

## QUESTION NO. 1

### Answer this question in booklet No. 1

Giant Corp. holds an oil and gas lease and has made a sizeable discovery located on state land in a remote part of Alaska. Region, Inc., a regional corporation formed pursuant to the Alaska Native Claims Settlement Act (“ANCSA”), owns large tracts of land adjacent to the discovery. In order to build the infrastructure to access and develop the oil and gas resource – a road, pipeline, etc. – Giant needs a road across Region’s land.

The State decided to build a new public road to the discovery to support development of the project even though Giant has not yet decided whether it will develop the oil and gas discovery. The State proposed to take by eminent domain one thousand acres of Region’s land for the new public road. The State’s engineers had studied the area and concluded that their road alignment was the most efficient design. The study did not analyze on a parcel-by-parcel basis the potential effects of the taking on any given parcel. The State offered Region \$1,000,000 for the land (or \$1,000 per acre). When Region refused, the State filed a complaint for taking the land in state court, filed a declaration of taking which stated that the “road is necessary to support the development of the Giant project” and placed \$1,000,000 in the registry of the court.

Region answered the complaint and disputed the State’s valuation. Region claimed that its land is worth \$2,000 per acre based upon recent sales of nearby recreational parcels on rivers and lakes in the area. The State countered that its road route is exclusively in uplands areas (away from rivers and lakes) where land values are substantially lower. Region also claimed that it was not a proper public purpose to build a road to an undeveloped natural resource project that may never be developed and that Region’s land, as original ANCSA-conveyed land, is not subject to eminent domain.

1. Discuss whether Region can prevent the taking of its land while it litigates the valuation issue and the merits of the valuation issue.
2. Discuss the merits of Region’s other defenses to the State’s proposed taking.

## GRADER'S GUIDE

### \*\*\* QUESTION NO. 1 \*\*\*

#### SUBJECT: REAL PROPERTY

**1. Discuss whether Region can prevent the taking of its land while it litigates the valuation issue and the merits of the valuation issue. (30 points)**

**a. Quick take condemnation procedure.**

Region cannot prevent the taking of its land while it litigates the valuation issue. Alaska law provides for a “quick take” procedure, which the State has chosen to use in this case. Under the quick take procedure, title to the taken land vests with the plaintiff (the State) upon the deposit in the registry of the court of the estimated compensation for the taken property interest. 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.

The valuation issue will not prevent the State from actually taking Region’s property because the State used 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.

**b. Merits of valuation issue.**

Region will also argue that the State is not offering it 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.” *See also* AS 09.55.440

Here, the State has placed \$1,000,000 (or \$1,000 per acre) into the registry of the court. Region has argued that its property is worth more than that. Region has provided sales data for recent and local recreational property sales in the area at \$2,000 per acre. The State has countered that those sales were all recreational properties located on water bodies and that its uplands route is of lesser value. In addition, the State may argue that the road will actually benefit Region's property as it will provide access to this otherwise rural and largely inaccessible area.

Applicants can reach any conclusion on this issue.

**2. Discuss the merits of Region's other defenses to the State's proposed taking. (70 points)**

**a. Region's argument that the State's taking is not for a public purpose. (40 points)**

**1. Authority**

Region has argued that the taking is unconstitutional because it is not for a public purpose. Region likely will argue that the State intends to take its land solely for purposes of the economic development associated with the private oil and gas development by Giant and that such a use is not a proper public purpose.

Region's argument will not succeed. A public road clearly serves a public purpose under Alaska law. 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, Region's constitutional argument will fail.<sup>1</sup>

In *Kelo v. City of New London*, the U.S. Supreme Court reviewed "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment." 545 U.S. 469, 474 (2005). There the City intended to take land from private land owners as a part of a broad redevelopment plan aimed at economic development. The Supreme Court held that such a plan did satisfy the public purpose prong of the Fifth Amendment. *See id.* at 483 ("Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized."). Examinees also may note that the state

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<sup>1</sup> 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).

may have a royalty or tax interest in the oil and gas that may be produced and, therefore, that the state's interest further supports the public purpose for the taking.

Region would also argue that the State has not satisfied AS 09.55.270, which requires that “[b]efore property can be taken: (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) (and discussed above). Subsection (2), the “necessity” prong, is satisfied because the right-of-way is necessary to build the road. It is important to note that the fact that Giant has not committed to drill for the oil and gas is not a part of the analysis of the “necessity” prong. That is because the necessity prong analysis is confined to the narrow scope of whether the amount of private land to be taken is necessary to accommodate the proposed public use (e.g. is 1,000 acres actually necessary for the road project contemplated here, or would 500 acres of Region's land suffice?).

## **2. Compatible with public purpose and causes least private injury.**

Region would 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, Region 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. Region may further argue that the road will adversely affect its other property interests.

The State will respond that its engineering study determined that the road alignment using Region's thousand acres was the most efficient road design, thus satisfying the requirement to minimize injury to Region and other property owners. The State may also assert that the new road will enhance the value of Region's property.

There is not enough information to reach a conclusion 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.

**b. Region's land is not subject to eminent domain. (30 points)**

Region has also argued that the lands conveyed to Region under ANCSA are not subject to state eminent domain. That argument will fail.

Alaska Statute 09.55.260 provides:

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

- (1) all real property belonging to any person;
- . . .
- (6) all classes of private property not enumerated may be taken for public use when the taking is authorized by law.

ANCSA corporations are "persons" for purposes of Alaska law. AS 01.10.060(a)(8) ("person" includes a corporation . . . as well as a natural person").

There is no provision in the ANCSA that protects Region's ANCSA-conveyed lands from state eminent domain proceedings, *see* 43 U.S.C. § 1601 et seq., despite many specific provisions protecting ANCSA lands from other types of governmental proceedings. *E.g.* 43 U.S.C. § 1620(d)(1) ("Real property interests conveyed, pursuant to this chapter, to a . . . Regional Corporation . . . which are not developed or leased to third parties or which are used solely for the purposes of exploration shall be exempt from State and local real property taxes . . .").