The Purdy defendants ask this court to dismiss the condemnation count (Count VI of the Complaint) for lack of subject matter jurisdiction. In support of this request, the Purdy defendants allege that the State fails to follow Alaska law in two respects: it has not sufficiently documented its consideration of the private injury to the Purdys of condemning the historic trails that cross their allotments (or, in one instance, the allotment of Anne but not of Agnes), and that the Meyers Fork Spur trail designated as no. 4 on the litigation map is for the benefit of a single individual and not of the public. In particular, the Purdys allege that the State has not followed the dictates of AS 09.55.420, .430, .450(a) and .460(b).

Subject matter jurisdiction is conferred on the federal court by 25 U.S.C. §357, which provides:

> 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.

This statute was held to give subject-matter jurisdiction to the federal court in condemnation cases involving Native allotments in *Yellowfish v.City of Stillwater*, 691 F.2d 926 (10th Cir. 1982), *Cert. Denied* 461 U.S. 927 (May 16, 1983). *See* 41 Am. Jur. 2d Indians §81.

Because 25 U.S.C. 357 confers subject-matter jurisdiction over this matter on the district court, the Purdy defendants' motion to dismiss for lack of subject-matter jurisdiction must be denied.

Without subject-matter jurisdiction, the court could not address the Purdy defendants' challenges to the sufficiency of the pleadings. In order to avert unnecessary delays in the future, the state offers the following preliminary response the Purdys' contentions, reserving its right to respond more fully if the objections are properly raised.

The Purdy defendants' objection to the complaint is premature insofar as they dispute the state's allegation that the takings are necessary. The condemnation count will only come into play, if at all, after the court has ruled on the quiet-title counts. If the court confirms the state's title to all the trails identified in the complaint, there will be no need to condemn any of them. If the court confirms the state's ownership of some of the trails as

RS 2477 rights-of-way and not of others, the state will reassess the remaining trails at that time. Until the court has ruled on the quiet-title counts of the complaint, it is not possible to make a detailed analysis of the necessity of any trails that may remain. This objection should be held in abeyance until after the court has ruled on the quiet-title aspects of this case and the state has had an opportunity to reassess any remaining trails in light of the court's ruling.

The merits of the Purdy defendants' objections to the condemnation count in the complaint are misaddressed; the Purdys conflate two different types of condemnation action with two sets of requirements, and apply the wrong requirements to the condemnation action initiated here.

AS 09.55.460(a) governs the status of title to disputed property in an appeal from a trial court's decision regarding a condemnation. Since this is not an appeal from a trial court's decision, AS 09.55.460(a) cannot apply. AS 09.55.460(b), regarding the divesting of title from a condemnor and restoring title to its original holder, only applies in a "quick take" case, which this is not.

AS 09.55.420-.450 govern a "quick take" condemnation using a Declaration of Taking. The State has not used a Declaration of Taking in this case. Rather, this condemnation is what the Alaska Supreme Court has referred to as a "general condemnation," the only available option before Alaska's "quick take" statute was adopted in 1953[1]. *See Ship Creek Hydraulic Syndicate v. State*, 685 P.2d 715, 716 (Alaska 1984). In *Ship Creek*, the Alaska Supreme Court ruled that when the state – or another condemnor - chooses to employ the "quick take" method of condemnation using a Declaration of Taking, it must

[1] The differences between a "general" condemnation and a "quick take" condemnation are set out in *ARCO Pipeline Co. v. 3.60 Acres*, 539 P.2d 64 (Alaska 1975). In a "quick take" condemnation, title to the property in question passes defeasibly to the condemnor upon filing of the Declaration of Taking and deposit of the estimated just compensation, and the question of the amount of compensation is deferred for later proceedings. In a general condemnation, title to the property remains with the previous owner until the conclusion of the action when the amount of compensation has been determined and the court has entered an order and judgment of condemnation. *ARCO* at 70. Thus, the order of consideration is different in a "quick take" and a general condemnation. In a "quick take" condemnation, the issue of of authority and necessity for the taking is bifurcated from the issue of the amount of compensation, and is heard in a separate proceeding prior to the compensation phase. This is not the case in a general condemnation.

include with its Declaration of Taking a Decisional Document setting out its reasoning for selecting a particular property to be acquired for a project. *Id.* At 718. The absence of such a document would be a basis for a motion to dismiss a "quick take" condemnation, but not a general (or "slow take") condemnation. The Alaska Supreme Court has not ruled on the need for a Decisional Document in a "slow take" or "general" condemnation action.

The state has not filed a "quick take" condemnation in this case. Instead, Count VI of the complaint states a claim for a general or "slow take" condemnation, in which title remains with the original landowners until the conclusion of the action when the court enters a judgment of condemnation after having determined the amount of just compensation for the taking. A general condemnation is governed by AS 09.55.240 - .410.

The prerequisites for a general condemnation are set out at AS 09.55.270:

> Before property can be taken, it shall appear that
> (1) the use to which it is to be applied is a use authorized by law;
> (2) the taking is necessary to the use;
> (3) if already appropriated to public use, the public use to which it is to be applied is a more necessary public use.

In *City of Fairbanks v. Metro*, 540 P 2d 1056, 1058 (Alaska 1975), the Alaska Supreme Court held that in a general condemnation case arising under AS 09.55.270(2), the condemnor need show no more than that the taking is "reasonably requisite and proper for the accomplishment of the purpose for which it is sought." Once the condemnor has presented sufficient evidence to support a finding that the taking is "reasonably requisite," particular questions as to the route, location, or amount of property to be taken are to be left to the sound discretion of the condemning authority absent a showing by clear and convincing evidence that such determinations are the product of fraud, caprice, or arbitrariness. *Id.* These are delineated in the decision as evidentiary questions, and thus are not appropriate to decide on the pleadings alone.

In *Town of Seward v. Margules*, 9 Alaska 354 (D Alaska Terr. 1938), the territorial district court, interpreting a territorial statute that set out the first two elements of AS 09.55;270, held that allegations in an amended complaint that the taking was necessary ("imperatively required") was sufficient to survive a demurrer. *Id.* At 358. So here, in a general condemnation case, the assertion in the complaint that the taking is necessary to serve a legitimate public purpose is sufficient to withstand a motion to dismiss. Evidence

will be required to weigh whether the taking is reasonably requisite, and that will only be possible to determine once the court has ruled on the quiet title counts of the complaint.

The Purdy defendants also assert that the condemnation of the Myers Fork Spur trail is for the private benefit of one user (Motion, page 10) and so cannot be for a public use as authorized by law. In fact, Busby has observed (numerous?) moose hunters using the Myers Fork Spur trail to access hunting areas this season (reference affidavit that Kent will have obtained). More telling is the principle that "[p]ublic use does not require actual use by the public, but rather that the public will receive a benefit or advantage from the taking." 1985 Inf. Op. Atty. Gen. (September 12, 166-186-84) (1985 WL 70222(Alaska A.G.), *citing Montana Power Co. v. Bokma*, 457 P.2d 769, 774-75 (Mont. 1969). As long as the public has the right of use, whether exercised by one or many members of the public, a "public advantage" or "public benefit" accrues sufficient to constitute a public use…." *Id., quoted* in *Williams v. Hyrum Gibbons & Sons*, 602 P.2d 684, 687 (Utah 1979).

Here, the benefit to the public is one of access to resources and opportunities, whether they be recreational, hunting, exploration or other types of opportunity. No individual holds a monopoly on the use of any of the trails identified in the state's complaint. Any trails that are condemned in this action will be condemned for the beneficial use of the public, not of any individual. Which and how many members of the public choose to avail themselves of the opportunity to use public trails at any particular time is not within the control of the state and does not determine whether the trails are for pubic use.