

## 8. Legal

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### 8.1. Introduction

DOT&PF must make every reasonable effort to expeditiously acquire real property by negotiation as required by [AS 34.60.120](#) and the Uniform Act. The Uniform Act further requires an attempt to expedite the acquisition by agreements with owners and to avoid litigation and relieve congestion in the courts.

Before the Regional ROW Chief submits a parcel for condemnation they should meet with representatives of the Department of Law's (LAW) Attorney General's Office (AGO) staff to discuss the parcel and determine if there are any approaches to settlement that have not been attempted, including such options as redesign or acquiring a lesser property interest.

There will be instances where all efforts to reach agreement with the owner fail, or where in order to clear title, condemnation is necessary. Once this determination has been made, formal condemnation proceedings must be initiated so that it will not be necessary for the property owner to institute legal proceedings (inverse condemnation) to prove the fact of the taking of the real property.

Although condemnation is expensive, both for the State and property owner, once a parcel is referred to LAW for condemnation expect that a trial will occur to resolve the factual issues in the case. The Regional Pre-Construction Engineer has the final authority for instituting condemnation actions. When the case is referred to LAW, the Regional ROW Chief will provide a ledger code against which to charge the attorney's time.

LAW's Transportation Section represents DOT&PF in eminent domain proceedings and provides legal assistance as requested. Assistant Attorneys General (AAG) are located in Juneau, Anchorage, and Fairbanks. A Section Chief, who reports to LAW's local office Chief, supervises these AAGs. These

AAGs bill their time via an Agency Journal Entry (AJE) transaction.

The Attorney General (AG) may request private (fee) co-counsel to handle a particularly complex or unique case, or to handle additional workload. DOT&PF has prior approval of this method.

The Attorney General (AG) or their designee at LAW will select fee counsel. The State will base fees on the usual and customary fees charged for handling cases of similar complexity. DOT&PF may claim Federal-aid participation in these costs if LAW shows that employment of fee counsel is in the public interest and that the fee is reasonable and not on a percentage basis.

LAW is responsible for providing quarterly status reports of pending cases to the Regional ROW Section. The Regional ROW Chief notifies headquarters of the scheduling of hearings, trials, or other proceedings, based upon these quarterly reports and other communications between LAW and the region.

Of note, LAW has confirmed that "merger of title" does not occur when two agencies of the same government hold interest in the same parcel of land because each of the agencies has different statutory rights in the management of the land. Generally speaking the Alaska Department of Natural Resources (DNR) manages the subsurface rights and DOT&PF manages the surface rights acquired by DOT&PF. Note that tidelands may or may not be managed by DNR. For transportation corridors, DNR has historically concurred that DOT&PF manages the right of way through tidelands.

### 8.2. Authorities

Eminent domain cases, in general, are subject to the [Alaska Constitution](#), [AS 02.15.060](#), [AS 02.15.070](#), and Alaska Supreme Court decisions. [Alaska Rules of Civil Procedure Rule 72](#), governs the special procedures for eminent domain cases. [AS 19.05.040](#) (3), [AS 19.05.080-AS 19.05.110](#), [AS 35.20.010-AS 35.20.040](#), and [AS 44.42.020](#) (b) grant DOT&PF the authority to acquire land through the State's power of eminent domain.

### 8.3. General Procedures

The region's acquisitions supervisor prepares a recommendation for condemnation to the Regional ROW Chief, setting forth the results of the negotiations and number of contacts made, and attaching a copy of the Record of Contact (ROC).

The Regional ROW Chief reviews the case and determines whether legal action is justified. If so, they prepare a recommendation to the regional Pre-Construction Engineer for filing an eminent domain case.

When the Pre-Construction Engineer approves the recommendation, they must request the Design Section to prepare a draft decisional document and forward it to the Regional ROW Chief for review.

In no event may DOT&PF advance the date of condemnation or take any coercive action to induce an agreement over the price to be paid to a property owner.

This process is reversible at any time.

#### 8.3.1. Submission to Department of Law

The Regional ROW Chief must provide the following to LAW:

1. Draft decisional document in hard copy and electronic format, allowing for easy editing.
2. Record of Contact.
3. Market Value Letter with a copy of purchase vouchers.
4. Updated title report.
5. List of defendants who have an interest in the property, including their addresses.
6. Parcel description, plat, and vicinity map.
7. All appraisals that have been prepared for the parcel.
8. Reviewer Appraiser's Recommendation of Just Compensation.
9. Recommendation for Condemnation memorandum.
10. All correspondence.
11. A letter of final offer and intent to condemn.

12. Warrant, or a copy of the purchase voucher to the Clerk of Court, showing DOT&PF has requested the Market Value Deposit.

13. Relocation Benefit Statement (if applicable)

#### 8.3.2. Declaration of Taking

The Declaration of Taking vests title of the real property interest in the State of Alaska. The Regional Pre-Construction Engineer must sign the Declaration of Taking and transmit it with the deposit to LAW. Under [AS 09.55.440](#), title vests when eminent domain proceedings have been instituted in the proper court; however, a certified copy, from the Superior Court, must be recorded immediately in the recording district in which the land being acquired or condemned is located, date stamped as filed in the trial court.

#### 8.3.3. Attorney General Office Review

A legal requirement for all indemnification clauses/agreements/sovereign immunity waivers must be approved by Deputy Attorney General.

#### 8.3.4. Deposit

When LAW files the Declaration of Taking, it must deposit a State warrant with the court for the owner's (or other claimants of interest) benefit, in an amount not less than the Recommendation of Just Compensation.

When all necessary documents have been filed in court, LAW will forward a copy of the filed documents with the filing date to the Regional ROW Chief.

#### 8.3.5. New, Updated, or Revised Appraisals

DOT&PF or LAW must procure any additional valuation or updates to the original valuations for condemnation in accordance with Ch. 4. In accordance with Ch. 5 the Appraiser must forward the report to the Appraisal Review Section (or Appraisal Review Contractor designated by the Statewide Right-of-Way Chief) for review before acceptance for litigation. The purpose of this review is to ensure that the report complies with accepted and applicable appraisal practices.

#### 8.3.6. Settlement Justification

LAW may make a legal settlement if it is in the public interest. For settlements in excess of the Recommendation of Just Compensation, LAW must submit them in a Pre-Trial Settlement Report that justifies expenditure of additional State and Federal money.

### **8.3.7. Possession**

The ROW phase is not complete until the courts give DOT&PF possession of all parcels. The attorney assigned to the case must advise the Regional ROW Chief of the date that (1) the Declaration of Taking and the deposit were filed with the Clerk of the Court, and (2) the State has been given legal and physical possession.

The Regional ROW Chief and LAW should maintain active communication so that these dates are made available to DOT&PF. This information is critical to advancing the project through plans, specifications, and estimate and to the authority to advertise for construction.

### **8.3.8. Interest**

In the absence of a final judgment setting out interest due, DOT&PF pays interest as follows:

- on the amount by which an award exceeds the amount deposited into court;
- at the rate prescribed by law;
- from the date of the original deposit in court up to, but not including, the day the final payment is received in the court registry; and
- based on a 365-day calendar and calculated to two significant decimals.

## **8.4. Authority and Necessity Hearing**

After LAW files the Declaration of Taking, the owners have 20 days to challenge the State's Authority and Necessity for taking the parcel. If challenged, DOT&PF presents evidence to show it has the authority to condemn the parcel and there is no reasonable alternative to taking the parcel. The court determines authority and necessity for the public use by weighing the greatest public good against the least private injury.

## **8.5. Masters' Hearings**

If the court condemns the parcel, Masters are appointed by the court under [Civil Rule 72 \(h\)\(3\)](#). The Master will determine just compensation in the proceedings under the provisions of [AS 09.55.310](#). A Masters' Hearing may not be waived unless all parties agree, in which case, the matter valuation is resolved by a jury trial under [AS 09.55.300 \(b\)](#), using the methodology set forth in [AS 09.55.310](#).

A Masters' Hearing is an informal proceeding where the rules of evidence and testimony are relaxed. The hearings are governed by [Civil Rule 37](#) and [Civil Rule 45](#). Each side has the right to examine and cross-examine witnesses. All testimony is under oath. The court may or may not record the Masters' Hearing.

Either side may appeal the award of damages and the valuation of the property, as set forth in the Masters' Report, for a new trial in Superior Court.

### **8.5.1. Masters' Report**

The Master will prepare a report that summarizes and documents the amount of compensation. If neither party objects to the Masters' finding, the Masters' report becomes final 15 days after the clerk of court makes the Notice of Filing the report. DOT&PF should appeal an award if it is in the State's best interests. However, before making a decision to file an appeal or accept a settlement offer, LAW must obtain the regional director's approval.

## **8.6. Trial**

If the parties to the action object to the appointment of a Master, or if the Masters' Award has been appealed, the court will proceed with a jury trial, unless a jury is waived by all parties to the action.

## **8.7. Appeals to Supreme Court**

A party to an eminent domain proceeding may appeal the final judgment to the Supreme Court. The appeal is limited to factual or legal issues that they believe Superior Court erred in its decision.

Whether DOT&PF should appeal a case is a decision that ultimately rests with LAW. LAW's decision will only be made after consultation with the DOT&PF regional director.

Issues considered before appealing include the impact upon the Recommendation of Just Compensation in the particular action and precedence setting impact on future eminent domain cases conducted by the State and other agencies.

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