ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672
4405 STRA SB 193 - SB 303 1284

SENATOR
JOHN B. "JACK" COGHILL
Chairman

Senator Jan Faiks—Vice Chairman
Senator Mitch Abood
Senator Paul Fischer
Senator Joe Josephson

Alaska State Legislature

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4921

Senate Committee on Transportation

MEMORANDUM

To: Senate Advisory Council

From: John Manly, A.A. /jm

Date: March 22, 1985

Re: Eminent Domain proceedings

The Transportation Committee is presently considering SB 193, a Governor's bill proposing changes to statutes pertaining to eminent domain and the power of taking. One of these changes, under section 7 of the bill, would clarify what is meant by the phrase "in a manner compatible with the greatest public good or least private injury", by requiring the appellant (defendant) to establish by clear and convincing evidence that the condemning authority's decision to condemn was "arbitrary, capricious, or an abuse of discretion."

The proposed change is purported to merely codify existing law in Alaska as it has evolved through case law. In other words, it is currently the practice in this state that if a property-owner's property is condemned through eminent domain proceedings, and the property-owner contests the taking, the property-owner becomes the appellant, and the burden is then on the his shoulders to prove his case.

What we would like to know, before we go further with this bill, is if there are jurisdictions elsewhere in the country in which the burden is on the condemning authority to prove its case, if the property-owner appeals the taking. This would be opposite to present practice in Alaska, and apparently on the federal level, but would give greater weight to the individual in this area of law.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

BILL SHEFFIELD, GOVERNOR

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465-3603

MAR 2 6 1985

March 26, 1985

The Honorable John B. Coghill
Chairman, Senate Transportation Committee
Alaska State Senate
Pouch V
Juneau, AK 99811

Re: SB 193 relating to the power of eminent domain

Dear Senator Coghill:

During the Senate Transportation Committee meeting on March 20, 1985, inquiry was made regarding the approach of other jurisdictions on the issue of which party has the burden of proof that a particular taking is not necessary for a public purpose. My research indicates that it is routinely assigned to the property owner. In section 7 of SB 193, we proposed language codifying this legal principal which presently exists in Alaska law. The committee's amendment to the bill which deleted that language will not have much of an impact upon eminent domain practice in Alaska. However, if the committee further amends the bill by assigning to the condemning authority the burden to prove that its decision to condemn was not arbitrary, capricious, nor an abuse of discretion; the contrary is true. Statutory language of that sort would make Alaska unique among American jurisdictions, i.e. in effect the taking could be presumed invalid unless proven otherwise by the condemning authority.

The necessity for the taking of private property enjoys a presumption of validity for very sound public policy reasons. An executive agency undertakes a particular public works project by the direction of the legislature through the appropriation process. That public works project is brought to fruition by that executive agency under a grant of power conferred upon it by the legislature, which includes the grant of the power of eminent domain. Consequently, when, in the course of constructing a public works project, it becomes necessary to acquire interests in land necessary for its construction by the use of the power of eminent domain, the executive agency is fulfilling the will of the legislature, the elected representatives of the people. (It

is not fulfilling an agenda of its own.) It is for these reasons that the burden is assigned to the property owner to prove that the taking is not necessary for a public purpose. To assign the burden to the condemning authority is in our opinion contrary to sound public policy. Consequently, the administration is opposed to the amendment of SB 193 which would shift the burden of proof on the issue of necessity to the condemning authority.

If I may be of any further assistance in this matter, please contact me.

Sincerely yours,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: William F. Cummings
William F. Cummings
Assistant Attorney General

WFC:prm

Rule 72. Eminent Domain.

(a) **Applicability of Other Rules.** The procedure for the condemnation of property under the power of eminent domain shall be governed by these rules, except as otherwise provided in this rule.

(b) **Joinder of Properties.** The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use.

(c) **Complaint.**

(1) *Caption.* The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property.

(2) *Contents.* The complaint shall contain a short and plain statement of the authority and necessity for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification accompanied by a map or plat thereof, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. If an easement or right-of-way is sought to be condemned, the complaint and the attached map or plat must show the location, route and termini.

Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners".

Process shall be served as provided in subdivision (d) of

this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and the defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

(3) *Filing.* In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.

(d) **Process.**

(1) *Notice—Delivery.* Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendants subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.

(2) *Form.* Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of his property sufficient for its identification, the interest to be taken, the authority and necessity for the taking, and the use for which the property is to be taken. The notice must show the location, route and termini of any easement or right-of-way sought to be condemned.

The notice shall also state that the defendant may serve upon the plaintiff's attorney an answer within twenty (20) days after service of the notice, that a failure to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation, and that at a designated time and place the court will conduct a hearing to determine the authority and necessity for the taking.

The notice shall further state that the defendant, without filing an answer, may serve on plaintiff's attorney a notice of appearance designating the property in which he claims to be interested; that thereafter he will receive notice of all proceedings affecting it; that regardless of whether the defendant ap-

pears or answers, he may present evidence as to the amount of compensation to be paid for his property at the hearing or trial of the issue of just compensation; that regardless of whether he appears or answers he may share in the distribution of the award; that if neither an appearance nor an answer is filed the court will proceed to hear the action and to fix the compensation without further notice; and that if neither an appearance nor an answer is filed before ten (10) days after the jury's verdict is returned or the master's report is filed, judgment by default will be taken against the defendant for the relief demanded in the complaint.

(3) *Service of Notice.*

[a] *Personal Service.* Personal service of the notice shall be made in accordance with Civil Rule 4.

[b] *Unknown Owners.* Service of the notice upon unknown owners shall be made in accordance with Civil Rule 4(e).

(4) *Return—Amendment.* Proof of service of the notice shall be made, and amendment of the notice or proof of its service allowed, in the manner provided for the return and amendment of the summons under Rule 4(f) and (g).

(c) **Appearance or Answer.**

(1) *No Objection or Defense.* If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it.

(2) *Objection or Defense—Answer.* If a defendant has any objection or defense to the taking of his property, he shall serve his answer within twenty (20) days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all his objections and defenses to the taking of his property.

(3) *Declaration of Taking—Objection.* Any motion questioning the validity of a declaration of taking shall be served on or before the time provided in the notice for answering, or within twenty (20) days after the filing of the declaration of

taking, whichever is later. For good cause shown, the court may permit a later filing of the motion.

(4) *Waiver of Defenses and Objections.* A defendant waives all defenses and objections not presented as provided in this subdivision (c), but at the hearing or trial of the issue of just compensation, whether or not he has previously appeared or answered, and even though a default judgment may have been entered against him, he may present evidence as to the amount of compensation to be paid for his property, and he also may share in the distribution of the award if his claim

for compensation is filed before the award is ordered distributed by the court.

(5) *Other Pleading or Motion Precluded.* No other pleading or motion asserting any additional defense or objection shall be allowed.

(f) **Amendment of Pleadings.** Without leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivison (i) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5(b), upon any party affected thereby who has appeared and, in the manner provided in subdivison (d) of this rule, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy of each amendment, and he shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve his answer to the amended pleading, in the form and manner and with the same effect as there provided.

(g) **Substitution of Parties.** If a defendant dies or becomes incompetent or transfers his interest after his joinder, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing are to be served upon a person not already a party, service shall be made as provided in subdivision (d) (3) of this rule.

(h) **Hearing and Trial.**

(1) *Procedure.* The hearing of the allegations and evidence of persons interested, whether before the court, jury, or a master, shall be conducted in the manner prescribed by these rules.

(2) *Hearing Before Master.* A master appointed by the court to ascertain the amount to be paid by the plaintiff to each owner or other person interested in the property shall report to the court pursuant to Rule 53(d) (1). If all parties object to the appointment of a master, they may have a trial by jury or, if the

jury is waived by all parties to the action, a trial without a jury, by filing a demand for it within the time allowed for answer or within the additional time which the court may set.

(3) *Notice of Report.* Upon the filing of a report by the master, the clerk shall forthwith mail notice of the filing to all parties who have appeared or answered.

(4) *Appeal and Trial De Novo.* The plaintiff may appeal within ten (10) days after being served with notice of the filing of the master's report. Any defendant who has appeared or answered before the filing of a master's report may appeal within fifteen (15) days after being served with notice of the filing of the master's report. Any other interested person desiring to appeal from a master's report must take his appeal within fifteen (15) days after the filing of such report.

(5) *Notice of Appeal.* A party or other interested person may appeal from the master's report by filing with the clerk a notice of appeal in duplicate, with sufficient additional copies for all parties who have appeared or answered. The notice of appeal shall contain the following:

[a] The title of the action.

[b] The names of the parties taking the appeal.

[c] The master's report or part thereof appealed from and the date of its filing.

[d] The name of the court to which the appeal is taken.

[e] A concise statement of the grounds of appeal.

Notification of the filing of the notice shall be given by the clerk by mailing copies thereof to all parties who have appeared or answered other than the party or parties taking the appeal, but his failure to do so does not affect the validity of the appeal. The notification to a party shall be given by mailing a copy of the notice of appeal to his attorney of record, or if the party is not represented by an attorney, then to the party at his last known address.

(i) **Dismissal of Action.**

(1) *As of Right.* If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that

property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) *By Stipulation.* Before the entry of any judgment vesting the plaintiff with the title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.

(3) *By Order of the Court.* At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

(4) *Effect.* Except as otherwise provided in the notice, or stipulation of dismissal, or order of the court, any dismissal is without prejudice.

(j) **Deposit and Its Distribution.** The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain, and although not so required, may make such deposit. In such case the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to him on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to him, the court shall enter judgment against him and in favor of the plaintiff for the over-payment.

(k) **Costs.** Costs and attorney's fees incurred by the defendant shall not be assessed against the plaintiff, unless:

(1) the taking of the property is denied; or

(2) the plaintiff appeals from the allowance of the master and the defendant does not appeal; or

(3) the award of the court was at least ten (10) percent larger than the amount deposited by the condemning authority or the allowance of the master from which an appeal was taken by the defendant; or

(4) the action was dismissed under the provisions of paragraph (i) of this rule; or

(5) allowance of costs and attorney's fees appears necessary to achieve a just and adequate compensation of the owner.

Attorney's fees allowed under this paragraph shall be commensurate with the time committed by the attorney to the case throughout the entire proceedings. (Amended by Supreme Court Order 414 effective August 1, 1980; and by Supreme Court Order 465 effective June 1, 1981)

CROSS REFERENCES: AS 09.55.240—AS 09.55.460; Civ. Form 148
(c) CROSS REFERENCES: AS 09.55.240—AS 09.55.270; Civ. Form 145
(d) (2) CROSS REFERENCE: Civ. Form 146
(d) (3) CROSS REFERENCE: Civ. Form 147
(e) (3) CROSS REFERENCES: AS 09.55.420—AS 09.55.460; Civ. Form 149
(e) (4) CROSS REFERENCE: AS 09.55.310
(h) (4) CROSS REFERENCE: AA 09.55.310

BILL SHEFFIELD
GOVERNOR

ch 193

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

The Honorable Don Bennett
President of the Senate
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Senator Bennett:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill making several changes in the exercise of the power of eminent domain under AS 09.55.240 -- 09.55.460. This bill recognizes recent developments in the law and contains provisions that should streamline eminent domain procedures without prejudicing landowners' rights. The result will alleviate delays that public works projects can experience. The public is well served by the amendments because it will get the use of its public works projects sooner and at lower public expense.

Section 1 of the bill amends AS 09.55.270 by requiring the condemning authority, before the taking of real property by a "declaration of taking," to prepare a decisional document summarizing the decision. Section 4 amends AS 09.55.430 by requiring that the decisional document be part of the declaration of taking. These two amendments codify and implement the holding in Ship Creek Hydraulic Syndicate v. State, 685 P.2d 715 (Alaska 1984).

Section 2 amends AS 09.55.300(a) by clearly specifying the power of the superior court when considering the requirement that a taking be made in a manner compatible with the greatest public good and least private injury. The court is to make its analysis based upon a review of the decisional document required by sec. 1 and on appropriate evidence as set out in sec. 7 of the bill.

Section 3 amends AS 09.55.410 by clearly stating the proposition that, if any money on deposit is withdrawn by a party in interest, the withdrawal operates as a waiver of all issues, except the amount of just compensation. This amendment codifies existing practice. We believe that it is reasonable because it requires the property owner early

GOVERNOR'S LETTER OF TRANSMITTAL

on to make a choice between attempting to stop the project or only litigating the issue of compensation.

Section 5 amends AS 09.55.440(a) by raising the statutory interest allowed under the declaration-of-taking procedure to the lawful interest rate. Under AS 45.45.010, that interest rate is currently 10.5 percent. Under the existing language of AS 09.55.440(a), a property owner is entitled to interest at the rate of six percent on the amount finally awarded that is in excess of the initial deposit. This interest rate was found unconstitutional in City of Valdez v. 18.99 Acres, 686 P.2d 682 (Alaska 1984), where the court held that condemning authorities are required to pay lawful interest.

Section 6 provides a number of amendments to AS 09.55.450(a) that will streamline the procedure in the superior court. First, the court is required to schedule a hearing for the review of the taking within 30 days after the filing of any objections to the declaration of taking or as soon after that as possible. This particular amendment does not create a priority over other matters on the court's calendar, but does place a requirement upon the superior court to deal expeditiously with hearings on objections to the authority and necessity for the taking. When combined with the changed nature of that hearing under the amendments contained in sec. 7, the scheduling of a hearing on any objections to the declaration of taking should be greatly expedited.

Section 6 also contains amendments that clearly state that if a defendant does not make his objections in a timely fashion, he has waived his objections and defenses to the taking. This amendment parallels the existing law found in Civil Rule 72(e)(4). We believe that the amendment is necessary to avoid situations such as those that arose in Stewart v. State, Op. No. 2895 (Alaska, December 28, 1984).

In that case, the state filed its declaration of taking, and the property owners filed no objection to the taking. The project went out to bid and the contract was awarded. Six months after the action was filed and two months after the award of the contract, the property owners entered an objection to the taking and the superior court allowed the objections. Rather than litigate the propriety of the taking, the state dismissed its declaration of taking and redesigned its project. This resulted in higher construction costs. Section 6's amendment, absent extraordinary circumstances that the superior court may in the interest

of justice address, is not prejudicial to a defendant's rights; it places him in no worse position than any other civil litigant; i.e., objections or defenses that are not made are waived.

Section 7 contains amendments that are a departure from the existing law and practice. Existing AS 09.55.460 requires an analysis by the superior court to determine whether the taking was accomplished in a manner compatible with the greatest public good and least private injury. If the court finds that the taking was not made in that manner, the state is divested of the title it has acquired with its declaration of taking. The difficulty with the current statute is that no procedural standards are given for the analysis, and no burden of proof is assigned to the parties. The result, in practice, of this lack of clarity in the statute has been generally to assign to the defendant the burden of proof that the taking was not made in a manner compatible with the greatest public good and least private injury, and a "mini-trial" was necessary for the taking of the parties' evidence.

Court calendars are quite crowded and, when coupled with the "mini-trial" practice, the effect has been to delay the hearing until a significant block of the court's calendar can be set aside. One recent Supreme Court case, Ship Creek Hydraulic Syndicate v. State, cited above, produced a hearing in the trial court which lasted nearly five days, during which expert testimony was presented by both sides. While the trial court did ultimately confirm the taking, time that could have been devoted to the project was lost. It should also be noted that the requirement for a decisional document, which is set out in sec. 1, is a product of this case.

The language proposed in AS 09.55.460(c) assigns the burden to the defendant to prove by clear and convincing evidence that the decision to condemn was arbitrary, capricious, or an abuse of discretion. We believe that this language is a codification of the holdings in State v. 0.644 Acres, 613 P.2d 829 (Alaska 1980) and State v. 2.072 Acres, 652 P.2d 465 (Alaska 1982), and only represents a departure from existing statutory language in that the appropriate review standards are clearly and succinctly stated.

The language proposed in AS 09.55.450(d) is a departure from existing practice, but, when combined with the amendments regarding decisional documents, should streamline the procedure in the superior court without prejudicing

the property owners' rights. Under this language, the superior court will consider the decisional document, any supporting reports, studies, or statements relied upon in reaching the decision to condemn, and any affidavits the parties might submit, as well as depositions taken by the parties. There is no provision for the taking of evidence by the court except in situations in which the court allows the presentation of additional evidence. This proposed language provides for a review process by the superior court which is analogous to the function it serves when reviewing decisions of the district court and administrative agencies under AS 22.15.240 and Appellate Rule 609.

Under the cited statute and rule, the superior court reviews cases involving significant liberty and property interests that have been adjudicated by the district court and a variety of administrative agencies. These appeals are all upon the record without the taking of additional evidence, except as provided by statute and rule in extraordinary circumstances.

There are significant differences between the record in an appeal from the district court or an administrative agency and the decisional document envisioned in sec. 1 of this bill. The most important is that the aggrieved party will have presented his case before the matter is in the superior court. We believe that allowing the parties to submit affidavits and depositions in response to, or to support objections to, the taking is a reasonable substitute. We reach this conclusion because of the extensive nature of the background analysis that is performed in the course of developing a public works project. Typically, location and design studies and, in many instances, environmental impact studies are prepared. An additional component of the planning and design of a public works project is a public hearing process during which comments are solicited from the public. Furthermore, AS 35.30.010 requires approval by local planning and zoning commissions. An analogous approval is required under AS 09.55.275 for any replatting which is necessary to accommodate the project. By the time an eminent domain action is filed, the project is a well-known entity and well defined, and has been the subject of local political decisions and adjudication procedures under AS 35.30.010 and AS 09.55.275.

With this extensive administrative background, we believe that augmenting the evidence before the court with depositions and affidavits provides the superior court an adequate basis to review the appropriateness of the taking.

Rb 193

Under the amendments in this bill, the superior court has the discretion to allow the presentation of additional evidence as it does in its appellate jurisdiction.

I urge your favorable action on this measure, so that our eminent domain code accurately reflects the law, and so that the public's business is handled in an expeditious and fair manner for all concerned.

Sincerely,

Bill Sheffield
Governor

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST
Bill/~~Resolution~~ No.: SB 193
Title:

Sponsor: Rules Committee
Requestor:
Date of Request:

FISCAL DETAIL
Agency Affected: Transportation & Public Faci
Program Category Affected: Capital Projects

BRU, Program or Subprogram(s) Affected:
Right of Way & Land Acquisition

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Although a dollar amount cannot be identified in this fiscal note, this bill should definitely provide a savings to the State. It will alleviate problems that have developed in regard to eminent domain procedures which have the potential to seriously delay badly needed public work projects. This bill should improve eminent domain procedures without prejudicing property owners' rights.

Prepared By: Milton H. Lentz, Chief, ~~R/W~~ & Land Acq. Phone: 465-2985
Division: Standards & Technical Services/HQ Date: 2/13/85

Approved by Commissioner: Date: 2/14/85
Agency: Dept. of Transportation & Public Facilities

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

ZERO FISCAL NOTE & ANALYSIS

ANALYSIS OF FISCAL NOTE

"An Act relating to the power of eminent domain; and providing for an effective date"

This bill recognizes recent development in the law and contains provisions that should streamline eminent domain procedures without prejudicing property owner's rights.

First, this would require the court to schedule a hearing for the review of the taking within 30 days after the filing of any objections to the declaration of taking or as soon after that as possible. This particular amendment does not create a priority over other matters on the court's calendar, but does place a requirement upon the Superior Court to deal expeditiously with hearings on objections to the authority and necessity for the taking.

This bill would amend AS 09-55-410 by clearly stating that, if any money on deposit is withdrawn by a party in interest, the withdrawal operates as a waiver of all issues except the amount of just compensation. This would require the property owner early on to make a choice between attempting to stop the project or only litigating the issue of compensation. This bill would also raise the statutory interest allowed under the declaration of taking procedure to the lawful interest rate.

This bill would clearly state that if a defendant does not make his objections in a timely manner, he has waived his objection and defense to the taking.

It is concluded that legislation that leaves a property owner's substantive rights intact, but that changes the procedural aspects of the litigation to a more effective and timely manner so that capital projects are not delayed is in the best interest of the public.

Although a dollar amount cannot be identified, this bill should provide a savings to the State, since it will alleviate problems that have developed in regard to eminent domain procedure which have the potential to seriously delay badly needed public work project.

Chapter 45. Trade Practices.

Article 1. Interest.

Sec. 45.45.010. Legal rate of interest. (a) The rate of interest in the state is 10.5 percent a year and no more on money after it is due except as provided in (b) of this section.

(b) No interest may be charged by express agreement of the parties in a contract or loan commitment which is more than five percentage points above the annual rate charged member banks for advances by the 12th Federal Reserve District on the day on which the contract or loan commitment is made. A contract or loan commitment in which the principal amount exceeds $25,000 is exempt from the limitation of this subsection.

(c) *[Repealed, § 3 ch 84 SLA 1973.]*

(d) *[Repealed, § 2 ch 94 SLA 1981.]*

(e) *[Repealed, § 4 ch 146 SLA 1974.]*

(f) No bank, credit union, savings and loan institution, pension fund, insurance company or mortgage company may require or accept any percent of ownership or profits above its interest rate. This subsection does not apply to a loan if the principal amount of the loan is $1,000,000 or more and the term of the loan is five years or more.

(g) Loan contracts and commitments covering one- to four-family dwellings may be prepaid without penalty, except federally insured loans that require a prepayment penalty.

(h) If the limitations on interest rates provided for in this section are inconsistent with the provisions of any other statute covering maximum interest, service charges or discount rates then the provisions of the other statute prevail. (§ 25-1-1 ACLA 1949; am § 20 ch 143 SLA 1968; am § 2 ch 69 SLA 1969; am §§ 1, 2 ch 94 SLA 1969; am §§ 1, 2 ch 239 SLA 1970; am §§ 1 — 3 ch 84 SLA 1973; am §§ 1 — 4 ch 146 SLA 1974; am § 1 ch 110 SLA 1976; am § 1 ch 159 SLA 1976; am § 2 ch 107 SLA 1980; am §§ 1, 2 ch 94 SLA 1981; am § 1 ch 56 SLA 1982)

Cross references. -- As to alternate technology and power resource loans, see AS 45.88.030(e).

Effect of amendments. — The 1981 amendment, in subsection (b), deleted "dated after June 4, 1976" following "contract or loan commitment" and substituted "on the day on" for "that prevailed on the 25th day of the month preceding the commencement of the calendar quarter during" preceding "which the contract" in the first sentence and substituted "$25,000" for "$100,000" preceding "is exempt" in the second sentence. The

AS 45.45.010 - INTEREST RATE

State v. Alaska Land Title Ass'n, Sup. Ct. Op. No. 2681 (File Nos. 5407, 5408), P.2d (1983).

48 U.S.C. § 321d does not apply to patents issued under the Small Tract Act of 1938, 43 U.S.C. §§ 682a-682(e) (now repealed). State v. Alaska Land Title Ass'n, Sup. Ct. Op. No. 2681 (File Nos. 5407, 5408), P.2d (1983).

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, Sup. Ct. Op. No. 2681 (File Nos. 5407, 5408), P.2d (1983).

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. (§ 13.04 ch 101 SLA 1962)

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

NOTES TO DECISIONS

Editor's note. — All notes from Montana decisions appearing under this section are constructions of the Montana statute from which this section derives.

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, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

Such 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, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (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, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (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, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (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).

The complaint should allege both that the use to which the property is to be applied is a use authorized by law and that the taking is necessary to such use. City of Helena v. Harvey, 9 P. 903 (Mont. 1886).

Which 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., Sup. Ct. Op. No. 1 (File No. 16), 349 P.2d 149 (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).

Taking for use authorized by law is not conclusive that taking is necessary. — By providing that the right to take property for public use is founded upon a use authorized by law and that the use for such purpose is necessary, the law itself recognizes the fact that a mere taking for a use authorized by law is not conclusive that the taking is necessary for such use. City of Helena v. Harvey, 9 P. 903 (Mont. 1886).

The rule of necessity must be determinative of the right to take in each instance. Northern Pac. Ry. v. McAdow, 121 P. 473 (Mont. 1912).

But absolute necessity is not required. — An absolute necessity is not a prerequisite to the exercise of the law of eminent domain. Butte A. & Pac. Ry. v. Montana U. Ry., 41 P. 232 (Mont. 1895).

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., Sup. Ct. Op. No. 1192 (File No. 2504), 540 P.2d 1056 (1975).

Question of necessity is one of fact. — In an action to condemn private property for a public use, the question of necessity is one of fact, to be determined as other questions of fact, in view of all the evidence in the case. State ex rel. Livingston v. District Court, 300 P. 916 (Mont. 1931).

And involves both public and private considerations. — The question of necessity in a given case involves a consideration of facts which relate to the public and also to the private citizen whose property may be injured. State ex rel. Livingston v. District Court, 300 P. 916 (Mont. 1931).

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., Sup. Ct. Op. No. 1192 (File No. 2504), 540 P.2d 1056 (1975).

Evidence should show that the land is reasonably required for the purpose of effecting the object of its condemnation. State ex rel. Livingston v. District Court, 300 P. 916 (Mont. 1931).

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., Sup. Ct. Op. No. 1192 (File No. 2504), 540 P.2d 1056 (1975).

Proof of unnecessary injury. — When an attempt is made to show that the location proposed is unnecessarily injurious, the proof should be clear and convincing; otherwise no location could ever be made. State ex rel. Livingston v. District Court, 300 P. 916 (Mont. 1931).

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., Sup. Ct. Op. No. 1192 (File No. 2504), 540 P.2d 1056 (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., Sup. Ct. Op. No. 1192 (File No. 2504), 540 P.2d 1056 (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., Sup. Ct. Op. No. 1192 (File No. 2504), 540 P.2d 1056 (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. Marcules, 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).

Convenience and enhanced profits are insufficient to permit appropriation. — That the appropriation of a particular piece of property would promote convenience of operation and enhance the profits of the business of a railroad company is not alone a sufficient reason for permitting it. Northern Pac. Ry. v. McAdow, 121 P. 473 (Mont. 1912).

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

Sec. 09.55.275. Replat approval. No agency of the state or municipality may acquire property located within a municipality exercising the powers conferred by AS 29.33.150 — 29.33.245 which results in a boundary change unless the agency or municipality first obtains from the municipal platting authority preliminary approval of a replat showing clearly the location of the proposed public streets, easements, rights-of-way, and other taking of private property. Final approval of replat shall be similarly obtained. However, if a state agency clearly demonstrates an overriding state interest, a waiver to the approval requirements of this section may be granted by the governor. The platting authority shall treat applications for replat made by state or local governmental agencies in the same manner as replat petitions originated by private landowners. (§ 2 ch 96 SLA 1975)

Sec. 09.55.280. Entry upon land. In all cases where land is required for public use, the state, the public entity, or persons having the authority to condemn, or its agents in charge of the use may enter upon the land and make examination, surveys, and maps and locate the boundaries; but it shall be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of 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. (§ 13.05 ch 101 SLA 1962)

and the deposit of the estimated compensation. Russian Orthodox Greek Catholic Church of N. Am. v. Alaska State Hous. Auth., Sup. Ct. Op. No. 809 (File No. 1600), 498 P.2d 737 (1972).

It is the objection which calls for the hearing. A motion for hearing with supporting affidavits is not required. State, Dep't of Transp. & Pub. Facilities v. 0.644 Acres, Sup. Ct. Op. No. 2118 (File No. 4861), 613 P.2d 829 (1980).

As to showings necessary where owner contests validity of taking, see Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

For 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, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

Collateral references. — 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) No appeal or a bond or undertaking given operates to prevent or delay the vesting of title to real property or the right to possession of it.

(b) The plaintiff may not be divested of a title or possession acquired except where the court finds that 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. (§ 13.23 ch 101 SLA 1962; am § 3 ch 149 SLA 1976)

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

NOTES TO 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, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (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, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

The concept of judicial review embodied in Alaska's general eminent domain stat-

AS 09.55.460

utes is inconsistent with, and inappropriate to, proceedings under a declaration of taking. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

Absent clear 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 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, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (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, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (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, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (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 unrebutted evidence to the effect that the design and construction criteria for the pipeline are most feasibly satisfied by the route across the property of 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, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (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, Dep't of Transp. & Pub. Facilities v. 0.644 Acres, Sup. Ct. Op. No. 2118 (File No. 4861), 613 P.2d 829 (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, Dep't of Transp. & Pub. Facilities v. 0.644 Acres, Sup. Ct. Op. No. 2118 (File No. 4861), 613 P.2d 829 (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, Dep't of Transp. & Pub. Facilities v. 2.072 Acres, More or Less, Sup. Ct. Op. No. 2575 (File No. 6159), 652 P.2d 465 (1982).

Collateral references. — 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.

the basic distinction arises between a question of fact and a question of law. Taylor v. Interior Enterprises, Inc., Sup. Ct. Op. No. 621 (File No. 1113), 471 P.2d 405 (1970).

Questions of fact may not be re-examined by court. — Where there is a trial by jury, questions of fact must be decided by the jury and may not be re-examined by the court. Taylor v. Interior Enterprises, Inc., Sup. Ct. Op. No. 621 (File No. 1113), 471 P.2d 405 (1970).

Criterion for determining sufficency of evidence for jury. — In deciding whether the evidence is sufficient to raise a question of fact to be presented to the jury, the court applies a criterion. In Alaska's courts the criterion is whether there is room for a difference of opinion among reasonable men as to the factual issue in controversy. If there is, the issue is submitted to the jury for its determination. If not, the court decides the issue without reference to the jury. Taylor v. Interior Enterprises, Inc., Sup. Ct. Op. No. 621 (File No. 1113), 471 P.2d 405 (1970).

Power of removing factual issues from jury. — The courts have exercised the power of removing from consideration by a jury factual issues in a case where the court decides there is insufficient evidence to raise a question of fact to be presented to the jury. Taylor v. Interior Enterprises, Inc., Sup. Ct. Op. No. 621 (File No. 1113), 471 P.2d 405 (1970).

Section does not preclude review of rulings on motions to set aside awards. — Nothing in this section precludes appellate review of the trial judges' rulings on motions to set aside awards. Fruit v. Schreiner, Sup. Ct. Op. No. 838 (File Nos. 1526, 1546), 502 P.2d 133 (1972).

Applicability of fair cross-section standard to civil jury selections. — See Malvo v. J.C. Penney Co., Sup. Ct. Op. No. 901 (File No. 1630), 512 P.2d 575 (1973).

Applied in State v. Kaatz, Sup. Ct. Op. No. 1536 (File No. 3080), 572 P.2d 775 (1977).

Quoted in Knudsen v. City of Anchorage, Sup. Ct. Op. No. 21 (File No. 58), 358 P.2d 375 (1960); Patrick v. Sedwick, Sup. Ct. Op. No. 206 (File No. 314), 391 P.2d 453 (1964); Pennington v. Snow, Sup. Ct. Op. No. 625 (File No. 1101), 471 P.2d 370 (1970); Martinez v. Bullock, Sup. Ct. Op. No. 1152 (File No. 2209), 535 P.2d 1200 (1975); Jeffries v. Glacier State Tel. Co., Sup. Ct. Op. No. 1985 (File No. 4298), 604 P.2d 4 (1979).

Cited in Lee v. State, Sup. Ct. Op. No. 749 (File No. 1395), 490 P.2d 1206 (1971).

Section 17. Imprisonment for Debt. There shall be no imprisonment for debt. This section does not prohibit civil arrest of absconding debtors.

The gist of the offense under AS 28.35.026 is failure to return an automobile with a conscious purpose to injure the owner and not mere failure to pay the rental price. Hence, the constitutional prohibition against imprisonment for debt has not been violated. Speidel v. State, Sup. Ct. Op. No. 584 (File No. 1014), 460 P.2d 77 (1969).

Section 18. Eminent Domain. Private property shall not be taken or damaged for public use without just compensation.

Cross reference. — As to compensation and damages awarded for property taken by eminent domain, see AS 09.55.330.

I. General Consideration.
II. Damage.
III. Taking.
IV. Just Compensation.

I. GENERAL CONSIDERATION.

Construction. — The supreme court has liberally construed this section in favor of the private property owner. Alsop v. State, Sup. Ct. Op. No. 1764 (File No. 3023), 586 P.2d 1236 (1978).

ALASKA CONSTITUTION ART. 1 § 18

Compensation for personal property. — Reading Alaska Const., art. I, § 18, and Alaska Const., art. I, § 1, in paria 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., Sup. Ct. Op. No. 496 (File No. 924), 459 P.2d 480 (1969).

There is no clear legislative intent manifested that personal property taken or damaged by public use should not be justly compensated. Stroh v. State Hous. Auth., Superior Court, 3rd Jud. Dist., No. 65-1222, 459 P.2d 484 (1969).

See note under catchline "Personal property used on land not considered in determining compensation" under analysis line IV, "Just Compensation."

Chattel as real estate. — 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. State Hous. Auth., Superior Court, 3rd Jud. Dist., No. 65-1222, 459 P.2d 484 (1969).

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., Sup. Ct. Op. No. 496 (File No. 924), 459 P.2d 480 (1969); Stroh v. State Hous. Auth., Superior Court, 3rd Jud. Dist., No. 65-1222, 459 P.2d 484 (1969).

Expectation of renewal of a lease is not a compensable interest. State, Dep't of Hwys. v. Salzwedel, Sup. Ct. Op. No. 1861 (File No. 3976), 596 P.2d 17 (1979).

Proceedings distinguished from ordinary civil actions. — This constitutional guarantee, together with the peculiar in rem nonadversary pleadings characteristic of condemnation proceedings, distinguish these proceedings from ordinary civil actions. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Alaska's procedural rules pertaining to condemnation actions do not provide a burden of pleading which could be looked to as determinative of the companionate burden of persuasion. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Procedural rules involving the concept of risk of failure to persuade are inapposite in a condemnation proceeding where the sole issue is determination of just compensation. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

The separate questions of order of proof and order of final arguments of counsel in condemnation proceedings should be left to the discretion of the trial judge. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

The burden of production facet of burden of proof, rather than the risk of non-persuasion aspect, is the more meaningful concept in the trial of a condemnation proceeding. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Competent evidence of fair market value. — As to the issue of fair market value, both the condemning agency and the property may produce competent evidence of the fair market value of the condemned property. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

For additional notes concerning evidence, see notes under analysis line IV, "Just Compensation."

Role of expert witness in eminent domain proceedings. — See Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Absent the production of evidence by either party, the triers of fact will determine fair market value solely from the other party's evidence. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Testimony. — It is not necessary, in order to give credence to a witness' opinion

of fair market value, to also require him to show that the property and market value are such that the entire purchase price could be expected to be paid at the time of sale. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970).

Sale 15 months after date of taking. — As to admission into evidence of a sale taking place 15 months after the date of the taking by the state, see Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

The focal point of the trier of fact's inquiry is the ascertainment of just compensation. Thus, regardless of whether the condemning agency or the property owner meets a given burden of persuasion, Alaska's constitutional mandate requires that the owner be awarded just compensation for the property he has lost. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Jury confronted with conflicting opinions as to value. — In the usual condemnation case, the jury is confronted with conflicting opinions as to value. The jury is not faced with the necessity of finding a particular value or no value at all. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Instructions on burden of proof, in the sense of allocating the risk of failure to persuade the jury, are inappropriate in condemnation actions. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

In a condemnation proceeding, the trial court did not err in refusing to instruct the jury on the subject of burden of proof, where the jury was informed that the exercise of the power of eminent domain is subject to the constitutional requirement of payment of just compensation, and was further instructed that their only concern was the determination of the just compensation to be awarded. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Quoted in Stroh v. Alaska State Hous. Auth., Sup. Ct. Op. No. 496 (File No. 924), 459 P.2d 480 (1968).

II. DAMAGE.

Section expressly requires compensation for damage, while 5th amendment does not. — See State v. Hammer, Sup. Ct. Op. No. 1268 (File Nos. 2500, 2660), 550 P.2d 820 (1976).

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 this section and must be compensated for. State v. Hammer, Sup. Ct. Op. No. 1268 (File Nos. 2500, 2660), 550 P.2d 820 (1976).

III. TAKING.

When taking occurs. — It is the general rule that a taking does not occur until: (1) Legal title vests in the state, (2) the state enters into actual possession, or (3) the state takes constructive possession either by causing damage to property or by depriving the owner of full beneficial use of his land. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Once an owner is deprived of the economic advantages of legal ownership, a taking has occurred. Grant v. State, Sup. Ct. Op. No. 1385 (File No. 2855), 560 P.2d 36 (1977).

Although the state is clearly not bound to abide by its construction plans and specifications, it is reasonable for parties negotiating for the sale of the land involved to assume that those plans will be implemented, and where the plans are not implemented, any further economic interference constitutes a second taking for which the state must pay just compensation. Grant v. State, Sup. Ct. Op. No. 1385 (File No. 2855), 560 P.2d 36 (1977).

Limiting access to vessels able to pass through a culvert six feet in diameter was in effect a taking of such access. Wernberg v. State, Sup. Ct. Op. No. 972 (File No. 1797), 519 P.2d 801 (1974).

Loss of access due to closure of intersection. — Where owners received compensation for the taking of their property for construction of a highway, a second taking occurred, separate from the first, when the state decided to redesign the highway, the second taking consisting of a loss of access due to closure of an intersection and due to the limitation of travel on the frontage road to one-way traffic, if the settlement or the receipt of the intersection award had been in reliance upon unrestricted access to be closed. Alsop v. State, Sup. Ct. Op. No. 1764 (File No. 3023), 586 P.2d 1236 (1978).

Where owners contended that a second taking of their property occurred when the state redesigned the highway for the construction of which their property had

been originally taken, closing off an intersection and limiting travel on the frontage road to one-way traffic, in order to recover damages, each of the owners must demonstrate that he or a predecessor in interest had a portion of his property taken for the original construction project, that he or his predecessor relied on construction of the intersection or the two-way frontage road, or both, in settling or receiving an award for their condemnation claims, and that his remaining property had decreased in value as a result of the highway modifications. Alsop v. State, Sup. Ct. Op. No. 1764 (File No. 3023), 586 P.2d 1236 (1978).

Nonabutting owners, whose property has not been taken, cannot claim damages because a more circuitous access route is imposed upon them. Alsop v. State, Sup. Ct. Op. No. 1764 (File No. 3023), 586 P.2d 1236 (1978).

Changing a frontage road from a two-way street to a one-way street is not by itself a taking. B & G Meats, Inc. v. State, Sup. Ct. Op. No. 1950 (File No. 3940), 601 P.2d 252 (1979).

A distinction must be made between loss of access and loss of traffic flow. The latter is not a part of the owner's interest in his property. Restrictions which merely result in a diversion of traffic away from the property are thus not compensable. B & G Meats, Inc. v. State, Sup. Ct. Op. No. 1950 (File No. 3940), 601 P.2d 252 (1979).

Principles which control when claim of taking caused by loss of access is raised. — See B & G Meats, Inc. v. State, Sup. Ct. Op. No. 1950 (File No. 3940), 601 P.2d 252 (1979).

Compensation required for taking littoral access right. — The state must justly compensate the property owner when it takes by inverse condemnation, a littoral access right. Grant v. State, Sup. Ct. Op. No. 1385 (File No. 2855), 560 P.2d 36 (1977).

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, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Under the Alaska statutory scheme, an owner of unimproved or 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, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

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 v. Crosby, Sup. Ct. Op. No. 322 (File No. 584), 410 P.2d 724 (1966).

IV. JUST COMPENSATION.

Measure of just compensation. — Just compensation is measured by the value of the property taken. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970).

Fair market value is an appropriate measure of the just compensation guaranteed by this section. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

"Fair market value". — Fair market value is the price in money that the property could be sold for on the open market under fair conditions between an owner willing to sell and a purchaser willing to buy, with reasonable time allowed to find a purchaser. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970).

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 the property is suitable. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970); Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

The highest and most profitable use for which the property is adaptable is to be considered, to the extent that the prospect of demand for such use affects the market value while the property is privately held. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970).

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, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Use of property must be reasonably probable. — It must be shown that the use for which the property is claimed to be adaptable is reasonably probable. If this cannot be shown, evidence of prospective use must be excluded because it would allow mere conjecture and speculation to become a guide for ascertainment of value, and this is not a permissible method for the judicial ascertainment of truth. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970).

"Best use" evidence. — See Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (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. Thus, 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, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Admissibility of subdivision plat. — Where the adaptability of the land for subdivision use is shown to be reasonably probable, and not too remote or speculative, then a subdivision plat is admissible as illustrating the potential and reasonably probable use. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970).

A truly speculative or imagined use should not be considered. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Evidence of use as subdivision. — 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, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (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, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (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 conjectual or speculative. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (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, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (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, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

To the extent that the "just compensation" guarantee in this section 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, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Even in a market 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, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Income capitalization in general and the anticipated use or development method in particular are standard appraisal practices. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (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, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (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, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Rule as to 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, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Just compensation is not conditioned upon receipt of commensurate value by the state. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Personal property used on land not considered in determining compensation. — The general rule is to the effect that personal property which is used on land taken by eminent domain cannot be considered in the determination of the compensation. State v. Ness, Sup. Ct. Op. No. 977 (File No. 1914), 516 P.2d 1212 (1973).

The majority rule excludes property tax assessments from evidence in condemnation cases on the rationale that such an assessment is res inter alios acta, notoriously unreliable as a criteria of true value or the opinion of persons not called as witnesses and subject to cross-examination. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

It is almost everywhere the law that the value placed upon a parcel of land for the purposes of taxation by the assessors of the town in which it is situated is no evidence of its value for other than tax purposes. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

AS 29.53.080 does not furnish the basis for the admissibility of tax assessments as evidence in condemnation proceedings. Given the limited purpose of the act, there is no indication that the legislature intended to make tax assessments prima facie evidence of value in condemnation proceedings. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

In view of the special purposes for which tax assessments are made, the fact that there is little likelihood that an owner would contest an under-assessment or an assessment which did not reflect the property's full value, the potential unreliability of such assessments due to the varied qualifications of assessors, and the fact that such assessments standing alone embody the opinions of persons not called as witnesses and not subject to cross-examination, the admission of property tax assessments as evidence of fair market value in condemnation actions is prohibited. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Payment of interest may be necessary component of just compensation. — The payment of interest is, in appropriate circumstances, a necessary component of constitutionally guaranteed "just compensation." Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Before interest can accrue, there must be a "taking." Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Owner is entitled to interest from date of taking to date of payment. — This section 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 North America v. Alaska State Hous. Auth., Sup. Ct. Op. No. 809 (File No. 1600), 498 P.2d 737 (1972).

Since compensation for delays required. — The 5th amendment to the United States Constitution and this section require that a property owner be compensated for delays incurred between the dates of the government's taking of property and making payment. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

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. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Interest from date owner loses 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, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Although no statute so provides. — There is no statutory provision for payment of interest from the date a condemnation action is instituted where the property owner remains in possession, and it has long been recognized that unless interest is specifically authorized by legislative enactment, it may not ordinarily be assessed against the state in any action. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Compensation to include expenses necessarily incurred. — Civil R. 72(k)(4), when construed in the framework of the "just compensation" clauses of the United States and Alaska constitutions, entitles the property owner to be made whole for expenses necessarily incurred in connection with the condemnation of his property. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

This section and the 5th amendment entitle the property owner to be made whole for expenses necessarily incurred in connection with the condemnation of his property. City of Anchorage v. Scavenius, Sup. Ct. Op. No. 1183 (File Nos. 2214, 2222), 539 P.2d 1169 (1975).

Without such a rule, the state forces a property owner to pay a greater portion of the costs of a public project than any other taxpayer must pay by afflicting him with unavoidable expenses of condemnation. Placing such a burden on the property owner is no more just than assessing a levy against him but no others. City of Anchorage v. Scavenius, Sup. Ct. Op. No. 1183 (File Nos. 2214, 2222), 539 P.2d 1169 (1975).

Construction of holding in Stewart & Grindle, Inc. v. State. — The holding in Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974), that Civil R. 72(k)(4) when construed in the framework of the "just compensation" clauses of the United States and Alaska constitutions entitles the property owner to be made whole for expenses necessarily incurred in connection with the condemnation of his property, does not mean that the state must become the guarantor of costs incurred in advancing every possible legal theory an owner may have in an eminent domain proceeding. State, Dep't of Hwys. v. Salzwedel, Sup. Ct. Op. No. 1861 (File No. 3976), 596 P.2d 17 (1979).

Any rule which purports to shift the costs of the initial determination of the compensation award upon the owner would be unconstitutional. City of Anchorage v. Scavenius, Sup. Ct. Op. No. 1183 (File Nos. 2214, 2222), 539 P.2d 1169 (1975).

Appraisers' and attorney's fees held "necessarily" incurred. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Where the property to be taken has a readily ascertainable market value, or is worth too little to warrant a professional appraisal, an appraiser's fee could not be said to be "necessary," and the property owner would not be entitled to compensation for such an expense. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Where the property to be taken has a readily ascertainable market value, or is worth too little to warrant a professional appraisal, an appraiser's fee could not be said to be "necessary," and the property owner would not be entitled to compensation for such an expense. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Where the property has a readily ascertainable market value and the state has offered at least that amount, any attorney's fees subsequently incurred would not be necessary in order to obtain just compensation, and would accordingly be disallowed. Stewart & Grindle, Inc. v.

State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

No award of expenses in situations not specified in Civ. R. 72(k). — In the absence of an amendment, the supreme court is not justified in awarding costs and attorney's fees in situations not specified in Civ. R. 72(k), which specifies when costs and attorney's fees incurred by the property owner are to be assessed against the condemnor. City of Anchorage v. Scavenius, Sup. Ct. Op. No. 1183 (File Nos. 2214, 2222), 539 P.2d 1169 (1975).

Award of fees incurred in unsuccessfully seeking compensation for the expectancy of renewal of a lease was error since the expenses in developing this claim were not "necessarily incurred" within the meaning of Civ. R. 72(k)(4). State, Dep't of Hwys. v. Salzwedel, Sup. Ct. Op. No. 1861 (File No. 3976), 596 P.2d 17 (1979).

Where property owner unsuccessfully appeals master's award. — A condemnor is not entitled to an award of costs and attorney's fees when the property owner has unsuccessfully appealed a master's award. City of Anchorage v. Scavenius, Sup. Ct. Op. No. 1183 (File Nos. 2214, 2222), 539 P.2d 1169 (1975).

Just compensation within range of testimony precludes new trial. — The trial court did not commit an abuse of discretion in denying the state's motion for new trial, where the jury's determination of just compensation was within the range of the testimony. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Jury's award of $0.00 as just compensation to a property owner for the taking of an easement was not patently inadequate or violative of constitutional provisions pertaining to eminent domain. Scavenius v. City of Anchorage, Sup. Ct. Op. No. 1182 (File No. 2193), 539 P.2d 1161 (1975).

The taking of an easement does constitute an appropriation of the owner's property regardless of its minuscule effect. But where the property owner failed to object to instructions expressly permitting the entry of an award of no compensation and the difference between an award of $0.00 compensation and a nominal sum to which the property owner would have been entitled is de minimus, the failure to award compensation per se did not require reversal. Scavenius v. City of Anchorage, Sup. Ct. Op. No. 1182 (File No. 2193), 539 P.2d 1161 (1975).

Section 19. Right to Bear Arms. A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Section 20. Quartering Soldiers. No member of the armed forces shall in time of peace be quartered in any house without the consent of the owner or occupant, or in time of war except as prescribed by law. The military shall be in strict subordination to the civil power.

Section 21. Construction. The enumeration of rights in this constitution shall not impair or deny others retained by the people.

Right of self-representation has been so retained by the people. — See McCracken v. State, Sup. Ct. Op. No. 986 (File No. 1791), 518 P.2d 85 (1974).

A prisoner has a right to represent himself in post-conviction relief proceedings. McCracken v. State, Sup. Ct. Op. No. 986 (File No. 1791), 518 P.2d 85 (1974).

The right to counsel should not be used to bar self-representation. McCracken v. State, Sup. Ct. Op. No. 986 (File No. 1791), 518 P.2d 85 (1974).

The right to self-representation is not absolute. McCracken v. State, Sup. Ct. Op. No. 986 (File No. 1791), 518 P.2d 85 (1974).

Qualifications on right of self-representation in post-conviction proceedings. — See McCracken v. State, Sup. Ct. Op. No. 986 (File No. 1791), 518 P.2d 85 (1974).

Criminal R. 39(b) construed in light of this section. — See McCracken v. State, Sup. Ct. Op. No. 986 (File No. 1791), 518 P.2d 85 (1974).

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James A. Smith
Signature of Camera Operator

11/27/89
Date

02-519 (REV 8/78)

SB

202

SENATOR
JOHN B. "JACK" COGHILL
Chairman

Senator Jan Faiks—Vice Chairman
Senator Mitch Abood
Senator Paul Fischer
Senator Joe Josephson

Alaska State Legislature

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4921

Senate Committee on Transportation

TO: Senate Transportation Committee Members

FROM: Committee Staff

DATE: 3-29-85

RE: SB 202

SB 202, as you can see from the packet, asks for a special appropriation to the DOT/PF of $23,555,100 for the construction of a bridge over the Eagle River.

Enclosed in your packet you will find a copy of the bill, a copy of HB 248 from the Thirteenth Legislature dealing with the bridge, a site plan, a resolution from the City of Anchorage supporting the building of the bridge, an article from the Anchorage Times about SB 202 and the municipalities objections to the bill, and finally a portion of a plan commissioned by the City of Anchorage to look into ways to solve the traffic problems in the Eagle River area.

In conversation with Chip Dennerlein, director of intergovernmental affairs for the Municipality of Anchorage, it has come to the attention of the staff that the municipality is working with DOT/PF to make sure that the bridge can qualify for federal highway funds. If this happens the cost to the general fund would be far less than that requested. Mr. Dennerlein has said that a representative of the municipality will be testifying at the meeting.

ALASKA STATE LEGISLATURE

SENATOR
RICK
HALFORD
SENATE MINORITY LEADER

SENATE

Permanent Address
P.O. BOX 66
CHUGIAK, ALASKA 99567
Phone 907 688 2476
While in Juneau
POUCH V
JUNEAU, ALASKA 99811
Phone 907-465-4958

TO: The House Transportation Committee

FROM: Senator Rick Halford
Senator Tim Kelly

RE: HB 248, construction of a bridge in Eagle River

DATE: May 10, 1983

After careful study of the ongoing problems of traffic congestion in the downtown Eagle River area, I have concluded that there are two projects that can be undertaken at this time to alleviate some of the traffic hazards.

The first and immediate project, for which I have requested funding, is engineering and physical correction of the intersection of Eagle River Road and the Old Glenn Highway.

The second, more long-range project, which I feel should be started as soon as possible, is a bridge over Eagle River to funnel the traffic out of Eagle River Valley over to Hiland Road and out the Hiland Road overpass onto the four lanes to Anchorage.

This bridge seems to be the only feasible solution to the long-range problem of getting the existing traffic out of Eagle River Valley, without going into downtown Eagle River. I feel the sooner we fund and build this bridge, the more money we will save the State. As first designed and considered in 1982, the fiscal note was $12,995,000 and in 1983 it is $15,723,950; each year we wait, the price will be higher.

In conclusion, I strongly recommend your support for HB 248.

Rick Halford
Rick Halford

Tim Kelly
Tim Kelly

Support for HB 248

Introduced: 3/11/83
Referred: Transportation
and Finance

Funding Information
General Fund $15,000,000
Other Funds -0-
$15,000,000

IN THE HOUSE BY LISKA

HOUSE BILL NO. 248

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act making a special appropriation to the Department of Transportation and Public Facilities for construction of a bridge in Eagle River; and providing for an effective date."

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

* Section 1. The sum of $15,000,000 is appropriated from the general fund to the Department of Transportation and Public Facilities for construction of a bridge in Eagle River.

* Sec. 2. The appropriation made by this Act is for a capital project and is subject to AS 37.25.020.

* Sec. 3. This Act takes effect July 1, 1983.

Previous Bill HB248

STATE OF ALASKA
FISCAL NOTE

Revision Date: 11/30/83

I. REQUEST

Bill/Resolution No.: HB 248
Title: ...construct bridge...Eagle River
Sponsor: Rep. Liska
Requestor: House Transportation
Date of Request: 10/1/83

II. FISCAL DETAIL

Agency Affected: DOT&PF
Program Category Affected: Transportatio
BRU, Program or Subprogram(s) Affected:
Design & Construction

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL OPERATING			50.0	55.0	60.5	66.5
CAPITAL	305.0	400.0	34,284.0			
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	305.0	400.0	34,334.0	55.0	60.5	66.5
FEDERAL FUNDS						
OTHER (Specify Source)						
TOTAL	305.0	400.0	34,334.0	55.0	60.5	66.5

POSITIONS:

FULL TIME			1	1	1	1
PART TIME						
TEMPORARY						
TOTAL						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

Not identified by sponsor of bill

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared by: William R. Snell, Director
Phone: 266-1462
Division: Central Region Planning & Programming
Date: 11/30/83

Approved by Commissioner: David W. Haugen
Date: 11/30/83
Department: Deputy Commissioner, Central Region

Distribution:
Original to Legislative Finance
Copy to Office of Management and Budget (for Legislature introduced bills)
Copy to Department (for Governor introduced bills)
Copy to Sponsor
Copy to Requestor (if different from Sponsor)

HR 248 Fiscal Note

9/14/83

Offered: 5/20/83
Referred: Finance

Original sponsor: Liska

Funding Information	
General Fund	$750,000
Other Funds	-0-
	$750,000

IN THE HOUSE BY THE TRANSPORTATION COMMITTEE

CS FOR HOUSE BILL NO. 248 (Transportation)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act making a special appropriation to the Department of Transportation and Public Facilities for design, engineering, and construction of a bridge in Eagle River; and providing for an effective date."

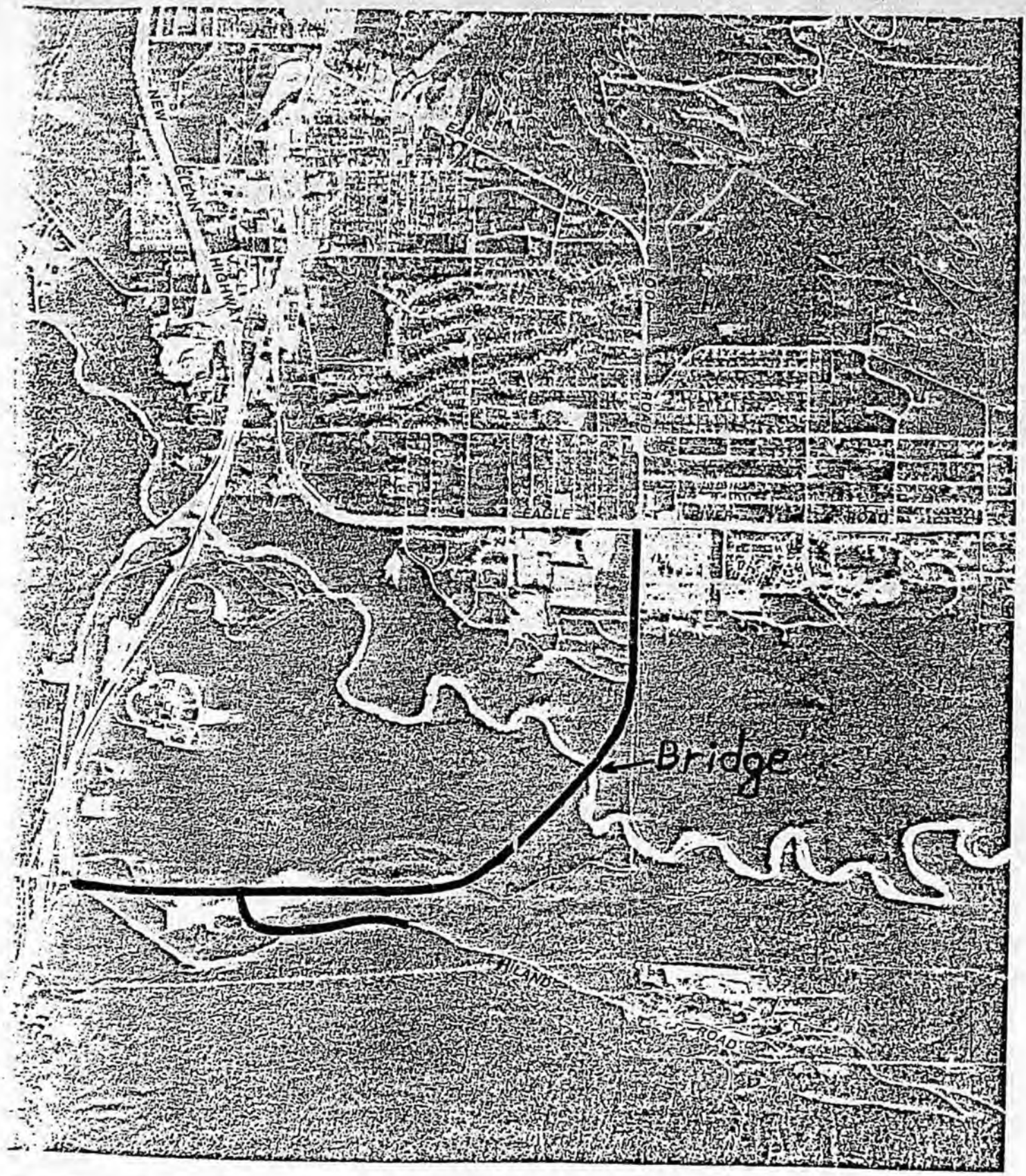
BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. The sum of $750,000 is appropriated from the general fund to the Department of Transportation and Public Facilities for design, engineering, and construction of a bridge in Eagle River.

* Sec. 2. The appropriation made by this Act is for a capital project and is subject to AS 37.25.020.

* Sec. 3. This Act takes effect July 1, 1983.

Previous -1- CS



Eagle River Bridge

- Alternative 4 -

N

Approximate Scale

Site Plan..

Request for Eagle River bridge funds stirs debate

By ANDY RYAN
United Press International

JUNEAU — A bill seeking $23.5 million to build a second bridge across Eagle River, linking Eagle River and Hiland roads, was introduced in the Senate Thursday but an Anchorage official says the money isn't needed this year.

State Sen. Tim Kelly, R-Eagle River, said he introduced the bill because the bridge, which would open up a second interchange into Eagle River from the Glenn Highway, is one of his community's highest priorities.

But Chip Dennerlein, director of intergovernmental affairs for Anchorage Mayor Tony Knowles, said about $500,000 for engineering work on the bridge already is contained in Gov. Bill Sheffield's proposed 1986 budget.

Money to actually build the bridge won't be needed until the 1987 budget, at the earliest, Dennerlein said.

"If you put construction money for the bridge in the budget it would just sit in the bank," said Dennerlein, explaining why the bridge construction funds aren't on the city's list of projects for legislative funding this year.

"We're not going to ask for money we're not going to use," Dennerlein said.

Kelly, a member of the Senate Majority coalition and chairman of the Senate Rules Committee, said the bridge is essential to clear up the bottleneck at Eagle River's sole interchange onto the Glenn Highway.

"It's one of the three priorities that we have in our area," Kelly said. "We have Chugiak High School, and the bridge and the expansion of the Glenn Highway.

"It's just absolutely necessary that we find another outlet-inlet onto the Glenn Highway, because the traffic problems out there with our one little entrance and exit are just insurmountable; and we simply have to find another way to access Eagle River."

At present, all traffic entering the community of Eagle River from the Glenn Highway goes through a single interchange. The new bridge, which would cross Eagle River several miles upstream of the existing bridge, would allow the present Hiland Road interchange to handle traffic bound for Eagle River.

Asked why he introduced the funding request for the bridge as a separate bill rather than incorporate it into the main construction budget, Kelly said it is a matter of legislative tactics.

"A lot of times you simply want to call attention to the fact that you need this, and by introducing a bill it becomes part of the process. If you can put in the budget, fine; if you can't then you might want to push a bill through. It's just another option that we're leaving ourselves with," the senator said.

The planned bridge, which was included Thursday in the U.S. highway system, and which thus will be eligible for federal as well as state funding, will be either two or four lanes wide, depending on how much money is available.

Dennerlein said other construction funds aimed at alleviating the problem of traffic congestion between Eagle River and Anchorage are contained in the governor's proposed budget. One project planned for this year, he said, is the widening of the Glenn Highway between Hiland Road and Muldoon Road, in Anchorage, from four to six lanes.

The city's main push for construction money for the bridge probably will come next year, Dennerlein said.

"It's a fair bet that the bridge will be very high on the 1987 (city) requests," he said.

Passion man's driving force

Continued from Page B-1

Jefferson Starship came to town and Bob was supposed to pick up Grace Slick at the airport. "But she ducked out one of the bottom doors and took a cab."

"I even put on a suit," he says with mock injury. "I had one of those little roses in my lapel. I was going to chauffeur GRACE SLICK!"

The Joneses say they do it all for the fun of it. They certainly seem to be having a good time. Last year they put 2,000 miles on Passion, driving to Settler's Bay for brunch and to Portage for picnics.

Back when Passion was black — with Cadillac silver crushed velour upolstery — Bob rolled her in a ditch at the curve where Dowling Road meets Lake Otis Drive. His father was a passenger in the car. No one was hurt but the car.

"My father thought it was just funnier than hell." The damage tab? Twelve grand.

"If you wanna play, you gotta pay," says Mike (1930 Chevy) Hunsberger, who has been listening to Bob talk about Passion.

Bob is stopped by a request to explain why he is willing to spend so much time and money on a car. "That's hard," he says. Hunsberger helps out:

"It's like having your own parade. People in front of you slow down. People behind speed up just to take a look."

Sometimes the cost of a passion is more than money. About five years ago, Patty left Bob, divorced him. He says it was because of his obsession with cars. She says there was more to it than that, but car madness was certainly way up there.

"I used to feel left out, neglected," she says.

The divorce only lasted seven months. "Our friends say he really grew up after I left him. He decided his family was important."

So the Joneses remarried and Bob bought Patty a 1948 Willys Jeep convertible and now they work on cars together.

Anchorage Daily News/ Erik Hill

Pearl of a sandwich

Moose death toll rises to 68

AMENDED AND APPROVED
DATE 3-12-85

Submitted by: Chair Angvik
Prepared by: Intergovernmental Affairs
Office of Internal Affairs at
the request of the Chair
For Reading: March 12, 1985

MAR 27 1985

ANCHORAGE, ALASKA
AR NO. 85-62

A RESOLUTION SUPPORTING IMPROVEMENT AND UPGRADE OF THE GLENN AND PARKS HIGHWAYS

WHEREAS, the Municipality of Anchorage and the Mat-Su Borough have both experienced dramatic increases in population during the past few years, and

WHEREAS, a great percentage of this growth has occurred in Eagle River and in the Wasilla area, and

WHEREAS, many of the people travel to and from the Anchorage Bowl for employment on a daily basis, including 40% of the working population of the Mat-Su Borough, and

WHEREAS, this has severely impacted the ability of the existing highway corridor to meet even the existing demand, and

WHEREAS, much of Southcentral Alaska's future growth and develoment will continue to occur along this primary corridor.

NOW, THEREFORE, be it Resolved that:

The Anchorage Assembly joins with the Mat-Su Borough in supporting an overall planning and improvement program for the entire Glenn and Parks Highway Corridor from Anchorage to Wasilla to include:

1. expansion of the Glenn from Muldoon to Eagle River to six lanes;

2. construction of a new Hiland Road bridge across Eagle River;

3. expansion of the Glenn Highway across the Elkutna Flats to Mile 35, including bridges, to four lanes;

4. expansion of the Parks Highway to Wasilla; and

5. obtaining of a right-of-way for Wasilla Bypass.

6. encourage the exploration with the Alaska Railroad of the feasibility and implementation of commuter rail transit between Wasilla, Eagle River and Anchorage.

This resolution shall take effect immediately upon passage and approval, and copies distributed to the Governor and members of the State Legislature.

PASSED AND APPROVED by the Anchorage Assembly this 12th day of March, 1985.

Jane Angvik
Chairman

ATTEST:

Barbara E. Smith
Municipal Clerk

Anchorage Resolution Supporting the Project

Through previous analysis, it has been shown that the bridge over Eagle River would be the best alternative for improving access to the Glenn Highway from Eagle River. The cost of this alternative also compares very favorably with the other alternatives. It is the only one of the various alternatives which would both lessen the congestion at the South Eagle River Interchange and eliminate the need for the Glenn Highway to be widened to a six lane facility north of the Hiland Road Interchange. Although the ADT on the Glenn Highway south of the Hiland Road Interchange is projected to be 55,000 by the year 2001, the ADT north of this interchange is projected to be only 38,000. This latter traffic volume is within the capacity of the existing facility.

Recommendations

Based on the results of this study, both interim and longer range improvements will be required to improve the access to the Glenn Highway from Eagle River. Interim solutions are needed since the traffic congestion currently in existence at the South Eagle River Interchange must be relieved as soon as practicable. However, long-range solutions are also needed since these interim solutions will not be sufficient to accommodate the projected traffic demand for the year 2001.

In order to relieve the existing congestion problems at the South Eagle River Interchange at Artillery Road, the following interim actions are recommended:

1. Construct an additional right-turn-only lane on the northbound off-ramp of the interchange;

2. Add an additional right-turn-only lane to eastbound Artillery Road from the interchange off-ramp to Eagle River Road;

3. Channelize the intersection of Eagle River Road by adding a right-turn-only lane from Eagle River Road to the New Eagle River Urban; and

4. Install a traffic signal at the intersection of Eagle River Road and the New Eagle River Urban.

In order to accommodate the projected growth in traffic demand throughout Eagle River, the following additional actions are recommended for implementation:

1. Program the preliminary engineering phase for the North Eagle River Access Road Interchange for FY 1984-86;

2. Construct the North Eagle River Access Road Interchange in FY 1987;

3. Program preliminary engineering monies for the bridge over Eagle River and the necessary Hiland Road improvements for FY1984-86;

4. Construct the Eagle River Bridge and upgrade Hiland Road in FY 1987; and

5. Prepare a long-range transportation plan for Eagle River and the surrounding area which will identify necessary internal circulation improvements.

The total estimated cost of these various improvements would be $41,575 million over the 1984-1987 time period. These costs are itemized in Table 3, with the specific projects displayed on Figure 13.

TABLE 3

ESTIMATED COST OF RECOMMENDED IMPROVEMENTS*
($000)

PROJECT	FISCAL YEAR 1984	1985	1986	1987	TOTAL
1. Eagle River Bridge-Hiland Road Improvements	300.0 PE	350.0 PE	400.0 PE	23,450.0 R, U, C	24,500.0
2. North Eagle River Interchange	200.0 PE	200.0 PE	500.0 PE	15,700.0 R, U, C	16,600.0
3. South Eagle River Interchange Improvements					
A. Added lanes	245.0				245.0
B. Traffic Signal	230.0				230.0
TOTAL	975.0	550.0	900.0	39,150.0	41,575.0

* Inflation is assumed at 7% per year.

er/ml

Environmental/Physical Impacts

The construction of a bridge across Eagle River from the extension of Eagle River Loop Road south to Hiland Road would have a greater impact on the environment than would the other alternatives. Moderate to steep slopes are present, while the site has a rating of moderately low to moderate susceptibility for seismically-induced ground failure. This area is within a coastal management zone, contains wetlands, and is also considered an important wildlife habitat. Extensive engineering and biological studies would be needed prior to constructing a bridge at this location.

The approach road north of the bridge would follow a section line which has been cleared and is currently in use accommodating a power transmission line. However, additional right-of-way would need to be acquired for the bridge structure and the road south of the Eagle River. The surrounding land is presently owned by the State Park System, the Eklutna Corporation, the Municipality, and private individuals.

No structures would need to be taken at this time. However, the roads leading to the bridge would need to be properly buffered to reduce noise and visual impacts to abutting land uses, which currently include a park and developing residential uses. An area on the northeast end of the approach road is currently designated as commercial in the Eagle River Master Plan. The new Gruening Junior High School is located south of the proposed alternative.

Traffic Impacts

At the present time, the existing Hiland Road Interchange is very underutilized. Average traffic volumes are only 1000 per day. However, with the construction of this alternative, this interchange would become a principal access point to the Glenn Highway from Eagle River. Access to and from the Hiland Road area to Eagle River would also be improved. School, shopping, and commercial interests would all be more accessible.

The construction of this bridge would greatly alleviate the existing and forecast traffic volumes at the South Eagle River Interchange, as traffic presently forced to access Eagle River from this location would now have the Hiland Road Interchange as another option. Based on the model projections, the traffic demand for the Hiland Road Interchange would be 17,000 by the year 2001. Of these total trips, 14,000 would cross the new bridge. The majority of this traffic would be diverted from the South Eagle River Interchange. Trips originating in the Eagle River Valley east of Eagle River Loop Road would also have a better access to the Glenn Highway. Figure 12 displays the impact of this alternative on the projected traffic volumes for the area.

Cost

In 1982 dollars, the cost of this facility has been estimated to be approximately $17.5 million. This cost figure also includes improvements to portions of Hiland Road.

The third alternative consists of reconstructing the existing South Eagle River Interchange as a diamond interchange. Higher speeds on the ramps leading to the New Glenn Highway would increase the capacity of the interchange. This alternative would also require the addition of another west-bound traffic lane from the Eagle River Road intersection to the on/off ramps west of the freeway. Traffic from the west side of the highway would be channelized to merge with the on-ramp and be controlled by a yield sign at this point.

Eagle River Valley Bridge - Hiland Road Improvements

The construction of a new road and bridge south from the extension of Eagle River Loop Road, over Eagle River to Hiland Road, could also potentially ease the congestion currently being experienced in Eagle River. This alternative would provide a direct link from the areas of new growth, located primarily in the Eagle River Valley, to Hiland Road and to the existing Hiland Road Interchange. Portions of Hiland Road would also be upgraded as a part of this alternative. These improvements are displayed on Figure 6.

ALTERNATIVES ANALYSIS

Each of the four principal alternatives under study would improve access to the Glenn Highway from Eagle River. However, there are varying impacts associated with each alternative. A brief description of the environmental, physical, and traffic impacts, and the associated cost, of each alternative appears in the ensuing section of this report. For purposes of this analysis, a "no-build" alternative has been included in order to depict the future situation if no improvements at all are made. Because of the State's ongoing program to upgrade the Glenn Highway to a full access controlled facility, it was assumed that the North Eagle River Interchange would be constructed by the year 2001. All future traffic modeling includes this facility except for the "no-build" alternative.

No-Build

If no efforts are undertaken to improve access to the Glenn Highway, the traffic situation in Eagle River can be expected to steadily worsen. Congestion at the South Eagle River Interchange, and in the immediate vicinity, would be far worse by the year 2001 than at present. Model projections indicate that by that time the ADT at this location would be 32,000.

At the only other access point to Eagle River, the North Eagle River Access Road, the ADT would approach 13,000.

IDENTIFICATION

BILL NAME
"An Act making special appropriations to the DOT/PF for construction of the Eagle River Hiland. Bridge; PED"

BILL NUMBER
SB 202

DATE INTRODUCED
2-28-85

RELATED BILLS PENDING
None

SPONSOR(S)
Tim Kelly

Co-Sponsor
Rick Halford

REFERRALS
Transportation
Finance

INITIAL RESEARCH

INITIAL SUMMARY COMPLETED
Yes

LEGAL DIVISION SUMMARY

DEPT OF LAW SUMMARY

SPONSOR CONTACTED FOR BACKUP MATERIALS
Yes - Used in Packet

FISCAL NOTE

AGENCY RESPONSE

OTHER INTERESTED LEGISLATORS NOTIFIED
Senator Kelly

BACKGROUND RESEARCH

SIMILAR BILLS INTRODUCED IN PREVIOUS LEGISLATURES
HB 248 CS 248

OTHER STATE OR FEDERAL PRECEDENTS, REGULATIONS, ETC

RESPONSES FROM INTERESTED PERSONS AND/OR GROUPS
Chip Oennerlein (Mun. of Anchorage) - Opposes Bill

HEARING PREPARATION

CHAIRMAN BRIEFED
Yes

DATE & PLACE SET
Yes 4-1-85

STAFF MEMO TO COMMITTEE
Yes - 3-29-85

TELECONFERENCE
No

BACKGROUND MATERIAL DISTRIBUTED
Yes

PSA/PRESS RELEASE
No

LIST OF WITNESSES

SUGGESTED AMENDMENTS/CS DRAFTED

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James R. Smith
Signature of Camera Operator

11/27/89
Date

02-519 (REV 8/78)

SB

240

SENATOR
JOHN B. "JACK" COGHILL
Chairman

Senator Jan Faiks—Vice Chairman
Senator Mitch Abood
Senator Paul Fischer
Senator Joe Josephson

Alaska State Legislature

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4921

Senate Committee on Transportation

MEMORANDUM

TO: Committee Members

FROM: Committee Staff BL

DATE: April 19, 1985

RE: SB 240 A Grant to the Kenai Peninsula Borough

The committee will be hearing SB 240 on Monday, April 22, 1985. This bill appropriates $17,000,000 to the Kenai Peninsula Borough for seven different road projects.

The Department of Transportation has no position on this bill because of its grant provision.

Enclosed in this packet you will find a copy of the bill and a publication from the Kenia Borough on each of the road projects, their status, the steps needed to get to the construction phase and the existing condition.

KENAI PENINSULA BOROUGH'S

ROAD PROGRAM

PREPARED BY:

KENIA PENINSULA BOROUGH

DEPARTMENT OF PUBLIC WORKS

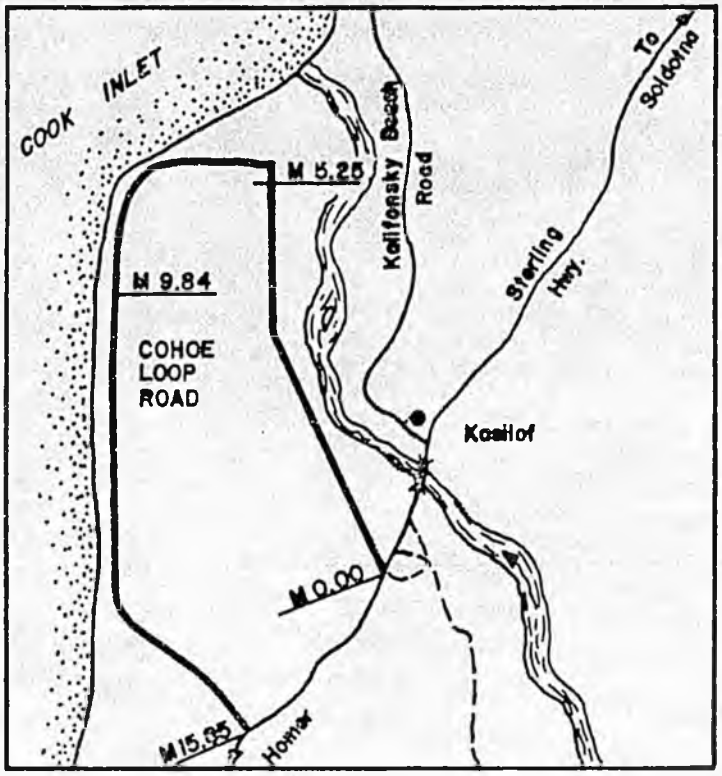
NOVEMBER 13, 1984

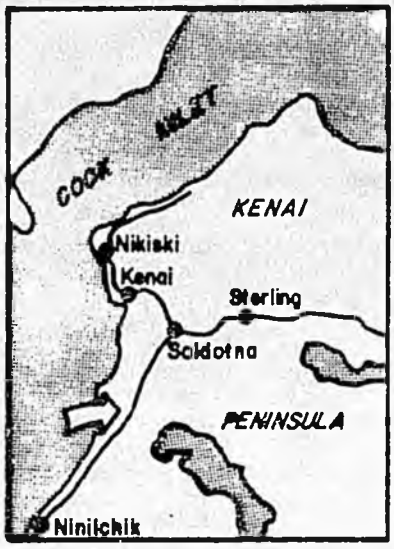
WILLIAM CONYERS
BOROUGH ENGINEER

STAN THOMPSON
MAYOR

Revised 2/5/85

COHOE LOOP ROAD (SR 114300)





Cohoe Loop Road
Capital Cost:

$2.0 million

1983 ADT = 325

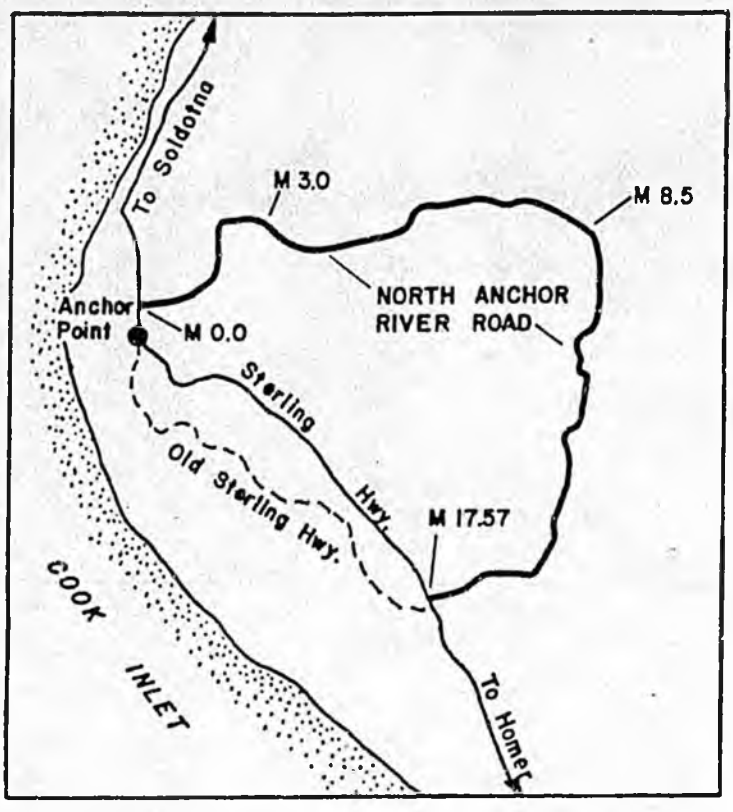
Existing Condition: Mile 0.0 (N. Jct Sterling Hwy) to Mile 5.25: Gravelled 32' surface, no shoulders. Mile 5.25 to Mile 9.84: Gravelled 18' surface. Mile 9.84 tc Mile 15.85 (end of route - S. Jct Sterling Hwy): Gravelled 24' - 26' surface, 4' - 5' shoulders, recently upgraded.

Proposed Physical Improvement: Mile 0.0 to Mile 5.25: Pave to 32'. Mile 9.84 to Mile 15.85: Mile 5.25 to Mile 9.84 - Reconstruct and pave to 32'.

Status: New proposal.

Next Step Prior to Construction: Funding of paving from Mile 0.0 to 5.25 and design from Mile 9.84 and Mile 15.85.

NORTH ANCHOR RIVER ROAD (SR 111800)



N. Anchor River Road
Capital Cost:

$4.5 million

1983 ADT = 700

Existing Condition: Mile 0.0 (N. Jct Sterling Hwy) to Mile 8.5 (S. Jct Sterling Hwy): Gravelled 20' surface, no shoulders. Overall condition: poor to fair.

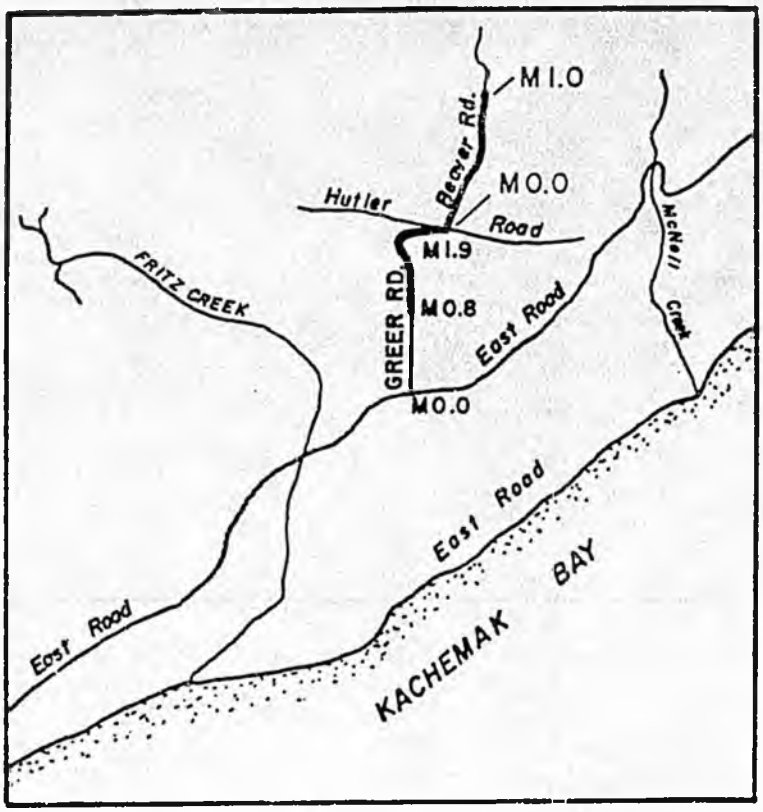
Proposed Physical Improvement: Mile 0.0 to Mile 8.5: Widen, realign, and pave to 32' rural standard. Replace wooden bridge over Anchor River with a steel bridge.

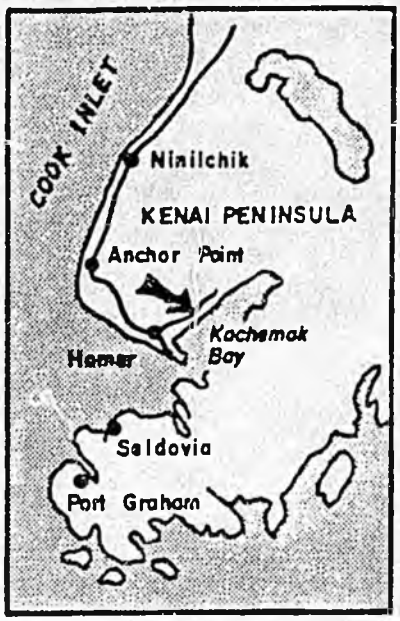
Status: The KPB has funded a $410,000 design in three phases: Phase I, Mile 0.0 to 3.0; Phase II, Mile 3.0 to 8.5; Phase III, Mile 8.5 to 17.0. The construction of Phase I is underway. The design of Phase II is nearing completion.

Next Step Prior to Construction: Construction funding in the amount of $800,000 to complete the paving of Phase I. The amount of $3.7 million for the acquisition of R.O.W. and construction of Phase II.

NORTH ANCHOR RIVER ROAD

GREER ROAD / BEAVER CREEK ROAD (G-11230)





Creer Road
Capital Cost:

$1.8 Million

1983 ADT = 85

Existing Condition: Mile 0.0 to Mile 0.8, 24 wide gravel road in overall good condition. Isolated problem areas. Mile 0.8 to Mile 1.9 - heavy timbered hillside. No existing road. Beaver Creek Road is a single lane mud road approx. 1.0 Mile long, impassible most of the year.

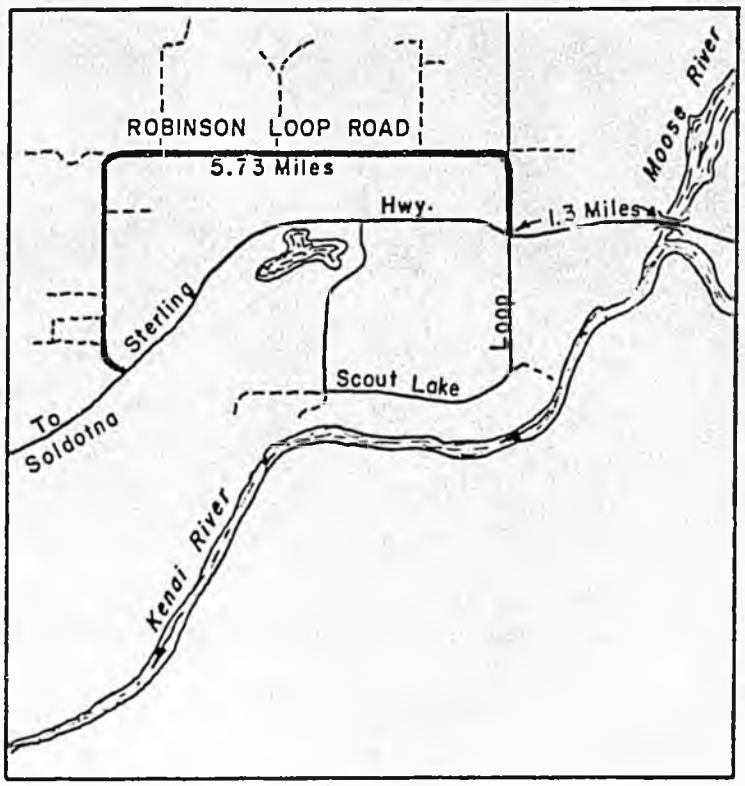
Proposed Physical Improvement: Mile 0.0 to Mile 0.8: Minor improvements and repairs. Mile 0.8 to Mile 1.9 construct new 24' wide gravel road to provide access to Hutler and Beaver Roads. Construct Beaver Creek Road Mile 0.0 to Mile 1.0 to 24' wide gravel road.

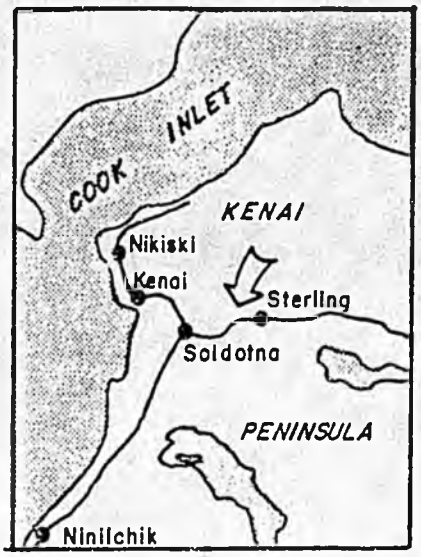
Status: The design is complete and the right-of-way has been secured. The utilities have been relocated.

Next Step Prior to Construction: Construction funding. Design funding for Beaver Creek Road.

GREER ROAD / BEAVER CREEK RD.

ROBINSON LOOP ROAD (SR 118500)





Robinson Loop Road
Capital Cost:

$2.5 million

1983 ADT = 600

Existing Condition: Mile 0.0 to Mile 5.73: Gravelled 24' surface, no shoulders. Overall condition: Fair with isolated drainage problems.

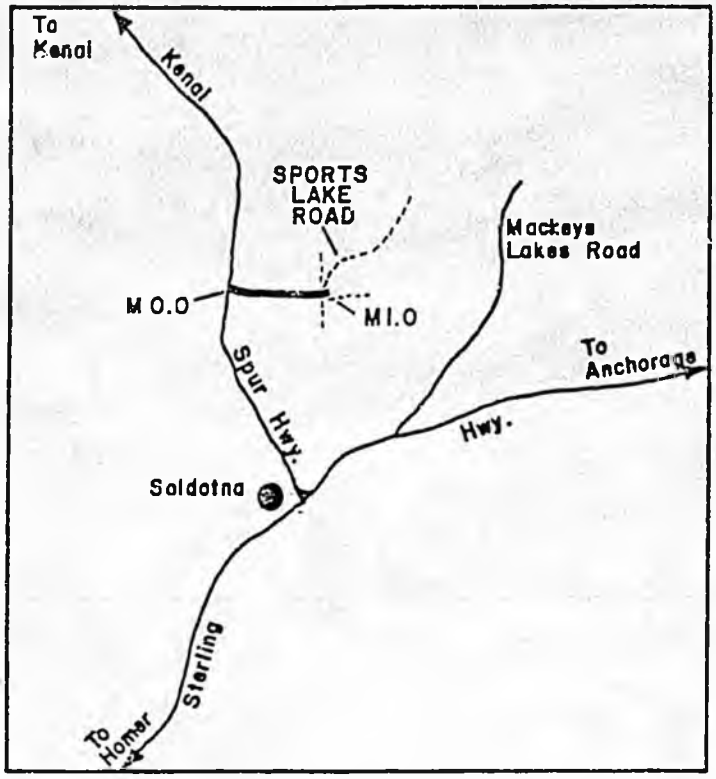
Proposed Physical Improvement: Paved to 32' wide rural standard between Mile 0.0 and Mile 5.73.

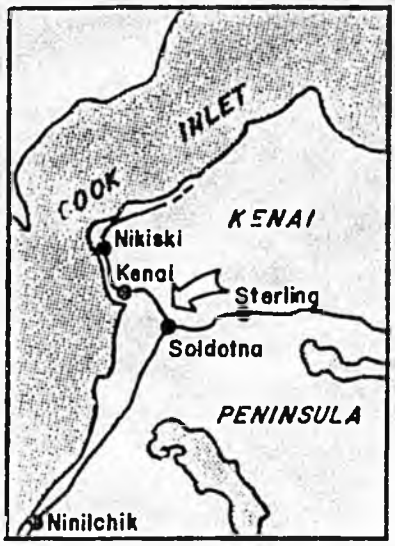
Status: The construction of Mile 0.0 to Mile 3.2 is actively underway. The design of Mile 3.2 to Mile 5.73 is nearing completion.

Next Step Prior to Construction: Funding of construction of Mile 3.2 to Mile 5.73.

ROBINSON LOOP ROAD

SPORTS LAKE ROAD (SR 117612)





Sports Lake Road
Capital Cost:

$2.2 million

1983 ADT = 730

Existing Condition: Mile 0.0 (Jct Kenai Spur) to approx. Mile 1.0, known as "Five Corners": Gravelled 24' surface, no shoulders. Overall condition: fair to poor.

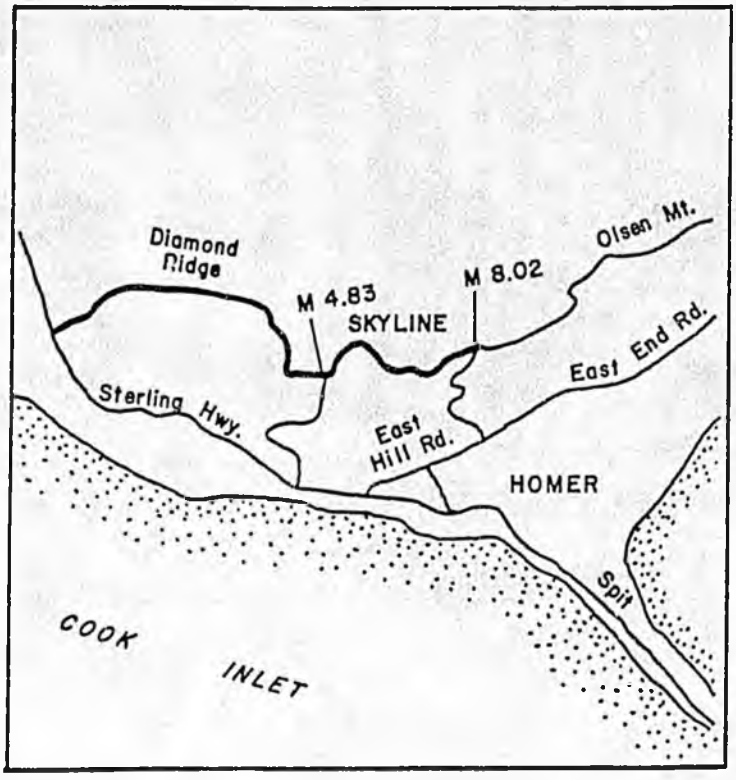
Proposed Physical Improvement: Mile 0.0 to approx. Mile 1.0: Widen and pave to 32' rural standard.

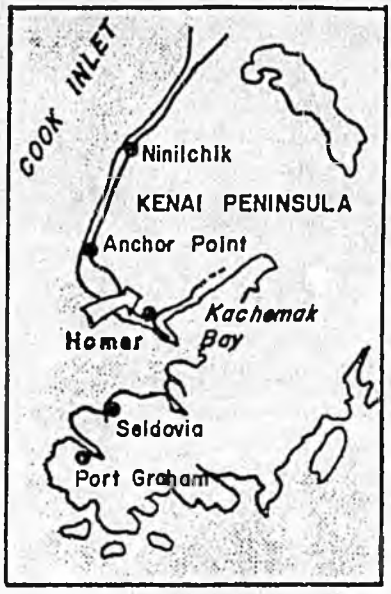
Status: The design is complete, permits have been acquired, right-of-way acquisition is underway.

Next Step Prior to Construction: Construction funding.

SPORTS LAKE ROAD

DIAMOND RIDGE (SKYLINE) / OLSEN MT. ROAD (SR 111300)





Diamond Ridge
Capital Cost:

$2.0 million

1983 ADT = 145

Existing Condition: Mile 0.0 (Jct Sterling Hwy) to Mile 15.81 (end of route): Gravelled 20' surface, no shoulders. Overall condition: poor to fair.

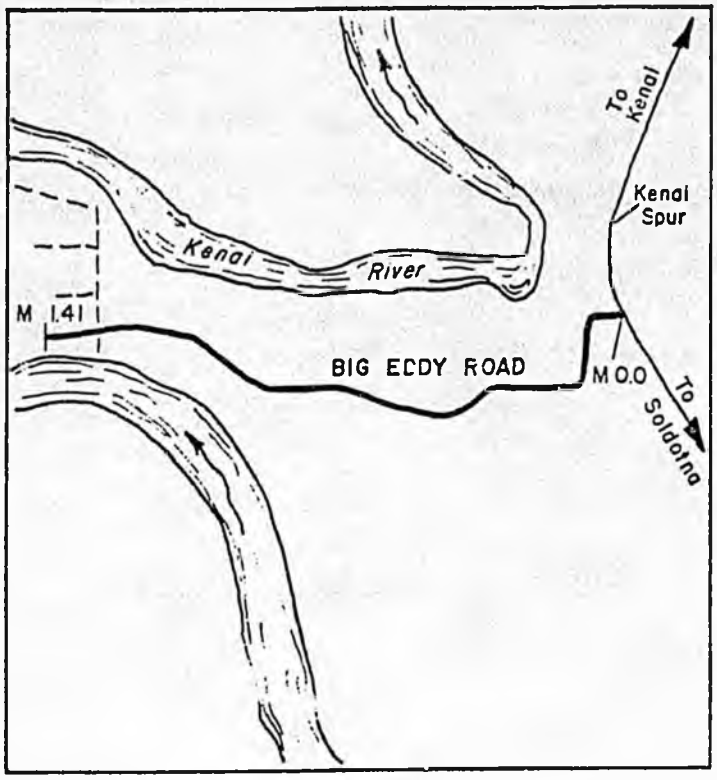
Proposed Physical Improvement: Diamond Ridge (Skyline Drive) Mile 4.83 (Jct West Hill Road) to Mile 8.02 (Jct East Hill Road): Widen and gravel to 28' rural standard. Install guardrails.

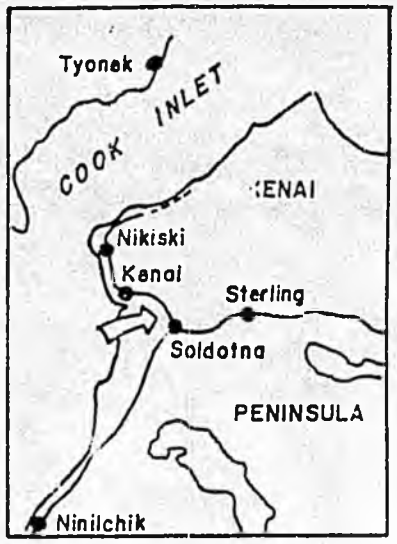
Status: The KPB has funded $68,000 for the design of Skyline Drive between East Hill Road and West Hill Road. The design is complete and right-of-way acquisition is underway.

Next Step Prior to Construction: Construction funding and right-of-way acquisition.

DIAMOND RIDGE (SKYLINE)/OLSEN MT. RD.

BIG EDDY ROAD (SR 117607)





Bid Eddy Road
Phase I
Capital Cost:

$1.5 million

1983 ADT = 400

Existing Condition: Mile 0.0 (Jct Kenai Spur) to mile 1.41 (end of route): Gravelled 18' - 20' surface, minimal shoulders.

Proposed Physical Improvement: Mile 0.0 to 1.4: Pave to 40' rural standard, improve drainage.

Status: The KPB has appropriated $30,000 for design and right-of-way acquisition. The design is actively under way.

Next Step Prior to Construction: Final design, right-of-way acquisition and construction funding.

BIG EDDY ROAD

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James A. Smith
Signature of Camera Operator

11/27/89
Date

02-519 (REV 8/78)

SB

303

DRAFT

TELECOPY COVER LETTER

DRAFT

To: Senator John B. Coghill

DRAFT

From: Mr. Frank Tarpin, President Alaska Railroad Corporation

Subject: _____

Telecopier No. 265-2469 Telephone No. 265-2690 Nancy Alford

NOTE: _____

No. of Pages: 2 including cover sheet

DRAFT

FROM RR ANC HQ 106 04/30/85 08:47 P. 1

XEROX TELECOPIER 495:31- 1-85:21:40 :1 907 265 2469 3404 → 9074653700:# 1

ALASKA RAILROAD CORPORATION

Pouch 7-2111 • Anchorage, Alaska 99510-7069

April 30, 1985

The Honorable John B. "Jack" Coghill
Alaska State Legislature
Pouch V
Juneau, AK 99811

Subject: SB 303

Dear Senator Coghill:

Thank you for inviting our response to Senate Bill 303, which proposes repeal of A.S. 42.40.355.

As you know, A.S. 42.40.355 provides that the Corporation may not apply for a right-of-way across, or exercise eminent domain in, the western unit of the Gates of the Arctic National Preserve.

Among the many powers assigned to it, the Corporation is authorized to plan for and undertake expansion of the railroad and railroad activities, including extension of the rail system. We support Senate Bill 303, because it creates a flexibility to plan for extensions in an important part of our State.

The Legislature has previously found that the Corporation must function as a viable economic entity, which will also provide a level of transportation service that best satisfies the needs of the people of the State. Although any proposed extension of the rail system calls for careful scrutiny consistent with such Legislative purposes, by promoting flexibility, SB 303 meshes well with our desire to responsibly plan for the future.

Sincerely,

F. G. Turpin
President and Chief Executive Officer

IDENTIFICATION

"An Act removing a limitation on the power of the Alaska Railroad to apply for a right-of-way or exercise eminent domain".

SB303

DATE INTRODUCED
4-29-85

RELATED BILLS PENDING
None

SPONSOR(S)
Coghill

REFERRALS
None

INITIAL RESEARCH

INITIAL SUMMARY COMPLETED

LEGAL DIVISION SUMMARY

DEPT OF LAW SUMMARY

SPONSOR CONTACTED FOR BACKUP MATERIALS
Yes

FISCAL NOTE

AGENCY RESPONSE

OTHER INTERESTED LEGISLATORS NOTIFIED
Senator Ferguson

BACKGROUND RESEARCH

SIMILAR BILLS INTRODUCED IN PREVIOUS LEGISLATURES

OTHER STATE OR FEDERAL PRECEDENTS, REGULATIONS, ETC
ARR Entitlement Act

RESPONSES FROM INTERESTED PERSONS AND/OR GROUPS
ARR - Pat (Frank Turpin's Sec. will call soon)
DOT-PF

HEARING PREPARATION

CHAIRMAN BRIEFED

DATE & PLACE SET

STAFF MEMO TO COMMITTEE

TELECONFERENCE

BACKGROUND MATERIAL DISTRIBUTED

PSA/PRESS RELEASE

LIST OF WITNESSES

SUGGESTED AMENDMENTS/CS DRAFTED

STATEMENT BY: SENATOR FERGUSON

to the Senate Transportation Committee

May 1, 1985

I am introducing this amendment to better allow the Alaska Railroad Corporation to extend a line into the Kantishna mining area. The Kantishna area is located in the Denali Park Preserve next to Mt. McKinley. The Alaska Land Use Council studied the Kantishna area pursuant to 16 USC 410 HH-1(b). There findings were that substantial and valuable minerals are present there and extractive activities should be allowed.

I believe that extending the railroad into Kantishna via the Stampede Road route would have many benefits. First it would be a vital asset to mining development of the Kantishna. Secondly, railroad access provides the least environmental damage. Thirdly, the railroad could double the number of tourists that would visit McKinley Park and Denali Park. Since McKinley is operated on a controlled access basis, the presence of the railroad would allow the interchange of bus passengers from one direction with the railroad passengers from the other direction, hence doubling the opportunities to visit the two parks.

While the amendment only pertains to state lands, I believe it will provide the railroad with less obstacle on starting across state land at the beginning of the Stampede route.

My amendment would be parody to the main bill which opens up the gates to the Arctic.

(c) The corporation may lease, subject to AS 42.40.285 and (d) of this section, grant easements in or permits for, or otherwise authorize use of portions of rail land. However, the corporation may not convey its entire interest in rail land except as provided in AS 42.40.285, 42.40.370(d) and 42.40.400.

(d) A lease or disposal of land approved by the legislature under AS 42.40.285 by the corporation to a party other than the state shall be made at fair market value as determined by a qualified appraiser or by competitive bid. (§ 2 ch 153 SLA 1984)

Sec. 42.40.355. Prohibition. Notwithstanding any other provision in AS 42.40, the state-owned railroad as defined under 45 U.S.C. 1202(14) may not apply for a right-of-way across, or exercise eminent domain in, the western (Kobuk River) unit of the Gates of the Arctic National Preserve under 16 U.S.C. 410hh(4)(b)-(e). (§ 2 ch 153 SLA 1984)

Sec. 42.40.360. Request for land. (a) The board may nominate federal land it determines may be useful for present or future railroad purposes for selection under the Alaska Statehood Act (P.L. 85 — 508, 72 Stat. 339), as amended, and request the commissioner of natural resources to select the land for the state through the federal land selection process.

(b) The board may identify and request the commissioner of natural resources to convey land necessary or useful for present or future railroad purposes owned by or tentatively approved for transfer to the state, including land not contiguous with a railroad utility corridor or rail land. The request must include a statement of and justification for the present or future railroad use. Upon receipt of a request, the commissioner shall temporarily reserve the land identified in the request for railroad purposes and defer disposal or lease of that land under other laws to a party other than the corporation. The temporary reservation of land is subject to valid existing rights and remains in effect for 180 days. (§ 2 ch 153 SLA 1984)

Sec. 42.40.370. Conveyance of land. (a) Within 90 days after receiving a request under AS 42.40.360(b) the commissioner of natural resources shall by written decision

(1) designate the identified land for railroad purposes and, subject to valid existing rights, convey the state's interests in the land to the corporation;

(2) notify the corporation of reasons for refusal to designate the identified land for railroad purposes; or

(3) approve the request in part and deny it in part and convey as appropriate.

(b) A conveyance of land under this section may be for less than its appraised value as determined by the commissioner of natural resources.

(c) In the absence of a reservation to the contrary, a conveyance of land under this section vests in the corporation ownership, control of the surface, material and mineral estate, including the right to extract or use timber and other construction materials, sand, gravel, rock, and the right to tunnel, ditch, recontour, excavate, or otherwise use the land for railroad, transportation, transmission, communication, and related purposes.

(d) The corporation may reconvey to the state land received under this section that the corporation and the commissioner of natural resources jointly identify as unnecessary or unsuitable for the corporation's purposes. (§ 2 ch 153 SLA 1984)

Sec. 42.40.380. Use of state land. When emergency conditions require that track or other right-of-way fixtures of the corporation be moved from the existing location and relocated on state land adjacent to or in the vicinity of the existing right-of-way and the chief executive officer determines that relocation is necessary to maintain safe and adequate rail operations, the corporation may effect the relocation and notify the Department of Natural Resources. The relocation must affect only the amount of state land necessary to adequately restore or continue safe rail operations at a normal level. (§ 2 ch 153 SLA 1984)

Sec. 42.40.385. Eminent domain. (a) The corporation may exercise the power of eminent domain under AS 09.55.240 — 09.55.460 to acquire land for railroad transportation purposes consistent with this chapter. Notwithstanding AS 09.55.250, the corporation may acquire a fee simple title whenever, in the judgment of the board, ownership of a fee simple title is necessary to carry out the purposes of this chapter.

(b) The corporation may file a declaration of taking in the manner provided for the state under AS 09.55.420.

(c) The power of eminent domain conferred under this section includes the power to obtain clay, gravel, sand, timber, rock or other material for the operation of the railroad, the land necessary to obtain the material, and access to the land and material.

(d) The exercise of the power of eminent domain requires the prior approval of the governor. (§ 2 ch 153 SLA 1984)

Sec. 42.40.390. Land use rules. The board may adopt exclusive rules governing land use by parties having interests in or permits for land owned or managed by the corporation. The power conferred by this section is exercised for the common health, safety, and welfare of the public and to the extent constitutionally permissible, may not be limited by the terms and conditions of leases, contracts, or other transactions. (§ 2 ch 153 SLA 1984)

Sec. 42.40.400. Vacation of easements. The corporation may vacate an easement acquired under this chapter by executing and filing a deed in the appropriate recording district. If the easement was

SENATE AMENDMENT

BY FERGUSON

To: AMEND SENATE BILL No. SB 303

To: HOUSE BILL No.

PAGE: 1 LINE: 11

Add a new Section 2 which reads

Section 2. AS 42.40.370(a)(2) and (a)(3) is repealed.

SB 303 cont'd

The question being: "Shall Amendment No. 1 be adopted?" The roll was taken with the following result:

SB 303 AM 1

Yeas:	10	Bennett, Fahrenkamp, Faiks, Ferguson, Halford, Kerttula, Ray, Sackett, Zharoff, Ziegler
Nays:	8	Abood, Coghill, Eliason, Fischer Paul, Josephson, Kelly, Rodey, Sturgulewski
Excused:	1	Fischer Vic
Absent:	1	DeVries

and so, Amendment No. 1 was adopted.

Senator Halford moved and asked unanimous consent that SENATE BILL NO. 303 am be considered engrossed, advanced to third reading and placed on final passage. Without objection, it was so ordered.

SENATE BILL NO. 303 am was read the third time.

The question being: "Shall SENATE BILL NO. 303 am (removing a limitation on the power of the Alaska Railroad to apply for a right-of-way or exercise eminent domain) pass the Senate?" The roll was taken with the following result:

SB 303 AM 3RD

Yeas:	15	Abood, Bennett, Coghill, Eliason, Fahrenkamp, Faiks, Ferguson, Fischer Paul, Halford, Kelly, Kerttula, Ray, Sackett, Zharoff, Ziegler
Nays:	3	Josephson, Rodey, Sturgulewski
Excused:	1	Fischer Vic
Absent:	1	DeVries

and so, SENATE BILL NO. 303 am passed the Senate.

Senator Josephson gave notice

THERE IS NO

COMMITTEE SUBSTITUTE FOR

SB 303

Introduced: 4/29/85
Referred: Transportation

IN THE SENATE BY COGHILL

SENATE BILL NO. 303

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act removing a limitation on the power of the Alaska Railroad to apply for a right-of-way or exercise eminent domain."

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

* Section 1. AS 42.40.355 is repealed.

SB 303

SENATOR
JOHN B. "JACK" COGHILL
Chairman

Senator Jan Faiks—Vice Chairman
Senator Mitch Abood
Senator Paul Fischer
Senator Joe Josephson

Alaska State Legislature

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4921

Senate Committee on Transportation

MEMORANDUM

TO: Committee Members

FROM: Committee Staff

DATE: 4-30-85

RE: SB 303

SB 303 repeals Section 42.40.355 of the Alaska Statutes. This sub-section prohibits the Alaska Railroad from applying for rights-of-way in the western unit of the Gates of the Arctic National Preserve under 16 U.S.C. 410hh(4)(b)-(e). 16 U.S., etc. refers to chapter 11 of the ANILCA act. Chapter 11 allows the State of Alaska to apply for access across or into national parks and preserves if the appropriate requirements are met.

Senator Ferguson, the sponsor of this provision of the Alaska Railroad Enabling Act, has agreed to this change.

STAFF MEMO

ALASKA RAILROAD CORPORATION

Pouch 7-2111 • Anchorage, Alaska 99510-7069

April 30, 1985

The Honorable John B. "Jack" Coghill
Alaska State Legislature
Pouch V
Juneau, AK 99811

Subject: SB 303

Dear Senator Coghill:

Thank you for inviting our response to Senate Bill 303, which proposes repeal of A.S. 42.40.355.

As you know, A.S. 42.40.355 provides that the Corporation may not apply for a right-of-way across, or exercise eminent domain in, the western unit of the Gates of the Arctic National Preserve.

Among the many powers assigned to it, the Corporation is authorized to plan for and undertake expansion of the railroad and railroad activities, including extension of the rail system. We support Senate Bill 303, because it creates a flexibility to plan for extensions in an important part of our State.

The Legislature has previously found that the Corporation must function as a viable economic entity, which will also provide a level of transportation service that best satisfies the needs of the people of the State. Although any proposed extension of the rail system calls for careful scrutiny consistent with such Legislative purposes, by promoting flexibility, SB 303 meshes well with our desire to responsibly plan for the future.

Sincerely,

F. G. Turpin
President and Chief Executive Officer

ALASKA RR RESPONSE

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(b) A conveyance of land under this section may be for less than its appraised value as determined by the commissioner of natural resources.

AS 42.40.355 !

and scenic beauty of the mountains, forelands, rivers, lakes, and other natural features; to provide continued opportunities, including reasonable access, for mountain climbing, mountaineering, and other wilderness recreational activities; and to protect habitat for and the populations of, fish and wildlife, including, but not limited to, caribou, grizzly bears, Dall sheep, moose, wolves, and raptorial birds. Subsistence uses by local residents shall be permitted in the park, where such uses are traditional, in accordance with the provisions of title VIII.

Post, p. 2422.

(b) Congress finds that there is a need for access for surface transportation purposes across the Western (Kobuk River) unit of the Gates of the Arctic National Preserve (from the Ambler Mining District to the Alaska Pipeline Haul Road) and the Secretary shall permit such access in accordance with the provisions of this subsection.

Publication in Federal Register.

(c) Upon the filing of an application pursuant to section 1104 (b), and (c) of this Act for a right-of-way across the Western (Kobuk River) unit of the preserve, including the Kobuk Wild and Scenic River, the Secretary shall give notice in the Federal Register of a thirty-day period for other applicants to apply for access.

Environmental and economic analysis.

(d) The Secretary and the Secretary of Transportation shall jointly prepare an environmental and economic analysis solely for the purpose of determining the most desirable route for the right-of-way and terms and conditions which may be required for the issuance of that right-of-way. This analysis shall be completed within one year and the draft thereof within nine months of the receipt of the application and shall be prepared in lieu of an environmental impact statement which would otherwise be required under section 102(2)(C) of the National Environmental Policy Act. Such analysis shall be deemed to satisfy all requirements of that Act and shall not be subject to judicial review. Such environmental and economic analysis shall be prepared in accordance with the procedural requirements of section 1104(e). The Secretaries in preparing the analysis shall consider the following—

42 USC 4332.

Post, p. 2459.

(i) Alternative routes including the consideration of economically feasible and prudent alternative routes across the preserve which would result in fewer or less severe adverse impacts upon the preserve.

(ii) The environmental and social and economic impact of the right-of-way including impact upon wildlife, fish, and their habitat, and rural and traditional lifestyles including subsistence activities, and measures which should be instituted to avoid or minimize negative impacts and enhance positive impacts.

(e) Within 60 days of the completion of the environmental and economic analysis, the Secretaries shall jointly agree upon a route for issuance of the right-of-way across the preserve. Such right-of-way shall be issued in accordance with the provisions of section 1107 of this Act.

Kenai Fjords National Park.

(5) Kenai Fjords National Park, containing approximately five hundred and sixty-seven thousand acres of public lands, as generally depicted on map numbered KEFJ-90,007, and dated October 1978. The park shall be managed for the following purposes, among others: To maintain unimpaired the scenic and environmental integrity of the Harding Icefield, its outflowing glaciers, and coastal fjords and islands in their natural state; and

ANILCA 16 USC 410hh(4)b-e

THERE IS NO

COMMITTEE SUBSTITUTE FOR

Introduced: 4/29/85
Referred: Transportation

IN THE SENATE BY COGHILL

SENATE BILL NO. 303

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

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