

**SB**

**190**

# FISCAL NOTE

STATE OF ALASKA  
1998 LEGISLATIVE SESSION

BILL NO. SB 190

Revision Date _____	Dept. Affected <u>DOT&amp;PF</u>
Title <u>Attempt to Purchase Before Eminent Domain</u>	BRU <u>Commissioners Office</u>
Sponsor <u>Senator Mackie</u>	Component <u>Office of the Commissioner</u>
Requester <u>(S) CRA</u>	Component Serial No. <u>530</u>

**Expenditures/Revenues** (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>	0.0	0.0	0.0	0.0	0.0	0.0
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type)	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY98) cost: 0.0

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

Prepared by <u>Dennis Poshard, Special Assistant</u>	Phone <u>465-3900</u>
Division <u>Commissioners Office</u>	Date <u>2/18/98</u>
Approved by <u><i>[Signature]</i></u> Commissioner	Date <u>2/18/98</u>
Agency <u>Department of Transportation and Public Facilities</u>	

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April 13, 1998

The Honorable Robin Taylor  
Chairman, Senate Judiciary Committee  
The State Senate  
State Capitol Rm 30  
Juneau AK 99801-1182

Re: CS SB 190  
An Act Relating to Eminent Domain

Dear Senator Taylor:

Thank you for the opportunity to testify before the Senate Judiciary Committee on April 8. During my testimony in favor of CS SB 190, relating to certain amendments to Alaska's eminent domain laws, committee members asked two questions that I could not readily answer. Please accept this letter to supplement my testimony and provide a response to the members' inquiries.

First, does the addition of the language "property interest to be taken" or "interest in the property" as used in the bill expand the right of the government to take property? I consulted with Sealaska's legal counsel, who is of the opinion that the references to interests in property do not expand the scope of the government's right to take property. Rather, this phrase is consistent with existing law, that a taking may consist of something less than the entire fee simple interest in property, and that such a taking should also be subject to just compensation. In that sense, the "interest in property" language is a narrowing or clarifying phrase, and simply reinforces the idea that the government must pay a

Senator Robin Taylor  
April 13, 1998  
Page 2

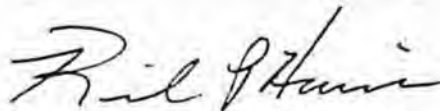
property owner for the taking of any compensable interest in property, even if it is not a complete taking.

The second issue discussed was whether similar language is contained in the laws of other states. As I mentioned in my testimony, the suggested language is found in the Model Eminent Domain Code. This Code is published by a national organization on uniform laws and is intended to be a consensus of the best laws from several jurisdictions. Our inquiry reveals that many states have adopted eminent domain language that includes the "interest in property" clause, including particularly the states of Washington, California, and Oregon. Accordingly, it is Sealaska's position that adoption of the recommended amendments would bring Alaska's eminent domain law more in line with the trend in the United States. Attached are examples from the Model Code and from the three states mentioned above.

Thank you for the opportunity to testify before the Committee, and for allowing me to expand on that testimony by this letter.

Sincerely,

SEALASKA CORPORATION



Richard P. Harris  
Senior Vice President  
Natural Resources

cc: Senate Judiciary Committee  
Sam Kito  
Robert W. Loescher, President and Chief Executive Officer  
Senator Jerry Mackie

UNIFORM LAWS ANNOTATED  
UNIFORM LAW COMMISSIONERS' MODEL EMINENT DOMAIN CODE 1974 ACT  
ARTICLE IV. COMMENCEMENT OF ACTION BY CONDEMNOR

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§ 404. [Contents of Complaint].

(a) In addition to other allegations required or permitted by law, the complaint shall:

(1) designate as a plaintiff each person on whose behalf the property is sought to be taken;

(2) name as defendants all persons who to the plaintiff's knowledge are owners of or who have or claim any interest in the property sought to be taken; defendants whose names are not known may be included under the designation "unknown claimants";

(3) contain a legal description of the property and of the interest therein sought to be taken; and

(4) allege the basis of the plaintiff's right to take the property by eminent domain and maintain the action, including (i) a reference to the plaintiff's legal authority to take the property; and (ii) a statement of the purpose for which the property is sought to be taken.

(b) If a plaintiff claims any interest in the property sought to be taken or that the property is devoted to a public use, the complaint must describe that interest or public use.

(c) For purposes of information and notice, the complaint shall be accompanied by a map or diagram portraying as far as practicable the property sought to be taken and the property that will be affected by the taking, showing their location in relation to the project for which the property is to be taken.

<General Materials (GM) - References, Annotations, or Tables >

COMMENT

1986 Main Volume

Section 404 describes the essential minimum contents of the complaint in a condemnation action. A complaint that does not contain all of the elements provided in this section is subject to preliminary objection. See Section 502. Allegations not required by Section 404 (e.g., market value; necessity for the taking) may, but need not, be made.

Under Subsection (a)(1), each condemnor must be identified, since this information may be relevant to the issue of the right to exercise the power of eminent domain. For example, if a joint and cooperative condemnation action is brought by agreement between different agencies, each condemnor must be named as a plaintiff. Similarly, a condemnor taking property to convey it to a specific private developer, in furtherance of an authorized community redevelopment project, must designate the person for whose benefit the plaintiff is condemning the property.

Under Subsection (a)(2), the complaint is required to name as defendants all persons who are known or believed to be owners of or to have or claim any interest, including a lien or other security interest, in the property sought

to be taken by the condemner. Under this rule, it would not be necessary to join a lessee if the plaintiff seeks to take the property "subject to" the lease, for the lessee's interest would not be described in the complaint as property sought to be taken. Since persons who have an interest in the property, but who are not named and served with process either personally or constructively, ordinarily are not bound by the judgment, this rule permits the condemner to secure full title without collateral litigation.

Subsection (a)(3) requires a "legal" description of the property sought to be taken. Present practice in this regard varies from state to state; the Code seeks to provide a uniform rule of accurate description as a means for giving the defendants notice of the scope of the take. In this respect, notice through the pleadings is deemed more efficient than to rely on discovery, as in other civil litigation. The complaint is not required to describe the interest which each defendant has or claims in the property; specification of the defendants' individual interests is a matter for their several responses. The complaint is sufficient if it merely alleges that each defendant has or claims to have some interest in the property described.

Clauses (i) and (ii) of Subsection (a)(4) require allegations of legal authority and purpose in order to show the plaintiff's right to take. Since there may be many different statutory provisions of varying scope that relate to the right to take, specification of the source of authority and public use claimed by the condemner should assist in reducing the number of unnecessary challenges to the right to take by clarifying that issue from the inception of the action. Compare Section 310(a) (similar requirement for condemnation authorization).

Subsection (b) is intended to provide notice of any claim by the condemner of an existing interest in the property, and of any issue of "higher public use" arising from the fact that the property sought to be taken is already devoted to public use.

Subsection (c), requiring a map or diagram to be annexed to the complaint, is designed for informational assistance only. Practice currently varies in this regard, with some states requiring a map, others making no such requirement, and still others requiring a map to be filed and made available for examination to interested parties. Since a well prepared map may explain graphically and give better notice than a legal description of the property which the plaintiff seeks to take, or which may be affected by the taking, its attachment to the complaint is required. The map or diagram, however, need only attempt to portray the property sought to be taken "as far as practicable" thereby recognizing that certain interests, such as mineral or water rights, air rights, or development easements, may not be capable of fully accurate representation by cartographic means. The map or diagram, as part of the complaint, is subject to amendment as are other pleadings; and it may constitute an admission of the plaintiff to the same extent as other parts of the complaint.

This section does not prescribe an explicit rule for designating condemnees whose interests may be affected by death, pendency of probate proceedings, or other analogous circumstances. The determination of who should be named as a defendant in an action affecting the property of a decedent, or property under guardianship, conservatorship, or included within a trust, should be conformed to the requirements of acceptable title practice in the state where the action is pending. The appointment of a guardian or other representative for a minor, an incompetent person, or some other similarly situated condemnee, is also left to local practice and procedure.

#### LIBRARY REFERENCES

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Eminent Domain ☞ 191(1) to (8).

Pretrial Procedure ☞ 650.

C.J.S. Pleading § 457 et seq.

C.J.S. Eminent Domain § 251 et seq.

#### NOTES OF DECISIONS

**Parties 1**

proceeding. *Weldon v. State*, Ala.Civ.App.1985, 495 So.2d 1113, affirmed as modified 495 So.2d 1121.

**1. Parties**

Model Eminent Domain Code § 404

Where rights of those owning dominant tenements in right-of-way across lot were not obstructed in any way by condemnation of small, noncontiguous portion of lot, they did not have to be joined as necessary and indispensable parties in condemnation

ULA EM DOMAIN § 404

END OF DOCUMENT

UNIFORM LAWS ANNOTATED  
UNIFORM LAW COMMISSIONERS' MODEL EMINENT DOMAIN CODE 1974 ACT  
ARTICLE I. GENERAL PROVISIONS AND DEFINITIONS

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§ 103. [Definitions].

As used in this Act:

- (1) "action" means condemnation action;
- (2) "appraisal" means an opinion as to the value of or compensation payable for property, prepared by or under the direction of an individual qualified by knowledge, skill, experience, training, or education to express an opinion as to the value of property;
- (3) "business" means a lawful activity, whether or not for profit, other than a farm operation, conducted primarily for the purchase, sale, lease, rental, manufacture, processing, or marketing of products, commodities, or other property, or for providing services;
- (4) "condemn" means to take property under the power of eminent domain;
- (5) "condemnation action" includes all acts incident to the process of condemning property after commencement of suit;
- (6) "condemnee" means a person who has or claims an interest in property that is the subject of a prospective or pending condemnation action;
- (7) "condemnor" means a person empowered to condemn;
- (8) "costs" means the reasonable fees, charges and expenses necessarily incurred in an action, including the fees and charges of expert witnesses, the cost of transporting the court and jury to view the premises, and other recoverable costs;
- (9) "court" means a [ ] court of this state, and includes, when the context requires, any [judge] [justice] of the court;
- (10) "crops" means any form of vegetation intended to be removed and used or sold for commercial purposes, including grass, flowers, fruits, vegetables, trees, vines, and nursery stock;
- (11) "farm operation" means any activity conducted primarily for the production of one or more agricultural products or commodities, including timber, for sale or home use, and customarily producing those products or commodities in sufficient quantity to be capable of contributing materially to the operator's support;
- (12) "improvement" includes any building or structure, and any facility, machinery, or equipment that cannot be removed from the real property on which it is situated without substantial damage to the real property or other substantial economic loss;
- (13) "lien" means a security interest in property arising from contract, mortgage, deed or trust, statute, common

law, equity, or creditor action;

(14) "litigation expenses" means the sum of the costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, necessary to prepare for anticipated or participation in actual court proceedings;

(15) "local public entity" means a public entity other than the State;

(16) "person" includes a natural individual, partnership, corporation, association, other legal or fiduciary entity, and a public entity;

(17) "personal property" means any property other than real property;

(18) "property" means an interest in real or personal property under the law of this State;

(19) "real property" means land and any improvements upon or connected with land; and includes an easement, servitude, or other interest therein; and

(20) "work" includes construction, alteration, repair, remodeling, excavation, demolition, rehabilitation, relocation and landscaping.

<General Materials (GM) - References, Annotations, or Tables >

**COMMENT**

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The definitions in the Uniform Code are designed to carry out the purpose of the Code to make uniform the eminent domain procedures of the enacting state in all condemnation actions by either public or private condemnors.

The pivotal term "property" is defined in paragraph (18) to include "any interest" in real or personal property. This terminology is intended to be accorded a broad interpretation so that it is coextensive with the state law of property and, if state law admits, will include such interests as air rights, subsurface rights, mineral interests, estates in submerged lands, water rights of any character, flowage or flooding easements, easements or servitudes for aircraft noise or operations, rights or permits for the temporary use and occupancy, franchises, rights to limit land use and development, leaseholds, liens, future interests, copyrights, etc.

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Eminent Domain ↪ 1 et seq.  
 Statutes ↪ 179.  
 C.J.S. Eminent Domain §§ 1, 2.  
 C.J.S. Statutes § 315.

**NOTES OF DECISIONS**

"Condemnor" 1  
 "Taking" 2

1. "Condemnor"

"Condemnor," within meaning of Eminent Domain Code, could be "empowered to condemn" pursuant to statutes authorizing pipeline companies to acquire by

condemnation rights of way for pipelines. Walker v. Gateway Pipeline Co., Ala.1992, 601 So.2d 970.

2. "Taking"

Although regulations which do not physically invade private property may be considered "taking" under Fifth Amendment, "taking" is more likely to be found where government action is physical invasion. Jones Truck Lines, Inc. v. Price Rubber Corp., M.D.Ala.1995, 182 B.R. 901.

In determining whether government action constitutes "taking" under Fifth Amendment, court looks to economic impact of regulation on claimant and extent to which action interferes with investment-backed expectations. Jones Truck Lines, Inc. v. Price Rubber Corp., M.D.Ala.1995, 182 B.R. 901.

Government action which is not reasonably related to proper purpose is insufficient, by itself, to constitute taking; deprivation of all beneficial use of property is required. Estate and Heirs of Sanchez v. County of Bernalillo, N.M.1995, 902 P.2d 550, 120 N.M. 395.

Model Eminent Domain Code § 103

ULA EM DOMAIN § 103

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**8.08.100 Mode of appropriation.** The right of eminent domain for the purposes intended in RCW 8.08.090 through 8.08.130 is hereby extended to all counties in this state and every such county for any purpose of condemnation, appropriation or disposition such as is mentioned in RCW 8.08.090 is hereby authorized and empowered to condemn and appropriate all necessary lands and all rights, properties and interests in or appurtenant to land under the same procedure as is or shall be provided by the laws of this state for the case of any similar condemnation or appropriation by other corporations. [1895 c 2 § 3; RRS § 903.]

**8.08.110 Tax levy to pay costs.** The board of county commissioners is hereby authorized and empowered in aid of the powers granted or prescribed in RCW 8.08.090 to levy, annually, a tax as large as may be necessary, but not exceeding the rate of one mill on the dollar, upon all the taxable property in the county, such tax to be assessed, levied and collected at the same time and in the same manner as taxes for general county purposes, but the proceeds of said taxes, when collected, shall constitute and be a special fund, applicable solely to the cost of such condemnation, appropriation or disposition, as is mentioned in RCW 8.08.090, and the expenses incident thereto. [1895 c 2 § 2; RRS § 902.]

**8.08.120 Indebtedness is for general county purposes.** Any county purpose mentioned in RCW 8.08.090 through 8.08.130 shall be deemed and held to be a general county purpose and any indebtedness contracted or to be contracted therefor shall be deemed and held to be an indebtedness for general county purposes, and all the provisions of law of this state relative to indebtedness for general county purposes or the contracting of such indebtedness or the bonds for funding the same shall be deemed applicable to any indebtedness contracted or to be contracted or any bonds issued by any county under RCW 8.08.090 through 8.08.130, but the accounts of the county with respect to the receipts and disbursements of all moneys received or disbursed by the county under the provisions of RCW 8.08.090 through 8.08.130 shall, for each condemnation, appropriation and disposition, be so kept as to clearly and fully exhibit such accounts separate and apart from the other accounts of the county. [1895 c 2 § 4; RRS § 904.]

*Public contracts and indebtedness Title 39 RCW*

**8.08.130 Limitation.** Any condemnation, appropriation or disposition intended in RCW 8.08.090 through 8.08.130 shall be deemed and held to be for a county purpose and public use within the meaning of RCW 8.08.090 through 8.08.130 when it is directly or indirectly, approximately or remotely for the general benefit or welfare of the county or of the inhabitants thereof, or when it is otherwise within the meaning of the phrase "for a county purpose" as occurring in the Constitution of this state. [1895 c 2 § 5; RRS § 905.]

**8.08.140 Condemnation for military purposes.** See RCW 8.04.170.

**8.08.141 Condemnation for military purposes—Construction.** See RCW 8.04.180.

**8.08.150 Appointment of guardian ad litem for minors, alleged incapacitated persons—Protection of interests.** See RCW 8.25.270.

## Chapter 8.12

### EMINENT DOMAIN BY CITIES

#### Sections

#### CONDEMNATION

- 8.12.010 "City" defined.
- 8.12.020 Other terms defined.
- 8.12.030 Condemnation authorized—Purposes enumerated.
- 8.12.040 Ordinance to specify method of payment—Limitations.
- 8.12.050 Petition for condemnation.
- 8.12.060 Contents of petition.
- 8.12.070 Summons—Service.
- 8.12.080 Service when state or county lands are involved.
- 8.12.090 Waiver of jury—Adjudication of public use—Procedure.
- 8.12.100 Trial—Jury—Right to separate juries.
- 8.12.120 Interested party may be brought in.
- 8.12.130 Jury may view premises.
- 8.12.140 Damages to building—Measure.
- 8.12.150 Separate findings where there are several interests—  
Interpleader of adverse claimants.
- 8.12.160 Verdict—New trial—Continuance—New summons.
- 8.12.170 Change of ownership—Powers of court.
- 8.12.190 Findings by jury.
- 8.12.200 Judgment—Appellate review—Payment of award into court.
- 8.12.210 Title vests upon payment.

#### PAYMENT FOR IMPROVEMENT

- 8.12.220 Payment from general fund.
- 8.12.230 Payment by special assessment.
- 8.12.240 Petition for assessment—Appointment of commissioners.
- 8.12.250 Advancement from general funds against assessments.

#### ASSESSMENTS—IMMEDIATE PAYMENT

- 8.12.260 Appointment of board of eminent domain commissioners—  
Terms of office.
- 8.12.270 Oath of commissioners—Compensation.
- 8.12.280 Duties of commissioners—Assessment of benefits—  
Apportionment.
- 8.12.290 Assessment roll.
- 8.12.300 Hearing on assessment roll—Notice.
- 8.12.310 Proof of service.
- 8.12.320 Continuance of hearing.
- 8.12.330 Objections to assessment roll.
- 8.12.340 Modification of assessment.
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- 8.12.360 Certification of roll to treasurer.
- 8.12.370 Treasurer's notice to pay when assessments immediately payable.
- 8.12.380 Notice by mail—Penalty for default.

#### BONDS—INSTALLMENT PAYMENT

- 8.12.390 Bonds authorized.
- 8.12.400 Maturity—Interest—Payment.
- 8.12.410 Sale—Application of proceeds.
- 8.12.420 Installment payment of assessments.
- 8.12.430 Notice to pay—Due date of installments—Penalty—Interest.
- 8.12.440 Bond owner may enforce collection.
- 8.12.450 Bondholder's remedy limited to assessments.
- 8.12.460 Payment of bonds—Call—Notice.

#### DELINQUENCY—REDEMPTION

- 8.12.470 Enforcement of collection—Interest on delinquency.
- 8.12.480 Assessment fund to be kept separate.
- 8.12.490 Record of payment and redemption.

ARTICLE 2

Rights Included in Grant of Eminent Domain Authority

- § 1240.110. Interests in property which may be acquired
- § 1240.120. Property necessary to carry out principal purpose; Acquisition with intent to sell or otherwise dispose of property
- § 1240.125. Local public entities; Property outside territorial limits; Purpose of acquisition
- § 1240.130. Acquisition of property by other means
- § 1240.140. Joint exercise of power by public agencies
- § 1240.150. Acquisition of remainder of property
- § 1240.160. Authorizations distinct and separate

Collateral References:

- 29 Cal Jur 3d Eminent Domain § 5.
- 19 Cal Practice Rev, Ch 386, Eminent Domain Proceeding.

**§ 1240.110. [Interests in property which may be acquired]**

(a) Except to the extent limited by statute, any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire any interest in property necessary for that use including, but not limited to, submerged lands, rights of any nature in water, subsurface rights, airspace rights, flowage or flooding easements, aircraft noise or operation easements, right of temporary occupancy, public utility facilities and franchises, and franchises to collect tolls on a bridge or highway.

(b) Where a statute authorizes the acquisition by eminent domain only of specified interests in or types of property, this section does not expand the scope of the authority so granted.

Added Stats 1975 ch 1275 § 2, operative July 1, 1976.

**Prior Law:**

(a) Former § 1239, as enacted 1872, amended by Code Amdts 1873-74 ch 383 § 161, Stats 1911 ch 356 § 1, Stats 1913 ch 394 § 1, Stats 1949 ch 978 § 1.

(b) Former § 1240 subds 1, 7, 8, as enacted 1872, amended by Stats 1901 ch 144 § 1, Stats 1905 ch 124 § 1, Stats 1907 ch 271 § 1, Stats 1911 ch 115 § 1, ch 358 § 1, Stats 1913 ch 292 § 1, Stats 1915 ch 429 § 1, Stats 1933 ch 465 § 1, Stats 1967 ch 751 § 1.

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Citation  
OR ST s 366.340  
O.R.S. § 366.340

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1996 OREGON REVISED STATUTES  
TITLE 31. HIGHWAYS, ROADS, BRIDGES AND FERRIES  
CHAPTER 366. STATE HIGHWAYS  
STATE HIGHWAYS

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366.340. Acquisition of real property generally.

The department may acquire by purchase, agreement, donation or by exercise of the power of eminent domain real property, or any right or interest therein, including any easement or right of access, deemed necessary for:

(1) Construction of shops, equipment sheds, office buildings, maintenance sites, patrolmen accommodations, snow fences, quarry sites, gravel pits, storage sites, stock pile sites, weighing stations and broadcasting stations.

(2) Appropriation, acquisition or manufacture of road-building materials, approach or hauling roads, connecting roads, frontage road, highway drainage and drainage tunnels.

(3) Maintenance of an unobstructed view of any state highway so as to provide for the safety of the traveling public.

(4) Any other use or purpose deemed necessary for carrying out the purposes of this Act.

(5) Elimination or prevention of hazardous or undesirable points of entry from adjacent property to state highways.

CREDIT

(Amended by 1953 c. 252 § 2)

<General Materials (GM) - References, Annotations, or Tables>

NOTES, REFERENCES, AND ANNOTATIONS

NOTES, REFERENCES, AND ANNOTATIONS

366.340

## NOTES OF DECISIONS

Proposed use of property acquired by condemnation need not be lawful use at time of acquisition. Oregon Department of Transportation v. Schrock Farms, 140 Or App 140, 914 P2d 1116 (1996)

O. R. S. § 366.340  
OR ST § 366.340  
END OF DOCUMENT

# Alaska State Legislature



State Capitol  
Juneau, AK 99801-1182  
(907) 465-3720  
(907) 465-2689

Official Business  
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Speaker of the House of Representatives

April 8, 1998

Mr. Dennis Metrokin  
President  
Koniag, Inc.  
4300 B Street, Suite 407  
Anchorage, AK 99503

Dear Mr. Metrokin:

Thank you for your letter regarding several bills before the legislature. SB 190, 191 and 286 were all introduced by Senator Jerry Mackie; and I will pass your comments of support along to him.

HB 373, amending the forest practices act, is currently headed for Senate Finance Committee – its last committee of referral. I personally introduced this bill earlier this session. It has since passed the House with strong support, and it appears to have strong support in the Senate as well. I appreciate receiving your positive comments regarding this bill and will include them in the bill files as well.

Again, I appreciate hearing from you and hope you will continue to share with me those issues of concern to your corporation.

Sincerely,

A handwritten signature in cursive script that reads "Gail Phillips".

Gail Phillips  
SPEAKER OF THE HOUSE

GP:jmj

cc: Senator Jerry Mackie

04-07-98 10:25 IN

*Judi -  
Do a brief  
response - can you  
believe anyone  
using paper like  
this?*

*To this  
Printer  
- it  
needs  
cleaning.*



**KONIAG**  
INCORPORATED

April 1, 1998

Representative Gail Phillips  
State Capitol  
Juneau, AK 99801-1182

Dear Representative Phillips,

Koniag, <sup>7K V</sup> Inc. is the Regional Native Corporation for the Kodiak Island archipelago and neighboring portion of the Alaska Peninsula. Koniag has 3400 shareholders, over half of whom are residents of Alaska. As its President, I wish to speak out in favor of certain land management and forestry related bills now before the State Legislature.

S.B. 190 to amend Alaska's eminent domain laws. We feel very strongly that Alaska's private lands including those belonging to Native Corporations, should have the same measure of added protection that are provided in the laws of nearly half of the other 50 states. Namely, that the condemning authorities first diligently attempt to purchase, in good faith, private land before exercising the power of eminent domain.

S.B. 191 relating to the exchange of essential municipal or public purpose lands for the State tidelands. This sounds like a good idea to us and Koniag conceivably might even get to use it on the Women's Bay and Afognak Island submerged lands which are currently intolerably burdened with claims of dual jurisdiction by both the U.S. Fish and Wildlife Service, Maritime Refuge, and by the State.

S.B. 286 which amends current law relating to adverse possession of private lands. We also believe that this is a good proposal to tighten up current State adverse possession laws whose original purposes have largely been superseded by modern conditions and technology.

H.B. 373 which amends the Alaska Forest Practices Act. As you are probably aware, the Koniag Region and a number of its Village Corporations are heavily involved in the timber industry. Koniag and everyone we are aware of in the Alaska Forest Industry strongly supports these proposed amendments as being a win-win situation for both the timber industry and public interest.

Thank you for taking the time to read this far, and for the opportunity to comment.

Sincerely,  
KONIAG, INC.

*Dennis Metrokin*  
Dennis Metrokin,  
President

cc: Sealaska  
Afognak Joint Venture  
Alaska Federation Of Natives  
Afognak Native Corporation

4300 B Street, Suite 407  
Anchorage, Alaska 99503  
(907) 561-2668  
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**TESTIMONY OF RICHARD P. HARRIS**  
**Senior Vice President**  
**SEALASKA CORPORATION**

**Senate Judiciary Committee**  
**April 8, 1998**

**CS SENATE BILL 190 -EMINENT DOMAIN**

I am Richard Harris, Senior Vice President of Sealaska Corporation, a Native Regional Corporation, organized under the Alaska Native Claims Settlement Act and under the laws of the State of Alaska. Sealaska Corporation has over 16,000 shareholders, with over half being residents of the State of Alaska. Under the Settlement Act, Sealaska will receive over 330,000 acres of fee estate and an additional 300,000 acres of subsurface estate underlying ANCSA Village and Urban Corporations' lands. Sealaska is the largest private landowner in Southeast Alaska, with its land base is primarily located on Prince of Wales Island, Chicagof Island, Kupreanof Island, and Dall Island. Much of Sealaska's land surround Southeast villages and municipalities.

Eminent domain is a power that the government has to take the property of another for a public purpose. It is referenced in our constitution and is a fundamental power of the government. (*See* Article I, Section 18, Alaska State Constitution) This right is tempered by the constitutional protection which requires the government to fairly compensate the person for the taking.

CS SB 190 adds some additional protections to the private landowner. CS SB 190 amends Alaska's eminent domain laws by requiring the government, and other condemning authorities, to diligently attempt, in good faith, to purchase private land before taking that land through the power of eminent domain. The reasons for the legislation are these:

Alaskans value the importance of private property rights, and they believe that government should intrude on those rights gingerly--and only as a last resort. Unfortunately, Alaska's current eminent domain laws reflect neither Alaskans' respect for private property, nor Alaska's lack of it. We believe Alaska's law omits two prerequisites to condemnation that should, in every case, guide those seeking to take private property. These prerequisites are:

- A. The requirement of a diligent, good faith attempt to purchase.**
- B. The requirement to justify the particular property interest taken.**

The amendments in this bill are not unreasonable. At least 23 other states offer such protection. Further, the Uniform Eminent Domain Code recommends such provisions.

**A. Good Faith Effort to Purchase:**

There is usually some discussion between the condemnor and the property owner before eminent domain proceedings are instituted, but nothing requires it. Officials are free to make unreasonable offers, or none at all. They can end discussions at their whim, and they are under no obligation to take even the most reasonable landowner concerns seriously.

As a result, the discussions--to the extent that they occur--are not arms-length. The amendment proposed in CS SB 190 will help to level the playing field. The landowner and the state begin with an arms-length bargaining relationship. The landowner will have the benefit of full disclosure of information used by the State to determine the public purpose for the taking and value of the interest taken. The purpose of the amendments in CS SB 190 is best stated by the Eminent Domain Uniform Code, which states:

*The purposes of preliminary purchase attempts include the protecting of property owners from arbitrary and unexpected exercises of eminent domain power, facilitation of amicable settlement of disputes as to the amount of just compensation, minimizing acquisition costs through reduction of litigation and promotion of citizen cooperation with governmental programs involving land acquisition.*

*Id.* at §306, Commentary.

**B. Specific Property Interest Taken:**

Current Alaska law requires that the state, or any other condemning authority, justify the need to take the property at issue. But, it does not necessarily require a justification for the particular interest (e.g. fee title, rights-of-way, or easements) in the property being taken. Our laws should expressly require that the state take as little of a person's property, or interest in property, as is actually necessary to accommodate the public need.

For example, there is no need to take a fee estate when an easement or right of way might suffice.

**C. Conclusion:**

In sum, CS SB 190 will have little impact on officials who already treat landowners fairly when condemnation seems necessary. At the same time, it will assure that, in each case, every appropriate step is taken to protect property owners from arbitrary and unexpected exercises of eminent domain. CS SB 190 will accomplish this result by requiring the state, or other condemning authority, to negotiate in good faith with the landowner to purchase the property interest and require the justification for the particular interest taken. We have included with this testimony a more detailed rationale and sectional analysis, including a summary of other states' "requirements to negotiate."

Thank you for this opportunity to speak on this issue. I would be pleased to answer any questions the committee members may have.

## SUMMARY CS SENATE BILL 190

### EMINENT DOMAIN

**Section 1.** AS 09.55. '70 lists the matters that any condemning authority must prove before it can condemn property through a judicial eminent domain complaint. Section 1 adds to that list proof that the authority made a good faith effort to purchase the property.

Section 1 also amends the existing "necessity" showing to require the authority to demonstrate not only that it is necessary to take the property at issue, but that it is also necessary to take the particular interest (e.g. fee title, rights-of-way, or easements) in the property that the authority is trying to condemn.

**Section 2.** Provides protection to the condemning authority by placing burden of proof on the landowner to show a good faith effort to acquire property was not made.

**Section 3.** Section 3 further amends the statute to add a subsection (8) requiring the condemning authority to show it has made a good faith effort to purchase the land. It also amends subsection (7) to require an explanation of why the particular interest being taken is necessary for a public purpose. By virtue of Section 3, authorities would now be required to also explain, in their decisional documents, how the good-faith requirement was met.

**Section 4.** Under current law, the filing of a declaration of taking serves to condemn the property at issue. *See* AS 09.55.440(a). The law protects property owners by allowing them to contest the truth, or sufficiency, of the statements made in the declaration. *See* AS 09.55.450(b).

Section 4 would further protect private property owners by amending AS 09.55.460(b) to allow the court to divest the condemnor of title when it was ultimately shown that a good-faith effort to purchase the property had not been made.

Without Section 4, Section 3 of the bill would be mostly meaningless, since: (1) the state (or other authority) would be obliged to make a statement that the good-faith

requirement had been met; but (2) the landowner would have no remedy in any case where the statement proved untrue.

Section 5. Section 5 provides an immediate effective date.

### 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 that 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 benefited, 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.

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

(§ 13.08 ch 101 SLA 1962; am § 2 ch 138 SLA 1968)

**Cross references.** For related court rules, see Civ. R. 72(e)(4) and (h).

## NOTES TO DECISIONS

### ANALYSIS

- I. General Consideration
- II. Just Compensation
  - A. Generally
  - B. Damages to Remainder
  - C. Benefits to Remainder
- III. Role of Witnesses

### I. GENERAL CONSIDERATION.

**Editor's notes.** - This section is based on a Montana statute.

**Applied in** State v. Hammer, 550 P.2d 820 (Alaska 1976).

**Cited in** Scavenius v. City of Anchorage, 539 P.2d 1161 (Alaska 1975).

### II. JUST COMPENSATION.

reflecting the facts and premises on which their decisions are based, in conjunction with their use of declarations of taking, holding that decisional documents will not be required with respect to any declaration of taking filed before the publication of this opinion *Ship Creek Hydraulic Syndicate v. State, DOT & Pub. Facilities*, 685 P.2d 715 (Alaska 1984).

The statement required by paragraph (7) does not qualify as a decisional document. *Ship Creek Hydraulic Syndicate v. State, DOT & Pub. Facilities*, 685 P.2d 715 (Alaska 1984).

**Judicial review of question of necessity only where showing of fraud, etc.** - 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. *Arco Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975), (decided prior to 1976 amendment which added paragraph (7)).

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. *Arco Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975), (decided prior to 1976 amendment which added paragraph (7)).

**State's failure to consider several important, relevant factors** made it impossible to rationally determine whether intended taking was compatible with the greatest public good and the least private injury, and rendered its action arbitrary; thus taking of subject land could not be upheld. *State, DOT & Pub. Facilities v. 2.072 Acres, More or Less*, 652 P.2d 465 (Alaska 1982).

**Distinction between various types of condemnation proceedings.** - See *Arco Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975), (decided prior to 1976 amendment which added paragraph (7)).

**Specification of amounts of separate interests.** - Where the state has adequate knowledge of separate interests, amounts should be specified for each. *Russian Orthodox Greek Catholic Church of N. Am. v. Alaska State Hous. Auth.* 498 P.2d 737 (Alaska 1972).

**Quoted in** *State, DOT & Pub. Facilities v. 0.644 Acres*, 613 P.2d 829 (Alaska 1980); *State v. 4.62 Acres, More or Less*, 704 P.2d 1340 (Alaska 1985).

#### **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. The judgment must include interest at the rate of 10.5 percent a year on the amount finally awarded that 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 may order that the money deposited or a part of it be paid immediately to the person or persons entitled to it for or on 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.

(§ 13.21 ch 101 SLA 1962; am § 3 ch 21 SLA 1985; am § 21 ch 26 SLA 1997)

# MEMORANDUM


State of Alaska  
Department of Law

TO: Dennis Poshard  
Legislative Liaison

DATE: April 29, 1998

FILE NO.:

TELEPHONE NO.: 465-3600

  
FROM: William F. Cummings  
Assistant Attorney General  
Transportation Section - Juneau

SUBJECT: SB 190 (JUD)

I have serious reservations regarding SB 190 (JUD). While the amendments made to the bill in the Senate Judiciary Committee have clarified the language, the bill has a number of unresolved problems.

This bill is unnecessary. DOT&PF acquires between two and five percent of its land acquisitions through condemnation actions. The rest of its land acquisitions, i.e., more than 95 percent of the total, is acquired through voluntary negotiations. It is not credible to argue that DOT&PF does not make good faith efforts to acquire interests in land cases through negotiations before filing condemnation cases.

Under existing law, a taking in a condemnation case can be voided if the property owner can prove that it was not acquired in a manner consistent with the "greatest public good and least private injury." This standard allows an aggrieved property owner to successfully attack a taking, if he/she can prove that the taking is arbitrary, capricious, or an abuse of discretion. The analysis under this existing language requires that the condemning authority carefully balance the public needs against private injury, with the intent to maximize the public benefit, but minimize private injury. This analysis would include whether the interest that DOT&PF seeks to acquire is appropriate for the facility to be constructed.

Under SB 190 two new means to challenge a taking are provided, i.e., the property owner could argue the interest to be acquired is not appropriate for the facility to be constructed and the negotiations, conducted prior to filing, were not made in good faith. These sorts of determinations are incredibly fact dependent and would be complicated to address in a judicial proceeding. The result of requiring these sorts of analysis in superior court will be to delay badly needed public projects until their resolution. This consequence is particularly troublesome because the bill addresses problems that do not exist.

I have written this memorandum from the perspective of DOT&PF. Senate Bill 190 (JUD) would have a similar impact upon condemnation actions filled by municipalities.

Dennis Poshard  
Legislative Liaison  
DOT&PF

April 29, 1998  
Page 2

If you have any questions on this matter, please contact me at your earliest convenience.

WFC/bap

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# SENATOR JERRY MACKIE

## ALASKA STATE LEGISLATURE

### SECTIONAL

### CS SB 190 (JUD)

Section 1. This section specifically includes that property interests must also be necessary for the authorized public use as a prerequisite for an eminent domain taking.

Section 2. This section provides a new condition that a good faith effort to negotiate the purchase of the property interest is also required prior to an eminent domain taking. However, in any dispute over nature of the negotiation, it is the opposing party's burden of proof to show that a good faith effort was not made.

Section 3. A statement that the good faith effort has been made (or in certain circumstances, not made) to purchase of property is added to the list of contents in a declaration of taking.

Section 4. The appeals section is amended to allow a court denial of an eminent domain taking if it finds that a good faith effort to purchase was not made.

Section 5. Effective date clause.

# LEGAL SERVICES

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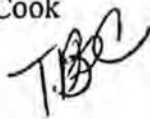
## MEMORANDUM

February 26, 1998

**SUBJECT:** Eminent domain (CSSB 190(CRA))

**TO:** Senator Jerry Mackie, Chair  
Senate Community and Regional Affairs Committee

**FROM:** Tamara Brandt Cook  
Director



Here is the final committee substitute you requested. The bill as it has evolved now contains an ambiguity. SB 190 originally required a reasonable and diligent effort to acquire property by purchase before a governmental entity could take the property through eminent domain, except when negotiation is not possible because of the incapacity, inability to convey legal title, or absence of one or more of the owners. The CS in bill sec. 2 still requires negotiation and places the burden of proving that a good faith effort to acquire the property by purchase was not made on the party opposing the taking. However, in bill sec. 3 the contents of a declaration of taking no longer require a statement regarding negotiation, and in bill sec. 4 the court is no longer required to make a finding that an effort to acquire the property by purchase has been made before divesting the plaintiff of title to the property. Is negotiation required, as is suggested by bill sec. 2? If so, bill sec. 4 should be changed to permit a court to halt the transfer of title in a condemnation proceeding where negotiation has not occurred.

TBC:jdr  
98-112.jdr

Enclosure

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# SENATOR JERRY MACKIE

ALASKA STATE LEGISLATURE

SECTIONAL

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Section 5. Effective date clause.

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# SENATOR JERRY MACKIE

ALASKA STATE LEGISLATURE

## SPONSOR STATEMENT

### SB 190, Require Negotiations Prior to Eminent Domain Taking.

I introduced SB 190 to bring fairness and expediency to state and municipal government actions which require the acquisition of private land for public purposes. The usual practice is to acquire private property through condemnation proceedings. This is a process where the governmental entity exercises the power of eminent domain to take the property and compensate the owner with or without the private owner's consent or agreement. The only recourse for an unwilling owner is to challenge in court the validity of the takings public purpose and the amount of compensation. In most cases the court's consideration is principally to determine the appropriate level of compensation. For both the governmental entity and the private property owner, this can be an expensive and time consuming procedure. For many landowners the prospect of contesting a condemnation proceeding in court is often beyond the landowner's financial abilities to pursue. In these situations, the landowner is at the mercy of the governmental entity, the extent of its property desires, and its method of determining compensation.

SB 190 would simply require that, prior to condemnation, a "good faith" effort is made to purchase private property through negotiations with the property owner. At least 23 states have similar requirements.

0-LS0890\K

Cook

3/3/98

CS FOR SENATE BILL NO. 190( )  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTIETH LEGISLATURE - SECOND SESSION

BY

Offered:

Referred:

Sponsor(s): SENATOR MACKIE

## A BILL

## FOR AN ACT ENTITLED

1 "An Act relating to eminent domain and to negotiations to purchase property  
2 before it is taken through eminent domain; and providing for an effective date."

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

4 \* Section 1. AS 09.55.270 is amended to read:

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

7                   (1) the use to which it is to be applied is a use authorized by law;

8                   (2) the taking and the property interest to be taken are [IS]  
9 necessary to the use;

10                   (3) if already appropriated to a public use, the public use to which it  
11 is to be applied is a more necessary public use.

12 \* Sec. 2. AS 09.55.270 is amended by adding a new subsection to read:

13                   (b) Except when negotiation is not possible because of the incapacity, inability  
14 to convey legal title, or absence of one or more of the property's owners, a good faith

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effort at negotiation to acquire the property interest by purchase shall be made. In a proceeding involving the taking of a property interest through eminent domain, the burden of proof is on the party opposing the taking to show that a good faith effort to acquire the property interest by purchase was not made.

\* Sec. 3. AS 09.55.430 is amended to read:

**Sec. 09.55.430. Contents of declaration of taking.** The declaration of taking must 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 or interest in the property is taken by necessity for a project located in a manner that is most compatible with the greatest public good and the least private injury; and
- (8) a statement that a good faith effort at negotiation to acquire the property by purchase has been made or that negotiation is not possible because of the incapacity, inability to convey legal title, or absence of one or more of the property's owners.

\* Sec. 4. 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

- (1) the property or interest in 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
- (2) a good faith effort at negotiation to acquire the property by purchase has not been made and negotiation was not made impossible by the

1     incapacity, inability to convey legal title, or absence of one or more of the  
2     property's owners.

3             (c) In the event of a finding under (b) of this section [THAT FINDING], the  
4     court shall enter the judgment necessary to (1) compensate the persons entitled to it  
5     for the period during which the property was in the possession of the plaintiff, (2)  
6     recover for the plaintiff any award paid to any person, and (3) order the plaintiff to  
7     restore the property to the condition in which it existed at the time of the filing of the  
8     declaration of taking unless such restoration is impossible, in which case the court  
9     shall award damages to the proper persons as compensation for any diminution in the  
10    value of the property caused by the plaintiff's wrongful possession.

11   \* Sec. 5. This Act takes effect immediately under AS 01.10.070(c).

***Issue: Should the State be Required to Undertake  
Good Faith Negotiations With a Private Landowner  
Before Taking Property by  
Eminent Domain (SB 190)***

***Description of the Issue:*** Should the State of Alaska be required to conduct good faith negotiations with a private landowner before initiating eminent domain proceedings against that landowner?

***Discussion of the Issue:*** At least 23 states require that the State, before taking property through eminent domain, make a good faith effort to acquire the property by consensual purchase. And, the drafters of the Uniform Eminent Domain Code recommend such a requirement in model state legislation. Although Alaska agencies will often undertake negotiations as a matter of practice, there is no current requirement in Alaska law that they do so.

A "good faith negotiations" requirement sets a cooperative tone in the state's dealings with its private sector. Moreover, supporters believe that it minimizes the likelihood of contested litigation, since the government and the private party begin their relationship as negotiators rather than adversaries.

Moreover, because the clause is common, there is considerably judicial precedent giving the clause a common sense interpretation. No prolonged face-to-face negotiations are required. A reasonable offer, based on full disclosure, and a willingness to consider timely counteroffers, is sufficient. And, the requirement does not apply where it is not practical--such as where the owner can't be found, or is incapable of conveying title.

***Recommendation:*** In a state with so limited a private property base, the use of eminent domain should be a last resort in Alaska. SB 190 would establish precisely such a policy by requiring that a good faith effort to purchase be made before property is involuntarily taken. The bill would also require the state to justify the particular interest in the property taken, in order to avoid a more intrusive interest being taken than is necessary to accomplish the state's goal.

*Legislation to Require a Good Faith Effort to Purchase Land Before it is  
Acquired Through Eminent Domain, and Requiring Condemning Authorities to  
Justify the Interest Condemned:*

*A Rationale and Section-by-Section Analysis*

*I. Rationale*

The enclosed legislation would amend Alaska's eminent domain laws by requiring the government, and other condemning authorities, to diligently attempt, in good faith, to purchase private land before taking that land through the power of eminent domain. The reasons for the legislation are these:

With only 10% of Alaska's land in private ownership, the State of Alaska should proceed carefully before eroding that already-insufficient private land base through the exercise of the power of eminent domain. Moreover, Alaskans value the importance of private property rights, and they believe that government should intrude on those rights gingerly--and only as a last resort.

Unfortunately, Alaska's eminent domain laws reflect neither Alaskans' respect for private property, nor Alaska's lack of it. Although the condemning authority must demonstrate the "necessity" of the land being taken, our laws omit two prerequisites to condemnation that should, in every case, guide those seeking to take private property:

*A. The requirement of a diligent, good faith attempt to purchase.* There is usually some discussion between the condemnor and the property owner before eminent domain proceedings are instituted, but nothing requires it. Officials are free to make only an unreasonable offer, or none at all. They can end discussions at their whim, and

they are under no obligation to take even the most reasonable landowner concerns seriously.

As a result, the discussions--to the extent that they occur--are not arms-length. Fair dealing necessitates that both sides have an incentive to deal, and the proposed legislation provides that incentive by engraining the better practice of sincere bargaining into statute.

At least 23 of our sister states currently impose such a requirement, as Appendix A to this rationale illustrates. Moreover, the Uniform Eminent Domain Code recommends such a provision, and the appended legislation is patterned after §202(a) of that model law. <sup>1/</sup> And, the requirement that the condemning authority "shall make every reasonable effort to acquire expeditiously real property by negotiation" has been an integral element of federal real property acquisition policy since 1971. <sup>2/</sup>

Because of its widespread use, the "good faith negotiation" requirement, as a prerequisite to the use of eminent domain, has been extensively interpreted by the nation's courts, which have given the clause a common-sense interpretation. For example:

- "Lengthy or face-to-face negotiations are not required." <sup>3/</sup> A letter offer can suffice, and if the private landowner doesn't make a reasonable counteroffer within a reasonable period of time, the

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<sup>1/</sup> Uniform Laws Annotated, *Uniform Law Commissioners' Model Eminent Domain Code, 1974 Act, §202 ("Uniform Code")* ("A condemnor shall make every reasonable and diligent effort to acquire property by negotiation."); *see also* §306(a) ("[A]n action to condemn property may not be maintained...unless the condemnor made a good faith effort to acquire the property by purchase before commencing the action.")

<sup>2/</sup> Sec. 301, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646).

<sup>3/</sup> *City of Thornton v. Farmers Reservoir and Irrigation Company*, 575 P.2<sup>nd</sup> 382, 392 (Colorado 1978).

property can then be condemned. *Id.* According to the leading commentator on eminent domain law, "no lengthy series of negotiations, offers and counter-offers is required. If the corporation desiring the property submits an offer to the owner and upon his refusal to accept the same asks for a counter-offer from him, and he refuses to name any figures or names an unreasonable one, it is sufficient...Even when the owner does not definitely reject the offer, but says he will give his answer within a specified time, the condemnor need not wait, but may institute proceedings at once." <sup>4/</sup>

- Section 203 of the *Uniform Code* requires that the state, at the outset of negotiations, offer the owner full appraised value for the property; however, that offer--in-and-of-itself--is not conclusive evidence of "good faith." <sup>5/</sup> The requirement of an initial full-value offer has been omitted from the enclosed legislation; and, as a result, the state's initial offer needn't be for full appraised value; rather, it need only be a reasonable offer "likely to preserve the framework for further negotiations"--in other words, not something that any reasonable person would dismiss as a deal-killer; <sup>6/</sup>
- The state would be obliged to disclose any appraisal that it has conducted on the property, along with some reasonable breakdown of the various items that the appraisal covers. <sup>7/</sup> In this way, the landowner will be an informed negotiator, and the controversy will be more likely to lead to an amicable resolution; <sup>8/</sup> and
- The state must be specific as to the interest and property for which the offer is made, so that the landowner can intelligently respond. <sup>9/</sup>

These legislatures, and their courts, believe that a good-faith requirement will "save time and expense incident to a condemnation

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<sup>4/</sup> 3 J. Sackman, *Nichols on Eminent Domain* ("Nichols"), §24.15 at 24-264.

<sup>5/</sup> *Uniform Code*, §206, Commentary.

<sup>6/</sup> *State Highway and Transportation Commissioner of Virginia v. Herndon*, 302 S.E.2<sup>nd</sup> 55, 58 (Virginia 1983).

<sup>7/</sup> See, e.g., *State v. Rowland*, 444 A.2<sup>nd</sup> 1123, 1129 (N.J. Super. 1982).

<sup>8/</sup> This requirement is similar to that imposed by §203(c) of the *Uniform Code*. Section 202(b) of the *Uniform Code* imposes the further requirement that the owner be allowed to accompany the state's appraiser, but that requirement is omitted from the enclosed legislation.

<sup>9/</sup> *Prarie View Telephone Company v. County of Cherry*, 138 N.W.2<sup>nd</sup> 468, 470 (Nebraska 1965).

proceeding.”<sup>10/</sup> As the Supreme Court of Virginia put it 71 years ago in

*Charles v. Big Sandy & C.R. Co.*, 129 S.E. 384, 385:

*A landowner should not be put to the trouble and possible expense of counsel fees upon the mere whim or caprice of the condemnor, when a bona fide effort to purchase his land would in all probability terminate the transaction.*

With such a statute, the landowner and the state begin with an arms-length bargaining relationship based on full disclosure. Without such a statute, the parties begin as adversaries. These statutes are thus designed to make litigation and prolonged delay less likely; for, as our own Supreme Court has noted, a landowner who feels fairly treated at the outset is far less inclined to ultimately litigate.<sup>11/</sup> According to *Nichols* (see n. 4, above), the requirement to negotiate is “designed to provide the negotiating parties with an atmosphere conducive to independent settlement.”<sup>12/</sup> Or as the drafters of the *Uniform Code* explained:

*The purposes of preliminary purchase attempts include the protecting of property owners from arbitrary and unexpected exercises of eminent domain power, facilitation of amicable settlement of disputes as to the amount of just compensation, minimizing acquisition costs through reduction of litigation and promotion of citizen cooperation with governmental programs involving land acquisition.*

*Id.* at §306, Commentary. In sum, this proposal will have little impact on officials who already treat landowners fairly when condemnation seems necessary. At the same time,

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<sup>10/</sup> *Clements v. North Worth D.S.P.Ry. Co.*, 7 S.W.2<sup>nd</sup> 895, 897 (Texas App. 1928).

<sup>11/</sup> *Ship Creek Hydraulic Syndicate v. State*, 685 P.2<sup>nd</sup> 715, 718 (Alaska 1984). At a minimum, the court said, procedural fairness prior to condemnation will allow the landowner to make rational decisions about his property, rather than reactive decisions provoked by perceived heavy-handedness.

<sup>12/</sup> *Nichols*, *supra* at §24.12, p. 24-185.

it will assure that, in each case, every appropriate step is taken to avoid prolonged litigation.

*B. The requirement to justify the particular property interest taken.* Current Alaska law requires that the state, or any other condemning authority, justify the need to take the property at issue. But, it does not necessarily require a justification for the particular *interest* in the property being taken.<sup>13</sup> / True to the thought that Alaska's private property base ought to be eroded for public purposes only as a last resort, our laws should expressly require that the state take as little of a person's property as is actually necessary to accomplish the public task at hand.

For example, there is no need to take a fee estate when an easement or right of way might suffice. If land is taken for conservation purposes, a conservation easement might suffice. And for public works in particular, the landowner might be left with its sand and gravel resources, or its subsurface estate. In this way, the landowner might benefit from the enterprise as a valuable source of supply for building materials.

The proposed legislation would accomplish this result by requiring the state, or other condemning authority, to justify the particular interest taken.

## *II. Section-by-Section Analysis*

*Section 1.* AS 09.55.270 lists the matters that any condemning authority must prove before it can condemn property through a judicial eminent domain complaint. Section 1 adds to that list proof that the authority made a good faith effort to purchase the

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<sup>13</sup> / It can be argued that, by requiring a showing of "necessity," Alaska's current law implicitly requires a showing that the particular interest taken is "necessary." *See Nichols, supra* at §9.2[2]. The enclosed legislation would remove any argument in this regard.

property. Of course, there are occasions when the authority can't negotiate. The owner may be absent, or may be legally incapable of conveying title. Other states recognize these exceptions, and they are also incorporated in Section 1.

Section 1 also amends the existing "necessity" showing in subsection (2) to require the authority to demonstrate not only that it is necessary to take the property at issue, but that it is also necessary to take the particular interest in the property that the authority is trying to condemn.

*Section 2.* AS 09.55.420-460 deal with "declarations of taking." Declarations of taking differ from an eminent domain complaint in that once a declaration is filed, the property is taken immediately, rather than after judicial proceedings are completed (as is the case with eminent domain complaints).<sup>14/</sup> Before 1976, the state could take land summarily under a declaration of taking without proving the necessity for the taking. In 1976, however, the legislature added subsection (7) to the statute, which required the declaration to contain a statement explaining how the taking was necessary.

Section 2 further amends that statute to add a subsection (8) to contain a statement verifying that, where possible, the condemning authority has made a good faith effort to purchase the land. It also amends subsection (7) to require an explanation of why the particular interest being taken is necessary for a public purpose.

In *Ship Creek Hydraulic Syndicate v. State*, 685 P.2<sup>nd</sup> 715, the Alaska Supreme Court ruled that, by virtue of the 1976 addition of subsection (7), the state (and other condemning authorities) were obliged to write decisional documents explaining the

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<sup>14/</sup> For a more complete discussion of the differences between the two procedures, see *Arco Pipeline Co. v. 3.60 Acres of Land, More or Less*, 539 P.2<sup>nd</sup> 64 (Alaska 1975).





necessity of the taking, and file those documents with the declaration of taking. By virtue of Section 2, authorities would now be required to also explain, in their decisional documents, how the good-faith requirement was met.

*Section 3.* As noted above, the mere filing of a declaration of taking serves to condemn the property at issue. See AS 09.55.440(a). The property owner, however, must have some opportunity to contest the truth, or sufficiency, of the statements made in the declaration. Under AS 09.55.450, the court may not award the state actual possession of the property until the property owner has been afforded a hearing on any objections it might have to the declaration. In turn, AS 09.55.460 authorizes the court to divest the authority of its new title if it is ultimately shown that the taking wasn't necessary.

Section 3 would amend AS 09.55.460(b) by authorizing the court to also divest the condemnor of title when it was ultimately shown that a good-faith effort to purchase the property had not been made. Without Section 3, Section 2 of the bill would be mostly meaningless, since: (1) the state (or other authority) would be obliged to make a statement that the good-faith requirement had been met; but (2) the landowner would have no remedy in any case where the statement proved untrue.

*Section 4.* Section 4 provides an immediate effective date.

## Appendix A: The Requirement to Negotiate in Other States

	<u>State</u>	<u>Citation</u>	<u>Language</u>
	<b>Model Eminent Domain Code</b>	Uniform Law Commissioner's Model Eminent Domain Code 1974 Act §306	<i>Except as provided in Section 308, an action to condemn property may not be maintained over timely objection by the owner unless the condemnor made a good faith effort to acquire property by purchase before commencing the action.</i>
	<b>Alabama</b>	Ala. Code §18-1A-22	<i>Before commencing a condemnation action, the condemnor shall establish an amount based on an appraisal which it believes to be just compensation therefor and promptly shall submit to the owner an offer to acquire the property for the full amount so established. The amount shall not be less than the condemnor's established amount of just compensation for the property.</i>
	<b>Colorado</b>	Colo. Rev. Stat. §38-1-102	<i>In all cases where the right to take private property for public or private use without the owner's consent...is conferred by general laws...and the compensation to be paid for, in respect of property sought to be appropriated or damaged for the purposes mentioned, cannot be agreed upon by the parties interested; or in the case the owner of the property is incapable of consenting, or his name or residence is unknown, or he is a nonresident of the state, it is lawful for the party authorized to take or damage the property to apply to the judge....</i>
	<b>Connecticut</b>	Conn. Gen. Stat. §48-12	<i>The procedure for condemning land or other property for any of the purposes specified in sections..., if those desiring to take such property cannot agree with the owner upon the amount to be paid him for any property taken, shall be as follows:</i>



**Idaho**

Idaho Code  
§7-707(6)

*The complaint [for condemnation] must contain:*

...  
*(6) In all cases where the owner of the lands sought to be taken resides in the county in which said lands are situated, a statement that the plaintiff has sought, in good faith, to purchase the lands so sought to be taken, or settle with the owner for the damages which might result to his property from the taking thereof, and was unable to make any reasonable bargain therefor, or settlement of such damages, but in all other cases these facts need not be alleged in the complaint, or proved.*



**Illinois**

Ill. Rev. Stat.  
§5/7-102

*Where the right to take private property for public use... has been heretofore and shall hereafter be conferred by general law or special charter... and the compensation to be paid for or in respect of the property sought to be appropriated or damaged for the purposes mentioned cannot be agreed upon by the parties interested, or in case the owner of the property is incapable of consenting, or the owner's name or residence is unknown, or the owner is a nonresident of the state, the party authorized to take or damage the property... may apply to the circuit court...*



**Indiana**

Ind. Code  
§32-11-1-1

*Before proceeding to condemn, such person, corporation or other body may enter upon any land for the purpose of examining and surveying the property sought to be appropriated or right sought to be acquired; and shall make an effort to purchase for the use intended such lands, right-of-way, easement or other interest therein or other property or right.*



**Kentucky**

Ky. Rev. Stat. Ann. §416.550

*Whenever any condemnor cannot, by agreement with the owner thereof, acquire the property right, privileges or easements needed... the condemnor may condemn such property... It is not a prerequisite to an action to attempt to agree with an owner who is unknown or who, after reasonable effort, cannot be found within the state or with an owner who is under a disability.*



**Michigan**

Mich. Comp. Laws §213.55

*Except as provided in section 25(4), before initiating negotiations for the purchase of property, the agency shall establish an amount which it believes to be just compensation and promptly shall submit to the owner a good faith offer to acquire the property for the full amount so established... If an agency is unable to agree with the owner for the purchase of the property, after making a good faith written offer to purchase the property, the agency may file a complaint for the acquisition of the property in the circuit court in the county in which the property is located.*



**Missouri**

Mo. Rev. Stat. §523.010

*In case land, or other property, is sought to be appropriated... and such corporation and the owners cannot agree upon the proper compensation to be paid, or in the case the owner is incapable of contracting, be unknown, or be a nonresident of the state, such corporation may apply to the circuit court...*



**Nebraska**

Neb. Rev. Stat. §76-704

*if any condemnee shall fail to agree with the condemnner with respect to the acquisition of property sought by the condemnner, a petition to condemn the property may be filed by the condemnner in the county court of the county where the property or some part thereof is situated.*



**New  
Hampshire**

N.H. Rev. Stat.  
Ann. §498-A:4

*Before making the offer provided for in paragraph II, the condemnor shall make reasonable efforts to negotiate with the condemnees or their personal representatives for the purchase of the property, but failure to confer or negotiate shall not be a defense to condemnation of the property.*

*...No property shall be taken unless the condemnor shall serve upon the condemnee a written notice of offer to purchase...*



**New Jersey**

N.J. Rev. Stat.  
§20:3-5

*...[W]henver any condemnor...shall have determined to acquire land or other property pursuant to law...but cannot acquire title thereto or possession thereof by agreement with a prospective condemnee, whether by reason of disagreement concerning the compensation to be paid or for any other cause...the condemnation of such property...shall be governed...in the manner provided by this act;*



**New  
Mexico**

N.M. Stat. Ann.  
§42A-1-4

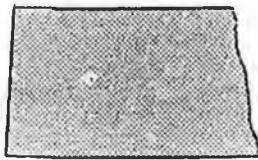
*A condemnor shall make reasonable and diligent efforts to acquire property by negotiation.*



**New York**

N.Y. Em. Dom.  
Law §303

*The condemnor shall make a written offer to acquire the property for one hundred per centum of the valuation so established. In no event shall such amount be less than the condemnor's highest approved appraisal. Wherever practicable, the condemnor shall make the offer prior to acquiring the property, and shall also, wherever practicable, include within the offer an itemization of the total direct, the total severance or consequential damages and benefits, if each may apply to the property.*



**North  
Dakota**

N.D. Cent. Code  
§32-15-06.1

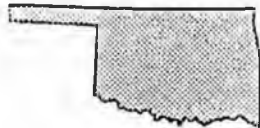
*A condemnor shall make every reasonable and diligent effort to acquire property by negotiation.*



**Ohio**

Ohio Rev. Code  
Ann §163.04

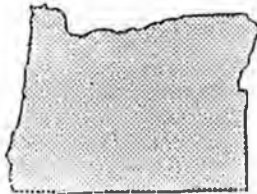
*Appropriation shall be made only after the agency is unable to agree, for any reason, with the owner...or when any owner is incapable of contracting...or is unknown, or is not a resident of this state, or his residence is unknown to the agency and cannot with reasonable diligence be ascertained.*



**Oklahoma**

Okla. Stat.  
tit. 27, §13

*Every reasonable effort shall be made to acquire, expeditiously, real property by negotiation.*



**Oregon**

Or. Rev. Stat.  
§35.235

*...[T]he condemnor shall...attempt to agree with the owner with respect to the compensation to be paid therefor, and the damages, if any, for the taking thereof.*



**Texas**

Tex. Prop. Code  
Ann. §21.012

*If the United States, [or] this state...wants to acquire real property for public use but is unable to agree with the owner of the property on the amount of damages, the condemning entity may begin a condemnation proceeding by filing a petition in the proper court.*

*The petition must...state that the entity and the property owner are unable to agree on the damages.*



**Vermont**

Vt. Stat. Ann.  
tit. 24, §2805

*When the location of a municipal building is determined...and the owner refuses to release or convey the same to such municipality for a reasonable price...the mayor... shall set out the necessary lands and cause the same to be surveyed. They shall appoint a time and place for hearing...*



**Virginia**

Va. Code Ann.  
§26-46.5

*No proceedings shall be taken to condemn property until a bona fide but ineffectual effort has been made to acquire from the owner by purchase the property sought to be condemned, except where such consent cannot be obtained because of the incapacity of one or more of the owners or because one or more of such owners is unable to convey legal title to such property or is unknown or cannot with reasonable diligence be found in this State.*



**Wisconsin**

Wis. Stat.  
§32,06(2a)

*Before making the jurisdictional offer under sub. (3) the condemnor shall attempt to negotiate personally with the owner or one of the owners...for the purchase of the property.*



**Wyoming**

Wyo. Stat.  
§1-26-509

*A condemnor shall make reasonable and diligent efforts to acquire property by good faith negotiation.*

*And at the federal level...*



**Federal  
Uniform  
Relocation and  
Assistance and  
Real Property  
Acquisition  
Policies Act of  
1970**

Sec. 301, P.L. 91-646

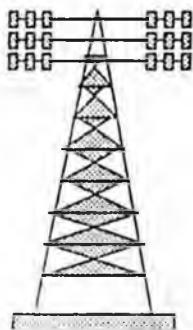
Note: Pursuant to §102 of the Act, the policies of §301 do not affect the validity of individual condemnation actions. However, they do govern the use of federal funds by states "to the greatest extent practicable under State law." Sec. 305(1).

*In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts...and to promote public confidence in Federal land acquisition practices...*

*(1) The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.*

*(2) Real property shall be appraised before the initiation of negotiations, and the owner...shall be given an opportunity to accompany the appraiser during his inspection of the property.*

*When a licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others... it may acquire the same by the exercise of the right of eminent domain....*



**Federal Energy  
Regulatory  
Commission**

16 U.S.C. §814