

HB

194

<TARGET><BILL>HB 194</BILL><SUBJECT>HB
194</SUBJECT><COMM>HTRA28</COMM></TARGET>

**SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 194
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-EIGHTH LEGISLATURE - SECOND SESSION**

BY REPRESENTATIVE FOSTER

**Introduced:
Referred:**

A BILL

FOR AN ACT ENTITLED

1 **"An Act vacating a portion of the Copper Center - Valdez right-of-way; relating to**
2 **rights-of-way acquired under former 43 U.S.C. 932 that cross land owned by a private**
3 **landowner; and relating to the use of eminent domain to realign a right-of-way."**

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

5 *** Section 1. AS 19.30.400 is amended by adding a new subsection to read:**

6 (e) The Copper Center - Valdez right-of-way, RST 633, identified in (d) of
7 this section is vacated for those portions that overlap public easements established
8 under 43 U.S.C. 1616(b) (Alaska Native Claims Settlement Act).

9 *** Sec. 2. AS 19.30 is amended by adding a new section to read:**

10 **Sec. 19.30.430. Rights-of-way acquired under former 43 U.S.C. 932 that**
11 **cross land conveyed to a private landowner. (a) Notwithstanding AS 19.10.015(a),**
12 **a right-of-way granted under former 43 U.S.C. 932 (R.S. 2477) that crosses land**
13 **owned by a private landowner is limited to the uses of the route established on**
14 **October 21, 1976, and may not exceed a width of 60 feet.**

1 (b) A right-of-way granted under former 43 U.S.C. 932 (R.S. 2477) that
2 crosses land owned by a private landowner may be used only for transportation
3 purposes and may not be used for rest areas, parking lots, overnight camping, boat
4 launches, recreation sites, or other similar uses.

5 (c) A right-of-way granted under former 43 U.S.C. 932 (R.S. 2477) that
6 crosses land owned by a private landowner shall include a secondary easement to
7 enter, inspect, repair, maintain, and improve the right-of-way under the following
8 conditions:

9 (1) routine maintenance and repair may only preserve the condition of
10 the right-of-way as it existed on October 21, 1976;

11 (2) the state may make reasonable and necessary improvements to a
12 right-of-way for the transportation uses preserved by the right-of-way;

13 (3) before improvements, other than routine maintenance and repair,
14 the state shall consult with and gain the permission of the private landowner subject to
15 the right-of-way established under former 43 U.S.C. 932 (R.S. 2477) and give the
16 private landowner an opportunity to

17 (A) determine whether the proposed improvements are
18 reasonable in light of the traditional uses of the right-of-way as it existed on
19 October 21, 1976;

20 (B) study the potential effect of the proposed improvements on
21 the surrounding land; and

22 (C) determine whether modifications to the proposed
23 improvements should be made to protect the surrounding land and propose
24 modifications, if appropriate;

25 (4) in the event of a dispute between the private landowner and the
26 state about proposed improvements, the dispute shall be submitted to mediation
27 directed by a mediator who is mutually agreeable to the parties and who is not
28 employed by either party; each party shall bear its proportionate share of the cost of
29 mediation, including the mediator fees; if, after a period of 60 days following
30 commencement of mediation, the parties are unable to resolve the dispute, either party
31 may bring suit in superior court; the proposed improvements may not proceed until

1 resolution of the suit.

2 (d) Notwithstanding any other provision of law, if a right-of-way established
3 under former 43 U.S.C. 932 (R.S. 2477) has been damaged beyond repair by natural
4 causes and the state plans to realign the right-of-way as provided in (c)(3) of this
5 section, the state shall use the process in AS 09.55.240 - 09.55.460 for any additional
6 land that will be burdened by the realigned right-of-way.

7 (e) In this section, "routine maintenance and repair" includes preservation of
8 an existing road or trail by physical upkeep, repair of wear or damage from natural or
9 other causes, maintenance of the shape of the road, grading or blading to preserve the
10 character of the road, maintenance to ensure proper drainage, and any other activities
11 necessary to preserve the condition of the road as it existed on October 21, 1976.

Alaska House of Representatives

Rep. Neal Foster, Co-Chair
P.O. Box 1630
Nome, Alaska 99762

Phone: (907) 443-5036
Fax: (907) 443-2162



During the Legislative Session
Alaska State Capitol, Room 434
Juneau, Alaska 99801

Phone: (907) 465-3789
Fax: (907) 465-3242

House Special Committee Military and Veterans Affairs

Sponsor Statement

HB 194

RIGHTS-OF-WAY

House Bill 194 limits the scope with which the State can exercise its RS2477 rights-of-way.

Rights-of-way were established in the state under R.S. 2477 through use and development until virtually all federal land in the state was withdrawn when Public Land Order 4582 was issued on January 17, 1969, which placed all federal land in the state in a reserved status. When sec. 706 of the Federal Land Policy and Management Act (43 U.S.C. 1701) repealed R.S. 2477 on October 21, 1976, valid existing rights under R.S. 2477 were preserved. In 1998, the Alaska State Legislature recognized claims to 602 rights-of-way, and the Department of Natural Resources has identified 67 additional R.S. 2477 rights-of-way. A significant number of the claimed R.S. 2477 rights-of-way in the state cross privately owned land. R.S. 2477 rights-of-way that cross private property have resulted in increased trespass to private land, resource damage to the servient estate, and conflicts between the public users, private landowners, and state right-of-way managers, all of which can lead to time-consuming and costly litigation. While providing for the public right to access R.S. 2477 rights-of-way, every effort should be made to minimize the effect on the affected property owners.

House Bill 194 would minimize this effect by limiting these rights-of-way to 60 feet and restricting their purpose to transportation. It also sets up the conditions for secondary easements for inspection, repair, maintenance and improvements, and the conditions for dispute resolution. The bill also states that realignment of RS2477s will be handled under eminent domain law.

House Bill 194 also vacates the Copper Center - Valdez right-of-way. This R.S. 2477 right-of-way overlaps a 17(b) easement involving a road and all-terrain vehicle trail that is roughly parallel the Klutina River from the New Richardson Highway to partway around Klutina Lake; the road and trail form a portion of the claimed Copper Center-Valdez right-of-way. The road and trail are also supported by 17(b) easements which were reserved to the public when the federal government conveyed the land underlying the road and trail to Ahtna, Incorporated.

District 39: Alatna, Alcan Border, Allakaket City, Arctic Village, Beaver, Betties City, Birch Creek, Brevig Mission City, Central, Chalkyitsik, Chicken, Chisana, Chistochina, Chitina, Circle, Coldfoot, Copper Center, Diomedea City, Dot Lake, Dot Lake Villages, Dry Creek, Eagle City, Eagle Village, Eim City, Evansville, Fort Yukon City, Gakona, Galena City, Gambell City, Golovin City, Gulkana, Healy Lake, Hughes City, Huslia City, Kaltag City, Kenny Lake, Koyuk City, Koyukuk City, Livengood, McCarthy, Mentasta Lake, Nabesna, New Allakaket, Nome City, Northway, Northway Junction, Northway Village, Nulato City, Paxson, Port Clarence, Rampart, Savoonga City, Shaktoolik City, Shishmaref City, Silver Springs, Slana, St. Michael City, Stebbins City, Stevens Village, Tanacross, Tazlina, Teller City, Tetlin, Tok, Unalakleet City, Venetie, Wales City, White Mountain City and Wiseman.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 485-3867 or 485-2450
FAX (907) 485-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

February 28, 2014

SUBJECT: Sectional Summary of SSHB 194
(Work Order No. 28-LS0730\N)

TO: Representative Neal Foster
Attn: Paul LaBolle

FROM: Hilary Martin 
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 -- the bill itself is the best statement of its contents.

Section 1. Vacates the Copper Center-Valdez right-of-way, RST 633, for those portions that overlap public easements established under 43 U.S.C. 1616(b).

Section 2. Limits R.S. 2477 rights-of-way that cross land owned by a private landowner to the use of the route as established on October 21, 1976; provides that the right-of-way may not exceed 60 feet in width; and limits the use of the right-of-way to transportation purposes only. Grants a secondary easement to R.S. 2477 rights-of-way that cross land owned by a private landowner in order to enter, inspect, repair, maintain, and improve the right-of-way, only to the extent necessary to preserve the condition of the right-of-way as it existed on October 21, 1976, and to make necessary improvements to the right-of-way to preserve the transportation use of the right-of-way. Requires the state to consult with and gain the permission of the private landowner that owns the land subject to the right-of-way prior to making improvements, other than routine maintenance and repair. Allows for mediation if there is a dispute between the private landowner and the state about improvements to a right-of-way. Requires the state to consult with the private landowner who owns the underlying land if an R.S. 2477 right-of-way has been damaged beyond repair and is to be realigned. Defines "routine maintenance and repair."

HVM:ray
14-093.ray

FISCAL NOTE

STATE OF ALASKA
2014 LEGISLATIVE SESSION

Bill Version SS HB194
Fiscal Note Number _____
() Publish Date _____

Identifier (file name) HB194SS-DOT-NDAES-3-11-14 Dept. Affected DOT&PF
Title Rights-of-Way Appropriation Design, Engineering & Construction
Allocation Northern Design and Engineering Services
Sponsor Representative Foster
Requester House Transportation Committee OMB Component Number 2299

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY15 Appropriation Requested	Included in Governor's FY15 Request	Out-Year Cost Estimates				
			FY16	FY17	FY18	FY19	FY20
OPERATING EXPENDITURES	FY15	FY15	FY16	FY17	FY18	FY19	FY20
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE		(Thousands of Dollars)					
1002	Federal Receipts						
1003	GF Match						
1004	GF						
1005	GF/Prgm (DGF)						
1007	I/A Rcpts (Other)						
1156	Rcpt Svcs (DGF)						
		0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES

Estimated SUPPLEMENTAL (FY14) operating costs _____ (separate supplemental appropriation required)
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY15) costs _____ (separate capital appropriation required)
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended, or repealed? _____ Discuss details in analysis section.

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version.

Prepared by Connie McKenzie, Special Assistant
Division Office of the Commissioner
Approved by Mary Siroky, Director
Division Administrative Services Division

Phone 465-4772
Date/Time 3/7/2014 10AM
Date 3/7/2014

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2014 LEGISLATIVE SESSION

BILL NO. SS HB194

Analysis

The proposed legislation would vacate the Revised Statutes of the United States (R.S.) 2477 Copper Center-Valdez right-of-way, referred to as RST 633 in statute, for those portions that overlap public easements established in 17(b) easements of the Alaska Native Claims Settlement Act.

In addition it would add a new section to AS 19.30 that would limit uses and size of R.S. 2477 rights-of-way that cross privately owned land: width not to exceed 60 feet; uses of the route established on October 21, 1976; used for transportation purposes excluding rest areas, parking lots, overnight camping, boat launches, recreation sites, or similar uses.

The proposed legislation would include a secondary easement to enter, inspect, repair, maintain, and improve the right-of-way under certain conditions. It also allows for re-alignment due to damage by natural causes that are beyond repair, but restricting transportation options to pre-1976 uses.

There will be no fiscal impact to the department.

FISCAL NOTE

STATE OF ALASKA
2014 LEGISLATIVE SESSION

Bill Version SSHB194
Fiscal Note Number _____
() Publish Date _____

Identifier (file name) HB194SS-DNR-MLW-3-8-14 Dept. Affected Natural Resources
Title RIGHTS-OF-WAY Appropriation Land & Water Resources
Allocation Mining, Land and Water
Sponsor Representative Foster
Requester House Transportation OMB Component Number 3002

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY15 Appropriation Requested	Included in Governor's FY15 Request	Out-Year Cost Estimates					
			FY15	FY16	FY17	FY18	FY19	FY20
OPERATING EXPENDITURES								
Personal Services	***	0.0	***	***	***	***	***	***
Travel								
Services								
Commodities								
Capital Outlay								
Grants, Benefits								
Miscellaneous								
TOTAL OPERATING	***	0.0	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts		0.0					
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1007	I/A Rcpts (Other)							
1156	Rcpt Svcs (DGF)							
		***	0.0	***	***	***	***	***

POSITIONS								
Full-time								
Part-time								
Temporary								

CHANGE IN REVENUES	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
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Estimated SUPPLEMENTAL (FY14) operating costs 0.0 (separate supplemental appropriation required)
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY15) costs 0.0 (separate capital appropriation required)
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended, or repealed? N/A Discuss details in analysis section.

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial Version

Prepared by Brent Goodrum, Director
Division Mining, Land and Water
Approved by Joe Balash, Commissioner
Division Natural Resources

Phone 269-8600
Date/Time 3/8/14 12:00 PM
Date 3/8/2014

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2014 LEGISLATIVE SESSION

BILL NO. SSHB194

Analysis

SSHB 194 alters State-owned and historically vested property rights. The bill would limit the size, maintenance and use of R.S. 2477 rights-of-way, effectively relinquishing valuable state property interests with no compensation.

The precise fiscal impacts of this bill are indeterminate because by placing limitations on the State's existing property rights, it curtails public property interests that the State currently holds in trust for the benefit of all Alaskans. In addition, the loss of access and the value of that access to the state would be significant and should the state need to realign a right-of-way, the state would be required to repurchase the land relinquished through its condemnation authority under new AS 19.40.340(d).

The bill seeks to vacate portions of, and significantly alter the State's remaining interests in an R.S. 2477 right-of-way known as RST 633 (the Copper Center to Valdez Trail). That right-of-way and the State's interests in it is currently the subject of ongoing litigation in a case brought by Ahtna, Inc. against the State of Alaska. See *Ahtna, Inc., v. Alaska Dept. of Transp. & Public Facilities, et. al.*, Case No. 3AN-08-6337.

Second, the bill seeks to relinquish State-owned R.S. 2477 property interests which have already historically vested. Today, due to subsequent conveyance of lands which were once federally owned, in many instances R.S. 2477 rights-of-way now continue to exist across private ownership, including Alaska Native corporations. These rights-of-way serve as important legal access to resources and opportunities for all citizens of the State.

This bill would restrict the legal interests that the State presently possesses in R.S. 2477 rights-of-way by, among other things:

1. Narrowing their width;
2. Narrowing the methods and types of use which can occur on them, including limiting the rights-of-way to the mode, method and types of use which occurred as of R.S. 2477's repeal in 1976; and
3. Placing limitations on the State's ability to maintain and improve the rights-of-way.

DNR estimates that the State currently possesses in excess of 20,000 linear miles of codified R.S. 2477 rights-of-way. If uncoded routes were included, this number is likely closer to 26,600 miles. A significant percentage, but not all, of the codified routes are 100 feet in width. Of the acreage subject to a codified RST, at least 50% of that acreage is owned by native corporations or is privately owned. The bill seeks to limit RSTs on these lands to only 60' in width. The loss of right-of-way acreage to the state resulting from the diminished 40' of right-of-way on codified R.S. 2477s would at a minimum equate to 48,500 acres. (20,000 linear miles of codified RSTs x 5,280 ft/mile x 40 ft. width lost, divided by 43,560 s.f./acre x 50%). The loss of value of these routes to the state would exceed \$48.5 million assuming a basic cost of lands along public access of \$1,000 per acre.

January 27, 2014

Representative Neal Foster
District 39
State Capitol Room 434
Juneau, Alaska 99801

Re: HB194/SB94 - Propose State vacate RS 2477 Klutina Lake Road

Dear Representative Foster:

In April/2013 our local newspaper, Copper River Record, posted an article in which Senator Olson and yourself sponsored proposed legislation HB194/SB94 on behalf of Ahtna, Inc. that proposes the State of Alaska vacate its RS 2477 right of way easement that provides public access along the popular Klutina Lake Road.

This was fantastic news for all of the private property owners who have been greatly concerned since the State DOT began its push for the RS 2477 designation. However, the article stated "the state would only vacate its easement in places where it overlaps a Federal 17(b) Right of Way public access easement." We want our voices to be heard so that the proposed RS 2477 is vacated from the Klutina Lake road and from our private properties.

The newspaper article nor the legislation mentioned the 20+ private landowners at the outlet of the Klutina, that will be seriously affected should this road be designated an RS 2477. A 100 ft right of way directly through private pristine river front property. This would put public access literally at our cabin doors. We have to ask "for what purpose" is the State DOT pushing this? There is already more than adequate access to the public.

As you read the enclosed documents in regards to the State of Alaska vs. Ahtna, Inc., records will show that the current 17(b) easement stops way before private property begins and that there was never a right-of-way easement through this original native allotment. The State DOT also had no legal right to make private property owners remove the gate.

In closing, the only way for anyone to get a good picture of what is going on at Klutina, is to travel the road and see for yourself. The beauty, the wildlife, the river, the lake, the accesses, private property and how we will all be affected.

Sincerely,



Debbie M. Townsend

Enclosures: Written Response to Complaints - Case #3AN-08-6337-CI
Public Access information - BLM

cc: Governor Sean Parnell
Senator Donny Olson, Alaska State Legislature - SB94

January 27, 2014

Howard S. Trickey
Jermaln, Dunnagan & Owen, PC
3000 A Street, Ste 100
Anchorage, Alaska 99503

Re: Case No. 3AN-08-6337-CI

Dear Mr. Trickey:

We are in receipt of a 'copy' of a summons to the above mentioned case number, which list Ahtna, Inc. as the Plaintiffs and the Department of Transportation as the Defendants. Along with DOT, there is also a list of private landowners at the outlet of Klutina Lake, listed as "Defendants" against Ahtna, Inc.

This summons did not have a few landowners listed, including ourselves, and our name is not listed on this current summons as "Defendants". However, we have been landowners at the outlet of Klutina Lake since 2001.

The State of Alaska, Department of Transportation is 'proposing' an RS 2477 on the Klutina Lake Road, without regard to our rights as landowners, the DOT would force a 100 ft easement through our pristine riverside properties.

The 20+ landowners should actually not be listed as 'Defendants' in this matter. Though we can't speak for them, we know that they oppose an RS 2477.

Terry and I, side with Ahtna, Inc., on the majority of the complaints mentioned in this case. Please see our enclosed response to those complaints.

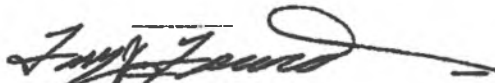
We also pray that the State Legislature will pass HB194/SB94, vacating the RS 2477.

Sincerely,



Debbie M. Townsend

Date: 1-27-14



Terry J. Townsend

Date: 1-27-14

Enclosures: Written Response to Complaints - Case #3AN-08-6337-CI
Public Access Information - BLM

cc: Klutina Landowners
Governor Sean Parnell
Senator Donny Olson, Alaska State Legislature - SB94
Representative Neal Foster, Alaska State Legislature - HB194

Written Response to Complaints listed in Summons, Case # 3AN-08-6337-CI

As private land owners at the outlet of Klutina Lake, we are writing in reference to the court case with Ahtna Incorporated and the State of Alaska, Dept of Transportation & PF, concerning the state's proposed RS 2477 on the Klutina Lake or Brenwick Craig road.

The purpose of a RS 2477 as defined by Congress... "to facilitate the construction of highways across public lands."

There has always been access to "public lands" utilizing the Klutina Lake road. The "public lands" in this court case is the "Klutina River and Klutina Lake". The Klutina Lake road has an existing 17(b) easement, which provides access. There has been no problems with the public accessing the Klutina River or the Lake, at any number of areas or spurs along the way.

We disagree with the State of Alaska and we side with Ahtna, incorporated on a number of the complaints. We offer the following to the 'complaints' in the above mentioned case number:

PARTIES

1. We agree with this statement regarding Plaintiff Ahtna, Inc., is an organized regional corporation.
2. We agree with this statement regarding Defendant State of Alaska, and DOT.
3. We agree that the individuals listed have an interest as private landowners in certain said parcels.

Add - Debbie & Terry Townsend (per proof of land ownership provided to Jermain, Dunnagan Ownen, PC in previous correspondence - Nov/2013)

4. We agree the court has jurisdiction.
5. We agree the venue is the 3rd Judicial District.

FACTS

6. We do not agree that the Klutina Lake road runs approximately 25 miles.

The Klutina Lake road runs approximately 23 miles in length and ends at a one acre site easement located at the end of the airstrip easement closest to the lake.

Ahtna, Inc. owns the land adjacent to and underlying much of the road (except for the private landowners).

Ahtna recognizing the road as being supported by a 60 ft wide easement, for public access from Ahtna land to the Klutina River, Klutina Lake, and a one acre-site. Ahtna further recognizes a 25 ft wide 17(b) easement that goes from the one-acre site to State land on Klutina Lake adjacent to private property.

We don't agree that the 25 ft wide 17(b) easement runs through the parcels where private property is located. This is further validated by the following attached "Public Access Information" from the Bureau of Land Management - "The 17(b) easement or 25 ft wide trail begins at the one-

acre site easement and ends at private property just before the lake. Access beyond this point is allowable by foot traffic only under the permission of the private land owner."

Ahtna, Inc. and the BLM have respected the rights of private land owners and have had no issues with the private gate (35+yrs). Two summers ago the State of Alaska threatened private landowners with legal action if they did not remove the gate through their private recreational property.

The State of Alaska began asserting an RS 2477, even before the courts have decided. With totally disregard to private landowners rights, they opened up our properties and cabins to theft and vandalism.

9. We **agree** that private landowners utilize the road to access their property at Klutina Lake.
10. We **agree** with Ahtna's contention that the 17(b) easement(s) provides the Private landowners and members of the public with a transportation corridor for legal access to the Klutina River, Klutina Lake, and private property near the outlet of Klutina Lake.
11. We **agree** with the States contention that the road itself is interrupted in various locations due to landslides, and erosion, etc.

We do not agree that these locations have interrupted the actual 17(b) easement, which allows for public access to Klutina River and Klutina Lake.

The road was rerouted and the 17(b) easement follows along the new route. The BLM, Ahtna, Inc. and the State of Alaska, DOT, have a 'Memorandum of Understanding' in place. The state's statement that "discontinuous easement" that does not provide a complete route of legal public access to Klutina Lake or the private land holdings at the Klutina Lake outlet" is untrue.

We have traveled the Klutina Lake road since 1977, where we use to camp with our family at the airstrip. There has always been public access to the river and lake.

12. We **do not agree** that "the road and the 17(b) easement are subject to a superior and pre-existing 100-foot wide easement pursuant to Revised Statute 2477,and runs Impeded from Copper Center to Valdez through public and private property, including Ahtna's and the Private Landowners property along Klutina River and Klutina Lake."

The parcels of land now owned by private landowners, was originally a native allotment, Makee Mildred Truitt (BLM Case #AKAA 007337A). No easement or right-of-way is depicted in any documents or plats, in relation to this 120 acre parcel. Even the BLM 17(b) easement does not run through the parcels of private property. The BLM recognizes it was previously a native allotment parcel, and is now privately owned.

13. We **disagree** with the states assumption that an RS 2477 would open up public access to the Klutina River through the use of numerous spurs and arterials.

There is already public access to the Klutina River and Lake. There has been public access since

1962, when Leonard Brenwick joined by Walter Charley and Jack Craig, walked a cat tractor along the trail, used by Ahtna natives for thousands of years.

Today, the BLM 17(b) easement provides the public access with sites for limited parking and camping. Both river, float and hunting guides use the road and these access sites every year. Ahtna also provides access and camping sites at numerous locations for a fee.

14. We agree with Ahtna, Inc. and we do not recognize the State's asserted RS 2477 right-of-way or the claimed spurs and arterials.

FIRST CAUSE OF ACTION

15. N/A

16. We agree. Ahtna's property, over which the Road traverses, was never public lands for purposes of accepting a public highway pursuant to RS 2477.
17. We agree with this statement that Ahtna Athabascans held an un-extinguished claim of aboriginal title to the Klutina River, etc.
18. We agree with this statement that the Ahtna people have used and occupied the Klutina River drainage for hundreds and likely thousands of years, etc.
19. With agree with this statement that Ahtna had a comprehensive foot trail system throughout the entire Klutina River drainage, etc.
20. We agree that the Ahtna people camped, hunted, fished, trapped, picked berries, etc.
21. We agree with this statement that the Ahtna people defended their territory against intrusion by others.
22. We agree with this statement, that the Ahtna Athabascans, claimed the lands and said lands were held in trust for them by the United States.
23. We agree with this statement that the land at issue in this dispute was never public land for purposes of RS 2477, the State could not and did not accept the RS 2477 right-of-way offer prior to Congress repealing the law in 1976.
24. We agree with this statement that the Road was constructed in the 1960s by private individuals (Leonard Brenwick and Oscar Craig), using private equipment, in order to access private land at Klutina Lake, which is located in wild, unenclosed, and uncultivated wilderness.
25. We agree with this statement that the State did not construct the Road.
26. We agree with this statement that the right-of-way was not accepted by public use.

The Road has been in place for YEARS, there has never been any documentation or paperwork defining the right-of-way as an RS 2477. The 17(b) easement allows access.

27. We agree with this statement that even if a public highway was accepted by public user, the right-of-way was abandoned.

Again, the state never filed paperwork or acknowledged the right-of-way. It was BLM who established the road as a 17(b) easement years later.

28. We agree with this statement that the State has refused to recognize Ahtna's ownership rights to land surrounding the Road and has failed and refused to restrict its road maintenance activities to the confines of the federal 60-foot 17(b) easement.

We would like to add that the State has also refused to recognize the private landowners rights. With totally disregard to private landowners rights, the State would enforce a 100 ft right-of-of-way directly through our pristine recreational properties.

For what purpose? Ahtna, Incorporated, owns the land on both sides of the private landowners properties, and there is already access to the River and the Lake.

29. We agree that for the purpose of this litigation, Ahtna seeks to confirm that its land is not subject to the State's claimed RS 2477 right-of-way (RST 633) and to have the Court declare the parties' rights and legal interests in relation to the Road and the claimed right-of-way.

SECOND CAUSE OF ACTION

30. N/A

31. We agree that Ahtna owns the land.

32. , 33., 34., 35. N/A to private landowners issues in regards to RS 2477.

Except, for #35, we agree that the State refused and continues to refuse to constrain its activities to the confines of the 60-foot 17(b) easement.

- 36., 37., 38., N/A to private landowners issues in regards to RS 2477.

39. As a private landowner we still take pleasure in the quiet enjoyment of the land, regardless of the existing road widening.

40. As a private landowner we still take pleasure in the scenic and aesthetic values including the wilderness experience sought by recreational users, including Ahtna shareholders, and non-shareholders that pay to use Ahtna land, regardless of the existing road widening.

41. We agree that the State will continue to enter onto Ahtna's lands in regards to asserting the RS 2477.

The State will continue to enter onto private property in regards to asserting the RS 2477.

PRAYER FOR RELIEF

We agree with 1., 2., 3., 4., 5., and 6 and hope the courts will side with Ahtna, Incorporated. In doing so, they will have also sided with the private landowners and their prayer for relief in that there will be "NO RS 2477" on the Klutina Lake Road.



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

GLENNALLEN FIELD OFFICE

P.O. BOX 147

GLENNALLEN, ALASKA 99588-0147

www.ak.blm.gov/gdo/gdomain.html

PUBLIC ACCESS INFORMATION

Prepared by the Bureau of Land Management,
In cooperation with Ahtna, Inc.

The Klutina River and Lake are considered navigable by the Bureau of Land Management. All lands above the mean high water line along the Klutina River, starting 300' feet south of the power transmission line crossing, to 4 miles along the north shore and 2 miles along the south shore of Klutina Lake are private property owned by Ahtna, Inc. All lands situated below the mean high water line are owned by the State of Alaska. The entire area is primitive in nature and there are no facilities available.

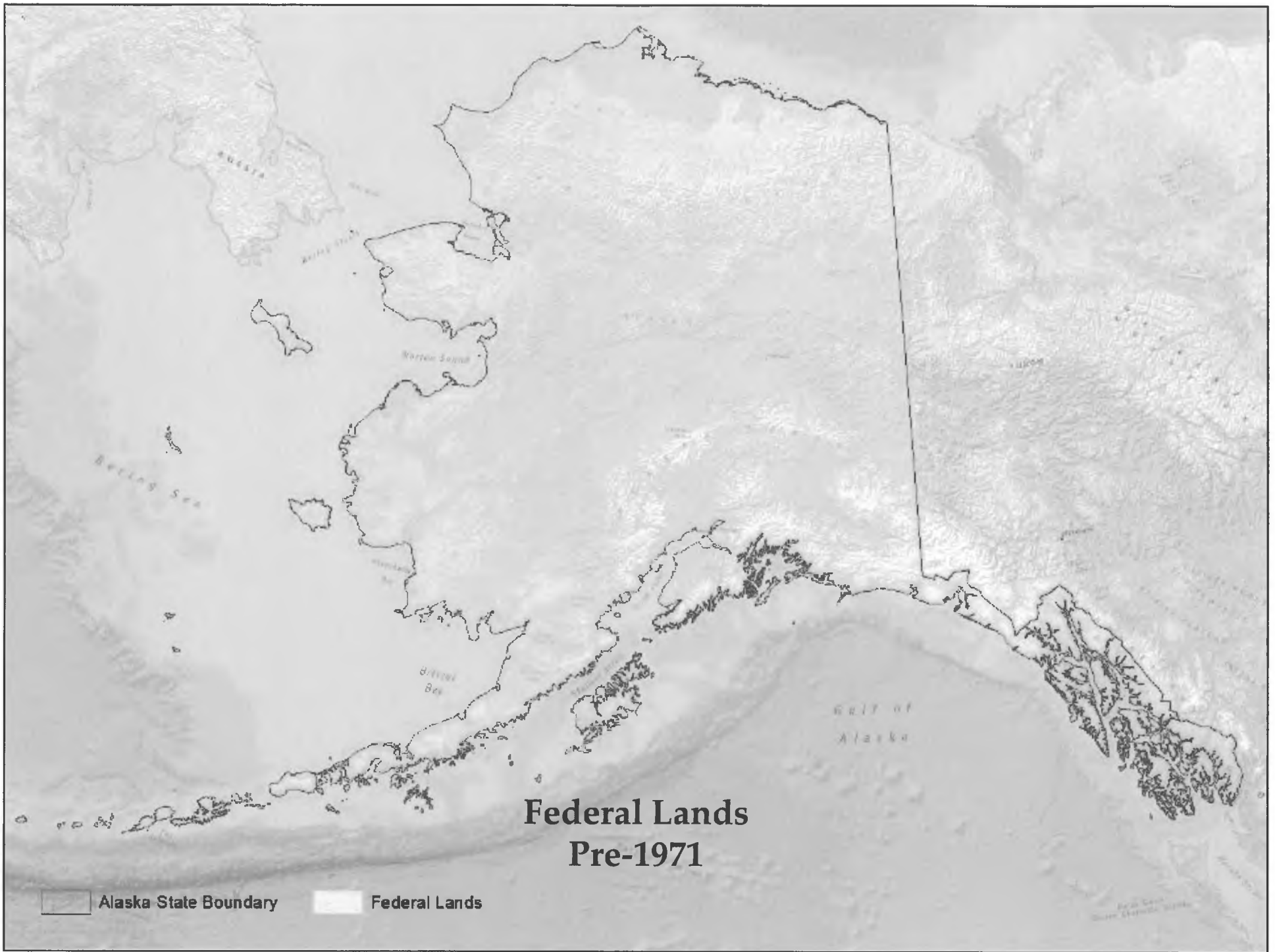
The Klutina Lake road (Brenwick-Craig Road) is a 60' easement for travel across private land, to public lands and water. The easement is approximately 23 miles in length and ends at a one acre site easement located at the end of the airstrip easement closest to the lake. The condition of the road varies and four wheel drive is recommended beyond MP 10. For management purposes the easement is considered to be 30' from either side of the centerline of the existing road surface. Camping and parking are not allowed on this easement. There are several roads and trails branching off along the way, but only those roads or trails posted as public easements are open to the public.

The Klutina Site easement is a one acre site for loading, unloading, parking, and changing modes of transportation. Overnight camping is allowed by regulations but it is limited to 24 hours. The site is adjacent to the Klutina River at MP 23.5 on the Klutina road and provides direct access to the river. It is approximately 280' by 155'. This site easement and allowable uses are posted by the BLM. Please limit all camp fires to the established pits.

The Klutina Trail is a twenty five foot wide trail easement for travel across private land, to public lands and water. Vehicle access is restricted to ATVs with less than 3,000 pound gross vehicle weight. Trucks and automobiles are not allowed beyond this point. Camping and parking are not allowed on this easement. The trail begins at the one acre site easement and ends at private property just before the lake. Access beyond this point is allowable by foot traffic only under the permission of the private land owner.

The Klutina airstrip easement is a bush airstrip located at MP 23.5 on the Klutina road. It is intended for aircraft landing and parking. Camping and motor vehicle parking are not recommended on the airstrip.

**** All other activities on private lands above the mean ****
high water line, including parking, camping, hunting,
**** and fishing, require an authorization from Ahtna, Inc.****

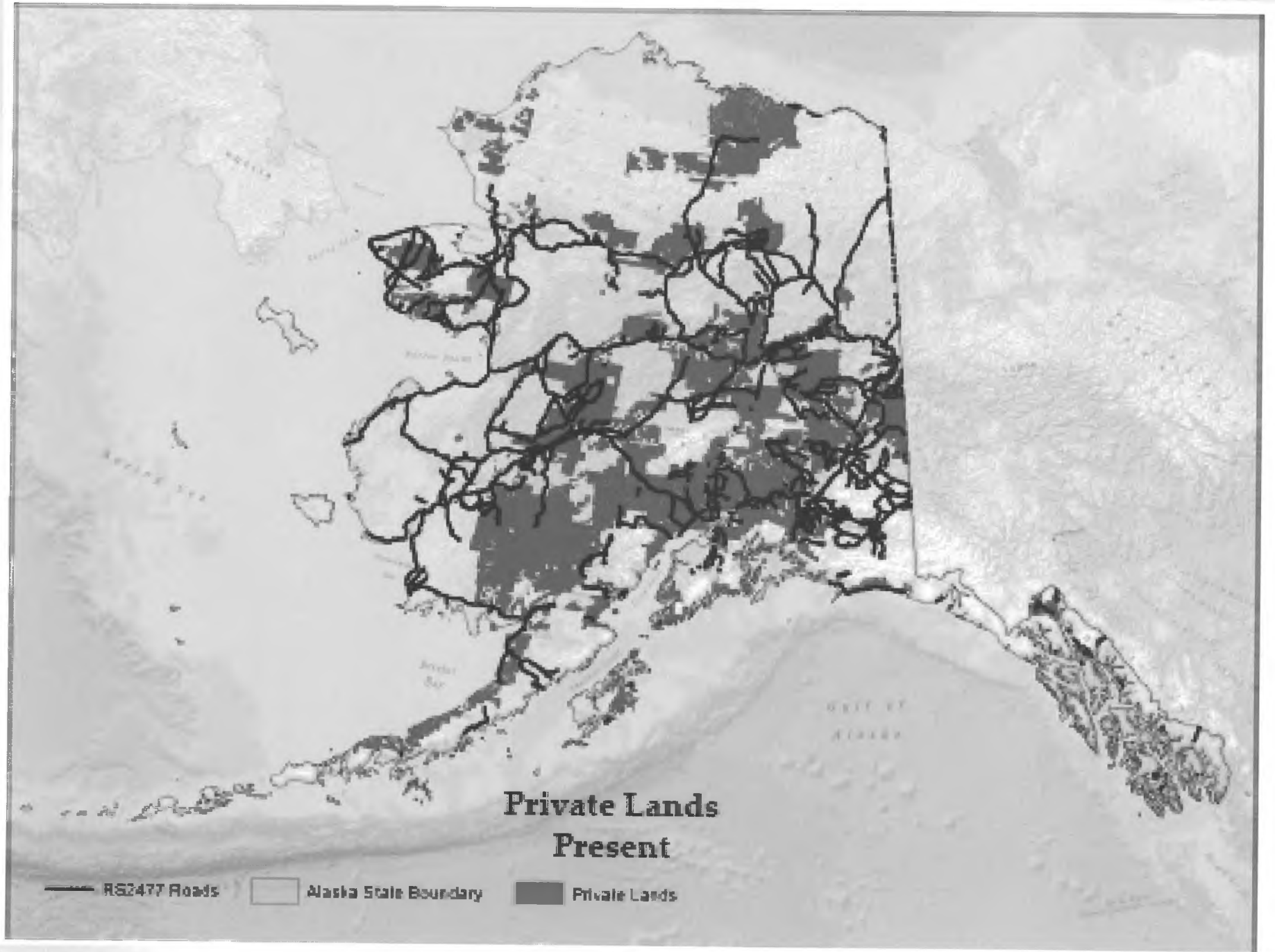


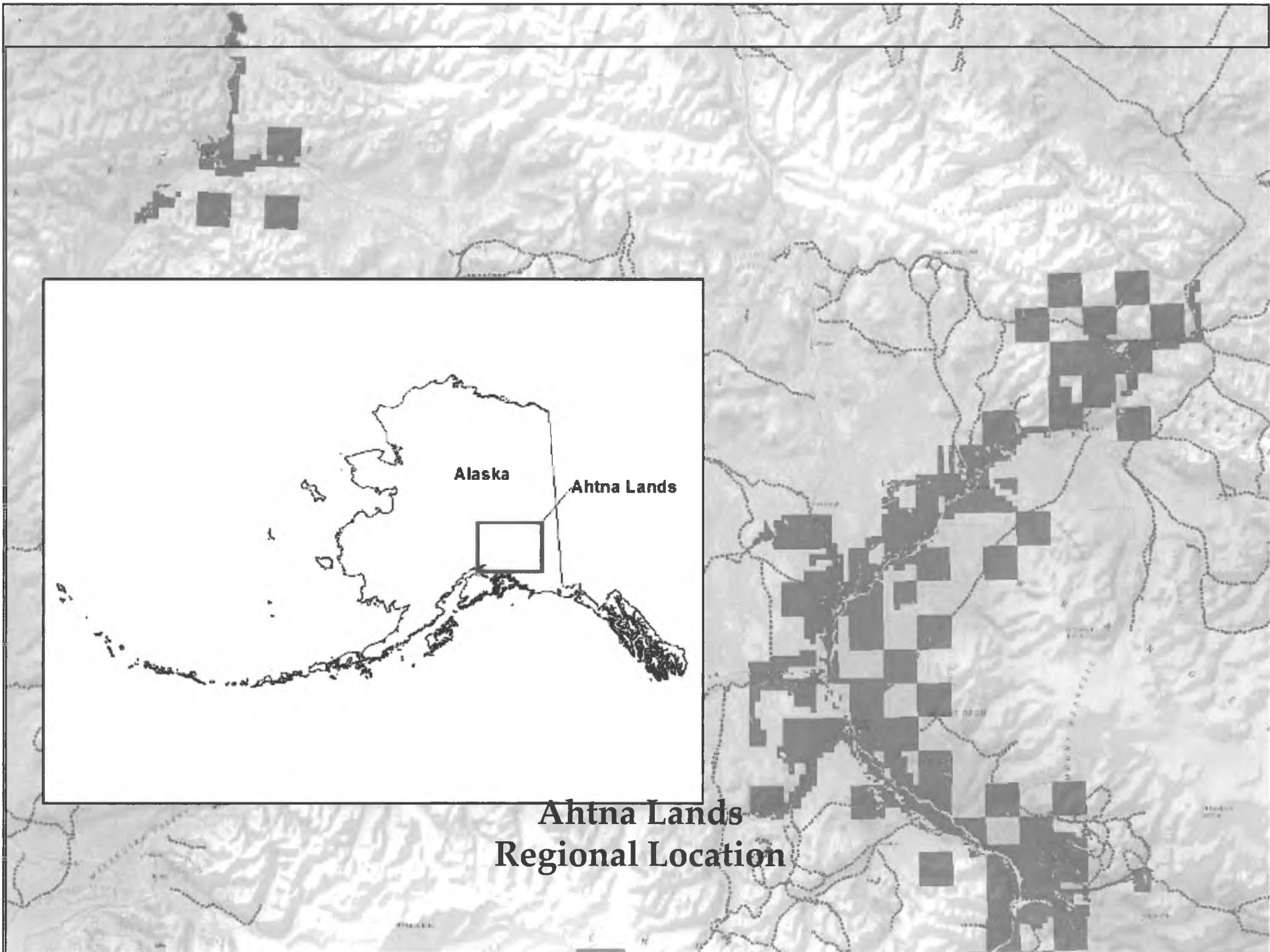
**Federal Lands
Pre-1971**

Alaska State Boundary Federal Lands

Legal Definitions

- The statute reads: "***The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.***"
- On the ADNR-DML&W website it states: "***the word highway was historically used to refer to foot trails, pack trails, sled dog trails, crudely built wagon roads, and other corridors for transportation.***" The term highway is defined in state statute AS.19.59.001 (8) "***as a road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility and right-of-way thereof...***"
- The process of asserting claims under the statute is far from consistent and has been the subject of litigation between the federal government, the States and private landowners.
- The Alaska Legislature instructed in its 1998 law that, while providing for the public's right to use these historic access easements, "***every effort should be made to minimize the effect on private property owners.***"





Alaska
Ahtna Lands

**Ahtna Lands
Regional Location**



RS2477 Landowner Problems Icy Roads Caused by Incised Roads

RS2477 Roads

— RS2477 Roads in Ahtna Lands

■ Ahtna Lands

11/2008



Well Maintained RS2477 Road

Stakeholder Coordination Required to Reach Solutions

- Require consultation with the private landowner prior to engaging in anything other than routine maintenance or improvement activities.
- Require consultation with the private landowner prior to realigning damaged segments of the R-O-W and requiring payment of just compensation to the landowner for any additional acreage burdened by the realigned R-O-W.
- The legislation would also specifically vacate the RS 247 R-O-W along the Kartina Lake Road, effectively ending Alpha's litigation with the State by utilizing the existing 60 foot wide public easement.



Thank You

Sec. 19.10.015. Establishment of highway widths.

(a) It is declared that all officially proposed and existing highways on public land not reserved for public uses are 100 feet wide. This section does not apply to highways that are specifically designated to be wider than 100 feet.

(b) Notwithstanding (a) of this section, a municipality may designate the width of a road that is not a part of the state highway system if the municipality maintains the road.

Sec. 19.30.400. Identification and acceptance of rights-of-way.

(a) The state claims, occupies, and possesses each right-of-way granted under former 43 U.S.C. 932 that was accepted either by the state or the territory of Alaska or by public users. A right-of-way acquired under former 43 U.S.C. 932 is available for use by the public under regulations adopted by the Department of Natural Resources unless the right-of-way has been transferred by the Department of Natural Resources to the Department of Transportation and Public Facilities in which case the right-of-way is available for use by the public under regulations adopted by the Department of Transportation and Public Facilities.

(b) The Department of Natural Resources shall conduct the necessary research to identify rights-of-way that have been accepted by public users under former 43 U.S.C. 932 and that have not been previously identified and shall annually report to the legislature by the first day of each regular session of the legislature on rights-of-way that have been identified and that are not listed in this section.

(c) The rights-of-way listed in (d) of this section have been accepted by public users and have been identified to provide effective notice to the public of these rights-of-way. The failure to include or identify a right-of-way under (d) of this section does not relinquish any right, title, or interest the public has in a right-of-way.

(d) The following rights-of-way are identified by the name of the right-of-way and the identification number the right-of-way has been assigned by the Department of Natural Resources in the Historic Trails Database, known as the "RST" number, which contains a complete description of the right-of-way:

Copper Center - Valdez

0633 (page734)

Article 1 - Declaration of Rights

§ 18. Eminent Domain

Private property shall not be taken or damaged for public use without just compensation.

Sec. 09.55.240. Uses for which authorized; rights-of-way.

(a) Except as provided in (d) and (e) of this section, the right of eminent domain may be exercised for the following public uses:

(1) all public uses authorized by the government of the United States;

(2) public buildings and grounds for the use of the state and all other public uses authorized by the legislature of the state;

(3) public buildings and grounds for the use of an organized or unorganized borough, city, town, village, school district, or other municipal division, whether incorporated or unincorporated; canals, aqueducts, flumes, ditches, or pipes conducting water, heat, or gas for the use of the inhabitants of an organized or unorganized borough, city, town, or other municipal division, whether incorporated or unincorporated; raising the banks of streams, removing obstructions from them, and widening, deepening, or straightening their channels; and roads, streets, and alleys, and all other public uses for the benefit of an organized or unorganized borough, city, town, or other municipal division whether incorporated or unincorporated, or its inhabitants, which may be authorized by the legislature;

(4) wharves, docks, piers, chutes, booms, ferries, bridges of all kinds, private roads, plant and turnpike roads, railroads, canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming land, and for floating logs and lumber on streams not navigable, and sites for reservoirs necessary for collecting and storing water;

(5) roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines, and sites for reservoirs necessary for collecting and storing water;

(6) private roads leading from highways to residences, mines, or farms;

(7) telephone lines;

(8) fiber-optic lines;

(9) telegraph lines;

(10) sewerage of an organized or unorganized borough, city, town, village, or other municipal division, whether incorporated or unincorporated, or a subdivision of it, or of a settlement consisting of not less than 10 families, or of public buildings belonging to the state or to a college or university;

(11) tramway lines;

(12) electric power lines;

(13) for the location of pipelines for gathering, transmitting, transporting, storing, or delivering natural or artificial gas or oil or any liquid or gaseous hydrocarbons, including, but not limited to, pumping stations, terminals, storage tanks, or reservoirs, and related installations.

(b) The use of water for mining, power, and municipal purposes and the use of pole and power lines for telephone and telegraph wires, for aerial trams, and for the transmission of electric light and electric power, by whomever utilized, are each declared to be beneficial to the public and to be a public use within the provisions of AS 09.55.240 - 09.55.460. Rights-of-way across private property when they are necessary for the operation of the mine or other project in connection with which it is intended to be used may be condemned in the manner as for any other condemnation. The right-of-way may extend only to a right-of-way along, upon, and across the surface of the land to be condemned and to a strip of the land of sufficient width to permit the construction on the land of a ditch, flume, pipeline, canal, or other means of conveying water as is adequate for the purposes intended, for the setting of poles or the construction of towers upon which to string wires for telephone and telegraph lines and lines for the transmission of electric light or power for the operation of aerial trams, and to permit maintaining the lines and keeping them in repair.

(c) [Repealed, Sec. 15 ch 59 SLA 1982].

(d) The power of eminent domain may not be exercised to acquire private property from a private person for the purpose of transferring title to the property to another private person for economic development purposes. This subsection does not apply to transfers of private property to another private person if one or more of the following apply:

(1) the landowner consents, either before or after a condemnation proceeding has been filed, to the use of the property for a private commercial enterprise or other economic development;

(2) the private person has been expressly authorized by statute either to exercise the power of eminent domain or to receive an interest in land acquired by the exercise of eminent domain;

(3) the transferred property is used for a private way of necessity to permit essential access for extraction or use of resources;

(4) the acquisition is used, in part, for leasing property to a private person that occupies a portion of public property or a public facility, including a private business that occupies a portion of an airport, port, or public building;

(5) the property is transferred to a person by oil and gas lease under AS 38.05.180;

(6) the property is transferred to a common carrier.

(e) The power of eminent domain may not be exercised for the purpose of developing a recreational facility or project if the property to be acquired includes an individual landowner's personal residence or recreational structure or that portion of an individual's property attached to and within 250 linear feet of an individual landowner's personal residence or recreational structure unless the landowner consents either before or after a condemnation proceeding has been filed.

(f) Notwithstanding the limitations on the power of eminent domain in (d) and (e) of this section, the legislature may approve the exercise of eminent domain against private property in an Act, the subject of which is limited to the transfer of the property for a purpose otherwise restricted under (d) or (e) of this section.

(g) The power of eminent domain may only be delegated by statute.

(h) In this section,

(1) "common carrier" has the meaning given in AS 04.16.125;

(2) "economic development" means development of property for a commercial enterprise carried on for profit or to increase tax revenue, tax base, or employment;

(3) "personal residence" means a structure that is the dwelling place of an individual that

(A) must be used by the owner or beneficiary of a trust holding legal title to the structure as a dwelling unit, as opposed to a rental, storage, or other commercial space;

(B) must be inhabited by the owner, prior owner, or beneficiary of a trust holding legal title to the structure for at least 90 days during the 12-month period immediately before the date an action for the exercise of the power of eminent domain is filed;

(C) must constitute an ordinary home for general living purposes; and

(D) may not have been constructed, placed, or occupied for the purpose of avoiding eminent domain proceedings;

(4) "private person" means a person that is not a public corporation as defined in AS 45.77.020 or a government as defined in AS 11.81.900;

(5) "recreational facility or project"

(A) means a facility or project, the primary purpose of which is recreational;

(B) includes a park, trail or pedestrian pathway, greenbelt, amusement park, fresh water boat harbor, sports facility, playground, infrastructure, or other facility related to or in support of an indoor or outdoor recreational facility or project;

(C) does not include

(i) a highway, sidewalk, or path within the right-of-way of a highway;

(ii) a path, trail, or lane used as a safe route to a school program;

(iii) a wayside or rest stop;

(iv) a development, the primary purpose of which is not recreational, such as a path, trail, or lane developed to reduce congestion, or to encourage use of an alternate, gas-saving mode of transportation;

(v) a path or trail to or between villages or from a village to a facility or resource;

(vi) a stormwater retention or treatment facility or wetland, habitat, or other acquisition required to obtain a permit for a highway, airport, or other public project;

(vii) a taking under AS 19.05.110, 19.05.120, AS 19.22.020, AS 27.21.300, AS 35.20.040, 35.20.050, or AS 41.35.060;

(viii) a taking not prohibited by law before January 1, 2007, under AS 41.21; and

(ix) a path, trail, road, or site for which no reasonable alternative exists and which is necessary to preserve or establish public access to or along publicly owned land or water, if the use of the path, trail, road, or site itself is for transportation to or to facilitate use of publicly owned land or water;

(6) "recreational structure" means a permanent structure that

(A) is used by the owner or beneficiary of a trust holding legal title to the structure as a dwelling for seasonal recreational purposes, as opposed to a rental, storage, or other commercial space; and

(B) may not have been constructed, placed, or occupied for the purpose of avoiding eminent domain proceedings.

History -

(Sec. 13.01 ch 101 SLA 1962; am Sec. 2 ch 72 SLA 1972; am Sec. 1 ch 62 SLA 1973; am Sec. 24 ch 3 FSSLA 1973; am Sec. 15 ch 59 SLA 1982; am Sec. 2, 3 ch 84 SLA 2006; am Sec. 1 - 3 ch 51 SLA 2009)

Cross References -

For statement of legislative intent and findings for the 2006 amendment of (a) of this section and addition of (d) - (h) of this section, see Sec. 1, ch. 84, SLA 2006, in the 2006 Temporary and Special Acts.

Amendment Notes -

The 2006 amendment, effective October 3, 2006, added "Except as provided in (d) and (e) of this section" at the beginning of subsection (a), inserted paragraph (a)(8), renumbering paragraphs (a)(8) - (12) as (a)(9) - (13), added subsections (d) through (h), and made a minor stylistic change.

The 2009 amendment, effective October 7, 2009, in (e), twice added "or recreational structure" following "individual landowner's personal residence"; in (h)(3)(c), deleted ", as opposed to a dwelling used only for seasonal recreational or temporary purposes" following "must constitute an ordinary home for general living purposes"; added (h)(6).

Editors Notes -

Under Sec. 6, ch. 84, SLA 2006, the 2006 amendment of (a) of this section and addition of (d) - (h) of this section apply "only to condemnation actions filed on or after October 3, 2006."

AG Opinions -

The state may use its condemnation powers for a state office complex to be constructed by, and leased from, a private developer. In order to insure that the leasing arrangement clearly qualifies as a public use, however, the department should enter into a long-term lease with the developer, and should not grant the developer any sort of purchase option at the conclusion of the lease term. April 17, 1981, Op. Att'y Gen.

Decisions -

I. General Consideration.

Eminent domain proceedings are unique, and are governed by comprehensive rules of procedure applicable to condemnation actions alone. *Stewart & Grindle, Inc. v. State*, 524 P.2d 1242 (Alaska 1974).

Strict construction. - Eminent domain statutes are universally construed strictly, particularly where a different construction would render the act of doubtful validity. *Northern Mining & Trading Co. v. Alaska Gold Recovery Co.*, 20 F.2d 5 (9th Cir. 1927).

Public subject matter. - The subject matter of eminent domain proceedings is one of public rather than of private interest. *Alaska Gold Recovery Co. v. Northern Mining & Trading Co.*, 7 Alaska 386 (1926).

Questions to be considered by court. - Ordinarily the only questions to be considered by the courts in condemnation proceedings are: First, whether the petitioner has the power to exercise the right of eminent domain; second, whether the property itself is of a nature subject to condemnation; third, whether the property is being taken for a public or a private use; and fourth, whether the power is being used for taking an excessive amount of property. *Town of Seward v. Margules*, 9 Alaska 354 (1938).

Appropriation deemed exercise of power of eminent domain. - Neither the failure of the state to institute a condemnation action nor the owners' assertion of a claim based on the theory of trespass changed the essential nature of the state's action in appropriating the owners' property from one of the exercise of the power of eminent domain. *State, Dep't of Highways v. Crosby*, 410 P.2d 724 (Alaska 1966).

Improvements to right of way reserved in patent. - While the original reservation of a right-of-way and election provided for in former Sec. 41-1-4 ACLA 1949 was without limitation as to initial choice on the part of either the federal government or Alaska, once the right-of-way has been selected and defined, later improvements necessitating the utilization of land upon which the road is not already located can only be accomplished pursuant to the condemnation and compensation provisions of this article. *Hillstrand v. Alaska*, 181 F. Supp. 219 (D. Alaska 1960), petition for interlocutory review denied, 352 P.2d 633 (1960).

Cited in *Mount Juneau Enters., Inc. v. City of Juneau*, 923 P.2d 768 (Alaska 1996); *Hillstrand v. City of Homer*, 218 P.3d 685 (Alaska 2009).

II. Power to Condemn.

Inherent power in government. - The power of eminent domain is inherent in the government and does not depend upon the constitution. *Alaska Gold Recovery Co. v. Northern Mining & Trading Co.*, 7 Alaska 386 (1926).

Constitution only acts as limitation on power. - See *Alaska Gold Recovery Co. v. Northern Mining & Trading Co.*, 7 Alaska 386 (1926).

The right of a municipality to proceed in eminent domain is conferred, when this section is considered in connection with the express statutory grant of power to municipalities to provide for the location, construction, and maintenance of the necessary streets, alleys, crossings, sidewalks, sewers, and wharves. *Ashby v. City of Juneau*, 174 F. 737 (9th Cir. 1910).

The power to locate and construct a street can only be exercised by a municipality, and can only be made effective by invoking the power of eminent domain. *Ashby v. City of Juneau*, 174 F. 737 (9th Cir. 1910).

Borough. - A borough's authority to condemn land for a school can be inferred from the eminent domain statutory scheme. *Greater Anchorage Area Borough v. 10 Acres More or Less*, 563 P.2d 269 (Alaska 1977).

The express and exclusive authority to operate a school system, coupled with the statutory permission to condemn land for public buildings for school districts, conferred upon a borough the authority to condemn land for a school. *Greater Anchorage Area Borough v. 10 Acres More or Less*, 563 P.2d 269 (Alaska 1977).

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

Right of foreign or domesticated corporations to condemn lands. - See *Miocene Ditch Co. v. Lyng*, 138 F. 544 (9th Cir. 1905).

III. Public Uses.

A. Generally.

"Public use" extends to use for public welfare. - The term "public use" has received enlarged scope and meaning, and the test is no longer confined to use by the public, but use for the public welfare. The power of a state to work out from the conditions existing in a mining region the largest welfare of its inhabitants has often been recognized. *Alaska Gold Recovery Co. v. Northern Mining & Trading Co.*, 7 Alaska 386 (1926).

Question of public use is ultimately for jury. - The question whether the use is in fact public or not, so as to justify the taking without the consent of the owner, is, ultimately, one which the courts alone may determine. *Alaska Gold Recovery Co. v. Northern Mining & Trading Co.*, 7 Alaska 386 (1926).

Mining gold. - The mining of gold has been held to be a public use on account of its relation to the public currency. *Alaska Gold Recovery Co. v. Northern Mining & Trading Co.*, 7 Alaska 386 (1926).

Roads, streets and alleys. - The words "roads, streets and alleys" in paragraph (a)(3) of this section are used independently as within the public uses defined by the statute, and relate to properties clearly made the subjects of condemnation. *Ashby v. City of Juneau*, 174 F. 737 (9th Cir. 1910).

B. Mines.

Lode and placer claims are included within "mines". - The word "mines," as used in this section, e.g., "supplying mines . . . with water," and "roads, tunnels, ditches, flumes, pipes, and dumping places for working mines," is sufficiently broad to include, and was intended to include, placer mining ground, and both lode and placer claims are so included, irrespective of whether they are already opened up or not. *Alaska Gold Recovery Co. v. Northern Mining & Trading Co.*, 7 Alaska 386 (1926).

Land may be condemned for ditch to carry water to mining claims. - A corporation authorized to own and operate mines and mining claims, to own and appropriate water and water rights for private and public use, and to build canals, ditches, flumes, and aqueducts, and to lay pipes for supplying its

mines with water, and for the general use of the public has the right to condemn land for a ditch to carry water to work mining claims owned by it, by others, and by the public generally for mining purposes. *Miocene Ditch Co. v. Jacobsen*, 146 F. 680 (9th Cir. 1906).

Property may not be taken for site for equipment to operate mine. - Where the main purpose of the taking was to obtain a site for plant and equipment to operate a mine which could not be maintained on the mining claim itself because of the periodical inflow of sea water, this section did not authorize such a taking. *Northern Mining & Trading Co. v. Alaska Gold Recovery Co.*, 20 F.2d 5 (9th Cir. 1927).

"An outlet for a flow" for which a fee simple taking is allowed refers only to the flow of tailings or refuse matter from mines. *Williams v. City of Valdez*, 603 P.2d 483 (Alaska 1979). See paragraph (a)(5) of this section and AS 09.55.250(1). - Ed. note.

The phrase "an outlet for a flow" does not include a drainage ditch. *Williams v. City of Valdez*, 603 P.2d 483 (Alaska 1979).

C. Tramway Lines.

The right of way for a "tramway line" or "aerial tram" is intended also for power to operate them. *Alaska Gold Recovery Co. v. Northern Mining & Trading Co.*, 7 Alaska 455 (1927), rev'd on other grounds, 20 F.2d 5 (9th Cir. 1927).

Collateral Refs -

Compensation for, or extent of rights acquired by, taking of land, as affected by, promissory statements as to character of use or undertakings to be performed by condemnor, 7 ALR2d 364.

Municipal power to condemn land for cemetery, 54 ALR2d 1322.

Necessity of condemnation where private rights are affected by regulation of bathing, swimming, boating, fishing, or the like, to protect public water supply, 56 ALR2d 790.

Electric light or power line in street or highway as additional servitude, 58 ALR2d 525.

Amount of property which may be condemned for public school, 71 ALR2d 1071.

Liability of public schools and institutions of higher learning for taking or damaging property for public use, 86 ALR2d 600; 33 ALR3d 703; 34 ALR3d 1166; 35 ALR3d 725; 35 ALR3d 758; 36 ALR3d 361; 37 ALR3d 712; 37 ALR3d 738; 38 ALR3d 830; 23 ALR5th 1.

Condemnation of underground areas for storage of natural gas reduced to possession, 94 ALR2d 548.

Use or improvement of highway as establishing grade necessary to entitle abutting owner to compensation on subsequent change, 2 ALR3d 985.

Right to condemn property in excess of needs for a particular public purpose, 6 ALR3d 297.

Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves, 35 ALR3d 1293.

Right to condemn property owned or used by private educational, charitable, or religious organization, 80 ALR3d 833.

Validity of appropriation of property for anticipated future needs, 80 ALR3d 1085.

Possibility of overcoming specific obstacles as element in determining existence of necessary public use, 22 ALR4th 840.

Industrial park or similar development as public use justifying condemnation of private property, 62 ALR4th 1183.

Article Notes -

Notes To Decisions

Cross References. For related court rule, see Civ. R. 72.

Cited in *Tunley v. Municipality of Anchorage Sch. Dist.*, 631 P.2d 67 (Alaska 1980).

Collateral References.- 26 Am. Jur. 2d, Eminent Domain, Sec. 1 et seq.

29A C.J.S., Eminent Domain, Sec. 1 et seq.

Nichols on Eminent Domain (Matthew Bender).

Patrick J. Rohan, *Condemnation Procedures and Techniques C Forms* (Matthew Bender).

Southwestern Legal Foundation, *Institute on Planning, Zoning, and Eminent Domain* (Matthew Bender).

Negligence of governmental agent causing damage to private property as "taking," "damage," or "use," for public purposes in constitutional sense, 2 ALR2d 677.

Flood protection measures as entitling property owner to compensation or damages, 5 ALR2d 59.

Conditions imposed to approval of proposed subdivision map or plat as constituting taking of property for public use without compensation, 11 ALR2d 532.

Constitutionality of reforestation or forest conservation legislation, 13 ALR2d 1095.

Constitutional rights of owner as against destruction of building by public authorities, 14 ALR2d 73.

Right of riparian owner to continuation of period and seasonal overflows from stream, 20 ALR2d 656.

Condemnation proceedings as affecting insurable interest of property owner, 29 ALR2d 888.

Compulsory pooling or unitization statute or ordinance requiring owners or lessees of oil and gas lands to develop their holdings as a single drilling unit and the like, as taking private property for public use without compensation, 37 ALR2d 439.

Quotient condemnation report or award by commissioners or the like, 39 ALR2d 1208.

Validity, construction, and effect of statutes providing for urban redevelopment by private enterprise, 44 ALR2d 1414.

Rights in respect of real-estate taxes, 45 ALR2d 522.

Conveyance of land as bounded by road, street, or other way as giving grantee right to compensation upon taking for public highway, 46 ALR2d 490.

Municipal power to condemn land for cemetery, 54 ALR2d 1322.

Necessity of condemnation where private rights are affected by regulation of bathing, swimming, boating, fishing or the like to protect public water supply, 56 ALR2d 790.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

Validity of statutes, ordinances, or regulations for destruction, without compensation, of diseased or infected vegetation, 70 ALR2d 871.

Right of owners of property abutting street to be compensated for loss of their interest in parkway in center of street on its appropriation for other use, 81 ALR2d 1436.

Permissible modes of service of notice of eminent domain proceedings, 89 ALR2d 1404.

Liability, upon abandonment, for loss or expenses incurred by property owner, or for interest on award or judgment, 92 ALR2d 355.

Injunction against exercise of power of eminent domain, 93 ALR2d 465.

Inclusion or exclusion of first and last days in computing time for giving notice of eminent domain proceedings which must be given a certain number of days before a known future date, 98 ALR2d 1414.

Power to condemn property or interest therein to replace other property taken for public use, 20 ALR3d 862.

Rights and liabilities of parties to executory contract for sale of land taken by eminent domain, 27 ALR3d 572.

Validity of "freezing" ordinances or statutes preventing prospective condemnee from improving, or otherwise changing, the condition of his property, 36 ALR3d 751.

Plotting or planning in anticipation of improvement as taking or damaging of property affected, 37 ALR3d 127.

Validity and construction of "zoning with compensation" regulation, 41 ALR3d 636.

Salting for snow removal as taking or damaging abutting property for eminent domain purposes, 64 ALR3d 1239.

What constitutes abandonment of eminent domain proceeding so as to charge condemnor with liability for condemnee's expenses or the like, 68 ALR3d 610.

Applicability of zoning regulations to projects of nongovernmental public utilities as affected by utility's power of eminent domain, 87 ALR3d 1265.

Zoning regulations limiting use of property near airport as taking of property, 18 ALR4th 542.

Review of electric power company's location of transmission line for which condemnation is sought, 19 ALR4th 1026.

Airport operations or flight of aircraft as constituting taking or damaging of property, 22 ALR4th 863.

Eminent domain: compensability of loss of view from owner's property - state cases, 25 ALR4th 671.

State statute of limitations applicable to inverse condemnation or similar proceedings by landowner to obtain compensation for direct appropriation of land without institution or conclusion of formal proceedings against specific owner, 26 ALR4th 68.

Validity of zoning laws setting minimum lot size requirements, 1 ALR5th 622.

Sec. 09.55.250. Classification of estates and land subject to be taken.

The following is a classification of the estates and rights in land subject to be taken for public use:

(1) a fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams and permanent flooding occasioned by them, or for an outlet for a flow, or a place

for the deposit of debris or tailings of a mine, or when, in the judgment of the Department of Natural Resources, or the Department of Transportation and Public Facilities, a fee simple is necessary for any of the purposes for which the department, on behalf of the state, is authorized by law to acquire real property by condemnation;

(2) an easement when taken for any other use;

(3) the right of entry upon an occupation of land, and the right to take from the land earth, gravel, stones, trees, and timber as may be necessary for a public use.

History -

(Sec. 13.02 ch 101 SLA 1962; am Sec. 10 ch 49 SLA 1963; am Sec. 8 ch 130 SLA 1971)

Decisions -

Court grants only such relief as plaintiff establishes right to. - This section merely classifies the estates and rights "subject to be taken," not that must be taken. The court, on a final hearing, will grant only such relief as plaintiffs shall show themselves entitled to, which relief will be within the limits set by the prayer of the complaint and the statutes. *Alaska Gold Recovery Co. v. Northern Mining & Trading Co.*, 7 Alaska 386 (1926).

"An outlet for a flow" for which a fee simple taking is allowed refers only to the flow of tailings or refuse matter from mines. *Williams v. City of Valdez*, 603 P.2d 483 (Alaska 1979). See paragraph (1) of this section and AS 09.55.240(5). - Ed. note.

The phrase "an outlet for a flow" does not include a drainage ditch. *Williams v. City of Valdez*, 603 P.2d 483 (Alaska 1979).

Vegetative buffer. - This section does not prohibit a city from taking a fee interest in land to be used as a vegetative buffer for a water treatment plant; it permits the taking of a fee simple, when taken for public buildings or grounds. *Hillstrand v. City of Homer*, 218 P.3d 685 (Alaska 2009).

Appeal. - A corporation which contracted with the state department of highways and received an adverse decision from the contracting officer after following contractual dispute provisions is not entitled to bring a new suit against the state. *State v. Lundgren Pac. Constr. Co.*, 603 P.2d 889 (Alaska 1979).

Sec. 09.55.260. Private property subject to be taken.

The private property that may be taken under AS 09.55.240 - 09.55.460 includes

(1) all real property belonging to any person;

(2) land belonging to the state or to an organized or unorganized borough, city, town, village, or other municipal division, whether incorporated or unincorporated, not appropriated to a public use;

(3) property appropriated to public use, but the property may not be taken unless for a more necessary purpose than that to which it has already been appropriated;

(4) franchises for a public utility, but those franchises may not be taken unless for a more necessary public use;

(5) all rights-of-way for any of the purposes mentioned in AS 09.55.240, and the structures and improvements on the rights-of-way, and the land held and used in connection with them shall be subject to be connected with, crossed, or intersected by another right-of-way or improvements or structures on them; they shall also be subject to a limited use, in common with the owner, when necessary; but the uses, crossings, intersections, and connections shall be made in the manner most compatible with the greatest public benefit and least private injury;

(6) all classes of private property not enumerated may be taken for public use when the taking is authorized by law.

History -

(Sec. 13.03 ch 101 SLA 1962)

Decisions -

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

Distinction between proceedings in condemnation under declaration of taking and those under complaint seeking condemnation and order for possession. - See ARCO Pipeline Co. v. 3.60 Acres, More or Less, 539 P.2d 64 (Alaska 1975).

Prerequisites to chattel becoming fixture. - The rule is that for a chattel to become a fixture and be considered as real estate, three prerequisites must unite: There must be an annexation to the realty of something appurtenant thereto; the chattel must have adaptability or application as affixed to the use for which the real estate is appropriated; and there must be an intention of the party to make the chattel a permanent accession to the freehold. Intention, the third of the three factors said to comprise the general test for determining whether an object has become a fixture, refers to the intent of the parties that the object being introduced onto the realty become a permanent accession thereto. Stroh v. Alaska State Hous. Auth., 459 P.2d 480 (Alaska 1968).

Compensation for personal property taken or damaged. - Reading Alaska Const., art. I, Sec. 18, and Alaska Const., art. I, Sec. 1, in pari materia, and the generally recognized principle that the constitution and legislative enactments in implementation thereof are to be liberally construed, the supreme court found no clear legislative intent to have been manifested that personal property taken or

damaged by public use should not be justly compensated. *Stroh v. Alaska State Hous. Auth.*, 459 P.2d 480 (Alaska 1968).

Carpeting constituted personalty at the time of the taking, and party was entitled to recover the actual market value thereof at the time of the taking. *Stroh v. Alaska State Hous. Auth.*, 459 P.2d 480 (Alaska 1968).

No error in jury's failure to award compensation for trees removed from land. - See *Scavenius v. City of Anchorage*, 539 P.2d 1161 (Alaska 1975).

Collateral Refs -

Validity and construction of statute or ordinance protecting historical landmarks, 18 ALR4th 990.

Sec. 09.55.265. Taking of property under reservation void.

After April 14, 1966, no agency of the state may take privately-owned property by the election or exercise of a reservation to the state acquired under the Act of June 30, 1932, ch. 320, Sec. 5, as added July 24, 1947, ch. 313, 61 Stat. 418, and taking of property after April 14, 1966 by the election or exercise of a reservation to the state under that federal Act is void.

History -

(Sec. 2 ch 92 SLA 1966)

Cross References -

For legislative intent, see Sec. 1, ch 92, SLA 1966, in the Temporary and Special Acts.

Editors Notes -

Act of June 30, 1932, ch. 320, Sec. 5, formerly codified as 48 U.S.C. 321d, was repealed by P.L. 86-70, Sec. 21(d)(7).

Decisions -

When statute applies. - The Right-of-Way Act of 1966 (AS 09.55.266 and this section) applies only to rights-of-way acquired under 48 U.S.C. Sec. 321d (now repealed) reservations. *State v. Alaska Land Title Ass'n*, 667 P.2d 714 (Alaska 1983), cert. denied, 464 U.S. 1040, 104 S. Ct. 704, 79 L. Ed. 2d 168 (1984).

When statute does not apply. - The Right-of-Way Act of 1966 (AS 09.55.266 and this section) applies only to interests taken by the state under a blanket reservation created pursuant to 48 U.S.C. Sec. 321d (now repealed); it does not apply to easements established under the authority of Sec. 321a

(now repealed). *State v. Alaska Land Title Ass'n*, 667 P.2d 714 (Alaska 1983), cert. denied, 464 U.S. 1040, 104 S. Ct. 704, 79 L. Ed. 2d 168 (1984).

48 U.S.C. Sec. 321d (now repealed) does not apply to patents issued under the Small Tract Act of 1938, 43 U.S.C. Sec. 682a-682e (now repealed). *State v. Alaska Land Title Ass'n*, 667 P.2d 714 (Alaska 1983), cert. denied, 464 U.S. 1040, 104 S. Ct. 704, 79 L. Ed. 2d 168 (1984).

The Right-of-Way Act of 1966 does not apply to rights-of-way created by a public land order issued pursuant to an executive order under which the President of the United States delegated his statutory authority to the Secretary of the Interior authorizing withdrawal of public lands in Alaska for specified public purposes. *State v. Alaska Land Title Ass'n*, 667 P.2d 714 (Alaska 1983), cert. denied, 464 U.S. 1040, 104 S. Ct. 704, 79 L. Ed. 2d 168 (1984).

Sec. 09.55.266. Existing rights not affected.

AS 09.55.265 may not be construed to divest the state of, or to require compensation by the state for, any right-of-way or other interest in real property that was taken by the state, before April 14, 1966, by the election or exercise of its right to take property through a reservation acquired under the Act of June 30, 1932, ch. 320, Sec. 5, as added July 24, 1947, ch. 313, 61 Stat. 418.

History -

(Sec. 3 ch 92 SLA 1966)

Editors Notes -

Act of June 30, 1932, ch. 320, Sec. 5, formerly codified as 48 U.S.C. Sec. 321d, was repealed by P.L.86-70, Sec. 21(d)(7).

Decisions -

When statute applies. - The Right-of-Way Act of 1966 (AS 09.55.265 and this section) applies only to rights-of-way acquired under 48 U.S.C. Sec. 321d (now repealed) reservations. *State v. Alaska Land Title Ass'n*, 667 P.2d 714 (Alaska 1983), cert. denied, 464 U.S. 1040, 104 S. Ct. 704, 79 L. Ed. 2d 168 (1984).

When statute does not apply. - The Right-of-Way Act of 1966 (AS 09.55.265 and this section) applies only to interests taken by the state under a blanket reservation created pursuant to 48 U.S.C. Sec. 321d (now repealed); it does not apply to easements established under the authority of Sec. 321a (now repealed). *State v. Alaska Land Title Ass'n*, 667 P.2d 714 (Alaska 1983), cert. denied, 464 U.S. 1040, 104 S. Ct. 704, 79 L. Ed. 2d 168 (1984).

48 U.S.C. Sec. 321d (now repealed) does not apply to patents issued under the Small Tract Act of 1938, 43 U.S.C. Sec. 682a-682e (now repealed). *State v. Alaska Land Title Ass'n*, 667 P.2d 714 (Alaska 1983), cert. denied, 464 U.S. 1040, 104 S. Ct. 704, 79 L. Ed. 2d 168 (1984).

The Right-of-Way Act of 1966 does not apply to rights-of-way created by a public land order issued pursuant to an executive order under which the President of the United States delegated his statutory authority to the Secretary of the Interior authorizing withdrawal of public lands in Alaska for specified public purposes. *State v. Alaska Land Title Ass'n*, 667 P.2d 714 (Alaska 1983), cert. denied, 464 U.S. 1040, 104 S. Ct. 704, 79 L. Ed. 2d 168 (1984).

Sec. 09.55.270. Prerequisites.

Before property can be taken, it shall appear that

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

(2) the taking is necessary to the use;

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

History -

(Sec. 13.04 ch 101 SLA 1962)

Cross References -

For contents of complaint, see Civ. R. 72(c).

Decisions -

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

Judicial review of necessity. - Alaska is among the minority of jurisdictions which statutorily calls for judicial inquiry into the question of necessity in eminent domain proceedings. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Judicial review is inappropriate to proceedings under declaration of taking. - The concept of judicial review embodied in Alaska's general eminent domain statutes is inconsistent with, and inappropriate to, proceedings under a declaration of taking. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

The question of necessity under a declaration of taking is not one for initial judicial consideration as in the case of other condemnation proceedings. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

For distinction between proceedings in condemnation under a declaration of taking and those under a complaint seeking condemnation and an order for possession, see *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Pleading must plainly show authority and necessity for taking. - The right of eminent domain can only be exercised in behalf of a public use authorized by law, and in the taking of property necessary to such public use the complaint or petition in such proceedings must show plainly and affirmatively the existence of the statutory authority for the public use, and the necessity of the property for such use. *Miocene Ditch Co. v. Lyng*, 138 F. 544 (9th Cir. 1905).

An inference is not sufficient in eminent domain proceedings. There must be a clear, positive statement that the property sought to be condemned is necessary for a public use authorized by law, and supported by a statement of facts from which the court can see that the property is intended to be used for that purpose. *Miocene Ditch Co. v. Lyng*, 138 F. 544 (9th Cir. 1905).

Authority and necessity must be found by court before condemnation. - This section has been construed as requiring the court to find the use is authorized by law and the taking is necessary "before condemnation." *Bridges v. Alaska Hous. Auth.*, 349 P.2d 149 (Alaska 1960).

Necessity of findings. - It is upon findings made in accordance with this section that there is established a basis for further proceedings. The findings constitute the decision of the court upon the vital question of whether or not the property sought to be taken can be condemned at all. *Van Dyke v. Midnight Sun Mining & Ditch Co.*, 177 F. 85 (9th Cir. 1910).

Questions to be considered by court. - Ordinarily the only questions to be considered by the courts in condemnation proceedings are: First, whether the petitioner has the power to exercise the right of eminent domain; second, whether the property itself is of a nature subject to condemnation; third, whether the property is being taken for a public or a private use; and fourth, whether the power is being used for taking an excessive amount of property. *Town of Seward v. Margules*, 9 Alaska 354 (1938).

Absolute necessity not required. - Although the condemnor may have the burden of making a prima facie showing of necessity, the language of this section ought to be construed to require no more than that the particular taking be shown to be "reasonably requisite and proper for the accomplishment of the purpose for which it is sought." *City of Fairbanks v. Metro Co.*, 540 P.2d 1056 (Alaska 1975).

Particular questions left to discretion of condemning authority. - In general condemnation proceedings under this article, once the condemnor has presented sufficient evidence to support a finding that a particular taking is "reasonably requisite" for the effectuation of the authorized public purpose for which it is sought, particular questions as to the route, location or amount of property to be taken are to be left to the sound discretion of the condemning authority absent a showing by clear and convincing evidence that such determinations are the product of fraud, caprice or arbitrariness. *City of Fairbanks v. Metro Co.*, 540 P.2d 1056 (Alaska 1975).

Burden of proof. - One seeking to show that a particular taking is excessive or arbitrary has a heavy burden of proof in the attempt to persuade the court to substitute its judgment for that of the condemnor. *City of Fairbanks v. Metro Co.*, 540 P.2d 1056 (Alaska 1975).

Relative private injury. - That certain property owners suffer relatively greater injury than others, or are less directly benefited by the project, does not establish that the taking of their property is unnecessarily injurious or unwarranted. *City of Fairbanks v. Metro Co.*, 540 P.2d 1056 (Alaska 1975).

While it is true that the inability of a particular condemnee to obtain immediate beneficial use from the project may be considered as a factor in weighing the project's impact in terms of the degree of private injury involved in a proposed route or location, the interest in minimizing private injury is not absolute and must always be weighed in relation to the goals and efficacy of the project in its entirety at the time such determinations are made. *City of Fairbanks v. Metro Co.*, 540 P.2d 1056 (Alaska 1975).

City clearly met its initial burden of demonstrating that its taking certain parcels of land for purposes of the construction of a sewer line was reasonably necessary under the circumstances. *City of Fairbanks v. Metro Co.*, 540 P.2d 1056 (Alaska 1975).

Complaint held sufficient. - Where a complaint used the words "imperatively required" for a public use and alleged facts supporting the same, this was sufficient to show necessity under this section. *Town of Seward v. Margules*, 9 Alaska 354 (1938).

Appeal from interlocutory order finding use authorized and taking necessary. - See *Van Dyke v. Midnight Sun Mining & Ditch Co.*, 177 F. 85 (9th Cir. 1910); *Northern Mining & Trading Co. v. Alaska Gold Recovery Co.*, 20 F.2d 5 (9th Cir. 1927).

Collateral Refs -

Sufficiency of condemnor's negotiations required as preliminary to taking in eminent domain, 21 ALR4th 765.

Sec. 09.55.275. Replat approval.

An agency of the state or municipality acquiring property in fee that results in a boundary change located within a municipality exercising the powers conferred by AS 29.35.180 or 29.35.260(c) shall conform to this section by obtaining preliminary approval of a replat showing clearly the location of the proposed public street or other acquisition of property. The platting authority may establish applicable review procedures and standards for a replat made for the purpose of a right-of-way acquisition or condemnation. Neither the adequacy of the municipal replat process or standards, if any, nor the failure of a municipality to follow its own replat process and standards shall deprive the state of the authority to exercise its power of eminent domain. Final approval of replat shall also be obtained. However, if a state agency clearly demonstrates an overriding state interest, a waiver of the municipal approval requirements in this section may be granted by the governor.

History -

(Sec. 2 ch 96 SLA 1975; am Sec. 23 ch 74 SLA 1985; am Sec. 2 ch 32 SLA 2004)

Revisors Notes -

In 1994, in the first sentence of this section, "An agency of the state or municipality may not" was substituted for "No agency of the state or municipality may" to conform the section to the current style of the Alaska statutes.

Cross References -

For statement of legislative purpose and intent concerning the 2004 repeal and reenactment of this section, see Sec. 1, ch. 32, SLA 2004, in the 2004 Temporary and Special Acts.

Amendment Notes -

The 2004 amendment, effective May 25, 2004, rewrote this section.

Decisions -

Applicability. - This section applies both to the state and to municipalities. Municipality of Anchorage v. Suzuki, 41 P.3d 147 (Alaska 2002) (decided under former law).

When a landowner claimed interference with his remainder interest after an eminent domain taking, allegedly in violation of this section, trial court did not err in denying the landowner's motion to dismiss because the landowner had other remedies available. Lundgren v. City of Wasilla, 220 P.3d 919 (Alaska 2009).

Approval not necessary. - In a condemnation proceeding that was challenged by a landowner, a city was not required to obtain approval of a final plat because this section does not require a city to obtain final replat approval at a specific point in the taking process. Hillstrand v. City of Homer, 218 P.3d 685 (Alaska 2009).

"Boundary change." - Easement that is not coextensive with the property owner's property line and that functionally interferes with the landowner's exclusive use is a boundary change under this section. Municipality of Anchorage v. Suzuki, 41 P.3d 147 (Alaska 2002) (decided under former law).

Municipality was required to obtain preliminary approval of replats showing easements involved; plain meaning of "boundary change" in this section encompassed changes in easement borders. Municipality of Anchorage v. Suzuki, 41 P.3d 147 (Alaska 2002) (decided under former law).

Sec. 09.55.280. Entry upon land.

In all cases where land is required for public use, the state, the public entity, or persons having the authority to condemn, or its agents in charge of the use may enter upon the land and make examination, surveys, and maps and locate the boundaries; but it shall be located in the manner that will be most compatible with the greatest public good and the least private injury, and subject to the provisions of AS 09.55.300. The entry shall constitute no cause of action in favor of the owners of the land except for injuries resulting from negligence, wantonness, or malice.

History -

(Sec. 13.05 ch 101 SLA 1962)

Decisions -

Time for measuring claim for compensation. - A claim for just compensation for the value of a sewer easement on the date of taking cannot be measured as of the date the city came onto the property for survey purposes. Rather it must be measured from the time construction of the sewer began. *Wickwire v. City & Borough of Juneau*, 557 P.2d 783 (Alaska 1976).

Distinction between proceedings in condemnation under a declaration of taking and those under a complaint seeking condemnation and an order for possession. - See *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Collateral Refs -

Valuation at time of original wrongful entry by condemnor or at time of subsequent initiation of condemnation proceedings, 2 ALR3d 1038.

Right to enter land for preliminary survey or examination, 29 ALR3d 1104.

Sec. 09.55.290. Jurisdiction.

Eminent domain proceedings may be commenced in the superior court.

History -

(Sec. 13.06 ch 101 SLA 1962)

Cross References -

For procedures generally, see Civ. R. 72.

Decisions -

Cited in *State, DOT & Pub. Facilities v. 0.644 Acres*, 613 P.2d 829 (Alaska 1980).

Collateral Refs -

Change of venue as justified by fact that large number of inhabitants of local jurisdiction have interest adverse to party to state civil action, 10 ALR4th 1046.

Sec. 09.55.300. Powers of court.

(a) The court has power

(1) to regulate and determine the place and manner of making the connections and crossings or of enjoying the common uses mentioned in AS 09.55.260(5), and of the occupying of canyons, passes, and defiles for railroad purposes, as permitted and regulated by law;

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

(b) If the court determines that the property is to be taken for a public use, and if all parties to the action do not object, the court shall appoint a master to determine the amount to be paid by the plaintiffs to each owner or other person interested in the property as compensation and damages by reason of the appropriation of the property. If all parties to the action object to the appointment of a master the court shall proceed with a jury trial, unless the jury is waived by all parties to the action.

History -

(Sec. 13.07 ch 101 SLA 1962; am Sec. 1 ch 138 SLA 1968)

Cross References -

For appointment of masters, see Civ. R. 53; for hearing before master, see Civ. R. 72(h)(2).

Decisions -

Judicial review inappropriate to proceedings under declaration of taking. - The concept of judicial review embodied in Alaska's general eminent domain statutes is inconsistent with, and inappropriate to, proceedings under a declaration of taking. ARCO Pipeline Co. v. 3.60 Acres, More or Less, 539 P.2d 64 (Alaska 1975).

The question of necessity under a declaration of taking is not one for initial judicial consideration as in the case of other condemnation proceedings. ARCO Pipeline Co. v. 3.60 Acres, More or Less, 539 P.2d 64 (Alaska 1975).

For distinction between proceedings in condemnation under a declaration of taking and those under a complaint seeking condemnation and an order for possession, see ARCO Pipeline Co. v. 3.60 Acres, More or Less, 539 P.2d 64 (Alaska 1975).

Determination of whether parcel is within original scope of public project. - A determination in a particular case of whether a parcel is within the original scope of a public project subsequently enlarged

to require the taking of the tract is a question for the trier of fact. *State v. Alaska Continental Dev. Corp.*, 630 P.2d 977 (Alaska 1980).

No finding necessary to issuance of order appointing master. - No "finding" seems to be necessary to the issuance of the order appointing commissioners (now master) to appraise damages. *Alaska Gold Recovery Co. v. Northern Mining & Trading Co.*, 7 Alaska 655 (1927), reversed on other grounds, 25 F.2d 106 (9th Cir. 1928).

Order appointing master is not appealable. - The order appointing commissioners (now master) cannot be regarded as appealable. *Alaska Gold Recovery Co. v. Northern Mining & Trading Co.*, 7 Alaska 655 (1927), reversed on other grounds, 25 F.2d 106 (9th Cir. 1928).

Appeal for abuse of discretion. - An order appointing commissioners (now master) can only be reviewed for an abuse of discretion, if at all. *Alaska Gold Recovery Co. v. Northern Mining & Trading Co.*, 7 Alaska 655 (1927), reversed on other grounds, 25 F.2d 106 (9th Cir. 1928).

"Owner" includes purchaser under contract. - An instruction "that the term 'owner' to whom compensation must be paid, may include a purchaser under contract who has an interest in the land sought to be taken or damaged," is entirely proper. *State v. Bradshaw Land & Livestock Co.*, 99 Mont. 95, 43 P.2d 674 (1935), construing the Montana statute.

Cited in *State, DOT & Pub. Facilities v. 0.644 Acres*, 613 P.2d 829 (Alaska 1980).

Collateral Refs -

Propriety of court's consideration of ecological effects of proposed project in determining right of condemnation, 47 ALR3d 1267.

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.

History -

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

Cross References -

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

Decisions -

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.

A. Generally.

Valuation of property. - See notes under AS 09.55.330 analysis line II "Just Compensation."

Fair market value is an appropriate measure of the just compensation guaranteed by Alaska Const., art. I, Sec. 18. *Dash v. State*, 491 P.2d 1069 (Alaska 1971).

One criterion for determining value is what the property is worth on the market-its fair market value- and this is to be determined by a just consideration of all the uses for which a property is suitable. *Dash v. State*, 491 P.2d 1069 (Alaska 1971).

The essential difference between market price and market value lies in the premises of intelligence, knowledge and willingness, all of which are contemplated in market value but not in market price. Stated differently, at any given moment of time, market value connotes what a property is actually worth and market price what it may be sold for. *Dash v. State*, 491 P.2d 1069 (Alaska 1971).

Section applicable to inverse condemnation. - Where a taking has occurred and the issue is the awarding of just compensation, such compensation may be determined in an inverse condemnation action using so far as is practicable the statutory requirements and procedural steps set out for eminent domain proceedings. *City of Kenai v. Burnett*, 860 P.2d 1233 (Alaska 1993).

"Best use" evidence. - See *Dash v. State*, 491 P.2d 1069 (Alaska 1971).

In determining just compensation, usually measured by the "market value" of the property, the highest and most profitable use for which the land is adaptable may be considered to the extent that the prospective demand for such use affects the property's present market value. *Dash v. State*, 491 P.2d 1069 (Alaska 1971).

A truly speculative or imagined use should not be considered. *Dash v. State*, 491 P.2d 1069 (Alaska 1971).

Evidence of use as subdivision. - Many courts, including Alaska's, have allowed evidence of a reasonably probable subdivision to be admitted to prove the adaptability of the land for subdivision use. *Dash v. State*, 491 P.2d 1069 (Alaska 1971).

The majority of courts allow evidence of a potential subdivision only for the limited purpose of showing the adaptability of the land for subdivision purposes. *Dash v. State*, 491 P.2d 1069 (Alaska 1971).

The courts are much more liberal in admitting evidence of a potential subdivision when some preliminary steps have been taken to develop the land. *Dash v. State*, 491 P.2d 1069 (Alaska 1971).

Where there is testimony that the highest and best use of the property is as an industrial subdivision, and evidence that other property in the immediate area was subdivided for industrial purposes, the proposed subdivision is not purely conjectural or speculative. *Dash v. State*, 491 P.2d 1069 (Alaska 1971).

If the land were adaptable for subdivision purposes, it would seem that the potential income to be derived from sales of the subdivided lots would be highly relevant to a determination of the "market value," especially to the extent that sophisticated investors who make decisions on the basis of income capitalization take part in market transactions. *Dash v. State*, 491 P.2d 1069 (Alaska 1971).

Capitalization of income, in contexts other than proposed subdivisions, has been recognized as an accepted method of valuation by a number of jurisdictions. Although capitalization of anticipated proceeds from a proposed subdivision necessarily has a speculative element, it still has a direct impact on the property's market value since it will influence investment decisions and thereby affect supply and demand. *Dash v. State*, 491 P.2d 1069 (Alaska 1971).

To the extent that the "just compensation" guarantee in Alaska Const., art. I, Sec. 18, comprises a notion of fair market value rather than merely the price the property will bring in an imperfect market,

income capitalization must be considered particularly apposite. *Dash v. State*, 491 P.2d 1069 (Alaska 1971).

Even in a market place where a parcel's price is unaffected by its income potential, income capitalization must be considered to have a bearing on "market value." The danger that market price will not closely reflect market value is enhanced when the property is not currently generating income. *Dash v. State*, 491 P.2d 1069 (Alaska 1971).

An expert's testimony which capitalized the anticipated rentals from a proposed recreational subdivision to arrive at an estimate of fair market value was properly admitted. *Dash v. State*, 491 P.2d 1069 (Alaska 1971).

As to admission of expert testimony on market value based on the development costs and income capitalization of a potential subdivision, see *Dash v. State*, 491 P.2d 1069 (Alaska 1971).

Sale fifteen months after date of taking. - As to admission into evidence of a sale taking place fifteen months after the date of the taking by the state, see *Dash v. State*, 491 P.2d 1069 (Alaska 1971).

B. Damages to Remainder.

Assessment of damages refers to "portion sought to be condemned". - The assessment of damages the award of the commissioners (master) provided for in this section is made with reference to property sought to be appropriated or "portion sought to be condemned," not to property already condemned at the time of the appointment. *Alaska Gold Recovery Co. v. Northern Mining & Trading Co.*, 7 Alaska 655 (1927), reversed on other grounds, 25 F.2d 107 (9th Cir. 1928).

Appraisal of damages prior to construction of improvements. - When damages are appraised prior to the construction of the improvements for which the land is condemned, the estimate should be made on the assumption that the improvements will be properly constructed; and, if they are constructed pending the condemnation proceedings, the rule should be the same. The actual effect of the properly constructed improvements in the manner proposed by plaintiff as to the larger parcels should control the appraisal. If the improvements are improperly or negligently constructed, no additional damage should be given for this reason. *City of Anchorage v. Scavenius*, 539 P.2d 1169 (Alaska 1975).

Alteration of original construction plan. - When an owner settles or receives a condemnation award in reliance on a construction plan which is implemented and later altered, the owner is entitled to just compensation for any resultant economic damage to the property, provided that a portion of the property was taken for the original construction project, and the remaining property decreased in value as a result of the alteration. The owner's reliance must be objectively reasonable, based on the documents prepared to resolve the original condemnation action. *State v. Lewis*, 785 P.2d 24 (Alaska 1990).

Inconsistent verdict. - State was entitled to a new trial on the amount of just compensation required for the taking of an abutting landowner's right of access to a controlled access highway, where the jury's answers to special interrogatories were internally inconsistent and inconsistent with the general verdict and the jury's conclusion that the remaining property was worth more after the taking than the entire parcel was worth before the taking was irreconcilable with its conclusion that the remainder received no special benefit from the highway project. *State v. Lewis*, 785 P.2d 24 (Alaska 1990).

Costs and attorney's fees. - City was entitled to award of costs and attorney's fees for successful defense of negligence claim pertaining to pavement damage occurring when water main installed. *City of Anchorage v. Scavenius*, 539 P.2d 1169 (Alaska 1975).

C. Benefits to Remainder.

Effect of special benefits. - The rule in Alaska is that special benefits to the remainder can only be used to offset severance damages to the remainder. In the event that special benefits exceed severance damages, the landowner is still entitled to receive the full market value of the portion actually taken. *Dash v. State*, 491 P.2d 1069 (Alaska 1971).

State's vacation of its pre-existing right-of-way was not a special benefit which could be set off, and could not be considered part of the just compensation to which condemnee was entitled. *Vezey v. State*, 798 P.2d 327 (Alaska 1990).

III. Role of Witnesses.

Role of expert witness in eminent domain proceedings. - See *Dash v. State*, 491 P.2d 1069 (Alaska 1971).

Weight of testimony is jury question. - The question of what weight to give witness' testimony is one for the jury to decide upon the evidence produced at the trial and under the court's instructions on the law. *Alaska State Hous. Auth. v. Vincent*, 396 P.2d 531 (Alaska 1964).

Collateral Refs -

Admissibility of evidence of promissory statements of condemner as to character of use or undertakings to be performed by it, 5 ALR2d 381.

Admissibility in condemnation proceedings of opinion evidence as to probable profits derivable from land condemned if devoted to particular agricultural purposes, 16 ALR2d 1113.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Propriety and effect, in eminent domain proceeding, of argument or evidence as to landowner's unwillingness to sell property, 17 ALR3d 1449.

Propriety and effect, in eminent domain proceeding, of argument or evidence as to source of funds to pay for property, 19 ALR3d 694.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 ALR3d 1081.

Propriety and effect of argument or evidence as to financial status of parties in eminent domain proceeding, 21 ALR3d 936.

Admissibility, on issue of value of condemned real property, of rental value of other real property, 23 ALR2d 724.

Admissibility of photographs or models of property condemned, 23 ALR3d 825.

Admissibility of evidence of proposed or possible subdivision or platting of condemned land on issue of value in eminent domain proceedings, 26 ALR3d 780.

Necessity of trial or proceeding, separate from main condemnation trial or proceeding, to determine divided interest in state condemnation award, 94 ALR3d 696.

Compelling testimony of opponent's expert in state court - eminent domain proceedings, 66 ALR4th 213.

Admissible expert opinion hearsay for property valuation evidence, 89 ALR4th 456.

Sec. 09.55.320. Right to jury trial as to damages and value of property.

An interested party may appeal the master's award of damages and valuation of the property, in which case there shall be a trial by jury on the question of the amount of damages and the value of the property, unless the jury is waived by the consent of all parties to the appeal.

History -

(Sec. 13.09 ch 101 SLA 1962)

Cross References -

For related court rules, see Civ. R. 72(h)(4) and (5).

Decisions -

The proceedings after the master's report are an appeal in name only. *Inglima v. Alaska State Hous. Auth.*, 462 P.2d 1002 (Alaska 1970).

The right to a jury trial vests by operation of law in all parties to the appeal. *Inglima v. Alaska State Hous. Auth.*, 462 P.2d 1002 (Alaska 1970).

The Alaska statute grants a jury trial to any party and without the necessity of any action or demand by the passive party to the proceeding once the appeal has been taken by any party. *Inglima v. Alaska State Hous. Auth.*, 462 P.2d 1002 (Alaska 1970).

The owner against whom appeal is taken is entitled to look forward to a jury trial as a matter of right, even though he may be the passive party. *Inglima v. Alaska State Hous. Auth.*, 462 P.2d 1002 (Alaska 1970).

Preparation for jury trial. - Once an appeal is taken from a master's report the opponent is placed in the position of any other party to a contested civil action. He may be called upon to make discovery, engage in motion practice, and prepare for trial. He must plan for the presentation of evidence. In whatever manner the burden of proof may be distributed in a condemnation case, the owner bears at least some burden if he is to hope for success. For what type of trial should he be expected to prepare? According to the statute, it is a trial by jury. *Inglima v. Alaska State Hous. Auth.*, 462 P.2d 1002 (Alaska 1970).

In eminent domain proceedings the right to appeal is purely statutory and may be granted to or withheld from, either party or both, at the discretion of the legislature, if no constitutional provision is thereby infringed. *Great N. Ry. v. Fiske*, 54 Mont. 231, 169 P. 44 (1917), construing the Montana statute.

Nature of proceeding depends upon statutory provisions. - When the assessment of damages is submitted to a jury after a prior assessment by commissioners, the nature of the proceedings depends upon statutory provisions. *State v. Anderson*, 92 Mont. 313, 13 P.2d 228 (1932), construing the Montana statute.

Case is tried de novo as to all elements of damages. - This section implies that not only is the case to be tried de novo before the jury, but it is tried de novo as to all the elements which go to make up the damages to which the owner may be entitled by reason of the appropriation of his property. *Great N. Ry. v. Fiske*, 54 Mont. 231, 169 P. 44 (1917), construing the Montana statute.

This section does not provide for valuation of separate elements of the property and thus implies that there will be a full re-evaluation. *Rebischke v. State*, 572 P.2d 432 (Alaska 1977).

If no appeal taken original award remains as just compensation. - Although there be a right of appeal, to resubmit the question of damage, that appeal may never be prosecuted to effect, in which event the original award would remain as the just compensation ascertained and deposited in such case. *State ex rel. Volunteer Mining Co. v. McHatton*, 15 Mont. 159, 38 P. 711 (1894), construing the Montana statute.

Review of jury findings. - In eminent domain proceedings, the jury findings will generally not be disturbed on appeal unless they are so obviously and palpably out of proportion to the injury done as to

be in excess of just compensation. *State v. Peterson*, 134 Mont. 52, 328 P.2d 617 (1958), construing the Montana statute.

Quoted in *State v. 7.536 Acres*, 431 P.2d 897 (Alaska 1967); *6,656 Square Feet, More or Less v. State*, 456 P.2d 480 (Alaska 1969).

Cited in *Tallman v. State, Dep't of Pub. Works*, 506 P.2d 679 (Alaska 1973).

Collateral Refs -

Right to jury view, 77 ALR2d 548.

Evidentiary effect of view by jury in condemnation case, 1 ALR3d 1397.

Unaccepted offer for purchase of real property as evidence of its value, 25 ALR4th 571.

Unaccepted offer to sell or listing of real property as evidence of its value, 25 ALR4th 983.

Sec. 09.55.330. Compensation and damages.

For the purpose of assessing compensation and damages, the right to them accrues at the date of issuance of the summons, and its actual value at that date is the measure of compensation of the property to be actually taken, and the basis of damages to property not actually taken but injuriously affected in the cases where the damages are allowed. If an order is made letting the plaintiff into possession, as provided in AS 09.55.380, the compensation and damages awarded shall draw lawful interest from the date of the order. Improvements put upon the property after the date of the service of summons may not be included in the assessment of compensation or damages.

History -

(Sec. 13.10 ch 101 SLA 1962)

Revisors Notes -

In 1994, in the last sentence of this section, "Improvements put upon the property after the date of the service of summons may not be" was substituted for "No improvements put upon the property after the date of the service of summons shall be" to conform the section to the current style of the Alaska Statutes.

Cross References -

For constitutional provision prohibiting the taking or damaging of private property for public use without just compensation, see Alaska Const., art. I, Sec. 18.

Decisions -

I. General Consideration.

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

Constitutionality. - The just compensation requirement of Alaska Const., art. I, Sec. 18, is satisfied by fixing the valuation date as of the commencement of the action; therefore, this section is constitutional as applied in a case where a lengthy delay (almost 2 years) in payment of compensation follows commencement of the action, the proper remedy for the delay being an award of interest, less any rents and profits derived from the use of the property as compensation to the landowner for the loss of use of the money owed him during the pendency of the action. *Lazy Mt. Aviation, Inc. v. City of Palmer*, 618 P.2d 570 (Alaska 1980).

The provisions of AS 09.55.440(a) are not irreconcilable with those pertaining to another form of eminent domain proceeding in this section. *State v. Alaska Continental Dev. Corp.*, 630 P.2d 977 (Alaska 1980).

Under a declaration of taking, title and right to possession pass to the state immediately upon filing and depositing an amount for just compensation, while under a complaint for condemnation this "taking" does not occur until judgment is entered by the court. *State v. Alaska Continental Dev. Corp.*, 630 P.2d 977 (Alaska 1980).

The central objective in eminent domain proceedings is the determination of just compensation for the property condemned. *Babinec v. State*, 512 P.2d 563 (Alaska 1973), rev'd on other grounds, 586 P.2d 966 (Alaska 1978).

Just compensation must not be deterred by rigid evidentiary rules or technical formulas. *Babinec v. State*, 512 P.2d 563 (Alaska 1973), rev'd on other grounds, 586 P.2d 966 (Alaska 1978).

The scope of cross-examination of an expert who has testified to the value of land in an eminent domain proceeding is very broad since cross-examination of the expert witness is the primary protection which an opposing party has against unwarranted estimates. *Babinec v. State*, 586 P.2d 966 (Alaska 1978).

When relevant evidence may be excluded. - The trial court may in its discretion exclude relevant evidence if it finds its probative value is outweighed by the risk that it will have a prejudicial effect on the jury, confuse the issues, or mislead the jury. *Babinec v. State*, 586 P.2d 966 (Alaska 1978).

The standard for appellate review of a lower court's decision to exclude testimony is whether it committed a clear abuse of discretion. *Babinec v. State*, 586 P.2d 966 (Alaska 1978).

Reversible error in restricting cross-examination as to first appraisal of state expert. - See *Babinec v. State*, 586 P.2d 966 (Alaska 1978).

Costs and attorney's fees. - City was entitled to award of costs and attorney's fees for successful defense of negligence claim pertaining to pavement damage occurring when water main installed. *City of Anchorage v. Scavenius*, 539 P.2d 1169 (Alaska 1975).

Award under Civ. R. 72(k)(5). - Only expenses necessarily incurred in defending an eminent domain action should be awarded under Civ. R. 72(k), despite the fact that only subsection (4) (now 5) requires that the award appear necessary to achieve just compensation. *State v. Alaska Continental Dev. Corp.*, 630 P.2d 977 (Alaska 1980).

Quoted in *Triangle, Inc. v. State*, 632 P.2d 965 (Alaska 1981).

Stated in *Munroe v. City Council ex rel. City of Anchorage*, 545 P.2d 165, 547 P.2d 839 (Alaska 1976).

Cited in *City of Valdez v. 18.99 Acres*, 686 P.2d 682 (Alaska 1984).

II. Just Compensation.

A. Generally.

Appropriate measure of just compensation. - "Fair market value," or the price a willing buyer would pay a willing seller for property, is the appropriate measure of "just compensation." *State v. Alaska Continental Dev. Corp.*, 630 P.2d 977 (Alaska 1980). See also *Gackstetter v. State*, 618 P.2d 564 (Alaska 1980).

Value-to-the-taker is not an appropriate measure of just compensation where residential property was taken, even though fill and gravel from the property was utilized by the condemnor. *Gackstetter v. State*, 618 P.2d 564 (Alaska 1980).

Employment of the fair market value test where the property contained dirt and gravel fill which was removed by the condemnor and used elsewhere in the project to its benefit does not preclude the owners from receiving just compensation. It is a basic tenet of eminent domain law that just compensation is determined by what the owner has lost and not by what the condemnor has gained. *Gackstetter v. State*, 618 P.2d 564 (Alaska 1980).

Where the state appropriated residential property for which the owners were justly compensated through employment of a fair market valuation measure, the superior court did not err in its determination that consideration of value to the state of the fill and gravel is received from the land was an inappropriate measure to just compensation. *Gackstetter v. State*, 618 P.2d 564 (Alaska 1980).

Value added by unrelated public project. - In Alaska, inclusion of value enhancement attributable to the project for which the property is being taken is generally prohibited in determining condemnation awards. This general rule is in accordance with the requirement in the Alaska and United States Constitutions that just compensation be paid for private property taken for public use, since it

only prevents a landowner from receiving more value for his property than he would if the government had no use for his land and it was purchased by a private buyer. However, this rule does not preclude an owner from receiving compensation for value added to the property by an unrelated public project which took no portion of the tract involved. *State v. Alaska Continental Dev. Corp.*, 630 P.2d 977 (Alaska 1980).

Value of improvements. - Property owners who are aware of proposed condemnation nevertheless may make reasonable improvements to their property and are entitled to the value of the improvements made with such knowledge before the taking. The evidence of prior knowledge is ordinarily irrelevant and inadmissible. *Babinec v. State*, 512 P.2d 563 (Alaska 1973), rev'd on other grounds, 586 P.2d 966 (Alaska 1978).

The property owner is not entitled to the value of improvements made solely in bad faith for the purpose of enhancing an award. *Babinec v. State*, 512 P.2d 563 (Alaska 1973), rev'd on other grounds, 586 P.2d 966 (Alaska 1978).

Purpose of fixing date of valuation as date summons issued. - The fixing by statute of the date of valuation of property taken or damaged as the date of the issuance of the summons of the eminent domain complaint was intended to prevent the state from taking advantage of the drop in property values which occurs once real property has been condemned or personal property has been removed from the condemned building. *State v. Hammer*, 550 P.2d 820 (Alaska 1976).

Date of valuation. - When a landowner claimed interference with his remainder interest after an eminent domain taking, allegedly in violation of this section, a trial court did not err in denying the landowner's motion to dismiss, or in refusing to set an alternative valuation date, because the correct date was the date of the issuance of a summons. *Lundgren v. City of Wasilla*, 220 P.3d 919 (Alaska 2009).

Using value of premises at time of trial when action not tried as eminent domain proceeding. - In an action for injury to gold mining claims by discharging debris thereon, where the cost of restoration would exceed the value of the property, the measure of damages was the value of the claims at the time of the injury, and plaintiff was not entitled to treat the suit as a quasi eminent domain proceeding and recover the value of the claims as of the time of the trial, thus giving himself the advantage of an increase in the price of gold, where the suit was tried and determined on the theory that it was an action in trespass, not one involving the power of eminent domain, the pleadings framed no issue of appropriation for a public use and the judgment did not purport to vest in the defendant any title or right of possession. *Erceg v. Fairbanks Exploration Co.*, 9 Alaska 264, 95 F.2d 850 (9th Cir. 1938), cert. denied, 9 Alaska 399, 305 U.S. 615, 59 S. Ct. 74, 83 L. Ed. 392 (1938).

Bases upon which appraisals made. - Appraisals may not be based upon the aggregate of unadjusted retail sales, values of lots, or hypothetical divisions. *Babinec v. State*, 512 P.2d 563 (Alaska 1973), rev'd on other grounds, 586 P.2d 966 (Alaska 1978).

Quite often use of one larger parcel for evaluation purposes results in a lower value than evaluating smaller component parts and adding their total. *Babinec v. State*, 512 P.2d 563 (Alaska 1973), rev'd on other grounds, 586 P.2d 966 (Alaska 1978).

Where property has been subdivided into smaller lots, and indication that a market for such lots exists is demonstrated by the sale of one lot prior to the date of taking, valuation evidence based in part upon the ascription of retail values to individual lots and comparable sales data should properly be admitted for the jury to consider. *Babinec v. State*, 512 P.2d 563 (Alaska 1973), rev'd on other grounds, 586 P.2d 966 (Alaska 1978).

Where parcel is included in parcel in subsequent enlargement. - An exception to the general prohibition against awarding enhanced value from the project for which a parcel is taken occurs when the parcel was not properly within the scope of the original project but was included in a subsequent enlargement of the project. In those circumstances, a landowner should not be deprived of the value added in the meantime by the proximity of the improvement. *State v. Alaska Continental Dev. Corp.*, 630 P.2d 977 (Alaska 1980).

The burden of proving that the projects should be considered as one for valuation purposes was on the state, the party asserting the claim. *State v. Alaska Continental Dev. Corp.*, 630 P.2d 977 (Alaska 1980).

Burden of proof. - The burden of proof as to value is upon the owners of the property. *Alaska State Hous. Auth. v. Vincent*, 396 P.2d 531 (Alaska 1964).

The burden in contending that the trial court erred in its determination of just compensation for parcels is especially heavy with respect to condemnation proceedings, where considerable latitude must be accorded the trier of fact due to the complicated nature of property appraisals. *State v. Alaska Continental Dev. Corp.*, 630 P.2d 977 (Alaska 1980).

B. Damages to Property Not Taken.

Severance damages. - Severance damages are specifically authorized by this section. *Babinec v. State*, 512 P.2d 563 (Alaska 1973), rev'd on other grounds, 586 P.2d 966 (Alaska 1978).

When owner entitled to severance damages. - A property owner is entitled to severance damages if it is determined that the property taken is part of a larger parcel which has been adversely affected by the taking. *Babinec v. State*, 512 P.2d 563 (Alaska 1973), rev'd on other grounds, 586 P.2d 966 (Alaska 1978).

The principal test utilized for defining the "larger parcel" for severance damage purposes is often referred to as the "three unities" theory. *Babinec v. State*, 512 P.2d 563 (Alaska 1973), rev'd on other grounds, 586 P.2d 966 (Alaska 1978).

According to the "three unities" doctrine, three factors are employed in ascertaining whether property in which the take occurs constitutes a single larger parcel. The factors are: Physical contiguity between the several parcels, unity of ownership, and unity of use. *Babinec v. State*, 512 P.2d 563 (Alaska 1973), rev'd on other grounds, 586 P.2d 966 (Alaska 1978).

"Three unities" theory not controlling. - While the "three unities" theory is helpful in ascertaining the "larger parcel" to be considered for severance damage purposes, the theory is not controlling. *Babinec v. State*, 512 P.2d 563 (Alaska 1973), rev'd on other grounds, 586 P.2d 966 (Alaska 1978).

If competent evidence is presented indicating that by reason of condemnation of a portion of his property, remaining property owned by the property owner is diminished in value, the issue of severance damages should be presented to the jury, regardless of whether slavish adherence to the "three unities" theory might lead to a contrary result. *Babinec v. State*, 512 P.2d 563 (Alaska 1973), rev'd on other grounds, 586 P.2d 966 (Alaska 1978).

Date of valuation generally fixed prior to construction of improvement. - The date set forth by statute when the valuation of the owner's loss is to be measured is generally fixed at a time prior to the actual construction of the improvement. *City of Anchorage v. Scavenius*, 539 P.2d 1169 (Alaska 1975).

Appraisal of damages prior to construction of improvements should assume proper construction. - When damages are appraised prior to the construction of the improvements for which the land is condemned, the estimate should be made on the assumption that the improvements will be properly constructed; and, if they are constructed pending the condemnation proceedings, the rule under this section should be the same. *City of Anchorage v. Scavenius*, 539 P.2d 1169 (Alaska 1975).

Effect of properly constructed improvements should control appraisal. - The actual effect of the properly constructed improvements in the manner proposed by plaintiff as to the larger parcel should control the appraisal. *City of Anchorage v. Scavenius*, 539 P.2d 1169 (Alaska 1975).

No additional damage is allowed for improperly constructed improvements. - If the improvements are improperly or negligently constructed no additional damage should be given for this reason. *City of Anchorage v. Scavenius*, 539 P.2d 1169 (Alaska 1975).

Action at law in tort may lie against condemnor. - It is presumed that the condemnor will build the called for improvement without negligence and the just compensation award is to be determined based on that assumption. If, in fact, the condemnor's actions outside the inherent scope of the taking result in additional injury to the owner, he may be able to bring an action at law in tort against the condemnor. *City of Anchorage v. Scavenius*, 539 P.2d 1169 (Alaska 1975).

Whether a certain incidental damage claim should be considered part of a special condemnation proceeding turns on the nature of the incidental damage. *City of Anchorage v. Scavenius*, 539 P.2d 1169 (Alaska 1975).

When the damage to the remaining portion of the condemnee's tract necessarily results from the imposition of the easement or the proper construction of the improvement, then the incidental damage claim may properly be considered an element of the property owner's damage due to the condemnation. When the damage claim is based upon the allegedly negligent construction of the improvement, however, any loss incurred cannot properly be considered a part of the taking. *City of Anchorage v. Scavenius*, 539 P.2d 1169 (Alaska 1975).

Temporary loss of profits during relocation, incurred because of the state's exercise of its eminent domain power in taking the property on which the business was conducted, is a damaging of property within Alaska Const., art. I, Sec. 18, and must be compensated for. *State v. Hammer*, 550 P.2d 820 (Alaska 1976).

Matching incidental benefit to property may offset damages awarded. - The condemnee must be compensated for a limited form of incidental damages - temporary loss of profits due to business interruption caused by the taking. The condemnee is entitled to compensation for these damages, but is not entitled to double compensation. If the state can show a matching incidental benefit to the property incidentally damaged by the taking, that benefit may offset the damages awarded, but that benefit must accrue to the precise property interest affected. *State v. Hammer*, 550 P.2d 820 (Alaska 1976).

Depreciation in the value of the property, as well as physical damage, should be included in the calculation of compensation. *State v. Hammer*, 550 P.2d 820 (Alaska 1976).

Award of damages for depreciation in value of condemnee's bar equipment due to relocation upheld. - See *State v. Hammer*, 550 P.2d 820 (Alaska 1976).

Exclusion of evidence of resale to condemnee of bar equipment condemned by state upheld. - See *State v. Hammer*, 550 P.2d 820 (Alaska 1976).

C. Interest.

When interest statutorily provided for. - Alaska statutorily provides for the payment of interest in eminent domain actions only where the State enters into immediate actual or constructive possession. *Stewart & Grindle, Inc. v. State*, 524 P.2d 1242 (Alaska 1974).

There is no statutory provision for payment of interest from the date a condemnation action is instituted where the property owner remains in possession. *Stewart & Grindle, Inc. v. State*, 524 P.2d 1242 (Alaska 1974).

Only the legislature has the power to direct the assessment of interest against the sovereign. *Stewart & Grindle, Inc. v. State*, 524 P.2d 1242 (Alaska 1974).

Other payment of interest may be necessary component of "just compensation". - Stewart & Grindle, Inc. v. State, 524 P.2d 1242 (Alaska 1974).

Before interest can accrue, there must be a "taking." Stewart & Grindle, Inc. v. State, 524 P.2d 1242 (Alaska 1974).

Where owner deprived of economic advantages but not liabilities. - If as a matter of constitutional law the property owner is entitled to interest from the moment the state takes legal possession, he should, a fortiori, receive interest where he has been deprived of all the economic advantages of legal ownership but is relieved of none of the liabilities. Stewart & Grindle, Inc. v. State, 524 P.2d 1242 (Alaska 1974).

When interest accrues where land is vacant and unimproved. - The institution of condemnation proceedings constitutes a compensable appropriation of vacant and unimproved land, and the property owner is constitutionally entitled to interest dating from the institution of such proceedings. Stewart & Grindle, Inc. v. State, 524 P.2d 1242 (Alaska 1974).

Under the Alaska statutory scheme, an owner of unimproved and untenanted property is deprived of both investment potential and the possibility of future development the moment a condemnation action commences. Meanwhile, the owner remains liable for property taxes, mortgage payments, and any other expenses incidental to legal ownership. Stewart & Grindle, Inc. v. State, 524 P.2d 1242 (Alaska 1974).

Collateral Refs -

Valuation of land and improvements and fixtures thereon separately or as unit, 1 ALR2d 878.

Relinquishment of part of land or incorporeal rights therein as affecting costs, 5 ALR2d 739.

Elements and measure of compensation for temporary use and occupancy, 7 ALR2d 1297.

New or additional compensation for use by municipality or public of subsurface of street or highway for purposes other than sewers, pipes, conduits for wires, and the like, 11 ALR2d 180.

Attorneys' fees as within statute imposing upon condemner liability for "expenses," "costs," and the like, 26 ALR2d 1295.

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

Measure of compensation in condemnation proceedings for pollution of stream, 49 ALR2d 267.

Amount of compensation of attorney for services in eminent domain proceeding in absence of contract or statute fixing amount, 56 ALR2d 13; 57 ALR3d 475; 57 ALR3d 550; 57 ALR3d 584; 58 ALR3d 201; 10 ALR5th 448; 17 ALR5th 366; 23 ALR5th 241; 86 ALR Fed. 866.

Fire risk or hazard as element of damages in condemnation proceedings, 63 ALR2d 313.

Liability of public utility to abutting owner for destruction or injury of trees in or near highway or street under provision requiring compensation for property taken for public use, 64 ALR2d 868.

Compensation or damages for condemnation of public utility plant, 68 ALR2d 392; 35 ALR4th 1263.

Solid mineral royalty under mining lease as real or personal property for purpose of payment of damages in condemnation proceedings, 68 ALR2d 735.

Cost to property owner of moving personal property as element of damages or compensation, 69 ALR2d 1453.

Liability for costs in trial tribunal in eminent domain proceedings as affected by offer or tender by condemnor, 70 ALR2d 804.

Liability of state, or its agency or board, for costs, 72 ALR2d 1379.

Right to damages or compensation upon condemnation of property, of holder of unexercised option to purchase, 85 ALR2d 588.

Bad reputation of condemned property derived from its illegal use for gambling, prostitution, or the like, as factor decreasing compensation or damages, 87 ALR2d 1156.

Distribution as between life tenant and remainderman of proceeds of condemned property, 91 ALR2d 963.

Mandamus to compel ascertainment of compensation for property taken or for injuries inflicted under the power of eminent domain, 91 ALR2d 991.

Changes in purchasing power of money as affecting compensation, 92 ALR2d 772.

Restrictive covenant or right to enforcement thereof as compensable property right, 4 ALR3d 1137.

Depreciation in value, from project for which land is condemned, as a factor in fixing compensation, 5 ALR3d 901.

Zoning as a factor in determination of damages in eminent domain, 9 ALR3d 291.

Deduction of benefits in determining compensation or damages in proceedings involving opening, widening, or otherwise altering highway, 13 ALR3d 1149.

Existence of restrictive covenant as element in fixing value of property condemned, 22 ALR3d 961.

Award of or pending proceedings for, compensation for property condemned as precluding action for damages arising from prior trespasses upon it, 33 ALR3d 1132.

Cost of substitute facilities as measure of compensation paid to state or municipality for condemnation of public property, 40 ALR3d 143.

Measure and elements of damage for limitation of access caused by conversion of conventional road into limited-access highway, 42 ALR3d 148.

Measure of damages for condemnation of cemetery lands, 42 ALR3d 1314.

Traffic noise and vibration from highway as element of damages in eminent domain, 51 ALR3d 860.

Condemned property's location in relation to proposed site of building complex or similar improvement as factor in fixing compensation, 51 ALR3d 1050.

Good will or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain, 58 ALR3d 566.

Loss of liquor license as compensable in condemnation proceedings, 58 ALR3d 581.

Compensation for diminution in value of the remainder of property resulting from taking or use of adjoining land of others for the same undertaking, 59 ALR3d 488.

Consideration of fact that landowner's remaining land will be subject to special assessment in fixing severance damages, 59 ALR3d 534.

Determination of just compensation for condemnation of billboards or other advertising signs, 73 ALR3d 1122.

Good will as element of damages for condemnation of property on which private business is conducted, 81 ALR3d 198.

Compensation for interest prepayment penalty in eminent domain proceedings, 84 ALR3d 946.

Measure of damages for injury to or destruction of shade or ornamental tree or shrub, 95 ALR3d 508.

Right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land - state cases, 95 ALR3d 752.

Un sightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97 ALR3d 587.

Recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

Recovery of exemplary or punitive damages from municipal corporation, 1 ALR4th 448.

Assemblage or plottage as factor affecting value in eminent domain proceedings, 8 ALR4th 1202.

Running of interest on judgment where both parties appeal, 11 ALR4th 1099.

Measure and elements of lessee's compensation for condemnor's taking or damaging of leasehold, 17 ALR4th 337.

Sufficiency of condemnor's negotiations required as preliminary to taking in eminent domain, 21 ALR4th 765.

Fear of powerline, gas or oil pipeline, or related structure as element of damages in easement condemnation proceeding, 23 ALR4th 631.

Damages resulting from temporary conditions incident to public improvements or repairs as compensable taking, 23 ALR4th 674.

Eminent domain: Compensability of loss of view from owner's property - state cases, 25 ALR4th 671.

Unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel, 59 ALR4th 308.

Compensability of loss of visibility of owner's property, 7 ALR5th 113.

Abutting owner's right to damages for limitation of access caused by traffic regulation, 15 ALR5th 821.

Validity, construction, and effect of statute or lease provision expressly governing rights and compensation of lessee upon condemnation of leased property, 22 ALR5th 327.

Measure of damages or compensation in eminent domain as affected by premises being restricted to particular educational, religious, charitable, or noncommercial use, 29 ALR5th 36.

Method of determining rate of interest allowed on award to owner of property taken by United States in eminent domain proceeding, 56 ALR Fed. 477.

Jury trial under Rule 71A(h) of Federal Rules of Civil Procedure (Fed. Rules Civ. Proc., Rule 71A(h), 28 U.S.C.A.) in condemnation proceedings by United States, 164 ALR Fed. 341.

Sec. 09.55.340. Defective title.

If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same as provided in AS 09.55.240 - 09.55.460.

History -

(Sec. 13.11 ch 101 SLA 1962)

Sec. 09.55.350. Time for paying compensation or damages and bond to build railroad fences and cattle guards.

The plaintiff shall, within 30 days after final judgment, pay the sum of money assessed. If the use is for railroad purposes, the plaintiff may, at the time of or before the payment, elect to build the fences and cattle guards. If the plaintiff so elects, the plaintiff shall execute to the defendant a bond, with one or more sureties to be approved by the court, in double the assessed cost of the same to build such fences and cattle guards within eight months from the time the railroad is built on the land taken. If the bond is given, the plaintiff need not pay the cost of the fences and cattle guards. In an action on the bond, the plaintiff may recover reasonable attorney fees.

History -

(Sec. 13.12 ch 101 SLA 1962)

Sec. 09.55.360. Payment or deposit and execution.

Payment may be made to the defendants entitled to payment, or the money may be deposited in court for the defendants and be distributed to those entitled to it. If the money is not so paid or deposited, the defendants may have execution as in civil cases. If the money cannot be obtained on execution, the court, upon a showing to that effect, shall set aside and annul the entire proceedings and restore possession of the property to the defendants if possession has been taken by the plaintiff.

History -

(Sec. 13.13 ch 101 SLA 1962)

Cross References -

For related court rule, see Civ. R. 72(j).

Decisions -

The holder of legal title to land taken is prima facie entitled to compensation under this section. *Forbis v. Cannon*, 35 Mont. 424, 90 P. 161 (1907), construing the Montana statute.

Sec. 09.55.370. Final order of condemnation.

When payments have been made and the bond given, if the plaintiff elects to give one as required by AS 09.55.350, the court shall make a final order of condemnation, which shall describe the property

condemned and the purposes of the condemnation. A copy of the order shall be recorded in the office of the recording district where the land is located, at which time the property described in the order vests in the plaintiff for the purposes specified in the order.

History -

(Sec. 13.14 ch 101 SLA 1962)

Revisors Notes -

Minor word changes related to the recording of documents were made in this section in 1988 under sec. 42, ch. 161, SLA 1988.

Decisions -

Final order of condemnation may not constitutionally precede payment of award. - The final order of condemnation follows the payment of the award and could not be entered in advance without infringing the constitutional mandate that private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner. *Great N. Ry. v. Benjamin*, 51 Mont. 167, 149 P. 968 (1915), construing the Montana statute.

Quoted in *Williams v. City of Valdez*, 603 P.2d 483 (Alaska 1979).

Sec. 09.55.380. Order authorizing plaintiff to continue in or take possession.

Upon application of the plaintiff at any time after the jury's verdict has been returned or the master's report has been filed in the court, the court may make an order that, upon payment into court of the amount of damages assessed in the report or by the jury, the plaintiff, if already in possession of the property sought to be condemned, may continue in possession and, if not in possession, the court may authorize the plaintiff to take possession of the property and use and possess it until the final conclusion of the proceedings, and that all actions and proceedings against the plaintiff on that account be stayed until that time. However, where an appeal is taken by the defendant, the court may also require the plaintiff to give a bond or undertaking with sufficient sureties before continuing or taking possession. The bond or undertaking shall be approved by the court and shall be in the sum the court may direct, and conditioned to pay defendant any additional damages and costs given by the judgment over and above the amount assessed, and the damages which defendant sustains if the property is not taken for public uses. For the purposes of this section the amount assessed as damages in the report or by the jury is considered as just compensation for the property appropriated until reassessed or changed in further proceedings. However, the plaintiff, by payment into court of the amount assessed or by giving security as above provided, is not precluded from an appeal, but may appeal in the manner and with the effect as if no money had been deposited or security given. If the plaintiff deposits the amount of the assessment and continues in possession or takes possession of the property and there is no dispute as to the ownership of the property, the defendant may at any time demand and receive from the court

the money deposited, and the demand or receipt does not bar or preclude the defendant from the right of appeal. However, if the amount of the assessment is reduced on appeal by either party, the defendant who has received the amount of the assessment deposited is liable to the plaintiff for the difference between the amount received by the defendant and the amount finally assessed with legal interest from the time the defendant received the money deposited, and it may be recovered by action.

History -

(Sec. 13.15 ch 101 SLA 1962; am Sec. 3 ch 138 SLA 1968)

Decisions -

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

Deposit of damages in court authorizes order for possession. - Where the amount awarded as damages was on deposit in the court, and still subject to be drawn down by defendant, this, in itself, entitled plaintiffs to an order for possession or continued possession "until the final conclusion of the proceedings." *Alaska Gold Recovery Co. v. Northern Mining & Trading Co.*, 7 Alaska 655 (1927), rev'd on other grounds, 25 F.2d 106 (9th Cir. 1928).

Quoted in *Stewart & Grindle, Inc. v. State*, 524 P.2d 1242 (Alaska 1974).

Cited in *Triangle, Inc. v. State*, 632 P.2d 965 (Alaska 1981).

Sec. 09.55.390. Acquisition of easements and additional powers of the court to require surrender of possession to plaintiff.

The right to take possession under this section is in addition to any other right to take possession provided in AS 09.55.240 - 09.55.460. In proceedings for the acquisition of easements for the transmission and distribution of electric energy, communications, water, steam, and gas, the court may, upon motion and after a hearing, fix the time during which and the terms upon which the parties in possession are required to surrender possession to the plaintiff. If the court finds that urgent public necessity requires, it may grant the plaintiff possession at any time after the action has been commenced. Notice of the hearing shall be as provided in the Alaska Rules of Civil Procedure, except that, where service by publication is required, notice may be given at any time following the date of the last publication by registered mail addressed to the defendant and to parties in possession at their last known addresses as shown on the latest tax roll of the political subdivision in which the premises are located or as indicated by other evidence that shall be satisfactory to the court.

History -

(Sec. 13.16 ch 101 SLA 1962)

Sec. 09.55.400. Deposit into court of estimated compensation and damages; costs and fees.

The order given under AS 09.55.390 requiring the parties in possession to surrender possession to the plaintiff shall require that the plaintiff deposit with the clerk of the court an amount of money determined by the court fairly to represent the estimated compensation and the estimated damages to the defendant and for the speedy occupation, including reasonable relocation costs if required. In addition the court shall include in its order a further requirement that the plaintiff execute and file with the clerk of the court a bond, approved as to form and as to sufficiency of the sureties by the court, in an amount equal to the amount of money required to be deposited, conditioned upon payment to the defendant of additional damages and costs found to be due to the defendant in the action. Costs or attorney fees may not be assessed against the defendant in an action brought under AS 09.55.390.

History -

(Sec. 13.17 ch 101 SLA 1962)

Revisors Notes -

In 1994, in the last sentence of this section, "Costs or attorney fees may not" was substituted for "No costs or attorney fees shall" to conform the section to the current style of the Alaska Statutes.

Cross References -

For related court rule, see Civ. R. 72(j).

Collateral Refs -

Payment or deposit of award in court as affecting condemnor's right to appeal, 40 ALR3d 203.

Sec. 09.55.410. Withdrawal of funds by party in interest.

The money deposited in the court or a part of it may be withdrawn by a party in interest in the manner provided in AS 09.55.440, and the court shall have the power to direct the payment of delinquent taxes and special assessments out of the amount determined to be just compensation and to make orders with respect to encumbrances, liens, rents, insurance, and other charges as are just and equitable.

History -

(Sec. 13.18 ch 101 SLA 1962)

Sec. 09.55.420. Declaration of taking by state or municipality.

(a) Where a proceeding is instituted under AS 09.55.240 - 09.55.460 by the state, it may file a declaration of taking with the complaint or at any time after the filing of the complaint, but before

judgment. Where a proceeding is instituted under AS 09.55.240 - 09.55.460 by a municipality in the exercise of eminent domain for street or highway, off-street automobile parking facilities, school, sewer, water, telephone, electric, other utility, and slum clearance purposes or use granted to cities of the first class, the governing body of the municipality may exercise the power through the filing of a declaration of taking with the complaint or at any time after the filing of the complaint, but before judgment. The declaration of taking procedure may not be used with relation to the property of rural electrification or telephone cooperatives or nonprofit associations receiving financial assistance from the federal government under the Rural Electrification Act; provided that no declaration of taking for off-street parking purposes may be used unless there has been public notice by publication in a newspaper of general circulation in the area for not less than once a week for four consecutive weeks followed by a full and complete public hearing held before the governing body of the first class city or municipality.

(b) [Repealed, Sec. 15 ch 59 SLA 1982].

History -

(Sec. 13.19 ch 101 SLA 1962; am Sec. 2 ch 122 SLA 1966; am Sec. 2 ch 62 SLA 1973; am Sec. 15 ch 59 SLA 1982)

Cross References -

For the Rural Electrification Act referred to in subsection (a), see 7 U.S.C. 901 et seq.

History Reports -

For report on ch. 122, SLA 1966 (HB 418 am 5), see 1966 House Journal, p. 432.

AG Opinions -

AS 09.55.420 - 09.55.440 were taken almost word for word from 40 USC 258a (now 40 USCS Sec. 3114), except for substitutions of "state, public utility district, or school district" for "United States." 1960 Op. Att'y Gen., No. 15.

A determination to condemn by an agency acting under power to condemn delegated to it by the legislature would not become a problem requiring judicial action unless a lack of necessity for a public use could be shown, and if there is no fraud, bad faith, or abuse of discretion. 1960 Op. Att'y Gen., No. 15.

The question of the necessity of taking land for public use is primarily a "legislative" question rather than a "judicial" question. 1960 Op. Att'y Gen., No. 15.

Land acquired by eminent domain for the Anchorage state office complex could be transferred in a land exchange and used for a different purpose free from any special use restrictions. There was some risk, however, of a challenge by the former owners of the land, particularly those still litigating the issue of just compensation for the earlier taking. July 24, 1986, Op. Att'y Gen.

Decisions -

Legislative history of this section. - See Greater Anchorage Area Borough v. 10 Acres More or Less, 563 P.2d 269 (Alaska 1977).

This section specifically authorizes the state to use a declaration of taking. Babinec v. State, 512 P.2d 563 (Alaska 1973), rev'd on other grounds, 586 P.2d 966 (Alaska 1978).

Basis in federal law. - Alaska's declaration of taking statutes were patterned upon the language of 40 U.S.C. Sec. 258(a) (now 40 USCS Sec. 3114) which governs "quick take" eminent domain proceedings by the United States. ARCO Pipeline Co. v. 3.60 Acres, More or Less, 539 P.2d 64 (Alaska 1975).

The declaration of taking is a power of eminent domain, and not only a manner of exercising a power otherwise conferred. More than procedure is involved; substantive rights are affected. Bridges v. Alaska Hous. Auth., 349 P.2d 149 (Alaska 1959); ARCO Pipeline Co. v. 3.60 Acres, More or Less, 539 P.2d 64 (Alaska 1975).

Power is strictly construed. - A grant of power of eminent domain is to be strictly construed against the condemning party and in favor of the property owner. Bridges v. Alaska Hous. Auth., 349 P.2d 149 (Alaska 1959).

Power is confined within definite limits. - The legislature was particular in selecting those upon whom the power to exercise a declaration of taking would be conferred and particular also in confining this authority within definite limits. Bridges v. Alaska Hous. Auth., 349 P.2d 149 (Alaska 1959).

The Alaska Housing Authority may not use a declaration of taking. Bridges v. Alaska Hous. Auth., 349 P.2d 149 (Alaska 1959); Bridges v. Alaska Hous. Auth., 352 P.2d 1118 (Alaska 1960).

Borough is "municipal division". - Under this provision, the term "municipal division" clearly encompasses boroughs as well as cities. Therefore, for purposes of the eminent domain statute, a borough is a municipal division and, as a municipality, could take land under this section. Greater Anchorage Area Borough v. 10 Acres More or Less, 563 P.2d 269 (Alaska 1977).

A borough's authority to condemn land for a school can be inferred from the eminent domain statutory scheme. Greater Anchorage Area Borough v. 10 Acres More or Less, 563 P.2d 269 (Alaska 1977).

Effect of declaration of taking. - A declaration of taking enlarges the rights of the condemning authority and reduces those of the landowner. Bridges v. Alaska Hous. Auth., 349 P.2d 149 (Alaska 1959); ARCO Pipeline Co. v. 3.60 Acres, More or Less, 539 P.2d 64 (Alaska 1975).

Summary exercise of power. - AS 09.55.420 - 09.55.450 were clearly intended to authorize a more summary and less judicially dependent exercise of the power of eminent domain. ARCO Pipeline Co. v. 3.60 Acres, More or Less, 539 P.2d 64 (Alaska 1975).

The condemnor may take immediate possession of the property upon the filing of a declaration of taking with the complaint. *Russian Orthodox Greek Catholic Church of N. Am. v. Alaska State Hous. Auth.*, 498 P.2d 737 (Alaska 1972).

Vesting subject only to limited right of owner to contest. - The intent of AS 09.55.420 - 09.55.450 was to bring, in summary fashion, statutory finality to the questions of title and right to possession even though litigation continues with respect to the ultimate amount of compensation to be paid. If such finality is to be given any meaningful effect, such vesting must be subject only to the rather limited right of the owner to contest the validity of the taking as not being statutorily authorized or as having been capriciously or arbitrarily exercised. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Owner must show taking results from clear abuse of discretion. - To permit the owner to challenge the necessity of the particular taking without an initial showing on his part that it is the result of some clear abuse of discretion is to give the concept of a declaration of taking no more effect than that of a complaint in any condemnation proceeding; such an interpretation would render the language of AS 09.55.440 essentially meaningless. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Condemnor need not show necessity of taking. - The trial court erred in its determination that, for purposes of the exercise of the power of condemnation by way of a declaration of taking, petitioners have the burden of showing consideration of possible alternate pipeline routes and of providing sufficient proof of the necessity of the particular route selected. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

A consideration of the clear legislative intent that the prompt completion of the pipeline be facilitated under the Right-of-Way Leasing Act (AS 38.35.010 et seq.), the supreme court's reading and analysis of certain critical provisions governing the effect of the use of a declaration of taking and the continued recognition and validation of the approach it adopted in *Bridges v. Alaska Hous. Auth.*, Sup. Ct. Op. No. 1 (File No. 16), 349 P.2d 149 (1959), rev'd on other grounds, Sup. Ct. Op. Nos. 8, 46, 352 P.2d 1118 (1960), lead to the conclusion that the court erred in concluding that in a proceeding for condemnation by way of a declaration of taking is empowered to require the condemnor to prove the necessity of a given taking. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Where it is clear that the use intended is public and statutorily authorized, and petitioners have presented un rebutted evidence to the effect that the design and construction criteria for the pipeline are most feasibly satisfied by the route across the property of respondent, it cannot be said that petitioner is under any duty to initially submit evidence that it has considered such alternate routing; nor can the failure to make such showing under the circumstances justify a finding of arbitrariness or an abuse of discretion. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Presumption that taking is reasonably requisite to realization of public use. - Once an authorized public use for the taking is established by the condemnor, and statutory and procedural requirements

are otherwise satisfied, that the particular taking is reasonably requisite to the realization of that use shall be presumed. ARCO Pipeline Co. v. 3.60 Acres, More or Less, 539 P.2d 64 (Alaska 1975).

The question of necessity under a declaration of taking is not one for initial judicial consideration as in the case of other condemnation proceedings. ARCO Pipeline Co. v. 3.60 Acres, More or Less, 539 P.2d 64 (Alaska 1975).

The concept of judicial review embodied in Alaska's general eminent domain statutes is inconsistent with, and inappropriate to, proceedings under a declaration of taking. ARCO Pipeline Co. v. 3.60 Acres, More or Less, 539 P.2d 64 (Alaska 1975).

In proceedings in eminent domain by way of a declaration of taking under AS 09.55.420 through 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).

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).

Distinction between various types of condemnation proceedings. - There exists a clear functional distinction between proceedings in condemnation under a declaration of taking and those under a complaint seeking condemnation and an order for possession. Under the former, title passes immediately upon filing and deposit - at which time, under AS 09.55.440, the property is deemed to be "condemned and taken for the use of the plaintiff." Under the latter no such vesting occurs; title does not vest, nor does "condemnation" actually occur until the final award is determined and an order and judgment of condemnation is entered by the court. ARCO Pipeline Co. v. 3.60 Acres, More or Less, 539 P.2d 64 (Alaska 1975).

The difference in the nature of proceedings in condemnation under a declaration of taking and those under a complaint seeking condemnation and an order for possession is not merely procedural; the almost summary quality of the former bespeaks the grant of an additional substantive power of condemnation which considerably reduces the rights of the landowner to contest the taking. ARCO Pipeline Co. v. 3.60 Acres, More or Less, 539 P.2d 64 (Alaska 1975).

Cited in State, DOT & Pub. Facilities v. 0.644 Acres, 613 P.2d 829 (Alaska 1980).

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 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.

History -

(Sec. 13.20 ch 101 SLA 1962; am Sec. 1 ch 149 SLA 1976)

Cross References -

For appearance on answer, see Civ. R. 72(e)(3).

Decisions -

Summary exercise of power. - AS 09.55.420 through 09.55.450 were clearly intended to authorize a more summary and less judicially dependent exercise of the power of eminent domain. *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)).

Condemnor need not show necessity of taking. - The trial court erred in its determination that, for purposes of the exercise of the power of condemnation by way of a declaration of taking, petitioners have the burden of showing consideration of possible alternate pipeline routes and of providing sufficient proof of the necessity of the particular route selected. *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)).

A consideration of the clear legislative intent that the prompt completion of the pipeline be facilitated under the Right-of-Way Leasing Act (AS 38.35.010 et seq.), the supreme court's reading and analysis of certain critical provisions governing the effect of the use of a declaration of taking and the continued recognition and validation of the approach it adopted in *Bridges v. Alaska Hous. Auth.*, Sup. Ct. Op. No. 1 (File No. 16), 349 P.2d 149 (1959), rev'd on other grounds, Sup. Ct. Op. Nos. 8, 46, 352 P.2d 1118 (1960), lead to the conclusion that the court erred in concluding that in a proceeding for condemnation by way of a declaration of taking is empowered to require the condemnor to prove the

necessity of a given taking. *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)).

Where it is clear that the use intended is public and statutorily authorized, and petitioners have presented un rebutted evidence to the effect that the design and construction criteria for the pipeline are most feasibly satisfied by the route across the property of respondent, it cannot be said that petitioner is under any duty to initially submit evidence that it has considered such alternate routing; nor can the failure to make such showing under the circumstances justify a finding of arbitrariness or an abuse of discretion. *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)).

Presumption that taking is reasonably requisite to realization of public use. - Once an authorized public use for the taking is established by the condemnor, and statutory and procedural requirements are otherwise satisfied, that the particular taking is reasonably requisite to the realization of that use shall be presumed. *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)).

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

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*, 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*, 704 P.2d 1340 (Alaska 1985).

Cited in *Hillstrand v. City of Homer*, 218 P.3d 685 (Alaska 2009).

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.

History -

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

Cross References -

For a statement of legislative intent relating to the provisions of ch. 26, SLA 1997, see Sec. 1, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts. For severability of the provisions of ch. 26, SLA 1997, see Sec. 56, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts.

Editors Notes -

Section 55, ch. 26, SLA 1997 provides that the provisions of ch. 26, SLA 1997 apply "to all causes of action accruing on or after August 7, 1997."

AG Opinions -

The Alaska declaration of taking statutes are as effective as the federal statutes in effecting the vesting of title in the condemnor of whatever interest in the land it seeks to condemn. If the state undertakes to obtain title to real property in fee simple absolute by the filing of a declaration of taking that is the title which it obtains. 1960 Op. Att'y Gen., No. 15.

Land acquired by eminent domain for the Anchorage state office complex could be transferred in a land exchange and used for a different purpose free from any special use restrictions. There was some risk, however, of a challenge by the former owners of the land, particularly those still litigating the issue of just compensation for the earlier taking. July 24, 1986, Op. Att'y Gen.

Decisions -

I. General Consideration.

Constitutionality. - This section, which fixes the pre- and post-judgment interest awarded in "quick-take" condemnations at six percent, is unconstitutional since it constitutes an unsound exception to most Alaskan lawsuits, including some condemnation actions, in which trial courts must assess pre- and post-judgment interest at the legal rate of 10.5 percent. *City of Valdez v. 18.99 Acres*, 686 P.2d 682 (Alaska 1984) (decided before the 1985 amendment).

This section violates the Alaska Constitution's equal protection clause because awarding different interest rates to property owners on the basis of the type of condemnation action a government brings against them has no rational basis. *City of Valdez v. 18.99 Acres*, 686 P.2d 682 (Alaska 1984) (decided before the 1985 amendment).

Distinction between various types of condemnation proceedings. - There exists a clear functional distinction between proceedings in condemnation under a declaration of taking and those under a complaint seeking condemnation and an order for possession. Under the former, title passes immediately upon filing and deposit - at which time, under this section, the property is deemed to be "condemned and taken for the use of the plaintiff." Under the latter no such vesting occurs; title does not vest, nor does "condemnation" actually occur until the final award is determined and an order and judgment of condemnation is entered by the court. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

The difference in the nature of proceedings in condemnation under a declaration of taking and those under a complaint seeking condemnation and an order for possession is not merely procedural; the almost summary quality of the former bespeaks the grant of an additional substantive power of condemnation which considerably reduces the rights of the landowner to contest the taking. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Construction with AS 09.55.330. - The provisions of subsection (a) are not irreconcilable with those pertaining to another form of eminent domain proceeding in AS 09.55.330. *State v. Alaska Continental Dev. Corp.*, 630 P.2d 977 (Alaska 1980).

Under a declaration of taking, title and right to possession pass to the state immediately upon filing and depositing an amount for just compensation, while under a complaint for condemnation this "taking" does not occur until judgment is entered by the court. *State v. Alaska Continental Dev. Corp.*, 630 P.2d 977 (Alaska 1980).

Summary exercise of power intended. - AS 09.55.420 - 09.55.450 were clearly intended to authorize a more summary and less judicially dependent exercise of the power of eminent domain. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Vesting subject only to limited right of owner to contest. - The intent of AS 09.55.420 - 09.55.450 was to bring, in summary fashion, statutory finality to the questions of title and right to possession even though litigation continues with respect to the ultimate amount of compensation to be paid. If such finality is to be given any meaningful effect, such vesting must be subject only to the rather limited right of the owner to contest the validity of the taking as not being statutorily authorized or as having been capriciously or arbitrarily exercised. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Owner must show taking results from clear abuse of discretion. - To permit the owner to challenge the necessity of the particular taking without an initial showing on his part that it is the result of some clear abuse of discretion is to give the concept of a declaration of taking no more effect than that of a complaint in any condemnation proceeding; such an interpretation would render the language of this section essentially meaningless. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Condemnor need not show necessity of taking. - The trial court erred in its determination that, for purposes of the exercise of the power of condemnation by way of a declaration of taking, petitioners have the burden of showing consideration of possible alternate pipeline routes and of providing sufficient proof of the necessity of the particular route selected. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

A consideration of the clear legislative intent that the prompt completion of the pipeline be facilitated under the Right-of-Way Leasing Act (AS 38.35.010 et seq.), the supreme court's reading and analysis of certain critical provisions governing the effect of the use of a declaration of taking and the continued recognition and validation of the approach it adopted in *Bridges v. Alaska Hous. Auth.*, 349 P.2d 149 (1959), rev'd on other grounds, 352 P.2d 1118 (1960), lead to the conclusion that the court erred in concluding that in a proceeding for condemnation by way of a declaration of taking is empowered to require the condemnor to prove the necessity of a given taking. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Where it is clear that the use intended is public and statutorily authorized, and petitioners have presented un rebutted evidence to the effect that the design and construction criteria for the pipeline are most feasibly satisfied by the route across the property of respondent, it cannot be said that petitioner is under any duty to initially submit evidence that it has considered such alternate routing; nor can the failure to make such showing under the circumstances justify a finding of arbitrariness or an abuse of discretion. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Presumption that taking is reasonably requisite to realization of public use. - Once an authorized public use for the taking is established by the condemnor, and statutory and procedural requirements are otherwise satisfied, that the particular taking is reasonably requisite to the realization of that use shall be presumed. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

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 through 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 this section, 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).

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).

Appropriate measure of "just compensation". - "Fair market value," or the price a willing buyer would pay a willing seller for property, is the appropriate measure of "just compensation." *State v. Alaska Continental Dev. Corp.*, 630 P.2d 977 (Alaska 1980).

A blanket estimate and deposit covering several parcels and not attended by allocation among them is not an effective tender of any sum for any parcel. *Russian Orthodox Greek Catholic Church of N. Am. v. Alaska State Hous. Auth.*, 498 P.2d 737 (Alaska 1972).

Multiple party interest in property for which lump sum is deposited without segregation. - When more than one party has an interest in property and a lump sum is deposited without segregation as to the amount estimated to be just compensation for the various interests, it is generally impossible to receive a speedy withdrawal of the funds. Under those circumstances the property owners necessarily will suffer a delay in receiving compensation for the value of their interest in the property taken. Where the amount to be deposited for the property may readily be segregated to reflect such interests, the government is obligated to allocate the deposit among the parcels taken in order to stop the running of interest. *Russian Orthodox Greek Catholic Church of N. Am. v. Alaska State Hous. Auth.*, 498 P.2d 737 (Alaska 1972).

Depositing separate amounts for structure, furnishings, and fixtures. - Where the appraisal allocated separate values for the fee interest in the land contained in two parcels as well as for a hotel structure and its furnishings and fixtures, it would have been a simple matter to deposit a separate amount for the hotel structure, its furnishings and fixtures. Since this was not done, the property owner should not be deprived of interest from the time of taking of the property until such time as he receives payment. *Russian Orthodox Greek Catholic Church of N. Am. v. Alaska State Hous. Auth.*, 498 P.2d 737 (Alaska 1972).

Quoted in *Babinec v. State*, 512 P.2d 563 (Alaska 1973); *Triangle, Inc. v. State*, 632 P.2d 965 (Alaska 1981).

Cited in *Tallman v. State, Dep't of Pub. Works*, 506 P.2d 679 (Alaska 1973); *State, DOT & Pub. Facilities v. 0.644 Acres*, 613 P.2d 829 (Alaska 1980); *State v. 4.62 Acres*, 704 P.2d 1340 (Alaska 1985); *Hillstrand v. City of Homer*, 218 P.3d 685 (Alaska 2009); *Lundgren v. City of Wasilla*, 220 P.3d 919 (Alaska 2009).

II. Interest.

Compensation for delays. - Alaska Const., art. I, Sec. 18, necessitates that a property owner be compensated for delays incurred between the dates of the government's taking of property and making payment. If an award were paid immediately upon the taking of the land by the state no damages to the property owner would ensue. But where, due to the necessity of legal proceedings to ascertain fair market value of property, delays ensue, the property owner is entitled to an adequate sum to reimburse him for the loss of use of the money during the period of such delay. To hold otherwise would constitute a taking of the property without just compensation. Therefore, it is well established that the owner of property is entitled to interest from the date of taking to the date of payment. *Russian Orthodox Greek Catholic Church of N. Am. v. Alaska State Hous. Auth.*, 498 P.2d 737 (Alaska 1972).

Precedence of interest provisions. - A statute such as subsection (a), specifically addressed to the subject of interest on judgments under a declaration of taking, must take precedence over statutes pertaining to more general subject matter. *State v. Alaska Continental Dev. Corp.*, 630 P.2d 977 (Alaska 1980).

When interest statutorily provided for. - Alaska statutorily provides for the payment of interest in eminent domain actions only where the State enters into immediate actual or constructive possession. *Stewart & Grindle, Inc. v. State*, 524 P.2d 1242 (Alaska 1974).

There is no statutory provision for payment of interest from the date a condemnation action is instituted where the property owner remains in possession. *Stewart & Grindle, Inc. v. State*, 524 P.2d 1242 (Alaska 1974).

Only the legislature has the power to direct the assessment of interest against the sovereign. *Stewart & Grindle, Inc. v. State*, 524 P.2d 1242 (Alaska 1974).

Other payment of interest may be necessary component of "just compensation". - See Stewart & Grindle, Inc. v. State, 524 P.2d 1242 (Alaska 1974).

Before interest can accrue, there must be a taking. Stewart & Grindle, Inc. v. State, 524 P.2d 1242 (Alaska 1974).

Where owner deprived of economic advantages but not liabilities. - If as a matter of constitutional law the property owner is entitled to interest from the moment the state takes legal possession, he should, a fortiori, receive interest where he has been deprived of all the economic advantages of legal ownership but is relieved of none of the liabilities. Stewart & Grindle, Inc. v. State, 524 P.2d 1242 (Alaska 1974).

When interest accrues where land is vacant and unimproved. - The institution of condemnation proceedings constitutes a compensable appropriation of vacant and unimproved land, and the property owner is constitutionally entitled to interest dating from the institution of such proceedings. Stewart & Grindle, Inc. v. State, 524 P.2d 1242 (Alaska 1974).

Under the Alaska statutory scheme, an owner of unimproved and untenanted property is deprived of both investment potential and the possibility of future development the moment a condemnation action commences. Meanwhile, the owner remains liable for property taxes, mortgage payments, and any other expenses incidental to legal ownership. Stewart & Grindle, Inc. v. State, 524 P.2d 1242 (Alaska 1974).

Assessment of interest. - This section provides for interest on the amount awarded which exceeds the amount paid into court under the declaration of taking. Russian Orthodox Greek Catholic Church of N. Am. v. Alaska State Hous. Auth., 498 P.2d 737 (Alaska 1972).

Interest is only assessed on the amount of the award in excess of what was deposited by the state at the time of the declaration of taking. State v. Alaska Continental Dev. Corp., 630 P.2d 977 (Alaska 1980).

State was entitled to a rental offset against interest for the period between the filing of its complaint and the successful seizure of possession of condemnees' parking lot, where condemnees had possession for that period and gave no consideration for it. 22,757 Square Feet, More or Less v. State, 799 P.2d 777 (Alaska 1990).

When interest avoidable. - Interest can be avoided only where the amount paid into court is available for immediate withdrawal by the owner or owners of the separate interests in the land. Russian Orthodox Greek Catholic Church of N. Am. v. Alaska State Hous. Auth., 498 P.2d 737 (Alaska 1972).

Failure to withdraw funds attributable to delay of owner. - In situations where the failure to withdraw funds on deposit in the registry of the court is attributable to the delay of the property owner, no interest should be allowed on the portion of the award so deposited. Russian Orthodox Greek Catholic Church of N. Am. v. Alaska State Hous. Auth., 498 P.2d 737 (Alaska 1972).

Property owners' failure to make a motion to withdraw the deposited funds constituted a delay attributable to them, and therefore no interest was payable on the amount deposited by the state. *Hofstad v. State*, 763 P.2d 1351 (Alaska 1988).

Interest rate. - The language of subsection (a) of this section unambiguously provides that the rate of judgment interest awarded under a declaration of taking proceeding such as this case will equal six percent for the time before and after judgment is entered. *State v. Alaska Continental Dev. Corp.*, 630 P.2d 977 (Alaska 1980).

Absent more evidence that the legislature intended otherwise, the supreme court of Alaska must presume the legislature was aware of the existence of this section when it enacted amendments raising the rate of interest on judgments in other cases, and made a conscious decision not to amend this section. *State v. Alaska Continental Dev. Corp.*, 630 P.2d 977 (Alaska 1980).

Collateral Refs -

Waiver, surrender or limitation by condemnor, after award, of rights or part of property acquired, 5 ALR2d 724.

Rights in condemnation award where land taken was subject to possible rights of reverter or re-entry, 81 ALR2d 568.

Who, as between condemnor and condemnee, bears risk of loss or destruction of property occurring after commencement but before completion of eminent domain proceedings, 89 ALR2d 1076.

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 may not be granted the plaintiff until after the running of the time for the defendant to file an objection to the declaration of taking or until after the hearing on any objection to the declaration of taking if the objection is made in the time allowed by law. Where the party in possession withdraws any part of the award and remains in possession, the court may fix a reasonable rental for the premises to be paid by that party to the plaintiff during such possession.

(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.

History -

(Sec. 13.22 ch 101 SLA 1962; am Sec. 2 ch 149 SLA 1976)

AG Opinions -

Possession is deferred pursuant to this section for at least that period of time which is granted to the defendant to file a challenge to the declaration of taking and for a greater period if the court should so direct. 1960 Op. Att'y Gen., No. 15, issued prior to the 1976 amendment, which added the language beginning "or until after the hearing" to the end of the second sentence of subsection (a).

Decisions -

Summary exercise of power intended. - AS 09.55.420 - 09.55.450 were clearly intended to authorize a more summary and less judicially dependent exercise of the power of eminent domain. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Vesting subject only to limited right of owner to contest. - The intent of AS 09.55.420 - 09.55.450 was to bring, in summary fashion, statutory finality to the questions of title and right to possession even though litigation continues with respect to the ultimate amount of compensation to be paid. If such finality is to be given any meaningful effect, such vesting must be subject only to the rather limited right of the owner to contest the validity of the taking as not being statutorily authorized or as having been capriciously or arbitrarily exercised. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Purpose of Subsection (a). - Subsection (a) is designed to prevent a condemnee from receiving both the value of the interest on the condemnation award and the value of continued use. *22,757 Square Feet, More or Less v. State*, 799 P.2d 777 (Alaska 1990).

Power of court to fix time and terms for surrendering possession. - Upon the filing of the declaration and a deposit of the amount of compensation estimated to be due, title to the real property vests in the condemning agency and such real property shall be deemed to be condemned and taken for the use of the condemning agency. And then, without the necessity of awaiting the report of the commissioners and assessment of damages, the court is given the power "to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession" to the condemning authority. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

The court may enter an order placing the plaintiff in possession of the property upon the filing of the declaration of taking and the deposit of the estimated compensation. *Russian Orthodox Greek Catholic Church of N. Am. v. Alaska State Hous. Auth.*, 498 P.2d 737 (Alaska 1972).

State was entitled to a rental offset against interest for the period between the filing of its complaint and the successful seizure of possession of condemnees' parking lot, where condemnees had possession for that period and gave no consideration for it. *22,757 Square Feet, More or Less v. State*, 799 P.2d 777 (Alaska 1990).

It is the objection which calls for the hearing. A motion for hearing with supporting affidavits is not required. *State, DOT & Pub. Facilities v. 0.644 Acres*, 613 P.2d 829 (Alaska 1980).

Showings necessary where owner contests validity of taking. - See *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Distinction between various types of condemnation proceedings. - See *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Quoted in *Vezey v. State*, 798 P.2d 327 (Alaska 1990).

Collateral Refs -

Condemnor's acquisition of, or right to, minerals under land taken in eminent domain, 36 ALR2d 1424.

Charging landowner with rent or use value of land where he remains in possession after condemnation, 20 ALR3d 1164.

Sec. 09.55.460. Effect of appeal.

(a) An appeal or a bond or undertaking given does not operate 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 the property was not taken by necessity for a public use or purpose in a manner compatible with the greatest public good and the least private injury. In the event of that finding, the court shall enter the judgment necessary to (1) compensate the persons entitled to it for the period during which the property was in the possession of the plaintiff, (2) recover for the plaintiff any award paid to any person, and (3) order the plaintiff to restore the property to the condition in which it existed at the time of the filing of the declaration of taking unless such restoration is impossible, in which case the court shall award damages to the proper persons as compensation for any diminution in the value of the property caused by the plaintiff's wrongful possession.

History -

(Sec. 13.23 ch 101 SLA 1962; am Sec. 3 ch 149 SLA 1976)

Revisors Notes -

In 1994, in (a) of this section, "An appeal or a bond or undertaking given does not operate" was substituted for "No appeal or a bond or undertaking given operates" to conform the section to the current style of the Alaska Statutes.

History Reports -

For report on ch. 149, SLA 1976 (HCSSB 546), see 1976 House Journal, p. 945.

Decisions -

Presumption that taking is reasonably requisite to realization of public use. - Once an authorized public use for the taking is established by the condemnor, and statutory and procedural requirements are otherwise satisfied, that the particular taking is reasonably requisite to the realization of that use shall be presumed. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

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

The question of necessity under a declaration of taking is not one for initial judicial consideration as in the case of other condemnation proceedings. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

The concept of judicial review embodied in Alaska's general eminent domain statutes is inconsistent with, and inappropriate to, proceedings under a declaration of taking. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Absent clear showing of fraud, court without authority to review question of necessity. - 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 subsection (b) of this section 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).

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).

Only specific allegations of fraud, bad faith or some gross abuse of discretion in locating the pipeline could raise issues sufficient to permit judicial review of the necessity of the taking. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

Failure of condemnor to make showing was not abuse of discretion. - Where it is clear that the use intended is public and statutorily authorized, and condemnor has presented un rebutted evidence to the effect that the design and construction criteria for the pipeline are most feasibly satisfied by the route across the property of the owner, it cannot be said that condemnor is under any duty to initially

submit evidence that it has considered such alternate routing; nor can the failure to make such showing under the circumstances justify a finding of arbitrariness or an abuse of discretion. *ARCO Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975).

No implied waiver. - Subsection (b) of this section, which provides in part, that when the court finds that the property was not taken by necessity for a public use or purpose in a manner compatible with the greatest public good and least private injury; the court shall enter the judgment necessary to "recover for the plaintiff any award paid to any person," militates against a finding of implied waiver from the respondents' withdrawal of money deposited in the registry of the court by the state in conjunction with its filing of a declaration of taking against respondents' property. *State, DOT & Pub. Facilities v. 0.644 Acres*, 613 P.2d 829 (Alaska 1980).

Injury should be minimized. - This section, which mandates in subsection (b) that "private injury" be considered with reference to the particular properties involved, contemplates that the injury suffered by each individual should be minimized to the extent that it is reasonably possible to do so without impairing the integrity and function of the project and without adding unreasonable costs to the project. *State, DOT & Pub. Facilities v. 0.644 Acres*, 613 P.2d 829 (Alaska 1980).

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*, 652 P.2d 465 (Alaska 1982).

Cited in *Hillstrand v. City of Homer*, 218 P.3d 685 (Alaska 2009); *Lundgren v. City of Wasilla*, 220 P.3d 919 (Alaska 2009).

Collateral Refs -

Appeal relating to amount of condemnation award, 50 ALR2d 1386.

Reviewability, on appeal from final judgment in eminent domain proceeding, of interlocutory order, as affected by fact that order was separately appealable, 79 ALR2d 1400.

Running of interest on judgment where both parties appeal, 11 ALR4th 1099.

28-LS1545\N
Bullock
3/10/14

CS FOR HOUSE BILL NO. 371(TRA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-EIGHTH LEGISLATURE - SECOND SESSION

BY THE HOUSE TRANSPORTATION COMMITTEE

Offered:

Referred:

Sponsor(s): HOUSE TRANSPORTATION COMMITTEE BY REQUEST

A BILL

FOR AN ACT ENTITLED

1 **"An Act providing for the Department of Transportation and Public Facilities to hold**
2 **the surface estate of certain state land; relating to the transfer of certain state land and**
3 **materials; relating to the lease, sale, or disposal by the Department of Transportation**
4 **and Public Facilities of rights-of-way, property interests, or improvements; relating to**
5 **the grant of certain easements over submerged state land to the federal government;**
6 **relating to the conveyance of land for right-of-way purposes from the Alaska Railroad**
7 **Corporation to the Department of Transportation and Public Facilities; and providing**
8 **for an effective date."**

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

10 * **Section 1.** AS 02.15 is amended by adding a new section to article 2 to read:

11 **Sec. 02.15.065. Surface estate of state airport land.** The department has
12 primary authority to manage the surface estate of land and property interests acquired

1 or held by the state for an airport, airport access road, or airport-related operations,
2 including land conveyed by the federal government under sec. 35 of the Alaska
3 Omnibus Act of 1959 (P.L. 86-70, 73 Stat. 141). In the exercise of that authority, the
4 department may require terms and conditions that are applicable to a proposed use of
5 the surface estate that may be authorized by the Department of Natural Resources in
6 the administration of the state program for the conservation and development of
7 natural resources.

8 * **Sec. 2.** AS 02.15.070(b) is repealed and reenacted to read:

9 (b) If the department determines that land, property interests, or improvements
10 are no longer necessary, the department shall notify the commissioner of natural
11 resources of the determination and may

12 (1) transfer the land, property interests, or improvements to the
13 Department of Natural Resources, if requested by the commissioner of natural
14 resources; or

15 (2) dispose of the land, property interests, or improvements by sale,
16 lease, vacation, or exchange, according to terms, standards, and conditions established
17 by the commissioner.

18 * **Sec. 3.** AS 02.15.070 is amended by adding a new subsection to read:

19 (c) If the department determines that a part of the state public domain is
20 reasonably necessary for an airport or as a source of materials for the construction or
21 maintenance of an airport, the department shall file with the Department of Natural
22 Resources a written determination and preliminary property plan identifying the
23 portion of or interest in the public domain land that the department reasonably needs,
24 subject to the following:

25 (1) the department shall provide public notice of the intended transfer
26 by posting the written determination and preliminary property plan on the Alaska
27 Online Public Notice System (AS 44.62.175);

28 (2) within four months after the filing, the Department of Natural
29 Resources shall transfer title to the surface estate to the department, subject to valid
30 existing rights; the transfer of land or materials under this subsection is not a disposal
31 of state land, and the transfer is presumed to be in the public interest;

1 (3) a transfer under this subsection vests control of the surface estate in
2 the department, including the right to extract or use sand, gravel, rock, timber, or other
3 construction materials, and the right to tunnel, ditch, contour, excavate, or otherwise
4 develop or use the land for transportation, utility, and related purposes;

5 (4) within two years after the completion of construction or of the
6 opening of a materials site, the department shall prepare and record a record of survey
7 of the property received by the department.

8 * **Sec. 4.** AS 19.05.070(b) is repealed and reenacted to read:

9 (b) If the department determines that land, property interests, or improvements
10 are no longer necessary, the department shall notify the commissioner of natural
11 resources of the determination and may

12 (1) transfer the land, property interests, or improvements to the
13 Department of Natural Resources, if requested by the commissioner of natural
14 resources; or

15 (2) dispose of the land, property interests, or improvements by sale,
16 lease, vacation, or exchange, according to terms, standards, and conditions established
17 by the commissioner.

18 * **Sec. 5.** AS 19.05.080 is amended by adding a new subsection to read:

19 (b) If the department determines that a part of the state public domain is
20 reasonably necessary for the right-of-way of a highway or as a source of materials for
21 the construction or maintenance of a highway, the department shall file with the
22 Department of Natural Resources a written determination and preliminary right-of-
23 way plan identifying the portion of or interest in the public domain land that the
24 department reasonably needs, subject to the following:

25 (1) the department shall provide public notice of the intended transfer
26 by posting the written determination and preliminary right-of-way plan on the Alaska
27 Online Public Notice System (AS 44.62.175);

28 (2) within four months after the filing, the Department of Natural
29 Resources shall transfer title to the surface estate to the department, subject to valid
30 existing rights; the transfer of land or materials under this subsection is not a disposal
31 of state land, and the transfer is presumed to be in the public interest;

1 (3) a transfer under this subsection vests control of the surface estate in
2 the department, including the right to extract or use sand gravel, rock, timber, or other
3 construction materials, and the right to tunnel, ditch, contour, excavate, or otherwise
4 develop or use the land for transportation, utility, and related purposes;

5 (4) within two years after the completion of construction or the
6 opening of a materials site, the department shall prepare and record a record of survey
7 of the property received by the department.

8 * **Sec. 6.** AS 19.05 is amended by adding a new section to article 2 to read:

9 **Sec. 19.05.124. Surface estate of state highway land.** The department has
10 primary authority to manage the surface estate of land and property interests acquired
11 or held by the state for the state highway system, including land conveyed by the
12 federal government under sec. 21 of the Alaska Omnibus Act of 1959 (P.L. 86-70, 73
13 Stat. 141), maintenance yards, materials sites, and other land and property interests
14 necessary for the operation of the state highway system. In the exercise of that
15 authority, the department may require terms and conditions that are applicable to a
16 proposed use of the surface estate that may be authorized by the Department of
17 Natural Resources in the administration of the state program for the conservation and
18 development of natural resources.

19 * **Sec. 7.** AS 35.10.120 is amended to read:

20 **Sec. 35.10.120. Lease or sale of [MARINE OR] harbor facilities.** The
21 department may lease for a period up to 50 years or may sell for a nominal sum to a
22 municipality [AN INCORPORATED CITY, PUBLIC UTILITY DISTRICT,] or
23 other incorporated area [MARINE OR] harbor facilities constructed or rebuilt with
24 territorial funds or state funds or with territorial or state and federal matching funds.
25 The intent of this section is to allow a municipality [CITIES, PUBLIC UTILITY
26 DISTRICTS, AND OTHER INCORPORATED AREAS] to lease or purchase a
27 [MARINE OR] harbor facility [FACILITIES] so that the municipality [THEY] may
28 enforce municipal ordinances on the harbor facility [THEM] and legally assess fees
29 to meet maintenance costs.

30 * **Sec. 8.** AS 35.20.010 is amended by adding a new subsection to read:

31 (b) If the department determines that a part of the state public domain is

1 reasonably necessary for a public building or public facility or as a source of materials
2 for the construction or maintenance of a building or facility, the department shall file
3 with the Department of Natural Resources a written determination and preliminary site
4 plan showing the portion of or interest in the public domain land that the department
5 reasonably needs, subject to the following:

6 (1) the department shall provide public notice of the intended transfer
7 by posting the written determination and preliminary site plan on the Alaska Online
8 Public Notice System (AS 44.62.175);

9 (2) within four months after the filing, the Department of Natural
10 Resources shall transfer title to the surface estate to the department, subject to valid
11 existing rights; the transfer of land or materials under this subsection is not a disposal
12 of state land, and the transfer is presumed to be in the public interest;

13 (3) a transfer under this subsection vests control of the surface estate in
14 the department, including the right to extract or use sand, gravel, rock, timber, or other
15 construction materials, and the right to tunnel, ditch, contour, excavate, or otherwise
16 develop or use the land for a public building or public facility;

17 (4) within two years after the completion of construction or the
18 opening of a materials site, the department shall prepare and record a record of survey
19 of the property received by the department.

20 * **Sec. 9.** AS 35.20 is amended by adding a new section to read:

21 **Sec. 35.20.015. Surface estate of public facility land.** The department has
22 primary authority to manage the surface estate of land and property interests acquired
23 or held by the state for public buildings and public facilities owned or controlled by
24 the department. In the exercise of that authority, the department may require terms and
25 conditions that are applicable to a proposed use of the surface estate that may be
26 authorized by the Department of Natural Resources in the administration of the state
27 program for the conservation and development of natural resources.

28 * **Sec. 10.** AS 35.20.070 is repealed and reenacted to read:

29 **Sec. 35.20.070. Leasing and disposing of land and property interests.** If the
30 department determines that land, property interests, or improvements are no longer
31 necessary, the department shall notify the commissioner of natural resources of the

1 determination and may

2 (1) transfer the land, property interests, or improvements to the
3 Department of Natural Resources, if requested by the commissioner of natural
4 resources; or

5 (2) dispose of the land, property interests, or improvements by sale,
6 lease, vacation, or exchange, according to terms, standards, and conditions established
7 by the commissioner.

8 * **Sec. 11.** AS 38.05.030(b) is amended to read:

9 (b) The provisions of this chapter do not apply to a [ANY] power, duty, or
10 authority now or in the future granted to the Department of Transportation and Public
11 Facilities in the name of the state, to acquire, use, lease, dispose of, or exchange real
12 property, or any interest in real property or to a transfer of land under
13 AS 02.15.070(c), AS 19.05.080(b), or AS 35.20.010(b). Land transferred
14 [ASSIGNED] by the division of lands to the Department of Transportation and Public
15 Facilities may [SHALL] be returned to [THE MANAGEMENT OF] the division of
16 lands when the land [IT] is no longer needed for the purposes transferred
17 [ASSIGNED].

18 * **Sec. 12.** AS 38.05.030(d) is amended to read:

19 (d) The [EXCEPT FOR LAND THAT IS REQUIRED TO BE RETURNED
20 TO THE DEPARTMENT UNDER (b) OF THIS SECTION, THE] Department of
21 Transportation and Public Facilities may dispose of real property acquired [BY IT]
22 under AS 02.15.065, 02.15.070, AS 19.05.040(1), (2), and (9), 19.05.080 - 19.05.124,
23 AS 35.05.040(1), (2), and (6) [AS 02.15.070, AS 19.05.040(1) AND (2), 19.05.080 -
24 19.05.120, AS 35.05.040(1) AND (2)], and AS 35.20.010 - 35.20.050. Land conveyed
25 under this section to a municipality for less than fair market value shall be credited
26 against the municipality's entitlement under AS 29.65.

27 * **Sec. 13.** AS 38.05.030 is amended by adding a new subsection to read:

28 (h) Notwithstanding the provisions in AS 38.05.550 - 38.05.565, extraction
29 and use of materials from sources and sites owned by the state is not a disposal of
30 materials when used for the construction or maintenance of an airport, highway, or
31 public facility owned by the state. The department may not collect payments, set time

1 limitations, or otherwise restrict the Department of Transportation and Public
2 Facilities from access to a source of materials and a site owned by the state.

3 * **Sec. 14.** AS 42.40.285 is amended to read:

4 **Sec. 42.40.285. Legislative approval required.** Unless the legislature
5 approves the action by law, the corporation may not

6 (1) exchange, donate, sell, or otherwise convey its entire interest in
7 land to an entity other than the Department of Transportation and Public
8 Facilities for state right-of-way purposes;

9 (2) issue bonds;

10 (3) extend railroad lines; this paragraph does not apply to a spur,
11 industrial, team, switching, or side track;

12 (4) lease land for a period in excess of 95 years unless the corporation
13 reserves the right to terminate the lease if the land is needed for railroad purposes;

14 (5) apply for or accept a grant of federal land within a municipality;
15 before approving an action under this paragraph, the legislature must determine that
16 the federal land is required for essential railroad purposes; this paragraph does not
17 apply to the application for or acceptance of a grant of federal land associated with

18 (A) the Anchorage-Wasilla line change project on Elmendorf
19 Air Force Base and Fort Richardson;

20 (B) the Fairbanks intermodal rail yard expansion project;

21 (C) a conveyance of rail properties of the Alaska Railroad
22 under the original Alaska Railroad Transfer Act of 1982 as set out in Title VI,
23 P.L. 97-468; in this subparagraph, "rail properties of the Alaska Railroad" has
24 the meaning given in 45 U.S.C. 1202(10).

25 * **Sec. 15.** The uncodified law of the State of Alaska is amended by adding a new section to
26 read:

27 **TRANSFER OF CERTAIN MAINTENANCE STATIONS.** The Department of
28 Natural Resources shall transfer the surface estate to the access roads, camps, and airstrips at
29 Franklin Bluffs and Happy Valley on the James Dalton Highway to the Department of
30 Transportation and Public Facilities. The transfer of those properties to the Department of
31 Transportation and Public Facilities does not affect or otherwise alter current licenses and

1 permits issued by the Department of Natural Resources for use of those properties. Within 60
2 days after the effective date of this Act, the Department of Transportation and Public
3 Facilities shall notify a person holding a license or permit of the administrative transfer of
4 those properties. Not later than January 1, 2015, the Department of Transportation and Public
5 Facilities shall accept and begin to process permit and license applications through its rural
6 airport permitting program for an activity currently authorized by permit or license by the
7 Department of Natural Resources and normally permitted through rural airport permitting
8 authorities. Other valid permits or licenses issued by the Department of Natural Resources
9 continue according to the terms of the permit or license.

10 * **Sec. 16.** The uncodified law of the State of Alaska is amended by adding a new section to
11 read:

12 GRANT OF CERTAIN EASEMENTS OVER SUBMERGED STATE LAND TO
13 IMPLEMENT A RECIPROCAL EXCHANGE. Notwithstanding a provision of state law to
14 the contrary, the easements over submerged land identified on the map numbered 92337 and
15 dated June 15, 2005, and that are part of the reciprocal exchange of rights-of-way and
16 easements enacted into federal law under 119 Stat. 1177 are granted to the United States
17 Forest Service. The easements identified in this section and granted to the United States
18 Forest Service may have a term of years for a period of more than 55 years if the
19 commissioner of natural resources determines the length of the term to be in the best interest
20 of the state.

21 * **Sec. 17.** This Act takes effect immediately under AS 01.10.070(c).