ORIGINAL

In the

# Supreme Court of the United States

UNITED STATES

PETITIONER,

V.

GLEN L. CLARKE, ET AL.,

RESPONDENTS.

No. 78-1693

Washington, D. C.
January 15, 1980
January 16, 1980

Pages 1 thru 49

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IN THE SUPREME COURT OF THE UNITED STATES

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| UNITED STATES, Petitioner, v. GLEN L. CLARKE, ET AL., Respondents. | No. 78-1693 |

Washington, D. C.,

Tuesday, January 15, 1980.

The above-entitled matter came on for oral argument at 2:46 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MARLON L. DALTON, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Petitioner

ROBERT S. PELCYGER, ESQ., Native American Rights Fund, 1506 Broadway, Boulder, Colorado 80302; on behalf of Respondent Tabbytite supporting Petitioner

RICHARD A. WEINIG, ESQ., Assistant Municipal Attorney, 437 E Street, Anchorage, Alaska 99502; on behalf of Respondents

# C O N T E N T S



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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-1693, United States v. Clarke.

Mr. Dalton, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF MARLON L. DALTON, ESQ.,

ON BEHALF OF THE PETITIONER

MR. DALTON: Thank you. Mr. Chief Justice and may it please the Court:

In this case, the Court is called upon to determine the means by which states and municipalities may acquire rights of way across land allotted to Indians and held in fee by the United States.

The precise question presented today is whether the municipality of Anchorage may invoking section 357 of title 25, acquire a private road running across the allotment of one Bertha Tabbytite by simply taking over that roadway and saying in effect sue me.

In 1954, Mrs. Tabbytite entered on the land in question and began to homestead it. Four years later, respondents Clarke and Baker filed a homestead application on an adjoining 80 acres and two months after that bulldozed a road across the Tabbytite allotment without seeking or obtaining her consent and without obtaining an easement from anyone. Tabbytite protested and continued to protest

for the eleven years from the construction of the road in 1958 until this suit was commenced in 1969 without success.

Now, from 1958 to 1966, Clarke, neighbors Clarke and Baker interposed three contests to Tabbytite's application for a homestead patent as a result of which she was unable to perfect that application during the pendency of those contests. Clarke and Baker, however, were able to obtain in 1961 a homestead patent for their property and they promptly subdivided it into 40 parcels which were essentially sold before the suit was instituted.

Also in 1961, the City of Glen Alps, the third class City of Glen Alps was incorporated and took over maintenance of the road. Essentially that city covered the territory surrounding the property of all of the aforementioned parties to this litigation.

QUESTION: It wasn't annexed to Anchorage, it was just incorporated into a city?

MR. DALTON: Exactly. In 1966, apparently despairing of ever obtaining her homestead patent, Tabbytite elected to take her land as an Indian allotment as she was entitled to do. In 1967, she attempted to block the road. Prior to that her attempts to block treaspassers essentially amounted to posting "no treaspassing" signs and in 1967 she tried physically to block the road but pulled back when Glen Clarke indicated to her that she could be arrested for

so doing.

At that point, she turned to the Bureau of Indian Affairs with her predicament and in 1969 the United States government instituted this suit to close the road and to seek damages.

In 1973, the District Court in fact awarded damages but declined to enter an injunction, holding that the road across the Tabbytite allotment constituted a way of necessity and that to close it would create undue hardship for the defendants. Now, that determination was reversed by the Ninth Circuit in 1976.

Just a few months before that reversal, however, Anchorage and Glen Alps merged in effect, there was a unification of Anchorage and two smaller communities and the resulted entity, the municipality of Anchorage took over maintenance of the road and entered this lawsuit.

Now, on remand the municipality of Anchorage opposed the government's injunction, request for injunction on the grounds that its predecessor in interest, Glen Alps, had in effect condemned the land inversely back in 1961 when it took over the road. The District Court entered two opinions the second time around which together held that Glen Alps did not have the power of inverse condemnation and therefore had not acquired the land in 1961, but that in 1975 when Anchorage and Glen Alps were unified,

Anchorage had effectively obtained the land by inverse condemnation and that that was satisfactory within the meaning of section 357.

QUESTION: Do you say that inverse condemnation is perhaps synonymous with de facto condemnation?

MR. DALTON: No, I would not --

QUESTION: In the sense of it?

MR. DALTON: On the contrary. The government's position is 180 degrees away from that position. Our position is that, despite the similarity of terminology, inverse condemnation and condemnation are by no means equivalence and indeed -- I may not use the term "inverse" condemnation again today.

What inverse condemnation is essentially is the second half of a taking by seizure. Inverse condemnation is a phrase that has been used really to describe the fact that landowners whose land is taken inadvertently by the sovereign have a constitutional right to just compensation, and the so-called inverse condemnation proceeding --

QUESTION: Well, does it have to be inadvertent? There is nothing very inadvertent about this, was there?

MR. DALTON: Well --

QUESTION: They knew the road was going over somebody else's land.

MR. DALTON: Absolutely. Absolutely, and indeed

one of our contentions is that -- though this is somewhat down the road in my argument -- the general proposition where taking are purposeful. It is a policy of the United States and the policy of the State of Alaska that those takings proceed by condemnation, not by seizure.

QUESTION: In an inverse condemnation action taken under the Tucker Act, isn't there a long line of federal authorities holding that the government may defend such an action by saying Congress had not authorized the intrusion and then the person's remedy is simply to have their land back?

MR. DALTON: I'm not familiar with that line of authority, but I trust that it exists. It strikes me that it is helpful to --

QUESTION: I would think it would be helpful to your case.

MR. DALTON: Absolutely.

The issue before this Court is not whether Ankorage has the power under Alaska law, imminent domain law to effect taking by seizure, and that is because this land is owned in fee by the United States and absent the consent of the United States there is no method by which Ankorage can acquire a roadway across the Tabbytite allotment.

Section 357 on its face appears to consent, to

be a waiver of the United States sovereign immunity with reference to state's attempt to condemn allotted land. I suppose it is incumbent upon me to acknowledge, as the Court is aware, that respondent Tabbytite draws into question whether even section 357 at this point constitutes a waiver of sovereign immunity when rights of way are at issue, and particularly when roadway rights of way are at issue. But if we assume for the moment that section 357 does apply, it should be construed narrowly both because it constitutes a waiver of sovereign immunity and because taking under it, condemnation under it in effect potentially results in derrogation of interest of Indians.

QUESTION: Mr. Dalton, excuse me for interruptin, but one question keeps running through my mind. You are denying that there was a taking here, in the inverse condemnation, and the government as I remember is seeking an injunction. You want to stop traffic from going over the road until the state institutes a condemnation proceeding, is that what you want in the case?

MR. DALTON: Well, we certainly take the position that section 357 has to be adhered to and that means that until a formal condemnation proceeding is brought, this taking constitutes a treaspass and --

QUESTION: And therefore you close off the road to traffic until the condemnation proceeding is concluded,

right?

MR. DALTON: Yes. I taeke it, by the way, that would impose no hardship on the municipality of Ankorage in that when Glen Alps --

QUESTION: A few commuters may be unhappy, I suppose.

MR. DALTON: Again, please.

QUESTION: A few commuters may be unhappy. It is sort of a main thorofare, isn't it?

MR. DALTON: It is a main thorofare in the context of a dirt road with one lane going in either direction, but for that part of the world it is a main thorofare. But when Glen Alps was involved in this litigation, it filed a counterclaim for formal condemnation in the event that its way of necessity argument was rejected by the court. Now, at that point the District Court upheld that argument, the Court of Appeals reversed. At that point, the municipality of Ankorage essentially reserved the right within thirty days of any adverse decision to it in this litigation to bring a formal condemnation action, so it strikes me that they are quite prepared to proceed in that fashion if necessary.

Ankorage has suggested in its brief that the term condemnation, that the definition of the term condemnation in section 357 is subject to state law because section 357

provides that condemnation may proceed under the laws of the states where property is situated, but we submit that that simply cannot be. The term condemnation is central to what Congress was about in section 357. It is determinative of the extent of the waiver of sovereign immunity and to leave states free to find the very right which Congress confers and that section we submit would stand the whole notion of consent and waiver on its head.

The decision below and Ankorage in its brief also suggest that the United States seeks to deny Indians the right to bring suits for just compensation. We certainly don't oppose the rights of Indians to receive just compensation, but that of course can be attained in the context of a formal condemnation proceeding.

Our point rather is that the state cannot relegate Indian allottees to an action for just compensation because, as I indicated in response to your first question, Mr. Chief Justice, the phrase proceeding for just compensation, while fairly neutral on its face, really carries with it the reality that at some point a taking by seizure has ocurred or is being contemplated. And since it is our position that a taking by seizure cannot be squared with section 357, it is inconsistent to place allottees in the position of having the burden of bringing an action for just compensation.

Now, there may be a case in which there would be an inverse taking in which allottee ought to be free to elect to proceed in an action for just compensation, but that is not this case and that needn't happen pursuant to section 357. That is, as this Court has said more than once, essentially a constitutional right.

We, of course, acknowledge that seizures by taking do exist and that the Tucker Act in federal practice is the proceeding by which persons whose land has been taken may indeed seek just compensation. This existed at the turn of the century, at the time 357 was enacted, it exists today. In general, we agree that it is an appropriate remedy for inadvertent taking, but it does not follow that this landowner's remedy can be converted into a means by which a sovereign like the municipality of Ankorage can acquire a roadway, an affirmatively purposefully across an Indian allotment.

With the Court's permission -- I am looking at the clock -- I have about a minute. I can enter into my next argument or I can pick it up in the morning.

MR. CHIEF JUSTICE BURGER: We will let you pick it up in the morning, counsel. We will resume at 10:00 o'clock.

(Whereupon, at 2:59 o'clock p.m., the argument in the above-entitled matter was recessed, to reconvene on Wednesday, January 16, 1980, at 10:00 o'clock, a.m.)

IN THE SUPREME COURT OF THE UNITED STATES

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| UNITED STATES, Petitioner, | : | |
| v. | : | No. 78-1693 |
| GLEN L. CLARKE, ET AL., Respondents. | : | |

Washington, D. C.,

Wednesday, January 16, 1980.

The above-entitled matter came on for further oral argument at 10:02 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MARLON L. DALTON, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Petitioner

ROBERT S. PELCYGER, ESQ., Native American Rights Fund, 1506 Broadway, Boulder, Colorado 80302; on behalf of Respondent Tabbytite supporting Petitioner

RICHARD A. WEINIG, ESQ., Assistant Municipal Attorney, 437 E Street, Anchorage, Alaska 99502; on behalf of Respondents

# C O N T E N T S



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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in 78-1693, United States v. Clarke.

Mr. Dalton, you may proceed whenever you are ready.

ORAL ARGUMENT OF MARLON L. DALTON, ESQ.,

ON BEHALF OF THE PETITIONER

MR. DALTON: Mr. Chief Justice, and may it please the Court --

QUESTION: Mr. Dalton, may I ask you a question before you start. Would you be joining Mrs. Tabbytite's arguments if they had been raised below and on the petition for cert?

MR. DALTON: Yes, I would. I also might add that if the Court is mind to entertain those arguments, then the government would be pleased if the Court would reac them in this case because it appears that even if the government prevails on the arguments that we've made, those arguments could be raised in the context of a condemnation proceeding and this proceeding has already gone on for ten years so it may be better to end it once and for all at this juncture.

As I think I indicated yesterday, the heart of the government's case is the proposition that taking by seizure are not the functional or the legal equivalent of takings by condemnation. Both modes, of course, ultimately result in dispossession of the landowner, at least to the extent of

the interests involved, but there the similarity ends.

Before land can be taken by condemnation, several events must occur. Notice must be given to all parties with an interest in the land, and that is particularly important in the allotment context since allottees need not reside on their allotments and the United States government certainly does not. Before land can be taken by a condemnation, the land must be described, there must be determination of the authority for the taking, and this case illustrates the significance of that requirement in that given the dispute over the power of the city of Glen Alps to proceed by eminent domain. Fourteen years after Glen Alps took over the road, a court finally determined that it did not even have the power to proceed in any fashion by eminent domain.

QUESTION: There certainly are these differences. Doesn't the case really come down to the date, that is what you are arguing about, isn't it?

MR. DALTON: Yes. Assume the taking has occurred, the proceeding for just compensation does not make up for the deficiencies prior to that point because the date of taking fixes the time of evaluation of the property and in a taking by seizure, the date of possession or seizure occurs, whereas in a condemnation proceeding the valuation of the land does not occur until compenation is actually

paid, and that is significant because there are necessarily delays when a taking by seizure occurs. In fact, there are incentives for delay and --

QUESTION: You say the valuation of the land in a condemnation proceeding doesn't take place is as of the date of payment?

MR. DALTON: Or the date of the bringing of the condemnation proceeding.

QUESTION: The date of bringing the action.

MR. DALTON: The date of the action, yes.

QUESTION: But absent an action, there is no fixed price until there is an action, right?

MR. DALTON: Correct.

QUESTION: Is that your position?

MR. DALTON: Precisely, and so in that sense the --

QUESTION: And in this case no price can be fixed from your point of view until they commence an action, a true action --

MR. DALTON: Precisely.

QUESTION: -- called inverse condemnation?

MR. DALTON: Exactly. There is one other major distinction in terms of the additional -- well, in terms of the deficiencies of a proceeding by inverse condemnation that I would like to draw to the Court's attention, and that is the fact that in a proceeding for just compensation

or an inverse condemnation proceeding, ordinarily the landowner cannot challenge the authority for the taking. Contrary to suggestions in the municipality's brief, the Causby case from the Alaska Supreme Court does not stand for the proposition that the authority for taking can be challenged in a compensation proceeding, and it would be the line of cases, Mr. Justice Rehnquist, to which you alluded yesterday, the Tucker Act cases involving unauthorized takings.

Certainly in those cases the Court determined that the takings were unauthorized, but it was in a peculiar posture because the government asserted the unauthorized nature of the taking as a defense to payment of compensation.

QUESTION: Assume a governmental agency having the power of eminent domain without commencing any proceeding, moves in and takes over a building and either removes the occupants or occupies a building that is not occupied. Are they in your point of view no different from any other squatter?

MR. DALTON: Yes.

QUESTION: No difference?

MR. DALTON: Yes.

QUESTION: It includes the power of eminent domain -- to you it means that they must exercise it in

the traditional way?

MR. DALTON: Yes, precisely.

QUESTION: Well, the government being clothed with eminent domain does not mean that it can simply -- that the Bureau of Land Management can simply wander around the country and seize various pieces of property. It requires an authorization by Congress as to the particular property, does it not?

MR. DALTON: Yes, and indeed I think that is the force of the cases that you brought to my attention yesterday.

With the Court's permission, if I have any time remaining, I would like to reserve it for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Dalton.

Mr. Pelcyger.

ORAL ARGUMENT OF ROBERT S. PELCYGER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. PELCYGER: Mr. Chief Justice, and may it please the Court:

There are two issues of statutory construction presented in this case. The first is whether section 357 permits the condemnation of allotted Indian lands by seizure or, put another way, whether would be condemnors are required to file a judicial condemnation proceeding.

The second is whether highway rights of way across

Indian allotted lands can be obtained by condemnation at all or, rather, as Tabbytite contends, whether the statutes authorizing the Secretary of the Interior to grant rights of way over allotted Indian lands subject to his conditions and requirements is the exclusive means of obtaining the right of way.

Now, briefly a textual argument with regard to the first issue. The statute says that allotted Indian lands "may be condemned." It does not say "may be seized." It does not say "may be taken." It doesn't even say "may be acquired."

Now, when land has been seized we don't say it has been taken -- we do say it has been taken, but we don't say it has been condemned. Condemnation requires one of two things, either a judicial proceeding initiated by the condemnor or a landowner suit for just compensation which has come to be known as an inverse condemnation suit.

Now I should say there is no indication that the term "inverse condemnation" had been used at all in 1901 when section 357 was enacted. But the important point is that the landowner suit for just compensation is the landowner's remedy and the condemnation cannot occur without either one of those two preconditions, either the landowner's suit or the suit by the governmental authority, and in this

case neither of those things has occurred so that neither condition precedent is present, therefore the lands have not been condemned within the meaning of the statute.

QUESTION: Do I understand you then to take the position that inverse condemnation always violates due process or just in this case?

MR. PELCYGER: Your Honor, our position on that is that seizure, a blatant seizure of property without notice or an opportunity to be heard violates due process. Inverse condemnation again is a landowner's remedy and in a sense when a landowner sues for compensation he is acknowledging his notice, he is himself pursuing his suit in a forum of competent jurisdiction. So, in a sense, the procedural due process issues do not arise in an inverse condemnation setting, but with seizures I would draw a distinction between advertent and inadvertent seizures. In many cases, most of the so-called inverse condemnation cases that have come to this Court involve situation where there is a good-faith dispute between the government and the landowner about whether Fifth Amendment protected property rights have actually been invaded. A classic example of that would be the Causby case involving whether an invasion of air rights constituted a violation of compensable property interest. Of course, the Court held that it did.

QUESTION: Do you think the answer to Justice Blackmun's question is consistent with our decision in the Railroad Reorganization cases?

MR. PELCYGER: I don't know the answer to that, Your Honor.

But our position is certainly that section 357 should be construed in compliance with procedural due process requirements, and certainly state and local authorities proceeding under section 357 should be required to do what they should be doing in any event, mainly to provide opportunity and a notice to be heard to property owner's whose rights stand to be invaded, just like they are required to do before terminating welfare benefits, before garnishing wages, before suspending driver's licenses. Indeed, it is hard to imagine how compensable property rights are entitled to any lesser procedural due process protection than are other kinds of lesser property interests.

QUESTION: I suppose a threshold issue in any formal condemnation proceeding is whether the condemnor in law has the power of eminent domain. Is that not a threshold question?

MR. PELCYGER: Yes, it is.

QUESTION: Well, that would be your first question here.

MR. PELCYGER: That's correct. Now, the procedural

due process aspects of the case are further highlighted by the declaration of taking laws, both federal and state laws providing very meticulous procedures and indeed a court order before possession can be transferred prior to the payment of just compensation. And indeed if seizures are permitted, these declaration or taking statutes are rendered completely superfluous. Alaska statutes in that regard are especially meticulous in protecting the rights of affected property owners.

Now, aside from general procedural due process, the Court, this Court has been especially vigilant in assuring special fairness to Indians. For example, in 1978, this Court decided in Santa Clara Pueblo v. Martinez, that Congress could not have intended to have created an implied cause of action by tribal officials against tribal officials because tribal officials had not had a prior opportunity to present their views to the Congress in the consideration of the 1968 Indian Civil Rights Act. The Court relied on "the overriding duty of our federal government to deal fairly with Indians."

Similarly, in a 1974 decision, Morton v. Ruiz, needy Indians who are living near but off Indian reservations were held not to be able to be denied welfare benefits by the Bureau of Indian Affairs by an unpublished ad hoc agency determination. The Court held that the denial

of assistance under these circumstances "is inconsistent with the distinctive obligation of trust incumbent upon the government in its dealings with these dependent and sometimes exploited people."

QUESTION: But that was based on a statute, wasn't it, that the BIA had represented in appropriations hearings time after time that it was providing assistance?

MR. PELCYGER: I wouldn't say it was primarily. There was that aspect of the decision, but the Court also held that even if the Bureau of Indian Affairs had the authority by Congress to reduce welfare benefits or even to eliminate them to off-reservation Indians, they hadn't done it in the proper way in this case.

So it is even more difficult to ascribe to Congress an intent to allow Indian lands to be taken by seizure, a procedure incidentally that the Ninth Circuit itself in another case, and not an Indian case, described as "high-handed government conduct and not to be favored."

Now, the second issue that is presented by Tabbytite was left open in this Court's decision forty years ago in Minnesota v. United States. Now, at that time Solicitor General Jackson argued on behalf of the United States that highway rights of way across allotted lands could not be obtained by condemnation at all but, rather, required the consent of the Secretary of the Interior

pursuant to 25 U.S.C., section 311, which incidentally was part of the same statute that also included section 357 in the 1901 Indians Appropriations Act.

QUESTION: Now, was this argument raised in the Ninth Circuit?

MR. PELCYGER: No, it was not, Your Honor. The Ninth Circuit though has a controlling precedent on point which is contrary to our position, so even if it were it is doubtful that the Ninth Circuit would have reconsidered that decision.

QUESTION: Is that the reason it wasn't raised?

MR. PELCYGER: I'm not sure why it wasn't raised, Your Honor. I wasn't involved in the case at that time.

I would, however, join Mr. Dalton's remarks that to decide this case solely on the ground presented in the petition for certiorari and sending it back and requiring the municipality to then file a condemnation action on which then Mrs. Tabbytite would defend on the grounds that the right of way can't be acquired by condemnation would prolong this already decade-long litigation which has already been slashed through the Ninth Circuit.

QUESTION: But that is in effect the Ninth Circuit's reasoning, isn't it, just two horses that maybe had different labels but they are the same thing?

MR. PELCYGER: Well, they are not really the same

thing, particularly in the context of when you consider 12 million acres of allotted Indian lands scattered across the country, to say that the land has been condemned through seizure without notice or an opportunity to be heard is --

QUESTION: I think that point is a valid one but it seems to me when you fall back on the idea that we might as well wrap up this whole ball of wax here now, that you are in effect using the same type of reasoning that the Ninth Circuit did.

MR. PELCYGER: Except that the decision-maker would be completely different. If Ankorage was required to apply to the Secretary of the Interior for a right of way, then it would not -- Ankorage would not have the power of condemnation under that statute, it is within the Secretary's discretion and he could impose conditions that are favorable to the interests of the Indian allottee which would be a very different kind of a resolution than the one that was effected by the Ninth Circuit in this case.

In fact, the kinds of problems that have arisen in this case would not have come up at all if the Secretary of the Interior has the exclusive power to authorize the use of Indian allotted lands for highway rights of way, and indeed those matters would be considered administratively by the Interior Department rather than in the federal courts.

As we pointed out in our brief, Tabbytite's

position on the second statutory argument is supported by all of the applicable canons of construction. The 1901 Indian Appropriations Act is ambiguous on its face because it has these two sections, arguably which one applies to the acquisition -- which one or both of them apply to the acquisition of rights of way across allotted lands. Well, that ambiguity should be resolved in favor of the Indians, and the specific statute should control over the general one and the statute should not be rendered insignificant or superfluous.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Weinig.

ORAL ARGUMENT OF RICHARD A. WEINIG, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. WEINIG: Mr. Chief Justice, and may it please the Court:

This is a case of eminent domain. The issue before the Court is to construe a simple unambiguous statute, 25 U.S.C., section 357. It reads: "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."

The issue of state law concerning what constitutes

condemnation, substance and procedure are rendered applicable in this case by virtue of the language of section 357. Section 357 is both a substantive and procedural statute concerning the law of eminent domain and is to be governed by the law of the state.

The specific issues before us involve a sub-specy of condemnation or its synonym eminent domain which is called inverse condemnation or de facto condemnation. Inverse condemnation, which is identical with de facto condemnation, is a taking of private property authotized pursuant to the laws of the state for public purpose without the prior filing of formal judicial eminent domain proceedings and require payment in just compensation.

The specific task before this Court in construing section 357 is to determine whether it allows condemnation of lands allotted in severalty to Indians to be taken in the nature of inverse condemnation or de facto condemnation if the laws of the state applicable allow a taking in the nature of inverse condemnation or de facto condemnation as well as by formal eminent domain proceedings.

Now, the United States has attempted to categorize this case as a feud between two homesteaders on a remote mountain top in frozen Alaska, with the issue being whether one could obtain the right to treaspass across the lands of another. This is not so. It is misleading.

The issue is whether a roadway used as a public roadway fully within city boundaries and maintained as the principal street of a city between 1961 and 1975 and by the municipality of Ankorage, a home rule municipality created in September of 1975 constitutes a taking in the nature of eminent domain of inverse condemnation or de facto condemnation for a public, not private road.

QUESTION: But if your position is correct, the same rule would apply if the state or some municipality of Alaska purported to seize a roadway in some remote mountain top in some other part of the state with nobody there, I mean the allottee not in possession, wouldn't it?

MR. WEINIG: Yes, it would.

QUESTION: I mean the set of facts of this particular case aren't all that important.

MR. WEINIG: The facts are not terribly important except in the sense that the laws of the State of Alaska since the Causby case was decided in 1966, and a continuous train of cases from there, the City of Ankorage v. Nesbett, the Wickwire case, have recognized that a taking in the nature of inverse condemnation is equally valid to a formal eminent domain proceeding as long as just compensation is paid in the proceeding.

QUESTION: But that could occur in a remote mountain top?

MR. WEINIG: It quite certainly could. It certainly could.

QUESTION: Mr. Weinig, just as a matter of curiosity, is this right in the built-up section of Ankorage?

MR. WEINIG: It is. It is up on the hillside. It is one of the more desirable subdivisions and residential areas of Ankorage. It is situated at about the 2,000-foot level in the Chugach Mountain area, an area that is very rapidly developing. It is an area, for instance, that has probably the finest view of any subdivision in Ankorage, but it is in a hilltop area.

QUESTION: One more question. If you knew beforehand that you were taking property for a public purpose, under Alaska law do you have an obligation to bring formal condemnation proceedings?

MR. WEINIG: The Supreme Court of Alaska has not ruled upon the issue specifically, but I think that if the government entity knew in advance that it were to bring eminent domain proceedings, it would be proper for it to file a complaint, not necessarily with the declaration of taking, because that is discretionary with the public agency; but I think that the facts of this case are critically important because the municipality of Ankorage did not exist during the time of the transgressions which have been outlined by the United States and Mrs. Tabbytite.

It was not created until September of 1975, and I would like to review the facts of this case for you because I think they are critical to an understanding of it.

And I think the first thing to examine in the facts of this case --

QUESTION: Mr. Weinig, could I ask you a question before you get to those facts.

MR. WEINIG: Surely.

QUESTION: You say the condemning authority would have to file an action of condemnation but not necessarily a declaration of taking. Would the complaint in condemnation have to describe with particularity the property that was to be taken?

MR. WEINIG: Normally it would, sir.

QUESTION: Well, are there circumstances under which it would not?

MR. WEINIG: If a deliberate act were made to go out and file a formal eminent domain proceeding, it would have to be described.

QUESTION: The government has told us that there are 12 million acres of land in this particular category. I suppose you would agree that the real parties in interest are not likely to know what is going on in all of those 12 million acres, nor is any Indian agent. Is that reasonably correct?

MR. WEINIG: Well, I would first answer that the allegation of the 12 million acres is not of record in this case.

QUESTION: Well, let's suppose it is six million or two million, it is a lot of acres, isn't it?

MR. WEINIG: Right.

QUESTION: Well, isn't the notice function just fundamental in due process to let a property owner or a claimant to property know that someone is taking or about to take?

MR. WEINIG: The notice function is integral to due process. However, in the cases of inverse condemnation which have been decided by this Court, the notice function has never been held to be constitutional deficiency to the taking. For instance, take the United States v. Causby case, the overflight cases, the Riggs case. The overflights, of course, were direct intentional actions on the part of the particular agency, but there was no finding by this Court in either case that the lack of notice was a jurisdictional or constitutional infirmity here.

Now, I think that the same situation would apply with regard to a taking in the nature of de facto or inverse condemnation with regard to the Indian lands. But if a party knew in advance that this government entity were going to go out and condemn land, the notice I think would be

essential.

But the fact in this case is that when Ankorage began maintenance of this road in 1975, September of 1975, there was notice to both the United States and Tabbytite that this action was being taken, and the history of the litigation is critical to this.

As I mentioned previously, before September of 1975, the history of local government is critical to this case. Before September of 1975, the regional government in the area was the rural and there were a number of cities therein, Ankorage --

QUESTION: While you go along, will you tell me whether the burough, the state or the city of Ankorage or anybody at any time paid this woman any money for that land?

MR. WEINIG: The answer directly is no except for treaspass damages which I believe were paid pursuant to the judgment of the District Court of 1973. We have been willing to adjudicate the issue of just compensation in this case since 1976.

QUESTION: Well, why didn't you go ahead and condemn it?

MR. WEINIG: Excuse me, sir?

QUESTION: Why didn't you condemn it?

MR. WEINIG: Because --

QUESTION: Too much trouble?

MR. WEINIG: No, we --

QUESTION: Too much cost?

MR. WEINIG: No, not in the least, sir.

QUESTION: Then what is the reason?

MR. WEINIG: There are two reasons.

QUESTION: Easier?

MR. WEINIG: No.

QUESTION: This is an Indian?

MR. WEINIG: No.

QUESTION: Well, I give up.

(Laughter)

MR. WEINIG: As I indicated, there are two reasons why we did not condemn immediately after the Ninth Circuit decision came down in February of 1976.

QUESTION: My question was why didn't you condemn immediately. My question was why didn't you condemn ever.

MR. WEINIG: All right.

QUESTION: Or why didn't you ever condemn, either way you want to put it.

MR. WEINIG: All right, let's take it from the beginning of time, September of 1976 when the municipality, a newly created government began maintenance of the road. At that time, there was a final judgment by the District Court for the State of Alaska binding upon the municipality,

successor to Glen Alps, binding upon the United States and binding upon Tabbytite at that time, that the road was a public road right of way through an easement of necessity. For the next five months, the municipality maintained that road, snowplowing it through the rigors of an Alaskan winter, pursuant to a final judgment of the District Court of the State of Alaska.

After the Ninth Circuit rendered its decision in February of 1976, as soon as the file was returned from the Ninth Circuit in San Francisco to Ankorage so that the new party, the municipality could examine what the prior course of litigation was, we filed a motion for summary judgment to determine whether as a consequence of the actions a taking in the nature of inverse had occurred.

After the District Court judge in November of 1976 ruled that it had not because the former city of Glen Alps did not have the power of eminent domain but invited us to refile a motion determining whether the new status of law of the municipality which clearly granted the power of eminent domain would be there.

The municipal assembly in December of 1976 held a public hearing upon the issue of whether a formal eminent domain proceeding should be instigated on that road. At that public hearing, and the transcript can be available to this court if you wish, Mrs. Tabbytite, the Indian, and

her attorney appeared and spoke with great earnestness and great fervor requesting the municipality not to file eminent domain proceedings upon this road, pending further negotiations of the parties and pending further outcome of the litigation which was then in process pursuant to the request of the District Court or an invitation to refile a motion determining whether the issue of inverse condemnation had been changed because a new government entity was involved.

Pursuant to the District Court's invitation in November of 1976 and pursuant to the request of Tabbytite before the municipal assembly not to file a formal eminent domain proceeding, we refiled a motion for summary judgment determining the issue of inverse condemnation. In April of 1977, the District Court of the State of Alaska ruled that it was unnecessary to file a formal eminent domain proceeding because a taking in the nature of inverse condemnation had taken place. This was appealed by the United States to the Ninth Circuit. The Ninth Circuit ruled in January of 1979 that an inverse taking had occurred.

Now, throughout all of this time period the position of the municipality has been -- and this can be documented by the record, and I have cited the record in my brief -- that at any time we were willing to adjudicate the issue of just compensation in this case.

QUESTION: Did you ever offer the people five

cents?

MR. WEINIG: Excuse me, sir?

QUESTION: Did you ever offer them any money for their land?

MR. WEINIG: This is not of record, but I will answer your question. The answer is --

QUESTION: If it is not in the record, I don't want the answer because I don't know how correct it would be.

MR. WEINIG: Well, it was in the course of negotiation with the United States --

QUESTION: Well, who has title to it right now under your peculiar Alaska procedure?

MR. WEINIG: I would think that until just compensation is paid in this case, the title would rest in the United States as trustee.

QUESTION: Well, how can you get it out of there except by eminent domain?

MR. WEINIG: Well, we are willing to --

QUESTION: Except by eminent domain.

MR. WEINIG: Your Honor, eminent domain and inverse condemnation are the same thing. We are willing to pay just compensation in this case at any time in which the United States is willing to --

QUESTION: Well, is there anything in the

legislative history of this act that says that it is meant inverse?

MR. WEINIG: Excuse me?

QUESTION: The statute, is there anything in the legislative history that says that it is meant inverse?

MR. WEINIG: Yes, sir.

QUESTION: Condemnation.

MR. WEINIG: There is nothing in the legislative history but there is plenty of contemporary interpretation of contemporary statutes which allow what is now known as inverse for statutes using the words condemnation, as section 357 does, or condemnation under judicial process as section 7 of the Reclamation Act of 1902 does, which was passed by the same Congress that enacted section 357.

The most persuasive evidence of contemporary usage in absence of any legislative history is section 7 of the Reclamation Act of 1902, cited in my brief, I believe at pages 32 and 33. That statute enacted by the same Congress that enacted section 357 in 1901 allowed condemnation under judicial process. This phrase was interpreted by this Court in United States v. Buffalo Pitts Company in 1814 to allow a taking in the nature of seizure or what is now known as inverse condemnation. This statute was further interpreted by the Ninth Circuit in the case of State v. Rank in 1961 affirmed by this Court, in Dugan

v. Rank in 1963, to allow language in a statute "condemned under judicial process," that is more restrictive than the word "condemnation" under our statute to allow what is in essence the taking in the nature of inverse condemnation.

QUESTION: That is a little after this statute was passed, isn't it?

MR. WEINIG: The other statute was enacted by the same Congress one year after.

QUESTION: You said one in 1967. That is a little later than this statute.

MR. WEINIG: Yes, it was but the primary interpretation of section 7 of the Reclamation Act of 1902 was in 1914 and that is highly contemporary.

QUESTION: May we come back to a question that was put to you a little earlier.

MR. WEINIG: Yes.

QUESTION: Let's assume that the municipality wanted to acquire either a right of way or title to land outright. Forget all the facts in this case. The city council says we need the land and they consult the city attorney and he says the quickest way to get it is to proceed under 357 exercising what you describe as a de facto right. Suppose the city simply goes over with a bulldozer and knocks down a building or two, giving no notice to anybody, purporting to exercise their right under 357 that

I understand you are asserting here today. What would be the consequences of that?

MR. WEINIG: Well, I think that the consequences would be in that case that it would not be a valid condemnation under section 357 and for this reason, that there is a requirement of good faith I believe on the part of the condemnor in exercising its powers of eminent domain. In the case that you raise, I think that good faith would not be present, but that is not the case before us with the municipality of Ankorage.

QUESTION: Is your case entirely dependent on the facts that would enable you to argue, as you are arguing, perhaps correctly, that the city was ignorant of the situation and did not understand the proper procedure required that it go through judicial condemnation?

MR. WEINIG: (No response)

QUESTION: Putting it differently, are you asserting that this statute conveys a right knowingly to condemn property by force without resort to judicial proceedings?

MR. WEINIG: No, I would not think that it conveys the right to go out and condemn property by force, but again that is not the situation in this case.

QUESTION: I understand that, but I was just testing your theory that 357 authorizes both de factor and judicial condemnation.

MR. WEINIG: Well, I do not think that the theories concerning inverse condemnation or de factor condemnation that have been evolved over the years would allow a taking by brute force premeditated in that regard. But there are, of course, any number of instances, for instance, in which the United States government has gone out and taken land. You have the Dow case, the Dickinson case, that whole string of cases where the United States has gone onto someone's land and taken it probably with premeditation of the individual officer involved. But I can only emphasize that that is not the case in our situation. We began maintenance of the road under the binding decision of the District Court and we have been engaged in good faith litigation as to its status ever since.

QUESTION: Doesn't the section refer to state law?

MR. WEINIG: Yes, sir.

QUESTION: And it doesn't authorize any condemnations that state law doesn't. And I suppose an adequate answer to a question like Mr. Justice Powell might be that if there were some Alaska law, that Alaska law just itself doesn't allow inverse condemnations of the kind that he referred to. Is there some Alaska law about inverse condemnations or not?

MR. WEINIG: There is a great deal of Alaska law about inverse condemnation. The leading cases that --

QUESTION: Well, does it go any farther than -- do they go as far as to say that you may condemn by force rather than by process?

MR. WEINIG: They do not say that you may go out and rally the tanks and move onto somebody's property, sir. But let's take a look at the two leading cases that have been involved in the Alaska Supreme Court on inverse condemnation. The Causby case is a prime example. The State of Alaska built a road across somebody's property and they did so under a mistake of fact. They thought that it was a section line right of way and in fact it wasn't, and the State Supreme Court, of course, found that the road was there and the road had been built, the road had in fact been placed there in good faith under a mistake, very similar to the mistake I believe in --

QUESTION: So I take it your submission then is that whatever happened here is wholly consistent with Alaska law.

MR. WEINIG: Yes, sir.

QUESTION: And is authorized by Alaska law.

MR. WEINIG: Yes, sir, it is.

QUESTION: And that it doesn't violate any constitutional limitations and hence you should win?

MR. WEINIG: That is absolutely right, sir. Now, I think it is important --

QUESTION: And if some other situation comes up sometime that is different, there may be some constitutional limitations on what the State of Alaska and hence what this federal statute can authorize? But I suppose you suggest nothing like that is here.

MR. WEINIG: I am suggesting that in this case nothing like that is here, and this is why it is very important, in light of the presentation of Tabbytite and of the United States, to bear in mind the difference between the status of the municipality of Ankorage and the former city of Glen Alps, the homesteaders on the mountain, and everything else, because we did not exist at the time that such transgressions, if transgressions they were, occurred.

I am suggesting that since the municipality was created and it is the responsible here today, that Mrs. Tabbytite has been afforded every due process required by both the Constitution and the State of Alaska eminent domain law.

QUESTION: And under Alaska law this is one of those situations where an inverse condemnation is permissible?

MR. WEINIG: Yes, sir, it is.

QUESTION: And you say that since it is permissible under Alaska law, it should be permissible here unless there is some constitutional prohibition, and you

say there isn't.

MR. WEINIG: I say that in this case there has been no constitutional prohibition, and I say that in this case section 357 allows condemnation under the laws of the state where the property is located. Yes, I think it is authorized by statute in this circumstance. I see no denail of due process or other constitutional impediment by the municipality of Ankorage.

QUESTION: Does the State of Alaska allow unorganized municipalities such as Glen Alps, as I understand was at one time, to condemn?

MR. WEINIG: Well, the answer to the question is no, unorganized municipalities may not. Glen Alps was not an unorganized municipality, it was organized pursuant to court order as a third class city in 1961.

QUESTION: So at all times it has been a third class city and not just a collection of people around --

MR. WEINIG: That is correct.

QUESTION: I suppose if this property hadn't been taken into Ankorage but was still owned by Glen Alps, I suppose -- and since it didn't have the power to condemn, it didn't have power to inversely condemn either, and so the section wouldn't authorize any kind of condemnation --

MR. WEINIG: Well --

QUESTION: -- because the section depends on state

law.

MR. WEINIG: If Glen Alps were the only party involved pursuant to the District Court in November of 1976, that would be correct.

QUESTION: And then you would have to give the property back, if there was no other --

MR. WEINIG: If the municipality did not exist.

QUESTION: Yes.

MR. WEINIG: Can I refer very briefly to the trial of this case in which eminent domain was an issue in June of 1972. Eminent domain had been posed as an issue by the City of Glen Alps. There was a hearing on the issue of necessity, placement of the road, and the expert testimony is summarized in our brief. The issue of authority by virtue of the Glen Alps counterclaim was before the court at that time, in June of 1972, but because the court found an alternative theory of law upon which to make its decision that the road was public, an easement of necessity, it dismissed the Glen Alps counterclaim as moot and refused to rule upon the issues that would otherwise have been presented if it had chosen an eminent domain theory upon which to rule. It may well have chosen the same decision in June 1972 that it did in November of 1976, that Glen Alps did not have that power. But it should not be thought by this Court that these issues were not before the trial court in

June of 1972. It just ruled on a different theory of law. The issue has been before the courts on eminent domain by Glen Alps at all times since December of 1970.

Might I add two other quick observations, if I may. The date evaluation nationwide if this Court determines that a taking in the nature of inverse is allowed by section 357 need not always be at the date of physical invasion.

Under the laws of each state, the date evaluation differ. Now, under Alaska law, City of Nesbitt v. Ankorage is under United States law, now versus United States. That date is in fact the date of invasion, but it varies from place to place. Other states have the date evaluation the time of filing the complaint. Some, like California, under certain circumstances have the date evaluation the time of trial or the payment of the award. So it is not uniform.

Now, two other things: One, the allegation is made by the United States and Tabbytite, oh, we would like to have an election of remedies, we would like to have treaspass and injunction as opposed to just compensation. Again, under the laws of the eminent domain statutes of each state, this varies from state to state. Under the State of Alaska, clearly there is no election of remedies. The Wickwire v. Juneau case decided that, but that is not

uniform nationwide. For instance, Colorado is at the other extreme.

If you take the Ossman v. Mountain State Telephone & Telegraph case, decided by the Supreme Court of Alaska in 1974, the condemnee if in a situation of inverse condemnation was given such election of remedies. So this isn't a uniform thing nationwide.

Now, I would like to make two other observations, slight corrections in my brief. I have indicated in my brief that administrative opinion and practice was of little consequence. At that time I had not had access to the briefs of Minnesota, but I believe that the Minnesota case, 113 F. 2d, administrative procedure is persuasive in this case.

The last thing I wish to bring to the attention of the Court is that I have found one case in the reply brief of Tabbytite which is unfavorable to my client and I feel an ethical obligation to disclose this to the Court.

In the United States v. Northern Trading & Transport Company, Justice Brandeis ruled that condemnation and implied contract were different beasts. However, in subsequent cases following that the next year, the United States v. Rogers, 255 U.S. 163, a similar situation is found to stem directly from the Fifth Amendment; in Seaward Air Line v. United States, 261 U.S. 299, 1923, another

requisition for military goods, cause of action found to stem directly from the Fifth Amendment; and the same in Phelps v. United States, 274.

QUESTION: What is the last citation?

MR. WEINIG: Phelps v. United States, 274 U.S. 341.

My only explanation for the Northern Transport case, if you look at the briefs that were submitted there was no claim in the petition for Court of Claims which alleged a taking under the Firth Amendment. There were two common counts for debt and breach of contract, and in light of the subsequent cases I could only believe that Justice Brandeis ruled as he did by narrowly construing the face of the complaint.

QUESTION: When you mentioned that one alternative date for fixing compensation was the date of payment, did you mean payment of tender? As it were, you had a tender by the municipality or the condemning authority and it was rejected and the payment was made a year later. Tender would be the more accurate or the more equitable date, would it not?

MR. WEINIG: I would think, Your Honor, that it would be a more equitable date. I think that in terms of policy it definitely would. In terms of law, I think this is a matter that is probably fixed by the eminent domain

laws of each state.

QUESTION: Of the state.

MR. WEINIG: It varies widely. It is a good equitable decision.

MR. CHIEF JUSTICE BURGER: Thank you. I think the time is all consumed. Thank you, gentlemen.

QUESTION: I take it that you still object or -- your briefs says that we should not consider one of the statutory grounds that is raised here for the first time.

MR. WEINIG: Yes, I think that -- well, there are two statutory grounds that are raised for the first time on appeal, the first of which is the argument that section 311 concerning secretarial grants controls over section 357.

QUESTION: Yes?

MR. WEINIG: Because it is more specific.

QUESTION: Yes? What is the other one?

MR. WEINIG: The other one is the allegation that there has been a repeal by implication of 357 by the act of February 5, 1948, which currently contains --

QUESTION: These were both raised by Tabbytite?

MR. WEINIG: These were both raised by Tabbytite for the first time.

QUESTION: I suppose that if she were to prevail on either one of those we would avoid reaching some

constitutional questions that seem to be hovering in the -- you can't win without our rejecting -- you can't win on your ground withour our rejecting whatever constitutional arguments that are being made here, right?

MR. WEINIG: That is always the case when it comes to constitutional issues in a case.

QUESTION: But we wouldn't reach them if we decided against you on any statutory ground.

MR. WEINIG: Your Honor, that is correct and that is the situation that the Court must face at any time when appellant raises a constitutional issue.

QUESTION: Exactly. Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, gentlemen. The case is submitted.

(Whereupon, at 10:50 o'clock a.m., the case in the above-entitled matter was submitted.)

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