

**DEPARTMENT OF COMMUNITY AND  
REGIONAL AFFAIRS**

*MUNICIPAL & REGIONAL ASSISTANCE DIVISION*

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October 26, 1994

Larry Strunk, Mayor  
City of Quinhagak  
P.O. Box 90  
Quinhagak, AK 99655

Dear Mayor Strunk:

The purpose of this letter is to clarify what powers of eminent domain (or condemnation) a second class city may have.

First, AS 29.35.030(a) specifies that a municipality may exercise the power of eminent domain within its boundaries. This section further states that "in the case of a second class city, the exercise of the power of eminent domain or declaration of taking must be by ordinance that is submitted to the voters...a majority of the votes on the question is required for approval of the ordinance." After the ordinance is approved, formal condemnation procedures should be followed. The procedures for a condemnation action are outlined in AS 09.55.240-.460.

The question that has often arisen is whether a city has the power of condemnation over a Native allotment. Dennis Hopewell, Assistant Attorney General for the Office of the Solicitor, Department of the Interior, has confirmed that Native allotments may be condemned. 25 USC 357 provides that "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

Mr. Hopewell also furnished a copy of a formal solicitor's opinion (M-36763 dated April 28, 1967) which held that the term "lands allotted in severalty to Indians" as used in 25 USC 357 also applies in Alaska to Native allotments granted under the Act of May 17, 1906, as well as townsite lots granted under the Act of May 25, 1926. A copy of the opinion is attached for your information. Mr. Hopewell also cited a case, U.S. v. Clark, 445 U.S. 253 (1980) which confirmed that condemnation authority exists but that the condemnation must be by formal procedure not "inverse condemnation." A copy of the court decision is also enclosed.

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Since Alaska Statute 29 is a law of the State of Alaska, it follows that a municipal corporation would have condemnation authority over a Native allotment just as it would over any other land that is needed for a public purpose. Although it was not an issue in the U.S. v. Clark case, the Supreme Court did not question the presumption that a municipal corporation does have condemnation power if it has been granted by the State.

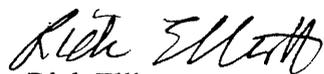
There appears to be only two limitations on the power to condemn a Native allotment. First, the land that is to be condemned must have been actually allotted. That is, a certificate of allotment must have been issued, otherwise the allotment is still in federal ownership and is not subject to condemnation. Second, the taking must be by formal condemnation action, not inverse condemnation. That is, a state or local government is not allowed to condemn by mere physical occupation. (See U.S. v. Clark, 445 U.S. 253 (1980).

Another court case, Etalook v. Exxon, 831, F. 2nd 1440, (1987) dealt with the value of improvements on the land taken. The court held in this case that the allottee was entitled to compensation for the land but not for compensation of the improvements constructed by the condemning agency even though the improvements were constructed prior to the formal condemnation action. This case may also be applicable to the situation in Quinhagak. A copy of the court decision is enclosed.

In summary, the City of Quinhagak does, in my opinion, have the authority to condemn a certified Native allotment. The City must enact an ordinance, which must be approved by the voters, in order to take a condemnation action. Then, formal condemnation procedures outlined in AS 09.55.240.-.460 must be followed.

Please let me know if you have any questions about this.

Sincerely,



Rick Elliott  
Program Manager  
Land Management Program

Enclosures: a/s

cc: Lynn Marino, Village Safe Water, DEC