**27.06(A) SEVERANCE DAMAGES / No Cost of Cure Issue**

In this case, the property owner is seeking severance damages. Severance damages occur when (a) the government takes only part of the owner’s property, (b) the part taken and the part not taken were an integrated whole prior to the taking, and (c) as a result of the taking, there is a decrease in the fair market value of the part not taken. In this case, the property taken is called “Part T” and the property not taken is called “Part NT.”

You must first decide whether Part T and Part NT were an integrated whole prior to the taking. To make this determination, you should consider all the evidence about the two parts, including:

(1) whether they were under common ownership prior to the taking;

(2) whether they are physically connected; and

(3) whether they were used for the same purpose, or it is reasonably probable that they would be used for the same purpose.

If you find Part T and Part NT were not an integrated whole prior to the taking, then [owner] is not entitled to severance damages.

[Insert either OPTION A or OPTION B]

**OPTION A--When Loss of Fair Market Value is the Only Issue**

If you find that Part T and Part NT were an integrated whole prior to the taking, you must then decide whether the fair market value of Part NT decreased as the result of the taking of Part T.

If you decide that the fair market value of Part NT decreased as a result of the taking, you must determine the dollar amount of this reduction in fair market value. This amount is [owner’s] severance damages. You must enter this amount on the verdict form on the line for severance damages for Part NT.

If you decide that the fair market value of Part NT increased or stayed the same as a result of the taking, then [owner] is not entitled to severance damages. You must enter $0 on the verdict form on the line for severance damages for Part NT.

**OPTION B--When the Government Claims that a Loss in Fair Market Value is Offset by a Special Benefit to the Property from the Project**

If you find that Part T and Part NT were an integrated whole prior to the taking, you must decide if [owner] is entitled to severance damages for Part NT. I will now explain how to make this determination.

You must decide if the taking of Part T reduced the fair market value of Part NT. If the answer is No, then [owner] is not entitled to any severance damages for Part NT. You must enter $0 on the verdict form on the line for severance damages for Part NT.

If the answer is Yes, you must determine the dollar amount of [owner’s] severance damages for Part NT. There are several steps to determine the dollar amount of these damages.

First, you must determine the dollar amount by which the taking of Part T reduced the fair market value of Part NT. I will refer to this amount as the Initial Damage Amount.

Second, [government] claims that this Initial Damage Amount must be reduced because completion of the project conferred a special benefit on Part NT which [increased] [will increase] Part NT’s fair market value. A special benefit is a benefit that is specific to Part NT and is not shared by other properties in the area or the community at large.

If you decide that completion of the project did not confer a special benefit on Part NT which [increased] [will increase] Part NT’s fair market value, there is no offset or reduction of the Initial Damage Amount. You must award [owner] severance damages for Part NT that are equal to the Initial Damage Amount. You must enter this amount on the verdict form on the line for severance damages to Part NT.

If you decide that completion of the project conferred a special benefit on Part NT, and that this special benefit [increased] [will increase] Part NT’s fair market value, the amount of this increase offsets any loss in fair market value in Part NT caused by the taking of Part T. To apply this offset, you must decide the dollar amount of the increase in fair market value due to the special benefit. I will refer to this amount as the Special Benefit Amount. Subtract the Special Benefit Amount from

the Initial Damage Amount. If the remaining amount is zero or a negative number, [owner] is not entitled to any severance damages for Part NT, and you must enter $0 on the verdict form for severance damages to Part NT. If the remaining amount is more than zero, this number is [Owner’s] severance damages for Part NT. Enter this amount on the verdict form as the severance damages for Part NT.

**Use Note**

This instruction should be given when the government takes a portion of the property owner’s land, and the property owner claims that the taking decreased the value of the portion that the government did not take. In this instruction, the terms Part T and Part NT refer to the properties taken and not taken. Prior to giving this instruction, the court may replace these terms with designations appropriate to the case.

Instruction 27.06(A) should be used when the government is not claiming that the owner could have avoided the claimed severance damages by taking curative measures. If the government is claiming that the owner could have avoided the claimed severance damages by taking curative measures, use Instruction 27.06(B)

Option A should be given when the government is not claiming that the fair market value of the remaining parcel was increased by any special benefit conferred on the property by completion of the project.

Option B should be given when the government claims that the fair market value of the remaining parcel increased due to a special benefit conferred by completion of the project.

It may be necessary to add an instruction defining "common ownership" in situations where the properties are owned in different legal capacities, such as by a partnership, corporation, or trust.

**Comment**

Severance Damages

Severance damages are those damages which accrue to the remainder due to the severance itself or due to construction of the project in the manner proposed by the condemnor. *See* AS 09.55.310(a)(2).

Severance damages do not include damages caused by negligent construction of the project, because the relevant date for awarding damages is the date of taking. *City of Anchorage v. Scavenius*, 539 P.2d 1169, 1177-79 (Alaska 1975). Under those circumstances, the condemnee may have a subsequent separate action in tort or in inverse condemnation. *Id*.

The "three unities" theory has traditionally been used to determine whether property is part of an integrated whole. According to this doctrine, three non-exclusive factors are employed to ascertain whether various units of property constitute an integrated whole. The factors are: physical contiguity between the several parcels, unity of ownership, and unity of use.

For a discussion of the three unities theory, see *Babinec v. State*, 512 P.2d 563, 567 (Alaska 1973); *see also City of San Diego v. Neumann*, 863 P.2d 725, 729 (Cal. 1993); *State v. Rittenhouse*, 634 A.2d 338 (Del. 1993).

Special Benefits

AS 09.55.310(a)(3) requires the factfinder to consider "how much the portion not sought to be condemned and each estate or interest in it will be benefited, if at all by the construction of the improvements proposed by plaintiff. . . ." These benefits are only used to offset severance damages and not the value of the part taken. AS 09.55.310(a)(3); *Vezey v. State*, 796 P.2d 327, 335 (Alaska 1990); *Dash v. State*, 491 P.2d 1069, 1072 n.6 (Alaska 1971).

Benefits that may offset severance damages are referred to as "special benefits." *State v. Lewis*, 785 P.2d 24, 27 (Alaska 1990). No Alaska decision articulates clearly when benefits that “flow” from a project are special rather than general.

In *Vezey v. State*, 796 P.2d 327, 335 (Alaska 1990), the court held that vacation of an old right-of-way was not a special benefit which would reduce severance damages, because the benefit did not flow from the project itself. Instead, the benefit flowed from a separate decision by the state to vacate the right-of-way.