equal protection clauses, I would hold that this statute is constitutional.

RESOURCE INVESTMENTS, a joint venture composed of Harold J. Moening, David G. Fritz, Bruce G. Purcell, Albert A. Kelly and Harvey P. Pittelko, Appellants,

v.

STATE of Alaska, DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES, Appellee.

No. 7229.

Supreme Court of Alaska.

July 27, 1984.

In eminent domain action, the Superior Court, Third Judicial District, Anchorage, Karl S. Johnstone, J., granted State's motion for partial summary judgment, holding that State already had 100-foot-wide right-of-way along highway, awarded amount to property owner greater than ten percent total amount deposited by State, and awarded property owner $115,000 attorney fees and $76,877.13 for costs, and property owner appealed. The Supreme Court, Matthews, J., held that: (1) original patentee's entry on land was valid existing right, and therefore, no part of homestead was affected by public land order which withdrew 100 feet of land for highway purposes; (2) trial court's failure to award entire attorney fees requested was not abuse of discretion; and (3) property owner was entitled to recover costs for trips by its soil expert, expert architect, and appraiser.

Reversed and remanded.

1. **Public Lands** ⇐135(1)

Original patentee's homestead entry of property was "valid existing right" within meaning of Secretary of Interior's public land order withdrawing for highway purposes 100 feet on each side of centerline of highway; thus, State did not own 100-foot-wide right-of-way.

2. **Eminent Domain** ⇐265(3)

Although full attorney fees are norm under rule entitling property owner to award of costs and attorney fees where award obtained is more than ten percent larger than amount deposited by state, attorney fees must be both reasonable and necessarily incurred to achieve just and adequate compensation for owner. Rules Civ.Proc., Rule 72(k).

3. **Eminent Domain** ⇐262(1)

Court of Appeals will not disturb trial court's decision to award less than property owner's actual costs or fees in eminent domain case unless it appears that court's decision is abuse of discretion.

4. **Eminent Domain** ⇐265(1)

When trial court decides not to award full attorney fees and costs in eminent domain case where award obtained is more than ten percent larger than amount deposited by state, trial court must state its reasons. Rules Civ.Proc., Rule 72(k).

5. **Eminent Domain** ⇐265(3)

Trial court's refusal to award full amount of attorney fees requested in eminent domain action in which award obtained was more than ten percent larger than amount deposited by State was not abuse of discretion, where trial court's stated reasons for failure to grant full award were that there was unnecessary utilization of two and sometimes three attorneys at trial and pretrial proceedings at which presence of one attorney would have sufficed, time spent was excessive in view of straightforward nature of issues to be tried, claim of $17,887.55 in attorney fees for preparing motions for costs and attorney fees was not only excessive in itself but suggested excessiveness as to all other fees, and one attorney's billings for travel

time to and from Alaska were unreasonable as was his hourly rate of $175. Rules Civ.Proc., Rule 72(k).

6. Eminent Domain ⇐265(3)

Property owner who recovered eminent domain award more than ten percent greater than that deposited by State was entitled to recover costs for trip by property owner's soil expert, expert architect, and expert appraiser, where trip for purpose of onsite field work by soil expert was reasonably necessary, expert architect's testimony was found by court to have been necessary, and trip of appraiser was also reasonably necessary. Rules Civ.Proc., Rule 72(k).

Mary K. Hughes and Steven S. Tervooren, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for appellants.

Bruce Tennant, Asst. Atty. Gen., Anchorage, Norman C. Gorsuch, Atty. Gen., Juneau, and Eugene F. Wiles and Marc D. Bond, Delaney, Wiles, Hayes, Reitman & Brubaker, Inc., Anchorage, for appellee.

Before BURKE, C.J., and RABINOWITZ, MATTHEWS and COMPTON, JJ.

OPINION

MATTHEWS, Justice.

This appeal follows the trial of an eminent domain action in which the State acquired a thirty acre parcel in Anchorage owned by Resource Investments. The land is situated next to the Old Seward Highway. Prior to trial the superior court granted the State's motion for summary judgment, holding that the State already had a 100 foot wide right-of-way along Old Seward Highway. This removed approximately two acres from the parcel. Resource Investments appeals this decision, contending that the State only had a thirty-three foot right-of-way.

Following a jury trial on the issue of just compensation, the superior court entered judgment on the verdict for $5,061,040, an amount more than 10% larger than the total amount deposited by the State, thus entitling Resource Investments to an award of attorney's fees under Civil Rule 72(k). The court awarded Resource Investments $115,000 for attorney's fees and $76,877.13 for costs. Resource Investments has appealed these amounts claiming that the superior court erred in not awarding actual costs of $149,918.49 and attorney's fees of $357,720.14.

I. THE RIGHT-OF-WAY ISSUE

The property in question was acquired by Resource Investments in 1966 from John Schandelmeier, the original patentee. Schandelmeier filed his application for homestead entry on March 27, 1946 and continuously lived on the property thereafter. He received the patent to his land on June 6, 1951 from the Bureau of Land Management of the United States Department of the Interior. On August 10, 1949 the Secretary of the Interior issued Public Land Order (PLO) 601, which, among other things, withdrew for highway purposes 100 feet on each side of the center line of the Old Seward Highway. The withdrawal was, however, subject to "valid existing rights." The question presented is whether Schandelmeier's pre-patent homestead entry was a valid existing right under the terms of PLO 601. If it was then PLO 601 did not effect a withdrawal from the property.

The landowner's situation in the present case is virtually identical to that of Hansen Associates in *State v. Alaska Land Title Association*, 667 P.2d 714 (Alaska 1983) (*ALTA*). There the original patentee had made his homestead entry prior to the issuance of PLO 601 but did not receive his patent until after PLO 601 became effective. We rejected the State's contention that it owned a 100 foot right-of-way, holding that a homestead entry was a "valid existing right" that was expressly excepted from withdrawal by PLO 601's own terms. *Id.* at 724. The State asks us to reconsider this decision.

In *ALTA* all parties, including the State, agreed that PLO 601 was based on Execu-

tive Order 9337 [1] which in turn was based on the Pickett Act, 43 U.S.C. § 141 *et seq.* *Id.* at 724. In the present case, the State agrees that PLO 601 is based on Executive Order 9337, but argues that the Executive Order is based in part on the Pickett Act and in part on the inherent authority of the President of the United States to withdraw public lands for public purposes. The significance of this distinction is that while the Pickett Act withdrawals may not include lands embraced in any lawful homestead entry, no such limitation applies to withdrawals made under the inherent authority of the President.

Although the State may well be correct that Executive Order 9337 is based on the President's inherent authority as well as on the Pickett Act, that fact is not determinative of the meaning of the phrase "valid existing rights" in PLO 601. In *Stockley v. United States*, 260 U.S. 532, 544, 43 S.Ct. 186, 189, 67 L.Ed. 390, 395 (1923), the United States Supreme Court recognized that an unperfected homestead entry was within an excepted category of "existing valid claims" excluded from the terms of a government withdrawal order. The court stated:

> [T]here is excepted from the operation of the order "existing valid claims." Obviously this means something less than a vested right, such as would follow from a complete final entry, since such a right would require no exception to insure its preservation. The purpose of the exception, evidently, was to save from the operation of the order claims which had been lawfully initiated, and which, upon full compliance with the Land Laws, would ripen into a title.

For the same reason, it seems apparent that the Secretary of the Interior intended to except pre-patent homestead entries from the operation of PLO 601.

[1] We conclude that Schandelmeier's entry was a valid existing right, therefore no part of his homestead was affected by PLO 601. Accordingly, we REVERSE the trial court's grant of summary judgment which held that the State owned a 100 foot right-of-way along the Old Seward Highway and REMAND for a determination of just compensation as to the sixty-seven foot strip of land extending beyond the thirty-three foot right-of-way conceded by Resource Investments.

II. COSTS AND ATTORNEY'S FEES

[2–4] The award of costs and attorney's fees in eminent domain cases is governed by Civil Rule 72(k).[2] Resource Investments is entitled to an award of costs and attorney's fees under Rule 72(k)(3) because the award it obtained was more than ten percent larger than the amount deposited

1. Executive Order 9337 provides in relevant part:

> AUTHORIZING THE SECRETARY OF THE INTERIOR TO WITHDRAW AND RESERVE LANDS OF THE PUBLIC DOMAIN AND OTHER LANDS OWNED BY OR CONTROLLED BY THE UNITED STATES.
>
> By virtue of the authority vested in me by the Act of June 25, 1910, ch. 421, 36 Stat. 847 [Pickett Act], *and as President of the United States*, it is ordered as follows:
>
> Sec. 1. The Secretary of the Interior is hereby authorized to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States *to the same extent that such lands might be withdrawn or reserved by the President*, and also, to the same extent, to modify or revoke withdrawals or reservations of such lands....

(Emphasis added).

2. Rule 72(k) provides:

> Costs and attorney's fees incurred by the defendant shall not be assessed against the plaintiff, unless:
>
> (1) the taking of the property is denied; or
>
> (2) the plaintiff appeals from the allowance of the master and the defendant does not appeal; or
>
> (3) the award of the court was at least ten (10) percent larger than the amount deposited by the condemning authority or the allowance of the master from which an appeal was taken by the defendant; or
>
> (4) the action was dismissed under the provisions of paragraph (i) of this rule; or
>
> (5) allowance of costs and attorney's fees appears necessary to achieve a just and adequate compensation of the owner.
>
> Attorney's fees allowed under this paragraph shall be commensurate with the time committed by the attorney to the case throughout the entire proceedings.