

**HB**

**537**

HOUSE COMMITTEE ON STATE AFFAIRS

RECAP OF  
HB 537

Property Acquisition Practices

Received February 12, 1990  
by Rep. Boucher by Request

Heard March 21, 1990  
Heard March 29, 1990  
Heard April 4, 1990

Adopted CS# 537 (SA) April 4, 1990

Passed Out of Committee April 4, 1990  
1 Do Pass  
3 No Recommendation

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# HOUSE COMMITTEE REPORT

(7)

Date Referred: February 12, 1990

FURTHER REFERRALS:

JUDICIARY

Date of Committee Action: \_\_\_\_\_

The STATE AFFAIRS Committee considered:

HB 537

HOUSE BILL NO. 537

PROPERTY ACQUISITION PRACTICES

"An Act relating to the taking and compensation for damage of property by the state; and providing for an effective date."

RECOMMENDATIONS:

- be replaced with CSHB537(SA)  the same title  
 a new title  
 have attached amendment(s)  
 do pass  
 do not pass  
 no recommendation  
 individual recommendations  
 additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of intent

ATTACHES NEW FISCAL NOTE(S):  
(Dept)

APPROVES PREVIOUS:

(Date/Dept)

- fiscal impact DOT/PF + Court Supt.  fiscal note(s) \_\_\_\_\_  
 zero fiscal note \_\_\_\_\_  zero fiscal note(s) \_\_\_\_\_  
 zero with analysis \_\_\_\_\_  zero fn/analysis \_\_\_\_\_

SIGNING DO PASS:

[Signature]  
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SIGNING:

(Check approp. column)

	Do Not Pass	No Rec	Amend
<u>[Signature]</u>		<input checked="" type="checkbox"/>	
<u>[Signature]</u>		<input checked="" type="checkbox"/>	
<u>[Signature]</u>		<input checked="" type="checkbox"/>	
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[Signature]

Chairman's Signature

Item 1A

STATE OF ALASKA  
1990 LEGISLATIVE SESSION

BILL VERSION: C.S. H.B. 537  
PUBLISH DATE: April 2, 1990

REQUEST: FISCAL NOTE

Revision Date: Agency Affected: DOT&PF  
Title: An Act Relating to Taking and Compensation for Damages of Property BRU: Engineering & Operations Standards  
Sponsor: Representative Boucher Components:  
Requestor:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTURAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	2888.0	2888.0	2888.0	2888.0	2888.0	2888.0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	2888.0	2888.0	2888.0	2888.0	2888.0	2888.0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	2888.0	2888.0	2888.0	2888.0	2888.0	2888.0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: ATTACHED

Prepared by: Milton H. Lentz  
Division: Engineering and Operations Standards  
Approved by Commissioner: \_\_\_\_\_  
Agency: Department of Transportation and Public Facilities  
Phone: 465-2985  
Date: April 2, 1990  
Date: 4/2/90

- Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

For further information contact Catherine McHugh at 465-3900

CONTINUATION OF FISCAL NOTE ANALYSIS

For Bill/Resolution C.S. H.B. No. 537

This Fiscal Note is based on several assumptions:

- (1) A ratio of 1 to 5 commercial properties effected by eminent domain (based on 5 year average) will include business or loss of good will.
- (2) Estimated complexity of the property.
- (3) Legal issues involved in determining business losses.

Our assumptions are believed to be typical under language of this bill.

5 parcels	@	\$ 50,000	(payment for business loss)	=	\$ 250,000
3 parcels	@	\$200,000	(payment for business loss)	=	\$ 600,000
2 parcels	@	\$300,000	(payment for business loss)	=	\$ 600,000
1 parcel	@	\$800,000	(payment for business loss)	=	\$ 800,000
TOTAL					\$2,250,000

PLUS:

Additional Appraisal Cost*	11 parcels	@	\$ 8,000	=	\$ 88,000
Legal Cost*	11 parcels	@	\$50,000	=	\$550,000

If no urban projects were programmed , the fiscal impact of this bill would be greatly reduced since fewer commercial properties would be encountered.

Please note that all costs in this Fiscal Note will be borne entirely with State Funds as payments for business losses are ineligible for federal participation.

\*Compensating business losses would require a specialty appraisal to determine compensation due. This specialty appraisal cost is over and above the normal cost for appraising real estate. The legal cost for attorneys and court costs would also be over and above the normal litigation cost.

# FISCAL NOTE

**REQUEST:**

Revision Date:	Agency Affected:	Alaska Court System
Title: <u>An Act relating to the taking and compensation for damages of property...</u>	BRU:	<u>Trial Courts</u>
Sponsor: <u>State Affairs</u>	Components:	
Requestor:		

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
Personal Services		22.9	22.9	22.9	22.9	22.9
Travel		1.0				
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>23.9</b>	<b>22.9</b>	<b>22.9</b>	<b>22.9</b>	<b>22.9</b>

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
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**FUNDING:** (Thousands of Dollars)

General Funds	0.0	23.9	22.9	22.9	22.9	22.9
Federal Funds						
Other						
<b>TOTAL</b>	<b>0.0</b>	<b>23.9</b>	<b>22.9</b>	<b>22.9</b>	<b>22.9</b>	<b>22.9</b>

**POSITIONS:**

Full-time						
Part-time		1.0	1.0	1.0	1.0	1.0
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

See attached analysis.

Prepared by: Jan Strandberg, General Counsel  
 Division: Alaska Court System  
 Approved by: Arthur H. Snowden, II, Administrative Director  
 Agency: Alaska Court System

Phone: 264-8228  
 Date: 04/02/90  
 Date: 04/02/90

Distribution (by preparer):  
 Legislative Finance  
 Legislative Sponsor  
 Requestor  
 Office of Management & Budget  
 Impacted Agency(ies)

Alaska Court System  
Fiscal Analysis  
CSHB 537

Personal Services

<u>Position</u>	<u>Salary</u>	<u>Benefits</u>	<u>Total</u>
Pro tempore superior court judge, Anchorage, permanent part-time, 6 months	\$9,663	\$13,256	\$22,919
<u>Travel (one-time cost)</u>			
Meeting of Civil Rules Committee to revise Civil Rule 72. One meeting for two days.			<u>1,000</u>
	<b>Total cost</b>		<u><u>\$23,919</u></u>

Fiscal Analysis - CSHB 537

Although this proposed legislation significantly changes the current eminent domain law, it is difficult to determine the extent of its fiscal impact on the court system. Under current law, the issue of just compensation is decided by a master or jury after the plaintiff has been granted a right of entry. AS 09.55.310(a), AS 09.55.450(a). Section 3 of the proposed statute would prohibit the granting of the right of entry until the court determines that the amount of the deposit is adequate just compensation for the property at issue. This means that the court would be required to take evidence of what is just compensation before the right of entry is granted. This requirement would add to the length of the hearing on objections to the declaration of taking under AS 09.55.450(a).

Also, section 4 of this bill adds several issues for the court to decide in determining whether to divest the plaintiff of title or possession: adequacy of deposited compensation, plaintiff's compliance with the provision of the Relocation Assistance and Real Property Acquisition Practices Act (AS 34.60), and whether plaintiff obtained preliminary replat authority.

Section 1 of the proposed bill adds business loss to the damages the jury or master must determine under AS 09.55.310(a). The requirements of both of these sections will take more superior court time.

This proposed legislation will also require the amendment of Civil Rule 72 which sets out the pleading, motion, deposit and distribution as well as the trial procedures for eminent domain proceedings.

The State of Alaska Department of Law currently has 80 eminent domain cases in the court system, either at the trial or appellate level. The Municipality of Anchorage estimates approximately 10 new cases each year. Based on an estimate of 50 cases per year, with additional court time of 2.5 days per case at the trial level, the court system would need the services of one part-time pro tem superior court judge at a cost of \$22,900. The necessary amendments to Civil Rule 72 would cost \$1,000.

*Department of Transportation and Public Facilities***POSITION PAPER**

Bill No: H.B. 537

Approved: Mark S. Hickey  
CommissionerTitle: An Act Relating to the Taking and Compensation  
for Damage of Property by the State

Date: March 20, 1990

The Department of Transportation and Public Facilities is concerned with the inclusion of business losses in House Bill No. 537. Payment of long term business losses will have a substantial effect on the department's ability to handle the highway program. Not only will it be a costly program but without case law and a decade of practice, it could jeopardize projects, especially in urban areas. If the bill continues to move in this direction, Alaska will be one of the few states that recognizes business losses as a part of the acquisition process. In addition to the legal issues the appraisals cost could more than triple when trying to determine long term business losses that may be subjective at best. The Federal Highway Administration has suggested that business losses are not generally federal participating. The Relocation Assistance program was designed and enacted at the federal level to assist business that are forced to move or go out of business due to a federal-aid program.

Without specific direction or language addressing the intent of this bill, or how such action will be handled, it is impossible to quantify the impact of paying long term business losses in the State of Alaska.

Item 3

PLETCHER, WEINIG, LOTTRIDGE & MOSER

ASSOCIATED IN THE PRACTICE OF LAW

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ANCHORAGE, ALASKA 99503

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TASHA M. PORCELLO  
ATTORNEY AT LAW

March 19, 1990

Representative Jim Zawacki  
P.O. Box V  
Juneau, Alaska 99811

Re: House Bill 537

Dear Jim:

Enclosed are amendments which I believe would be appropriate in reforming Alaska's antiquated and unjust eminent domain laws. As you know, there is no statutory provision requiring just compensation for business loss to property owners whose land has been taken or damaged for a public project. The Alaska Supreme Court, in State v. Hammer, 550 P.2d 820 (Alaska 1976), recognized that a business is a form of property which cannot be taken or damaged unless the property owner is fully indemnified for the loss. The court recognized that just compensation is determined by what the property owner has lost, not what the State has gained. However, because of the specific facts before it, the Supreme Court limited its holding to just compensation for temporary loss of business during relocation of that business. It did not address a situation in which long term business loss is provable or where a business has been forced to close its doors permanently as a consequence of the State's exercise of the power of eminent domain.

Since the Hammer decision, the State and the various municipalities condemning property for public purposes have attempted to circumvent their obligations to fully indemnify property owners for business loss. Over the years, uncounted businesses have been seriously damaged or destroyed as a consequence of condemnation for public projects. Few of these property owners had the economic resources to litigate a case for permanent loss of business damage to the Alaska Supreme Court. Hence, the issue of long term or permanent business loss has not been ruled upon.

Often, the State and municipalities, when exercising a declaration of taking, refuses to appraise and make a deposit of estimated just compensation for any business loss. Moreover, the state and various municipalities have often resorted to

Representative James Zawacki  
March 19, 1990  
Page 2

"lowballing" appraisals so that their deposit of estimated just compensation is low. When challenged in court on this issue, the condemners usually respond, that the court has no jurisdiction to review the adequacy of the deposit; that this is a matter exclusively within the discretion of the condemning agency.

Since 1971, the State has enacted the Uniform Real Property Acquisition Act, which parallels the Federal 1970 Act concerning federally funded projects. The Act sets forth specific guidelines requiring the condemner to appraise property prior to institution of eminent domain proceedings; to engage in fair, good faith negotiations prior to instituting condemnation proceedings; and to allow property owners at least 90 days to vacate the premises after right of entry has been granted by the court. All too often, these measures have been ignored or side stepped by condemners. All that the Federal Act does is to simply admonish condemners to go and treat their subjects kindly. It is not enforceable by any court action. The State Act has been interpreted similarly by the courts.

If these practices are to be stopped, both Title 34 and Title 9 of the Alaska Statutes need to be amended to make the Uniform Acquisition Act enforceable and to require full indemnification of a property owner for any provable business loss legally caused by the exercise of the power of eminent domain. It would be desirable if the Uniform Acquisition Act were to be broadened, so that it applies to all state projects, not to just those which are federally funded. The state's oppressive practices in winking at the Uniform Acquisition Act occur in both situations.

I am aware of these practices, having spent nine years as a trial attorney who condemned land on behalf of the Greater Anchorage Area Borough and Municipality of Anchorage, as well as seven years as an attorney for condemnees.

The proposed amendments to Title 34 would make the Act applicable to all State projects and would require the State to appraise business loss prior to institution of eminent domain proceedings.

The amendments to Title 9 would require that a property owner be fully indemnified for any provable business loss legally caused by condemnation; would give the courts jurisdiction to review the adequacy of any deposit of estimated just compensation in conjunction with a declaration of taking; and would require that any condemning authority, state or municipal, comply with the Uniform Acquisition Act or its municipal counterpart.

Representative James Zawacki  
March 19, 1990  
Page 3

These reforms are long overdue. The proposed amendments to Title 34 and Title 9 would insure that no citizen be forced to pay a disproportion cost for a public project.

I would be most appreciative if you could see fit to become a cosponsor of H.B 537, with the amendments which I have suggested. I understand that a public hearing will be held on the bill in the House Affairs Committee at 9:00 a.m. on March 21, 1990.


At the District 7 Republican Convention, the following resolution was passed:

The Legislature should enact a statute providing that if the State of Alaska or any Municipality takes or damages property for public purpose through the power of eminent domain, the property owner is entitled to full indemnification for any provable business loss legally caused by exercise of the eminent domain power.

Thanks for your help.

Sincerely,

PLETCHER, WEINIG,  
LOTTRIDGE & MOSER

  
Richard A. Weinig

RAW/kaa

Introduced: 2/12/90  
Referred: State Affairs, and Judiciary

6-1833A

BY REP. BOUCHER BY REQUEST

1 IN THE HOUSE

2

HOUSE BILL NO. 537

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

SIXTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6

For an Act entitled: "An Act relating to the taking and compensation for  
7 damage of property by the state; and providing for an  
8 effective date."

9

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

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\* Section 1. AS 34.60.020 is amended to read:

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Sec. 34.60.020. STATE AGENCIES TO ESTABLISH PROGRAM. State

12

agencies shall establish and provide the means for implementing a

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program providing fair and reasonable relocation and other payment for

14

persons displaced as a result of ~~federally assisted~~ activities under-

15

taken by state agencies, to carry out relocation assistance programs

16

for persons displaced, and to provide payments to persons as a result

17

of taking or damaging [ACQUISITION] of [REAL] property for activities

18

of state agencies.

19

\* Sec. 2. AS 34.60.040(a) is amended to read:

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(a) When the taking or damaging [ACQUISITION] of [REAL] property

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for a ~~federally assisted~~ program or project undertaken by a state

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agency will result in the displacement of a person, the state agency

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responsible for the program or project shall make payment to the

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displaced person, upon proper application as approved by the state

25

agency, for

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(1) actual reasonable expenses in moving a person, the

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person's family, business, farm operation, or other personal property;

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(2) actual direct losses of tangible personal property as a

29

result of moving or discontinuing a business or farm operation, but

WORK DRAFT

WORK DRAFT

1 have been required to relocate the property as determined by the state  
2 agency; and

3 (3) actual reasonable expenses in searching for a replace-  
4 ment business or farm.

5 \* Sec. 3. AS 34.60.050 is amended to read:

6 Sec. 34.60.050. REPLACEMENT HOUSING FOR HOMEOWNERS. (a) In  
7 addition to payments otherwise authorized by this chapter, the state  
8 agency shall make an additional payment not to exceed \$22,500 [,] to a  
9 displaced person who is displaced from a dwelling actually owned and  
10 occupied by the person for not less than 180 days before the initia-  
11 tion of negotiations for the acquisition of the property. This addi-  
12 tional payment must [SHALL] include the following elements:

13 (1) the amount, if any, that [WHICH], when added to the  
14 taking [ACQUISITION] cost of the dwelling taken [ACQUIRED] by the  
15 state agency, equals the reasonable cost of a comparable replacement  
16 dwelling that [WHICH] is a decent, safe, and sanitary dwelling ade-  
17 quate to accommodate the displaced person, is reasonably accessible to  
18 public services and places of employment, and is available on the  
19 private market; all determinations required to carry out this para-  
20 graph shall be made in accordance with standards established by the  
21 state agency making the additional payment;

22 (2) the amount, if any, that [WHICH] will compensate the  
23 displaced person for any increased interest costs that [WHICH] the  
24 displaced person is required to pay for financing the taking [ACQUI-  
25 SITION] of the comparable replacement dwelling; this amount may be paid  
26 only if the dwelling taken [ACQUIRED] by the state agency was encum-  
27 bered by a bona fide mortgage that [WHICH] was a valid lien on the  
28 dwelling for not less than 180 days before the initiation of negotia-  
29 tions for the taking [ACQUISITION] of the dwelling; and

1 taking [ACQUISITION] of the dwelling; and

2 (3) reasonable expenses incurred by the displaced person  
3 for evidence of title, recording fees, and other closing costs inci-  
4 dent to the purchase of the replacement dwelling, but not including  
5 prepaid expenses.

6 (b) The additional payment authorized by (a) of this section may  
7 be made only to a displaced person who purchases and occupies a re-  
8 placement dwelling that [WHICH] is decent, safe, and sanitary not  
9 later than the end of the one-year [ONE YEAR] period beginning on the  
10 date on which the person receives from the state agency final payment  
11 of all costs of the taken dwelling [,] or the date on which the person  
12 moves from the taken [ACQUIRED] dwelling, whichever is the later date.

13 \* Sec. 4. AS 34.60.060 is amended to read:

14 Sec. 34.60.060. REPLACEMENT HOUSING FOR TENANTS AND OTHERS. In  
15 addition to amounts otherwise authorized by this chapter, the state  
16 agency shall make a payment to or for a displaced person displaced  
17 from a dwelling, who is not eligible to receive a payment under  
18 AS 34.60.050, if the dwelling was actually and lawfully occupied by  
19 the displaced person for not less than 90 days before the initiation  
20 of negotiations for taking [ACQUISITION OF] the dwelling. The payment  
21 shall be either

22 (1) the amount necessary to enable the displaced person to  
23 lease or rent for a period not to exceed three years and six months  
24 [,] a decent, safe, and sanitary dwelling of standards adequate to  
25 accommodate the displaced person in areas not generally less desirable  
26 in regard to public utilities and public and commercial facilities,  
27 and reasonably accessible to the person's place of employment, but not  
28 to exceed \$5,250; or

29 (2) the amount necessary to enable the displaced person to

HOUSE MESSAGES

HOUSE MESSAGES

HOUSE MESSAGES

make a down payment, including incidental expenses described in

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AS 34.60.050(a)(3), on the purchase of a decent, safe, and sanitary dwelling of standards adequate to accommodate the displaced person in areas not generally less desirable in regard to public utilities and public and commercial facilities, but not to exceed \$5,250.

\* Sec. 5. AS 34.60.070 is amended to read:

Sec. 34.60.070. EXPENSES INCIDENTAL TO TRANSFER OF PROPERTY.

The state agency, as soon as practicable after the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of compensation in a condemnation proceeding to take or compensate for damage to [ACQUIRE REAL] property, whichever is the earlier, shall reimburse the owner, to the extent the department considers fair and reasonable, for expenses necessarily incurred for

(1) recording fees, transfer taxes, and similar expenses incidental to conveying the [REAL] property to the state agency;

(2) penalty costs for prepayment of a preexisting recorded mortgage entered into in good faith encumbering the real property, if the mortgage was a valid lien on the property for not less than 180 days before the initiation of negotiations for the acquisition of the property; and

(3) the pro rata portion of [REAL] property taxes paid that [WHICH] are allocable to a period subsequent to the date of vesting title in the state [,] or the effective date of possession of the [REAL] property by the state agency, whichever is the earlier.

\* Sec. 6. AS 34.60.080(a) is amended to read:

(a) The state court having jurisdiction of a proceeding instituted by the state agency to take [ACQUIRE REAL] property by condemnation shall award the owner of a [ANY] right to, or title to, or interest in, the [REAL] property a sum that [WHICH] will in the opinion of ~~the court reimburse the owner for reasonable costs, disbursements, and~~

1 the court reimburse the owner for reasonable costs, disbursements, and  
 2 expenses, including reasonable attorney, appraisal, and engineering  
 3 fees [,] actually incurred because of the condemnation proceedings, if  
 4 (1) the final judgment is that the state agency cannot take  
 5 [ACQUIRE] the [REAL] property by condemnation; or  
 6 (2) the proceeding is abandoned by the state agency.

7 \* Sec. 7. AS 34.60.090(a) is amended to read:

8 (a) When the taking or damaging [ACQUISITION] of [REAL] property  
 9 for a program or project undertaken by a state agency for a [federally  
 10 assisted] program or project undertaken by the state agency will result  
 11 in the displacement of a person [ON OR AFTER JANUARY 2, 1971], the  
 12 state agency shall provide a relocation assistance advisory program  
 13 for displaced persons that [WHICH] offers the services described in  
 14 (c) of this section. If the state agency determines that a person  
 15 occupying property immediately adjacent to the [REAL] property taken  
 16 [ACQUIRED] is caused substantial economic injury because of the taking  
 17 [ACQUISITION], it may offer the occupant relocation advisory services  
 18 under the program.

19 \* Sec. 8. AS 34.60.120 is amended to read:

20 Sec. 34.60.120. UNIFORM [REAL] PROPERTY TAKING AND DAMAGE COM-  
 21 PENSATION [ACQUISITION] POLICY. A state agency or other entity taking  
 22 or damaging [ACQUIRING REAL] property for a [ANY] project or program  
 23 in which <sup>state</sup> ~~federal or federal aid~~ funds are used shall to the greatest  
 24 extent practicable comply with the following policies:

- 25 (1) Every reasonable effort shall be made to expeditiously  
 26 take or make compensation for [ACQUIRE, REAL] property by negotiation.  
 27 (2) Property to be taken or damaged [REAL PROPERTY] shall  
 28 be appraised before the initiation of negotiations, and the owner or a  
 29 designated representative shall be given an opportunity to accompany

the appraiser during inspection of the property.

1 (3) Before the initiation of negotiations for [REAL] prop-  
2 erty, an amount shall be established that [WHICH] is reasonably be-  
3 lieved to be just compensation for the [REAL] property taken or  
4 damaged, and that amount shall be offered for the property. In no  
5 event shall the amount be less than the approved appraisal of the fair  
6 market value of the property. A decrease or increase in the fair  
7 market value of [REAL] property before the date of valuation caused by  
8 the public improvement for which the property is taken [ACQUIRED] or  
9 by the likelihood that the property would be taken [ACQUIRED] for or  
10 damaged by the improvement, other than that due to physical deterio-  
11 ration within the reasonable control of the owner, will be disregarded  
12 in determining the compensation for the property. The owner of the  
13 [REAL] property to be taken [ACQUIRED] shall be provided with a writ-  
14 ten statement of, and a summary of the basis for, the amount estab-  
15 lished as just compensation.

16 (4) An owner may not be required to surrender possession of  
17 [REAL] property before the state agency concerned pays the agreed  
18 purchase price or deposits with the court in accordance with applica-  
19 ble law, for the benefit of the owner, an amount not less than the  
20 approved appraisal of the fair market value of the property [,] or the  
21 amount of the award of compensation in the condemnation proceeding for  
22 the property.

23 (5) The construction or development of a public improvement  
24 shall be so scheduled that, to the greatest extent practicable, a  
25 person lawfully occupying [REAL] property is not required to move from  
26 a dwelling, assuming a replacement dwelling will be available, or to  
27 move the person's business or farm operation [,] without at least 90  
28 days' written notice of the date by which the move is required.

29 ~~(6) If an owner or tenant is permitted to occupy the [REAL]~~

1 (6) If an owner or tenant is permitted to occupy the [REAL]  
2 taken or damaged property [ACQUIRED] on a rental basis for a short  
3 term or for a period subject to termination by the state agency on  
4 short notice, the amount of rent required shall not exceed the fair  
5 rental value of the property to a short-term occupier.

6 (7) In no event may the time of condemnation be advanced or  
7 negotiations or condemnation and the deposit of funds in court for the  
8 use of the owner be deferred, nor any other coercive action be taken  
9 in order to compel an agreement on the price to be paid for the taking  
10 or damage to property.

11 (8) If an interest in [REAL] property is to be taken or  
12 damaged [ACQUIRED] by exercise of the power of eminent domain, formal  
13 condemnation proceedings shall be instituted. The [ACQUIRING] state  
14 agency may not intentionally make it necessary for an owner to insti-  
15 tute legal proceedings to prove the fact of the taking or damage of  
16 the [REAL] property.

17 (9) If the taking or damage [ACQUISITION] of only part of  
18 the property would leave its owner with an uneconomic remnant, an  
19 offer to take [ACQUIRE] the entire property shall be made.

20 \* Sec. 9. AS 34.60.130(a) is amended to read:

21 (a) Notwithstanding another [ANY OTHER] provision of law, if a  
22 state agency takes an [ACQUIRES ANY] interest in real property, the  
23 state agency must take [ACQUIRE] at least an equal interest in all  
24 buildings, structures, or other improvements located upon the real  
25 property that [WHICH] the state agency requires to be removed from the  
26 real property or that [WHICH] the state agency determines will be  
27 adversely affected by the use to which the real property will be put.

28 \* Sec. 10. AS 34.60.130(b) is amended to read:

29 (b) For the purpose of determining just compensation to be paid

WUBA DRA1

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for a building, structure, or other improvement required to be taken

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[ACQUIRED] under (a) of this section, the building, structure, or other improvement is considered to be a part of the real property to be taken [ACQUIRED] notwithstanding the right or obligation of a tenant, as against the owner of another [ANY OTHER] interest in the real property, to remove the building, structure, or improvement at the expiration of the tenant's term, and the fair market value that [WHICH] the building, structure, or improvement contributes to the fair market value of the real property to be taken [ACQUIRED], or the fair market value of the building, structure, or improvement for removal from the real property, whichever is the greater, shall be paid to the tenant.

\* Sec. 11. AS 34.60.150 is amended to read:

Sec. 34.60.150. DEFINITIONS. In this chapter

(1) "business" means any lawful activity, excepting a farm operation, conducted primarily

(A) for the purchase, sale, lease, and rental of personal and real property, and manufacture, processing, or marketing of products, commodities, or any other personal property;

(B) for the sale of services to the public;

(C) by a nonprofit organization; or

(D) for assisting, solely for the purpose of AS 34.60.040(a), in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display, whether or not the display is located on the premises on which any of the above activities are conducted;

(2) "displaced person" means a [ANY] any person who [, ON OR AFTER JANUARY 2, 1971] moves from [REAL] property, or moves per-

1 OR AFTER JANUARY 2, 1971] moves from [REAL] property, or moves per-  
 2 sonal property from [REAL] property, as a result of the taking [ACQUI-  
 3 SITION] of the [REAL] property, in whole or in part, or as a result of  
 4 the written order of the state agency to vacate [REAL] property, for a  
 5 program or project undertaken by the state agency, and solely for the  
 6 purpose of AS 34.60.040(a) and 34.60.090, as a result of the taking  
 7 [ACQUISITION] of, or as a result of the written order of a state  
 8 agency to vacate other [REAL] property on which the person conducts a  
 9 business or farm operation for the program or project;

10 (3) "farm operation" means any activity conducted solely or  
 11 primarily for the production of one or more agricultural products or  
 12 commodities, including timber, for sale or home use, and customarily  
 13 producing these products or commodities in sufficient quantity to be  
 14 capable of contributing materially to the operator's support;

15 (4) "mortgage" means those classes of liens commonly given  
 16 to secure advances on, or the unpaid purchase price of, real property  
 17 [,] under the law of the state in which the real property is located,  
 18 together with the credit instruments, if any, secured by the property;

19 (5) "person" means an individual, partnership, corporation,  
 20 or association;

21 (7) ~~(6)~~ "state agency" means a department, agency, instrumen-  
 22 tality, corporate authority of the state, or a political subdivision  
 23 of the state, or a department, agency, instrumentality or authority of  
 24 two or more political subdivisions of the state participating in  
 25 federally assisted programs.

26 \* Sec. 12. AS 34.60.100 is repealed.

27 \* Sec. 13. This Act takes effect immediately under AS 01.10.010(c).

(6) "property" includes short-term and  
 long term business interests;

AS 09.055 is amended as follows:

\* Section 14. AS 09.55.310 is amended to read:

Sec. 09.55.310. HEARING. (a) The jury or master shall hear the allegations and evidence of persons interested and shall ascertain and assess the following:

(1) the value of the property sought to be condemned, and all improvements on it pertaining to the realty, and of each separate estate or interest in it; if it consists of different parcels, the value of each parcel and each estate or interest in each parcel shall be separately assessed;

(2) if the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff;

(3) separately, how much the portion not sought to be condemned and each estate or interest in it will be benefitted, if at all, by the construction of the improvements proposed by the plaintiff; and, if the benefit is equal to the damages assessed under (2) of this section, the owner of the parcel shall be allowed no damages except the value of the portion taken; but if the benefits are less than the damages so assessed, the former shall be deducted from the latter

and the remainder shall be the only damages allowed in addition to the value;

(4) if the property sought to be condemned is for a railroad, the cost of good and sufficient fences along the line of the railroad, and the cost of cattle guards where fences may cross the line of the railroad.

(5) the full amount of business loss and/or loss of goodwill legally caused by exercise of the power of eminent domain.

(b) As far as practicable, compensation shall be assessed for each source of damages separately.

\* Sec. 15. AS 09.430 is amended to read:

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;

(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 including, but not limited to, the full amount of business loss and/or loss of goodwill legally caused by exercise of the power of eminent domain.

\* Sec. 3. AS 09.55.440 is amended to read:

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 proceed and established by judgment. the judgment shall include interest at the rate set out in AS 09.30.070 on the amount finally awarded which exceeds the amount paid into court under the declaration of taking. The interest runs from the date title vests to the date of payment of the judgment.

(b) Upon motion of a party in interest and notice to all parties, the court shall [may] order that the money deposited or a part of it be paid immediately to the person or persons entitled to it or an account of the just compensation to be awarded in the proceedings. If the compensation finally awarded exceeds the amount of money deposited, the deposit shall be offset against the award. If the compensation finally awarded is less than the amount of money deposited, the court shall enter judgment in favor of the plaintiff and against the proper parties for the amount of the excess.

\* Sec. 16. AS 09.55.450 is amended to read:

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 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. The court shall not grant the right of entry until it determines that the amount of estimated just compensation deposited pursuant to AS 09.55.440(a) is adequate just compensation for all property, real or

personal, which has been taken or damage. 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.

(b) The court may direct the payment of delinquent taxes and special assessments out of the amount determined to be just compensation, and make orders with respect to encumbrances, liens, rents, insurance, and other charges as are just and equitable.

(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 AS 09.55.240 -- 09.55.460.

\* Sec. 18. 09.55.460 is amended to read:

Sec. 05.44.460. EFFECT OF APPEAL. (a) No appeal or a bond or undertaking given operates to prevent or delay the vesting of title to real property or the right to possession of it.

(b) The plaintiff may not be divested of a title or possession acquired except where the court finds that (1) 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; (2) the amount of estimated just compensation deposited pursuant to AS 09.55.440(a) is adequate, (3) the State of Alaska failed to comply with AS 34.60.010 -- 150;

(4) a municipal corporation failed to comply with municipal ordinances concerning relocation assistance or real property acquisition practices which are substantially similar to AS 34.60.010 -- 150; or (5) plaintiff failed to comply with AS 09.55.275. 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, (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 property persons as compensation for any diminution in the value of the property caused by the plaintiff's wrongful possession.

Jeremy  
HB 533

LAW OFFICES

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(907) 452-4454

MAR 23 1987

March 18, 1987

The Honorable John B. "Jack" Coghill  
The Alaska State Senate  
Alaska State Legislature  
Pouch V (MS 3100)  
Juneau, AK 99811

RE: Proposed Legislation Eminent Domain Condemnation

Dear Senator Coghill:

Pursuant to our telephone conversation of Monday, March 2, 1987, this letter is to outline for your consideration some problems which I perceive with respect to the handling of condemnation cases in Alaska.

Specifically, under Alaska law, as established both constitutionally and by statute, condemnation cases represent a very special instance involving the government's treatment of its citizens. Article I, Section 18 of the Alaska Constitution provides that private property may not be taken or damaged by the State of Alaska without just compensation being offered. Although this mandate, by and of itself, is meritorious, the fact of the matter is that the administration of condemnation matters by the State of Alaska leaves much to be desired at this time.

As you are aware, I have worked in the field of eminent domain since 1976, and have done work for both the condemnor and the condemnee. I consider my work in the field to be relatively extensive, and have been involved with proceedings ranging from the most simple of takings to the extremely complex. Over the years, certain problems have presented themselves.

Perhaps one of the greatest problems in the field of condemnation rests in the area of having the case proceed to judgment with payment to the condemnee. Virtually all cases which have been taken through trial in the field of eminent domain have been appealed by the State of Alaska in the event of an adverse verdict to the State. Because the State of Alaska is not required by law to post a bond pending an appeal to the Supreme Court, it is a simple exercise to file

an appeal and thus delay the settlement of a case for well over an additional year. During the appeal time, the landowner continues to incur substantial attorney's fees. Furthermore, during appeal, in the past, attorney's fees incurred have not been compensable even though the landowner has received its attorney's fees before lower court proceedings. As such, the State is given a very potent weapon to compel a settlement by simply filing an appeal, knowing full well that the landowner generally will have to expend between five to twenty thousand dollars (\$5,000 - \$20,000) for appellate briefing which, most likely, will not be reimbursed under the current state of the law.

Another area of eminent domain which has caused serious concern as of recent has been in the area of mineral and materials resources. Although the landowner is capable of selling the resource on a unit basis in the marketplace, the State of Alaska appraises the property using a simple real estate formula of before and after values, essentially not taking into consideration the unit value of the material. A classic example of this occurred in Nome where the State of Alaska utilized on the Hastings Creek Project several tons of material, but offered the landowners only surface value for the property. The State agreed on the Nome Project that the material had distinct value, moreover, and further stated that one of the major reasons for condemning the parcel, which was owned by Allen Vezey and the Bering Straits Native Corporation, was to obtain the source of material.

Another area of concern in mineral and materials acquisition exists. When material and mineral properties which are known to exist are condemned by the State of Alaska, an obligation should be placed upon the State, by statute, to do a reasonable subsurface evaluation of the parcel. To date, the State of Alaska has simply insisted that the responsibility is that of the landowner to hire the drilling experts, geologists, or the like, knowing full well that substantial costs might be entailed in employing such resources. Again, the landowner has been faced with the burden, as opposed to the State of Alaska, in evaluating the property, and the Nome cases cited are another example.

An area of current abuse of eminent domain pertains to the deposit made by the State of Alaska. Under Alaska law, once a deposit is made, the landowner may withdraw the deposit for his use during the pendency of the condemnation case. The problem which occurs, however, is that there is nothing to compel the State of Alaska to make a good faith deposit. Although the law does state that a good faith deposit is implied, the State of Alaska has the option of either depositing far too little for the property, or, conversely, an amount far too great. In the case of an insufficient deposit, the landowner is faced with virtually no funds with which to present its defense. In the event of

an overly substantial deposit, however, the landowner can be tricked into withdrawing the entire deposit and spending the deposit before the conclusion of the case, only to find that the landowner must now reimburse the State of Alaska for the amount of money withdrawn at 10.5 percent interest. As such, a trap for the unwary exists under the second scenario under a situation where, say, the deposit is over twice as large as the amount the State intends to offer at trial and, once the landowner has withdrawn the entire amount of money, the landowner becomes subject to the State's mercy. This issue could be remedied by requiring the State of Alaska to offer an amount which is commensurate with the highest appraisal performed for the State of Alaska and by further mandating, by law, that the State of Alaska cannot offer less than the deposit either at the trial of the case, or in settlement. In short, the State would be bound by its deposit.

Recognizing the above-stated concerns, I am enclosing with this correspondence to you some proposed legislation. Needless to say, the proposed legislation is in draft format and, as such, there is no pride of authorship involved. If even some of the proposed legislation can be embodied into law in the 1987 session, many of the abuses currently followed by the State of Alaska will be curtailed.

I look forward to your thoughts on this matter.

Sincerely yours,

~~William R. Satterberg, Jr.~~

WRS/cf

Enclosures

Proposed Legislation:

Additional Section to Eminent Domain Code, Title 9

ATTORNEY'S FEES

A condemnee shall not be denied its costs and attorney's fees for issues raised during litigation unless the court determines upon a full review of the facts and law of the case that the specific issue raised by the condemnee for which denial of attorney's fees is sought by the condemning authority is a frivolous issue. The failure of a condemnee to prevail upon a point of law raised during condemnation proceedings shall not be the sole basis for a denial of attorney's fees to the condemnee if the issue of law has been fairly raised in the context of the lawsuit.

In the event of an appeal by the State of Alaska of any judgment in a condemnation case, the condemnee shall be entitled to its full and reasonable attorney's fees incurred on appeal. In the event of an appeal by the condemnee of any judgment in a condemnation case, the condemnee shall be entitled to its full and reasonable attorney's fees if it prevails on appeal. The Supreme Court is further authorized to award attorney's fees to the condemnee in the event of an unsuccessful appeal by the condemnee in the event that the Supreme Court determines that the appeal was taken in good faith and was not frivolous.

Proposed Legislation, cont.:

DEPOSIT AND DISTRIBUTION

The amount of funds deposited by the State of Alaska in any condemnation case shall constitute the State's offer, to which the State of Alaska shall be bound. In the event that the State of Alaska submits that an amount less than the State's deposit shall form the basis of just compensation for the purposes of a master's hearing or trial, the landowner shall still be entitled to retain the deposit made by the State of Alaska as full compensation notwithstanding any jury verdict or award resulting in just compensation being determined as less than the deposit made by the State.

In the event of a condemnation involving property having a distinct mineral or material source value, the condemning authority must conduct a reasonable subsurface analysis to determine the specific quality and quantity of the material source being acquired and the fair market value of such. Any offer to the landowner shall be made in consideration of the specific subsurface value of the property as determined following such subsurface analysis.

The State of Alaska shall not be entitled to acquire property by eminent domain for the purposes of obtaining a materials source, nor shall the State of Alaska be entitled to design a project in such a manner so as to take advantage of a material source under circumstances where reasonable design standards would not provide for the acquisition of the materials source. In the event of the acquisition of a material source by the State of Alaska, the State of Alaska shall pay to the owner the owner's net profit for the source as computed upon unit values existing in the marketplace. Although the demands created by the project for which the source was acquired may not be computed in arriving at just compensation, nothing shall preclude the consideration of demands and markets created by unrelated projects in the establishing of just compensation to be paid.

More Proposed Legislation:

INTERIM AWARD OF COSTS AND ATTORNEYS FEES

Upon application to the court by any condemnee, the court shall make an interim award of costs and attorneys fees to any such applicant if the court, following application, determines that the interim award of the costs and fees sought by the applicant represents those costs and fees reasonably and necessarily incurred by the condemnee in seeking just compensation. Application by the condemnee for costs and fees shall not be more often than on a quarterly basis following the institution of condemnation proceedings. In the event that any interim application for costs and fees shall involve or disclose privileged communications, the court shall be entitled to review any such application in camera.

Any award of costs or fees under this provision shall be conclusive and not subject to repayment by the condemnee in the event of a failure by the condemnee to prevail in the overall disposition of its case.

DEPOSIT OF MASTER'S AWARD

In the event of an appeal by the condemnor of any master's award, the condemnor shall deposit within twenty (20) days of any such appeal that amount of money forming the master's award, for the use and benefit of the condemnee.

Proposed Legislation, cont.:

PROHIBITION OF AWARD OF CONDEMNOR'S ATTORNEYS FEES  
IN CONDEMNATION CASES

At no time shall a condemnor be entitled to an award of attorneys fees or costs as against a condemnee in any cause of action involving either trial or appellate proceedings.

IN THE TRIAL COURTS FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT  
AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs

25,050 SQUARE FEET, TEXACO et al,

Defendant.

I certify this is a true copy of the original transcript herein, and that same is valid only if it bears my raised seal.

H & M COURT REPORTING

BY: George Alan Hayes

No. 3AN 89-4206 CIVIL

MOTION FOR IMMEDIATE POSSESSION

SEPTEMBER 11, 1989

PAGES 1 THROUGH 16

H & M Court Reporting  
510 "L" Street, Suite 650  
Anchorage, Alaska 99501  
(907) 274-5661

BEFORE THE HONORABLE RENE GONZALEZ  
Superior Court Judge

Anchorage, Alaska  
September 11, 1989  
3:15 o'clock p.m.

APPEARANCES:

For Plaintiff:

ATTORNEY GENERAL'S OFFICE  
RICHARD TODD, ESQ.  
1031 West 4th Avenue, Suite 200  
Anchorage, AK 99501  
(907) 276-3550

For Defendant:

WANAMAKER & DeVEAUX  
JAMES WANAMAKER, ESQ.  
LEROY DeVEAUX, ESQ.  
1031 West 4th Avenue, Suite 401  
Anchorage, AK 99501  
(907) 279-6591

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H & M Court Reporting  
510 "L" Street, Suite 650  
Anchorage, Alaska 99501  
(907) 274-5661

1 PROCEEDINGS

2 SEPTEMBER 11, 1989

3 (Tape: J-1998)

4 (564)

5 (On record - 3:15 p.m.)

6 THE CLERK: This court resumes its session  
7 with the Honorable Rene Gonzalez presiding.

8 THE COURT: Please be seated. We're on the  
9 record in the State of Alaska versus 25,050 Square  
10 Feet, et al. Case number 3AN 89-4206 Civil.

11 Present is Mr. Todd for the State. Mr.  
12 Wanamaker and Mr. DeVeaux for property owners, Mr.  
13 Snyder and Mr. Morgan, and Texnor, Inc.

14 I appreciate your coming on shortened notice.  
15 I'm in trial (indiscernible - unclear) tomorrow  
16 morning at 6:00 in the morning, and I, unfortunately,  
17 will not have the opportunity to get this typed up and  
18 reviewed and signed before I leave. I might be gone  
19 for four days or two weeks, but I don't know yet.

20 So, we'll put my findings so far on the  
21 record, and so both parties will know where they stand.

22 This case came before the court for hearing on  
23 August 17th, 24th and 25th of 1989, and continued  
24 through September 1st, 1989. On the State's expedited  
25 motions to establish authority and necessity in order

1 for possession. And on James Morgan's and Charles  
2 Snyder's and Texnor, Inc's motions to dismiss the  
3 complaint, set aside declaration of taking, and to  
4 divest the State of title they had acquired by virtue  
5 of filing a declaration of taking.

6 This court has considered all the evidence  
7 offered at the hearings, as well as the affidavits and  
8 exhibits filed by the parties in connection with their  
9 pleadings.

10 The background procedural history of this case  
11 is as follows:

12 On or about May 19th, 1989, and prior to the  
13 filing of its condemnation action, the State of Alaska  
14 entered into an agreement with Texaco Refining and  
15 Marketing, Inc. This agreement provided that the State  
16 would initially file its slow take condemnation action  
17 against Parcel 7. Texaco, the tenants, and other  
18 parties claiming an interest to Parcel 7.

19 The Department of Transportation and Public  
20 Facilities, at its sole discretion, could convert the  
21 action to a fast take proceeding by filing a  
22 declaration of taking. Texaco agreed that it did not  
23 have any objection to the project. Agreed that the  
24 taking was necessary. And waived the filing of a  
25 decisional document.

1 Texaco also agreed that upon receiving notice  
2 of the slow take condemnation action of the State, it  
3 would not renew the franchise and lease to its  
4 franchisees and lessees, Charles Snyder and James  
5 Morgan, d/b/a Texnor, Inc.. And that Texaco would  
6 only provide to them a month-to-month lease until July  
7 31st, 1989, with notice to vacate by that date.

8 Snyder nor Morgan did not vacate. Texaco  
9 committed itself to bring in an unlawful detainer  
10 action to remove them from Parcel 7. Texaco agreed  
11 with the State on the net of \$458,850.00 as just  
12 compensation for Texaco's fee interest and all  
13 improvements and fixtures located thereon.

14 The parties agreed -- the State and Texaco --  
15 that the total sum of \$491,000.00 would be deposited,  
16 and that \$32,150.00 would be used for remediation of  
17 soil contaminants.

18 The franchisees, lessees, Morgan and Snyder,  
19 were not parties to this agreement between the State  
20 and Texaco, nor were they informed of or aware of his  
21 existence until on or about August 30th, 1989.

22 On May 19th, 1989, and after its agreement  
23 with Texaco, the State filed this complaint  
24 condemnation seeking the taking of property under its  
25 (indiscernible - unclear) and domain. The property to

1 be acquired by this slow taking proceeding was  
2 described as Parcel 7. It was being taken for a  
3 roadway right-of-way of Alaska Highway Project FM-0526  
4 (1). Known as the Raspberry Road Project.

5 The estate being condemned was a fee simple  
6 estate, and the persons or entities identified as  
7 having a claim or interest in the property where Texaco  
8 Refining and Marketing, Inc., James M. Morgan, Charles  
9 E. Snyder, Texnor, Inc., Chugach Electric Association,  
10 Inc. and the Municipality of Anchorage. The State did  
11 not deposit with the court any funds as estimated value  
12 of the property condemned.

13 On June 12th, 1989, prior to any party having  
14 filed an answer, the State converted its complaint to a  
15 quick take proceeding by filing its First Amended  
16 Complaint, a Declaration of Taking dated June 12, 1989,  
17 and signed by William R. Snell, Regional Director,  
18 Department of Transportation and Public Facilities,  
19 Northern Region. And a decisional document signed on  
20 May 31st, 1989, by Tommy Jean Heinrich (ph), Director,  
21 Design and Construction, Central Region, Department of  
22 Transportation and Public Facilities.

23 The State, upon filing the declaration of  
24 taking and the decisional document, deposited the sum  
25 of \$491,000.00 as the estimated value of the fee estate

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condemned.

On June 12th, 1989 Chugach Electric Association, Inc. filed its appearance and designated this property interest as a duly recorded easement granted to it by Texaco, Inc. on August 31st, 1966. Chugach Electric did not object to the take of the easement by the State and demanded recovery of the cost of relocating these utility facilities under AS 19.25.020.

The Municipality of Anchorage has filed an appearance, but has not objected to the taking. Snyder and Morgan have objected to the taking, and have moved the court to dismiss the complaint. First, challenging their jurisdiction of this court, or, on the basis that the United States, as an indispensable party, has not been joined in the action. Also, they have moved to divest the State of title it has acquired by virtue of the filing of its declaration of taking.

I have carefully reviewed all the pleadings that have been filed. First, let me address the challenge to the jurisdiction of the court again, as filed by Snyder and Morgan.

Snyder and Morgan have moved to dismiss the complaint on the basis of the State's failure to join, as an indispensable party, the United States of

1 America, and does assert that this court lacks  
2 jurisdiction over the subject matter.

3 Snyder and Morgan have cited the single case  
4 of City of Fairbanks versus Electric Distribution  
5 System, the City of Fairbanks versus Electric  
6 Distribution System. The City of Fairbanks Borough  
7 filed an eminent domain action against an electric  
8 association to condemn the complete distribution system  
9 of an electric association in which the United States  
10 had a security interest by virtue of the mortgage on  
11 the system securing the loan from the United States  
12 pursuant to the Rural Electrification Act of 1936.

13 The court did hold in the City of Fairbanks  
14 case, that the United States, by virtue of this  
15 security interest in the complete distribution system,  
16 was an indispensable party under Civil Rule 19, and  
17 since the United States could not be joined as a part  
18 to that action because it could not be sued without its  
19 consent, the action was subject to dismissal.

20 The court in the City of Fairbanks applied the  
21 standard or the test of State Department of Highways  
22 versus Crosby, whether a determination of when a party  
23 is indispensable.

24 I have reviewed carefully the test of State  
25 Department of Highways versus Crosby. The test of

1           indispensability. And that case is found in 410 Pac  
2           2d, 924, Alaska, 1966. And I conclude that the United  
3           States is not a dispensable party to this action. In  
4           this case, Chugach Electric Association had an easement  
5           in Parcel 7. It is clear that the United States does  
6           have a security interest in the -- in Chugach Electric  
7           Association's property. But this -- the property  
8           that's been condemned in this case, as far as Chugach  
9           Electric is concerned, is an easement owned by Chugach  
10          on Parcel 7. And Chugach has not objected to the take,  
11          and apparently has entered into an agreement with the  
12          State that the State would pay for the relocation of  
13          this utility facility.

14                       Therefore, Snyder or Morgan's motion to  
15                       dismiss the complaint on the basis of lack of  
16                       jurisdiction of this court is denied.

17                       (1037)

18                       Snyder and Morgan also challenged the  
19                       decisional document that was filed by the State in this  
20                       case. And cite Sheep Creek Hydraulic Syndicate versus  
21                       State, 685 Pac 2d, 715, Alaska, 1984. Sheep Creek  
22                       Hydraulic made mandatory the filing of a decisional  
23                       document contemporaneously with the Declaration of  
24                       Taking, which explains the decision to use the quick  
25                       take method of the Declaration of Taking. The

1 decisional document is an essential and integral part  
2 of the Declaration of Taking.

3 Although not specifically stated in Sheep  
4 Creek, it can be implied that the decisional document  
5 be signed by the Commissioner of the Department of  
6 Transportation, Public Facilities, or by designee of  
7 the Commissioner within the Department.

8 It is clear from the evidence presented in  
9 this court that Tommy Lee Henreich [sic] -- is it  
10 Henrick or Heinrich?

11 MR. TODD: Heinrich.

12 THE COURT: Heinrich, was not delegated the  
13 authority by the Commissioner of the Department of  
14 Transportation and Public Facilities to sign the  
15 Declaration of Taking and the decisional documents.

16 The Commissioner, in fact, has not designated  
17 any person within the department to sign the decisional  
18 documents. A compelling argument can be made that a  
19 decisional document, which is signed by a person not  
20 specifically delegated by the Commissioner of the  
21 Department of Transportation Public Facilities to sign  
22 a Declaration of Taking, cannot serve as the basis for  
23 a Declaration of Taking.

24 Particularly in this case -- as in this case,  
25 the Declaration of Taking signed on June 12th, 1989 by

1 William R. Snell, the Regional Director of the  
2 Department of Transportation Public Facilities,  
3 Northern Region, who was duly delegated to sign the  
4 Declaration of Taking. That decisional document did  
5 not incorporate or adopt by reference, the decisional  
6 document.

7 In Sheep Creek the Supreme Court stated the  
8 following: We will not impose detailed requirements as  
9 to how the decisional documents is structured, or as  
10 to what they must contain, so long as a decisional  
11 document adequately reflects the facts and premises in  
12 which a decision is based.

13 The decisional documents, most useful, a  
14 document which separates and agency's actual reasons  
15 for making a decision from the legal arguments he later  
16 advises to justify it. And that quotation is on page  
17 720.

18 This court concludes that as to this case the  
19 fact that the State has filed the decisional document  
20 which was signed by a person who had not been delegated  
21 the authority by the Commissioner of the Department of  
22 Transportation Public Facilities to execute the  
23 Declaration of Taking is not fatally flawed. Sheep  
24 Creek did not make it specifically a mandatory  
25 requirement that the decisional document be signed by

1 the Commissioner or his duly delegated and authorized  
2 representative.

3 There is no doubt in my mind, however, that  
4 the preferable practice, and to be consistent with the  
5 Sheep Creek Hydraulic Syndicate decision, the State,  
6 henceforth, should require that the commissioner or a  
7 duly authorized representative of his be the person who  
8 carefully reviews the decisional document and the  
9 Declaration of Taking, be one in the same person.

10 I will give a little bit of background as to  
11 Snyder/Morgan's status on the subject property. In  
12 the spring of 1979 Snyder or Morgan purchased the  
13 business known as Sand Lake Texaco for approximately  
14 \$87,000.00. As a part of completing such purchase,  
15 Snyder and Morgan entered into lease and franchise  
16 agreements with Texaco. They have maintained such  
17 lease and franchises for approximately 10 years.

18 Snyder and Morgan have operated a full  
19 service station on said location. That is, the sale of  
20 gasoline and Texaco oil products, as well as the  
21 mechanics shop for the last 10 years.

22 As a direct consequence of the take by the  
23 State of Parcel 7, Snyder and Morgan -- Snyder and  
24 Morgan's business, as a service station, will be shut  
25 down completely. As all the improvements on Parcel 7

1 will be removed, and the highway improvement will drop  
2 the level of the parcel approximately 12 feet. The  
3 remainder of the parcel, which will not be used for a  
4 permanent highway improvements will be about 13,000  
5 square feet. An area too small to support a gas  
6 station.

7 Snyder and Morgan stand to lose all of their  
8 investment on the franchise and leasehold station as a  
9 direct result of the State's action. The State takes a  
10 position, and I -- in the view of the of this court,  
11 rather cavalierly, and erroneously, that Snyder/Morgan  
12 are not entitled to compensation for the long term loss  
13 of their business and the loss of their franchise with  
14 Texaco because they can relocate to another location.

15 The franchise itself cannot be relocated  
16 because it terminates by virtue of the condemnation by  
17 the State, and in order for Snyder and Morgan to start  
18 another service station business, they have to purchase  
19 a new franchise in the open market and pay very  
20 substantial consideration for it.

21 It is clear from the evidence before me that  
22 the State's plan originally was to acquire Parcel 7 by  
23 meaningfully dealing only with Texaco and not Snyder  
24 and Morgan. Prior to the filing of the condemnation,  
25 the State did not meet its duty and obligation to deal

1 with Snyder and Morgan fairly and in good faith. .

2 Under the facts and circumstances of this  
3 case, this court concludes that Snyder and Morgan have  
4 a property interest which the State must make a  
5 reasonable effort to compensate them for before the  
6 State acquires possession of the subject property. The  
7 State cannot be permitted to shut down an on-going  
8 business and completely fail to acknowledge the  
9 estimated losses suffered by the owners of the business  
10 for their long term business and franchise loss.

11 The State has failed to establish that they  
12 dealt with Morgan and Snyder fairly and in good faith.  
13 The State has not complied with the uniform real  
14 property acquisition policy found in AS 34.60.120.  
15 That the State shall, to the greatest extent practical,  
16 make every reasonable effort to expeditiously acquire  
17 property by negotiations.

18 AS 09.55.460 (b) mandates that private  
19 property be considered were referenced to the  
20 particular properties involved -- or, private injury,  
21 I'm sorry. AS 09.55.460 (b) mandates that private  
22 injury be considered with reference to he particular  
23 properties involved.

24 Where an agency fails to consider an  
25 independent factor in making its decision, the decision

1 will be regarded as arbitrary. The State in this case  
2 has failed to consider the impact of the taking of  
3 Snyder and Morgan's property interests, and has thus  
4 failed to properly take into account this factor as a  
5 part of a rational decision of the greatest public good  
6 and the least private injury.

7 For this reason, the State's motion for  
8 immediate possession of the subject property is denied.

9 Nothing further. We'll stand in recess.

10 THE CLERK: Please rise. This court stands in  
11 recess.

12 (1444)

13 (Off record - 3:30 p.m.)

14 \*\*\*END\*\*\*  
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CERTIFICATE

SUPERIOR COURT                    )  
  ) SS.  
STATE OF ALASKA                    )

I, Georgi Ann Haynes, Certified Professional Court Reporter for the Third Judicial District, State of Alaska, hereby certify:

That this transcript was prepared to the best of my knowledge and ability from Third Judicial District Gyr tapes identified as follows: .

That the transcript was prepared from 2-Channel quality tapes recorded by Alaska Court System personnel, therefore "indiscernible" portions appear throughout the transcript.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this 12th day of September, 1989.

\_\_\_\_\_  
Notary Public in and for Alaska  
My commission expires: 1/10/91

Item 6

# STATE OF ALASKA THE LEGISLATURE

POUCH Y STATE CAPITOL  
JUNEAU ALASKA 99811  
907 465 3800

## LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

April 4, 1990

SUBJECT: Sectional summary of draft CSHB 537 (State Affairs) (Work Order No. 6-1833E, 4-3-90)

TO: Representative H.A. "Red" Boucher  
Chair, House State Affairs Committee

FROM: Theresa L. Bannister <sup>TB</sup>  
Legislative Counsel

You have requested a sectional summary of the above described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1 amends AS 09.55.310(a) to require the jury or master in an eminent domain action to ascertain and assess the full amount of business loss caused by taking or damaging the property.

Section 2 amends AS 09.55.440(b) by directing the court in an eminent domain action to expeditiously order that deposited money be paid immediately to the entitled persons.

Section 3 amends AS 09.55.450(a) by adding a third situation in which a court is prohibited from granting a right of entry in an eminent domain action. The new provision delays the right of entry until the court determines that the deposited amount of the estimated just compensation for all property taken or damaged is substantiated by one or more appraisals prepared in good faith.

Section 4 adds four additional situations in which the plaintiff in an eminent domain action may be divested of a title or possession taken. The new situations are when the court

finds that the amount of the estimated just compensation deposited under AS 09.55.440(a) is not adequate, the state failed to comply with AS 34.60, the plaintiff is a municipality that failed to comply with AS 34.60, or the plaintiff failed to comply with AS 09.55.275.

Section 5 defines "business loss" and "private injury" for the eminent domain article.

Section 6 makes a technical change to make AS 29.35.100(25) compatible with the change made in sec. 7.

Section 7 adds to AS 29.35.030(a) the requirement that municipalities use the procedures set out in AS 09.55.250 - 09.55.-460 (Eminent Domain) and AS 34.60 (Relocation Assistance and Real Property Acquisition Practices), regardless of the source of funding, when exercising the powers of eminent domain and declaration of taking.

Section 8 states that the purpose of AS 34.60 is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of state agency activities.

Section 9 requires state agencies to establish a relocation and payment program for persons displaced as a result of state agency activities, in order to carry out relocation assistance programs and to provide payments to persons as a result of the taking or damaging of property for activities of state agencies.

Section 10 requires a state agency to make certain payments to displaced persons when the taking or damaging of property for a state agency program or project will displace the persons.

Section 11 Sec. 34.60.050(a) requires a state agency to make, in addition to other payments authorized by AS 34.60, an additional payment to a displaced person who meets certain requirements. The payment must include

(1) the amount that, when added to the cost of taking the dwelling, equals the reasonable cost of a comparable replacement dwelling that meets certain criteria;

(2) the amount that will compensate the displaced person for any increased interest costs that the displaced person is required to pay for financing a comparable replacement dwell-

ing; this amount is to be paid only if the dwelling taken by the state agency was encumbered by a mortgage meeting certain requirements a specified time before the negotiations began for the taking of the dwelling; and

(3) certain other expenses incurred by the displaced person relating to the replacement dwelling.

Sec. 34.60.050(b) limits the making of the additional payment authorized in (a) to a displaced person who purchases and occupies a replacement dwelling (that meets certain criteria) within one year from (1) when the person receives final payment of all costs of the taken dwelling, or (2) when the person moves from the taken dwelling, whichever is later.

Section 12 requires state agencies, in addition to amounts otherwise authorized by AS 34.60, to make a specified payment to a displaced person who is not eligible for a payment under AS 34.60.050, if the dwelling was actually and lawfully occupied by the person for a certain period before the initiation of negotiations for taking the dwelling.

Section 13 requires a state agency, as soon as practicable after paying the purchase price or depositing the funds to satisfy the award of compensation in a condemnation proceeding, whichever event is earlier, to reimburse the owner to a fair and reasonable extent for certain expenses necessarily incurred for conveying the property to the state agency, certain mortgage prepayment penalty costs, and a pro rata portion of certain property taxes.

Section 14 requires the state court handling a state agency condemnation proceeding to award the owners of certain interests in the property a sum that the court determines will cover certain costs incurred because of the condemnation proceedings, if (1) the final judgment is that the agency cannot take the property by condemnation, or (2) the state agency abandons the proceeding.

Section 15 directs a state agency to provide a specified relocation assistance advisory program for displaced persons when the taking or damaging of property for a program or project undertaken by a state agency will result in the displacement of a person. Directs the state agency to offer the occupant of immediately adjacent property the relocation

advisory services under the program if the person is caused substantial economic injury because of the taking.

Section 16 directs a state agency or other entity taking or damaging property for a project or program to comply with certain policies to the greatest extent practicable. These policies include

- (1) making every reasonable effort to expeditiously take or make compensation for the property by negotiation;
- (2) appraising the property before the initiation of negotiations, and giving the owner or designated representative an opportunity to accompany the appraiser during the inspection of the property;
- (3) before the initiation of negotiations for the property, establishing and offering a reasonable amount for compensation for all property taken or damaged; the amount is not to be less than the approved appraisal of the fair market value of the property; certain increases or decreases in the fair market value of the property are to be disregarded; the owner of the property must be provided with certain written information about the amount established as compensation;
- (4) not requiring the owner to surrender possession of the property before a specified payment or court deposit is made;
- (5) scheduling the construction or development of a public improvement so that a person lawfully occupying the property is not required to move or to move the person's business or farm operation without at least 90 days' written notice of the date for moving, and until 90 days have elapsed after
  - (1) a court determines that the prerequisites under AS 09.55.270 have been met, or
  - (2) has ruled under AS 09.55.450(a) on any objections made to a declaration of taking, or the time for filing objections under AS 09.55.450(a) has expired without an objection being filed.
- (6) if an owner or tenant is permitted to occupy the taken or damaged property on a rental basis for a short term or for a term subject to termination by the state agency on short notice, not charging rent that exceeds the fair rental value of the property to a short-term occupier;

(7) not advancing the time of condemnation, deferring certain other activities, or engaging in other coercive action in order to compel an agreement on the price for taking or damaging the property;

(8) initiating formal condemnation proceedings if an interest in property is to be taken or damaged by the exercise of eminent domain and not intentionally requiring the owner to begin legal proceedings to prove the taking or damage;

(9) offering to take the entire property if the taking or damage of only part of the property would leave the owner with an uneconomic remnant.

Section 17 directs a state agency taking property to take at least the same interest as taken in the property, in all buildings, structures, and certain other improvements located upon the property that are to be removed by the state agency or that will be adversely affected by the use to which the real property will be put.

Section 18 states that for determining just compensation for a building, structure, or other improvement required to be taken under AS 34.60.130(a) the building, structure, or other improvement is considered to be a part of the real property to be taken although a tenant has the right or obligation to remove it. The tenant with the right or obligation of removal is to be paid the fair market value that the building, structure, or improvement contributes to the fair market value of the real property to be taken, or the fair market value of the building, structure, or improvement for removal, whichever is greater.

Section 19 authorizes a state agency to make, in addition to other programs authorized by AS 34.60, loans to encourage and facilitate the construction or rehabilitation of housing to meet the needs of displaced persons. States that the loans are part of the project cost, identifies to whom and for what they may be made, identifies the maximum proportion of certain planning and financing costs that the loans may constitute, indicates when and how much interest is to be charged, establishes certain repayment requirements, and authorizes the cancellation of a loan under certain circumstances.

Section 20 authorizes a state agency to take the action necessary or appropriate to provide certain housing by using

Representative H. A. "Red" Boucher  
Page 6  
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funds authorized for the project, if the agency program or project cannot proceed to actual construction because comparable replacement sale or rental housing is not available and if the agency determines that housing cannot otherwise be made available.

Section 21 adds a definition of property to include short-term and long-term business interests. Makes several changes in the definition of "displaced person" to reflect the changes in the rest of the chapter and to delete an obsolete date.

Section 22 repeals AS 34.60.100.

Section 23 gives the act an immediate effective date.

If I can be of further assistance, please advise.

TLB:mi  
wkmi6/068