ESSAY QUESTION NO. 2

Answer this question in booklet No. 2

Wayne recently purchased Tract 1, a five acre parcel in Alaska, for $100,000. He wanted to build a bed and breakfast on Tract 1. Unbeknownst to Wayne, Gas Corp. had won a state lease to explore for natural gas in some subsurface lands, including beneath Tract 1. Gas Corp. planned to locate a drill rig on a part of Tract 2, immediately adjacent to Tract 1. Gas Corp. had a use agreement with the owner of Tract 2, but it had no agreement with Wayne.

Gas Corp. told Wayne that it held a valid state gas lease and that it could explore Tract 1 regardless of Wayne's objection to such exploration. Wayne responded that he received a valid deed conveying the fee title of Tract 1 and that he could exclude Gas Corp. from accessing Tract 1 to explore for natural gas.

Soon after Wayne acquired Tract 1, the State decided to realign a road and take one acre of Tract 1 as new right-of-way for the realigned road. The State's decision was unrelated to Wayne and Gas Corp.'s plans. The State's engineers had studied the area and concluded that their realignment was the most efficient design. The study did not analyze on a parcel-by-parcel basis the potential effects on any given parcel. The State offered Wayne $15,000 for the right-of-way. When Wayne refused, the State filed a complaint for taking the right-of-way in state court, filed a declaration of taking which stated that the "road is necessary to address safety concerns" and placed $15,000 in the registry of the court.

1. Can Wayne prevent Gas Corp. from exploring for natural gas in Tract 1? Explain.

2. What arguments should Wayne make in court in opposition to the state's case for taking the right-of-way?

GRADER'S GUIDE

***** QUESTION NO. 2 *****

SUBJECT: REAL PROPERTY

1. Can Wayne prevent Gas Corp. from exploring for natural gas in Tract 1? Explain. (40 points)

Whether Wayne can prevent Gas Corp. from exploring for natural gas in the subsurface estate depends first on ownership of the subsurface estate. In Alaska, the State retains the mineral estate (a part of the subsurface estate). The Alaska Constitution provides that:

> All sales or grants shall contain such reservations to the State of all resources as may be required by Congress or the State and shall provide for access to these resources. Reservation of access shall not unnecessarily impair the owners' use, prevent the control of trespass, or preclude compensation for damages.

Alaska Const. art. VIII, sec. 9. Here, the State owns the subsurface estate of Tract 1 if the deed contains the requisite reservation.

Secondly, Wayne's rights depend on the whether the power of a real property owner to exclude others includes the power to exclude the owner of the subsurface estate. The right of a property owner to exclude others is a "fundamental element of the property right" of owners of real property. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (cited in *State v. Arnariak*, 941 P.2d 154, 156 (Alaska 1997)).

Here, under Alaska law, Wayne cannot generally exclude the subsurface estate owner from use of the surface estate related to development or use of the subsurface. In *Parker v. Alaska Power Authority*, 913 P.2d 1089, 1090 (Alaska 1996), the Alaska Supreme Court discussed the relative powers of surface and subsurface estate owners. There, a mining claim owner of subsurface estate claimed the right to be compensated for the state granting surface right-of-way over the same property. *See id.* The court explained:

> At common law, the scope of a mineral owner's rights to the surface estate was "determined by reasonableness: the mineral owner [was] entitled to use as much of the surface estate as [was] reasonably necessary to obtain access to the minerals. Conduct [was] reasonable if it [was] consistent with the practices of the extraction industry." Ronald W. Polston, Surface Rights of Mineral Owners--What Happens When Judges Make Law and Nobody

> Listens?, 63 N.D.L.Rev. 41, 42 (1987). Norken Corp. v. McGahan, 823 P.2d 622, 628 (Alaska 1991). Thus, *the mineral interest was the dominant estate*, and "the mineral owner [had] no obligation to pay the surface owner for the reasonable amount of surface consumed in the development of the mineral estate." *Id.*; *see also* Michelle A. Wenzel, The Model Surface Use and Mineral Development Accommodation Act: Easy Easements for Mining Interests, 42 Am.U.L.Rev. 607, 622 (1993).

Id. (emphasis added) (internal footnote omitted). *See also United States v. Union Oil Co. of Cal.*, 549 F.2d 1271, 1277 (9th Cir. 1977) ("The subsurface estate is dominant."). The court noted that the common law did not apply because of state statutes that controlled the outcome of the issue, but concluded:

> Parker's surface right is a limited one. He can use the surface as necessary for his mining activities, but his surface uses are subject to reasonable concurrent uses. The State, as the owner of the surface estate, is permitted to convey all or part of its interest to other parties and it has done so in this case through the right-of-way grant to APA.

Id. at 1091. *Cf. Leisnoi, Inc. v. Stratman*, 154 F.3d 1062, 1066 (9th Cir.1998) (same result for ANCSA lands).

Here, the State owns the subsurface estate of Tract 1 and Wayne cannot prevent Gas Corp. from exploring for natural gas in its subsurface estate underlying Tract 1 or from reasonable use of the surface of Tract 1 for such exploration.

2. What arguments should Wayne make in court in opposition to the state's case for taking the right-of way? (60 points)

Wayne can make several arguments in court in opposition to the state's takings case. Wayne may argue that the taking is unconstitutional because it is not for a public purpose. He will not succeed because the taking of right-of-way for public roads falls squarely within the public purpose requirement of the Fifth Amendment. The Supreme Court has held that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). The realignment of a public road for safety reasons clearly serves a public purpose. Alaska Statute 09.55.240 specifically provides: "(a) The right of eminent domain may be exercised for the following public uses: . . . (5) roads . . . ." In short, Wayne's constitutional argument will fail.

Wayne may argue that the State does not have the authority for a taking of his property and that the use of his property – as opposed to a neighboring property – for the road is not necessary. AS 09.552.70 requires that the state show "[b]efore property can be taken . . . that: (1) the use to which it is to be applied is a use authorized by law; [and that] (2) the taking is necessary to the use." Here, subsection (1), the "authority" prong, is satisfied because the use is a public road and authority for taking for a road is provided by statute." *See* AS 09.55.240(a)(5). Subsection (2), the "necessity" prong, is satisfied because the surface right-of-way is necessary to the use of the one acre for the new road.

Wayne might further argue that the state has not carried its burden to show that its taking is compatible with the public good and causes the least private injury: AS 09.55.460(b) provides:

> 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 *State v. 0.644 Acres*, 613 P.2d 829 (Alaska 1980), the Alaska Supreme Court analyzed the requirements of AS 09.55.460(b). It concluded:

> The mandate of AS 09.55.460(b) is that "private injury" be considered with reference to the particular properties involved. In our view the statute 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.

Id. at 832-33 (emphasis added).

Here, Wayne will argue that the state's declaration of taking, its engineering study, and its other documentation fail to satisfy the individualized inquiry necessary to minimize the impact upon his property. He will further argue that the road will adversely affect his bed and breakfast and that the road should be moved as far as reasonably possible from his property.

The State will respond that its engineering study determined that the realignment using Wayne's one acre, was the most efficient road design, thus satisfying the requirement to minimize injury to Wayne and other property owners. Depending on where the road is, the State may also assert that a realigned (and presumably) upgraded road will enhance the value of Wayne's

property and is therefore compatible with his use of the rest of Tract 1 for a bed and breakfast.

There is not enough information to fully analyze this issue because the issue would depend upon the actual content of the engineering design study and how closely the State analyzed other potential routes and the costs of the same. Applicants should recognize that the conclusory statement in the State's declaration of taking is not enough to carry the State's burden on this point.

Wayne may argue that the state is not offering him enough money to pay for the right-of-way. Article I, Section 18 of the Alaska Constitution declares: "Private property shall not be taken or damaged for public use without just compensation." AS 09.55.440 provides:

> (a) Upon the filing of the declaration of taking and the deposit with the court of the amount of the estimated compensation stated in the declaration, title to the estate as specified in the declaration vests in the plaintiff, and that property is condemned and taken for the use of the plaintiff, and the right to just compensation for it vests in the persons entitled to it. The compensation shall be ascertained and awarded in the proceeding and established by judgment. The judgment must include interest at the rate of 10.5 percent a year on the amount finally awarded that exceeds the amount paid into court under the declaration of taking. The interest runs from the date title vests to the date of payment of the judgment.

Here, the state has placed $15,000 into the registry of the court. Wayne will argue that his property is worth more than that. He will state that he paid $100,000 for five acres or $20,000 per acre and that the state is taking one acre, therefore the minimum value is $20,000.

The state may argue that the right-of-way is less than the full fee title to the property and that a discount of $5,000 is appropriate. Depending on where the road is, the *S*tate may argue that the realignment of the road will actually benefit Wayne's property and his business as a bed and breakfast and that this would account for any $5,000 discount.

There are not enough facts provided to reach a final conclusion. The facts do not state if each of the five acres was roughly equal in value. Applicants can reach any conclusion on this issue but should recognize that in the end the valuation issue will not prevent the State from actually taking Wayne's property because the fact that it filed a declaration and a deposit means that the State is using the "quick take" procedure authorized by AS 09.05.440. When that procedure is used, a challenge to the amount of the deposit cannot be used to prevent the taking unless the deposit amount was in "bad faith". There are no

facts here to indicate that the deposit was made in bad faith. If the take goes ahead, the owner can take the money deposited but continue to litigate whether the deposit is sufficient compensation.