. Yost Farm Co.*, 142 Mont. 230, 384 P.2d 277, 279 (1963); *State ex rel. Livingston v. District Court*, 90 Mont. 191, 300 P. 916 (1931).

purpose for which the right of eminent domain may be exercised,[29] the original 1953 Act is otherwise in almost every respect identical to the present provisions. The 1953 Act, however, contained a severability clause which specifically provided in addition that

> [a]ll laws or portions of laws inconsistent with the policy and provisions of this Act are hereby repealed to the extent of such inconsistency in their application to the declaration of taking procedure authorized by this Act.[30]

This provision, though not incorporated in the original 1962 codification of the Alaska Code of Civil Procedure,[31] not only clearly reflects a legislative recognition of the substantive difference between the use of this special power and that of eminent domain in general, but it also evidences in its express repealer language an intent that the exercise of this power should not be restricted by limitations, otherwise applicable to eminent domain, which are inconsistent with the policies of immediate vestiture of title and the limited power of the court to divest such title once acquired (as is reflected in the present AS 09.55.460 noted *supra*). A judicial recognition of these policies appears at least by implication in our opinion in *Bridges*.

[5,6] After consideration of the foregoing, we are of the opinion that in proceedings in eminent domain by way of a declaration of taking under AS 09.55.420–09.55.450, the court is without authority, either by virtue of the express mandate of AS 09.55.460(b) or by implication from the legislative history and policy evidenced in AS 09.55.440, to review the question of the necessity of a particular taking absent a clear showing of fraud, bad faith, arbitrariness or an abuse of discretion in exercise of the power of condemnation by the condemning authority. Once an authorized public use for the taking is established by the condemnor, and statutory and procedural requirements are otherwise satisfied,[32] that the particular taking is reasonably requisite to the realization of that use shall be presumed. Notwithstanding such provisions as AS 09.55.270(2), judicial inquiry into such necessity or the condemnor's determinations with respect thereto is not appropriate unless and until the condemnee has presented clear and convincing evidence that the condemnor has acted in bad faith or so capriciously and arbitrarily as to indicate the absence of any reasonable determining principle.

[7,8] In this case it is clear that the use intended is public and statutorily authorized. Petitioners have, moreover, presented unrebutted evidence to the effect that the design and construction criteria for the pipeline are most feasibly satisfied by the route across the property of respondent. The fact that some other available routing might suffice or even be more desirable in some respects is not sufficient in this case to raise a proper defense to the declaration of taking. Consequently, it cannot be said that petitioner is under any duty to initially submit evidence that it has considered such alternate routing; nor can

29. We note that the historical development of these provisions reflects the adoption of increasingly less restrictive limitations on the use of this power. *See* § 1, ch. 90, SLA 1953 (use by the Territory for public highway purposes); § 1, ch. 138, SLA 1955 (use by the Territory "for any purpose for which the Territory is authorized the power of eminent domain"); §§ 1–5, ch. 146, SLA 1959 (extending the use of the declaration to the state, public utility and school districts); §§ 13.10–13.23, ch. 101, SLA 1962 (extending the power to first-class cities); § 2, ch. 122, SLA 1966 (adopting the language presently appearing in AS 09.55.420).

30. Section 7, ch. 90, SLA 1953.

31. Sections 13.10–13.23, ch. 101, SLA 1962.

32. It is clear, for example, that the failure of a declaration of taking to satisfy the specific requirements of AS 09.55.430 would constitute a proper defense to the condemnation. *See* note 3 *supra*. It is also manifest that a taking may properly be challenged on the ground that the condemnor's action is not in compliance with such specific restrictions on the exercise of the power as may appear in the commissioner's delegation of authority or the lease itself.

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the failure to make such showing under the circumstances justify a finding of arbitrariness or an abuse of discretion. Only specific allegations of fraud, bad faith, or some gross abuse of discretion in locating the pipeline can raise issues sufficient to permit judicial review of the necessity of the taking.[33] No such allegations have been made herein. The determination of the location of the pipeline must therefore be left to the agency charged with carrying out its completion.[34]

The order of the superior court is vacated and the case is remanded for further proceedings in conformity with this opinion.

Vacated and remanded.

BOOCHEVER, J., not participating.

Lionel KIMBLE, Appellant,
v.
STATE of Alaska, Appellee.
No. 2287.

Supreme Court of Alaska.
Aug. 22, 1975.

Defendant was convicted in Superior Court, Fourth Judicial District, Everett W. Hepp, Gerald J. Van Hoomissen, and Warren W. Taylor, JJ., for armed robbery and he appealed. The Supreme Court, Rabinowitz, C. J., held that even though indictment referred to two separate statutory provisions pertaining to robbery and use of firearms during commission of certain crimes, since trial court's instructions presented case to jury as one involving solely an armed robbery prosecution, any error in framing the allegedly duplicitous indictment was harmless; that accidental pretrial confrontations between defendant and robbery victim did not violate due process where evidence indicated that victim's courtroom identification had an independent origin; that there is no right to counsel at photographic displays; and that fact that there were no persons of defendant's race on the venire of jurors did not establish purposeful and systematic exclusion of an identifiable portion of the community.

Affirmed.

1. Indictment and Information ⇐125(1)

The rationale underlying the rule prohibiting duplicitous indictments is to give notice to the defendant of exactly what charges he must defend against and to avoid the consequences of the inability of the jury to indicate which way they are voting on each of the charges.

2. Criminal Law ⇐1167(1)

Where indictment on which defendant was tried referred to two separate statutory provisions pertaining to robbery and use of firearms during the commission of certain crimes, but trial court's instructions presented case to the jury as one involving solely an armed robbery prosecutio.., any error in framing of allegedly duplicitous indictment was harmless. AS 11.15.240, 11.15.295; Rules of Criminal Procedure, rule 8(a).

3. Indictment and Information ⇐144.1(1)

Proper remedy for duplicitous indictment is not to dismiss it but to compel the State to elect the charges on which it wishes to proceed.

4. Constitutional Law ⇐266(3)

When a pretrial confrontation is purely accidental and is not prearranged by the State, court will not ordinarily inquire into

33. No challenge on constitutional grounds has been raised in this case and we do not reach such issue in this review.

34. *See Williams v. Transcontinental Gas Pipe Line Corp.*, 89 F.Supp. 485, 488-89 (W.D.S.C.1950).

Introduced: 1/19/76
Referred: Resources

IN THE SENATE BY CROFT

SENATE BILL NO. 546

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the power of eminent domain."

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

* Section 1. AS 09.55.430 is amended by adding a new paragraph to read:

(7) a statement that the property is taken by necessity for a project located in a manner which is most compatible with the greatest public good and the least private injury.

* Sec. 2. AS 09.55.450(a) is amended to read:

(a) Upon the filing of the declaration of taking and the deposit of the estimated compensation, the court may, upon motion, fix the time during which and the terms upon which the parties in possession are required to surrender possession to the petitioner. However, the right of entry shall not be granted the plaintiff until after ~~the hearing of any objection to the declaration of taking made by the defendant, or~~ the running of the time for the defendant to file an objection to the declaration of taking or until after the hearing on any objection to the declaration of taking if the objection is made in the time allowed by law. Where the party in possession withdraws any part of the award and remains in possession, the court may fix a reasonable rental for the premises to be paid by that party to the plaintiff during such possession.

* Sec. 3. AS 09.55.460(b) is amended to read:

(b) The plaintiff may not be divested of a title or possession acquired except where the court finds that the property was not taken ~~by necessity~~ for a public use or purpose. ~~or purpose in a manner compatible with the greatest public good and the least private injury~~. In the event of that finding, the court shall enter the judgment necessary to (1) compensate the persons

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March 23, 1976

The Honorable Terry Gardiner
Chairman, House Judiciary Committee
Alaska House of Representatives
Pouch V, State Capital
Juneau, Alaska 99811

RE: Eminent Domain Bill (SB 546)

Dear Mr. Gardiner:

I understand that your committee has before it a bill which was originally introduced by Senator Croft to change the standards of judicial review and what a condemnor must prove in order to exercise a declaration of taking. The bill as I understand it is an outgrowth of a case decided by the Alaska Supreme Court entitled ARCO Pipeline Co., et al. v. 3.60 acres, et al. As the attorney for the condemnor in that case I would like to point out some of the factors which I find would be a great detriment to the condemnor and the people of this State if the bill becomes law.

As a matter of background the present Alaska Declaratory Judgment Act is modeled upon the federal Declaratory Judgment Act. Until the trial court's decision in the ARCO Pipeline case, the federal rule, which was enunciated by the Alaska Supreme Court in that case, had been applied by the Alaska courts. In other words, the Alaska Supreme Court merely followed the federal rule which had been in existence for years and in Alaska since the Declaration of Taking Act was first enacted in 1953. In other words, the Supreme Court merely adopted the generally accepted federal rule which still permitted the court judicial review to determine if proper action had been exercised by the condemning authority but did not allow the court to determine where and how a project should be built, which is not the function of the court.

In my opinion, if the Croft bill had been law, this state would not have seen a pipeline constructed by 1977 because of the delays and perhaps complete frustration of being unable to find the parcels which a judge deemed suitable for the routing depending upon the judge involved. The bill would have caused additional costs in project design, attorney's fees, trial time, administrative costs and, finally and most important, would probably require the condemning authority to pay more for the property in excess of the just compensation in order to avoid legal entanglements. In short, the bill could be a way of judicial blackmail to achieve more than the just compensation.

The ARCO Pipeline case in itself is illustrative of the delay. The condemnor attempted for almost four years prior to negotiate a settlement, but it ended up with the condemnee requesting the absurd sum of over $20,000.00 plus other stipulations for a 3.6 acre, 100 ft. (plus temporary construction easement) across the 80 acre homestead, which is not being used by the homesteader for any other use than a personal residence, in an area where the property is selling for a few hundred dollars an acre, and the condemnee asked for $1,500.00 an acre, but wanted other damages. On July 15, 1974, the condemnor filed its declaration of taking. Hearings were held on September 20 and November 1 on the necessity. A decision was finally entered on December 24, and a petition for review was filed with the Supreme Court. Fortunately, the Supreme Court granted a petition for review because of the public importance of the pipeline and rendered the decision on August 1, 1975, reversing the trial court. The Supreme Court's decision cannot be viewed as an unjust result under the circumstances where the landowner says build the project over the neighbor's property and leave me alone, an attitute which ignores the fact that the neighbor might object.

Since most other projects such as utility right-of-way, highways, buildings and other projects are not so monumental to require a quick action by the courts, it can be seen that a condemnation which took over one year of being expedited through the courts would conceivably be further delayed if an appeal were taken through the normal route. At the present

time I am involved in several matters on appeal, and one of them has been on appeal since May of 1975 without a record being prepared, and there will probably be an additional period of time of up to one year for the required briefing, oral argument and decision of the Supreme Court. In other words, the delay and frustration of the project could extend for over two years, and you undoubtedly know what a delay in construction costs means to a project. In short, a $2,000.00 easement which must be obtained in court could hold up a $1,000,000.00 project and add another 10-20% to that project until the easement is obtained. The condemnor either has to pay a greatly inflated price (judicial blackmail), redesign the project (and go through the same procedure again) or wait to determine what would happen in court. Furthermore, if the condemnor pays one landowner more during negotiations, then word spreads so that all condemnees want more. Because the Croft bill would require the court to make findings, the Supreme Court may be bound by such findings if not clearly "erroneous" and that project site would have to be abandoned because the trial court as judge, jury, planner, designer, engineer and economist so determined that another site might be better.

In the ARCO Pipeline case, the condemnee's basic objection to the pipeline was the routing. The condemnee stated that it should go around his property and drew a couple of pencil lines on a map to show to the court how this routing could be accomplished on someone else's property. In the ARCO Pipeline case the condemnee did not offer any expert testimony or show why the pencil line was better from an economic, soils, terrain, contours, planning, ecology, design, engineering, costs or other matters which a well-planned project would have to take into account. In other words, he made no offer to nor did he show the project was more feasible.

The trial court considered that this mere pencil line was in effect an "alternate route" and stated that the condemnor must offer "convincing evidence...to show that they have at least considered the alternative routing...and give cogent reasons for their alternate selection". In other words, the condemnor had to have prescience to visualize what every

possible condemnee might come up with over the 800 miles of pipeline, and to prove to the court why this imaginary alternate route should not be selected. As an engineer stated in one case, it is possible to build a pipeline up the side of the Empire State Building if one has the money to pay. So, the question in almost every condemnation case is not whether the project can be built at all on the particular parcel, but what is the more feasible route or site, a decision best determined by the agency and not a court. In the ARCO Pipeline case, based on the additional length as shown by the pencil line, the total construction cost of the proposed alternate pencil routing was estimated at $192,500.00. In other words, if the condemnor had not shown to the court's satisfaction (the court being a planner, designer, engineer, etc.) under the Croft bill that the alternate routing was perhaps not feasible, then the court could deny the taking. You might argue that the court would not do such a ridiculous thing when an easement valued at hundreds of dollars an acre would necessitate a completely new redesign at a tremendous extra cost, but this is exactly what the trial court did in one actual case. You and your committee might ask yourself what would happen to every other project in the State of Alaska, once it is known that the means are at hand to frustrate a legitimate public purpose by adding a test for no reason other than the ruling in the ARCO Pipeline case is not understood.

The only purpose of a declaration of taking is to give immediate title to the property so that the work can proceed. A declaration of taking is premised on the idea that the condemnor has exercised and will exercise its best judgment in selecting the route and performing the necessary design and engineering. If the courts and condemnees are going to select the sites and how a project is to be built, I think the citizens of this state are entitled to a protest.

I should like to emphasize that I do not have any prospects in the future of representing any condemnors, and that my practice will be again limited to that of representing condemnees. I can assure you as an attorney representing condemnees that if the present bill passes which emasculates the Declaration of Taking Act, you can be assured that many condemnees will not

surrender their property without going through the Supreme Court, unless as you may expect, they receive a considerable premium over and above the fair market value and just compensation for the privilege of the State having to avoid their challenge to the declaration of taking procedure so that the project can be built. Since the State must pay the condemnees actual costs under some circumstances such as when the jury some two years later in these inflationary times finds the property was 10% more (the condemnee asking for 100% or more) than the just compensation the entire cost through appeal could be added to the project cost.

In conclusion, the bill if passed would only frustrate legitimate public projects, would greatly delay the acquisition of property necessary for projects, would require the State and other condemnors to expend a great deal of money in attempting to meet frivolous objections, would probably require from time to time a complete project to be rerouted at considerable cost and would surely add to the land acquisition costs. In short, the bill is merely going to add to the great cost of public works and public utilities. You must ask who is being protected by the bill, the lawyers and their clients, or the general public.

I would request that you review this bill carefully because this bill will mean that a condemnor in effect no longer has a declaration of taking procedure to the detriment of the general public which undoubtedly desires a project being commenced as soon as possible at the least expense.

Yours very truly,

Karl L. Walter, Jr.

KLW/dd

Introduced: 1/29/76
Referred: Resources

IN THE SENATE BY CROFT

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The Honorable Terry Gardiner
Chairman, House Judiciary Committee
Alaska House of Representatives
Pouch V, State Capital
Juneau, Alaska 99811

RE: Eminent Domain Bill (SB 546)

Dear Mr. Gardiner:

I understand that your committee has before it a bill which was originally introduced by Senator Croft to change the standards of judicial review and what a condemnor must prove in order to exercise a declaration of taking. The bill as I understand it is an outgrowth of a case decided by the Alaska Supreme Court entitled ARCO Pipeline Co., et al. v. 3.60 acres, et al. As the attorney for the condemnor in that case I would like to point out some of the factors which I find would be a great detriment to the condemnor and the people of this State if the bill becomes law.

As a matter of background the present Alaska Declaratory Judgment Act is modeled upon the federal Declaratory Judgment Act. Until the trial court's decision in the ARCO Pipeline case, the federal rule, which was enunciated by the Alaska Supreme Court in that case, had been applied by the Alaska courts. In other words the Alaska Supreme Court merely followed the federal rule which had been in existence for years and in Alaska since the Declaration of Taking Act was first enacted in 1953. In other words, the Supreme Court merely adopted the generally accepted federal rule which still permitted the court judicial review to determine if proper action had been exercised by the condemning authority but did not allow the court to determine where and how a project should be built, which is not the function of the court.

In my opinion, if the Croft bill had been law, this state would not have seen a pipeline constructed by 1977 because of the delays and perhaps complete frustration of being unable to find the parcels which a judge deemed suitable for the routing depending upon the judge involved. The bill would have caused additional costs in project design, attorney's fees, trial time, administrative costs and, finally and most important, would probably require the condemning authority to pay more for the property in excess of the just compensation in order to avoid legal entanglements. In short, the bill could be a way of judicial blackmail to achieve more than the just compensation.

The ARCO Pipeline case in itself is illustrative of the delay. The condemnor attempted for almost four years prior to negotiate a settlement, but it ended up with the condemnee requesting the absurd sum of over $20,000.00 plus other stipulations for a 3.6 acre, 100 ft. (plus temporary construction easement) across the 80 acre homestead, which is not being used by the homesteader for any other use than a personal residence, in an area where the property is selling for a few hundred dollars an acre, and the condemnee asked for $1,500.00 an acre, but wanted other damages. On July 15, 1974, the condemnor filed its declaration of taking. Hearings were held on September 20 and November 1 on the necessity. A decision was finally entered on December 24, and a petition for review was filed with the Supreme Court. Fortunately, the Supreme Court granted a petition for review because of the public importance of the pipeline and rendered the decision on August 1, 1975, reversing the trial court. The Supreme Court's decision cannot be viewed as an unjust result under the circumstances where the landowner says build the project over the neighbor's property and leave me alone, an attitute which ignores the fact that the neighbor might object.

Since most other projects such as utility right-of-way, highways, buildings and other projects are not so monumental to require a quick action by the courts, it can be seen that a condemnation which took over one year of being expedited through the courts would conceivably be further delayed if an appeal were taken through the normal route. At the present

time I am involved in several matters on appeal, and one of them has been on appeal since May of 1975 without a record being prepared, and there will probably be an additional period of time of up to one year for the required briefing, oral argument and decision of the Supreme Court. In other words, the delay and frustration of the project could extend for over two years, and you undoubtedly know what a delay in construction costs means to a project. In short, a $2,000.00 easement which must be obtained in court could hold up a $1,000,000.00 project and add another 10-20% to that project until the easement is obtained. The condemnor either has to pay a greatly inflated price (judicial blackmail), redesign the project (and go through the same procedure again) or wait to determine what would happen in court. Furthermore, if the condemnor pays one landowner more during negotiations, then word spreads so that all condemnees want more. Because the Croft bill would require the court to make findings, the Supreme Court may be bound by such findings if not clearly "erroneous" and that project site would have to be abandoned because the trial court as judge, jury, planner, designer, engineer and economist so determined that another site might be better.

In the ARCO Pipeline case, the condemnee's basic objection to the pipeline was the routing. The condemnee stated that it should go around his property and drew a couple of pencil lines on a map to show to the court how this routing could be accomplished on someone else's property. In the ARCO Pipeline case the condemnee did not offer any expert testimony or show why the pencil line was better from an economic, soils, terrain, contours, planning, ecology, design, engineering, costs or other matters which a well-planned project would have to take into account. In other words, he made no offer to nor did he show the project was more feasible.

The trial court considered that this mere pencil line was in effect an "alternate route" and stated that the condemnor must offer "convincing evidence...to show that they have at least considered the alternative routing...and give cogent reasons for their alternate selection". In other words, the condemnor had to have prescience to visualize what every

possible condemnee might come up with over the 800 miles of pipeline, and to prove to the court why this imaginary alternate route should not be selected. As an engineer stated in one case, it is possible to build a pipeline up the side of the Empire State Building if one has the money to pay. So, the question in almost every condemnation case is not whether the project can be built at all on the particular parcel, but what is the more feasible route or site, a decision best determined by the agency and not a court. In the ARCO Pipeline case, based on the additional length as shown by the pencil line, the total construction cost of the proposed alternate pencil routing was estimated at $192,500.00. In other words, if the condemnor had not shown to the court's satisfaction (the court being a planner, designer, engineer, etc.) under the Croft bill that the alternate routing was perhaps not feasible, then the court could deny the taking. You might argue that the court would not do such a ridiculous thing when an easement valued at hundreds of dollars an acre would necessitate a completely new redesign at a tremendous extra cost, but this is exactly what the trial court did in one actual case. You and your committee might ask yourself what would happen to every other project in the State of Alaska, once it is known that the means are at hand to frustrate a legitimate public purpose by adding a test for no reason other than the ruling in the ARCO Pipeline case is not understood.

The only purpose of a declaration of taking is to give immediate title to the property so that the work can proceed. A declaration of taking is premised on the idea that the condemnor has exercised and will exercise its best judgment in selecting the route and performing the necessary design and engineering. If the courts and condemnees are going to select the sites and how a project is to be built, I think the citizens of this state are entitled to a protest.

I should like to emphasize that I do not have any prospects in the future of representing any condemnors, and that my practice will be again limited to that of representing condemnees. I can assure you as an attorney representing condemnees that if the present bill passes which emasculates the Declaration of Taking Act, you can be assured that many condemnees will not

surrender their property without going through the Supreme Court, unless as you may expect, they receive a considerable premium over and above the fair market value and just compensation for the privilege of the State having to avoid their challenge to the declaration of taking procedure so that the project can be built. Since the State must pay the condemnees actual costs under some circumstances such as when the jury some two years later in these inflationary times finds the property was 10% more (the condemnee asking for 100% or more) than the just compensation the entire cost through appeal could be added to the project cost.

In conclusion, the bill if passed would only frustrate legitimate public projects, would greatly delay the acquisition of property necessary for projects, would require the State and other condemnors to expend a great deal of money in attempting to meet frivolous objections, would probably require from time to time a complete project to be rerouted at considerable cost and would surely add to the land acquisition costs. In short, the bill is merely going to add to the great cost of public works and public utilities. You must ask who is being protected by the bill, the lawyers and their clients, or the general public.

I would request that you review this bill carefully because this bill will mean that a condemnor in effect no longer has a declaration of taking procedure to the detriment of the general public which undoubtedly desires a project being commenced as soon as possible at the least expense.

Yours very truly,

Karl L. Walter, Jr.

KLW/dd