

## MEMORANDUM

NOV 18 1998

State of Alaska  
Department of Law

To: John F. Bennett  
Engineering Supervisor  
DOT&PF-Northern Region

Date: November 16, 1998

AG File No:

Telephone No: 269-5162

Subject: Vacation of right-of-way

From: <sup>RAK</sup> Ross Kopperud  
Assistant Attorney General  
Transportation Section, Anchorage

Attached are documents regarding the question of vacation of right-of-way regarding whether or not the City of Anchorage could vacate the state's right-of-way. The materials are as follows:

- Decision and Order
- State's Cross-Motion for Summary Judgment
- Safeway's Opposition to State's Cross-Motion for Summary Judgment
- State's Reply to Safeway's Opposition
- Schedules B

Please call me if you have any further questions.

RAK:bg

Atts.

I:\KOPPERUR\MISC\BENNETT.MMO

**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT**

SAFEWAY, INC.,

Plaintiff,

vs.

STATE OF ALASKA, DEPARTMENT  
OF TRANSPORTATION AND PUBLIC  
FACILITIES,  
Defendant.

Post-it® Fax Note	7671	Date	9-28	# of pages	5
To	Susan Urig	From	Judge Wolverton		
Co./Dept.	AGO	Co.			
Phone #	269-5100	Phone #	264-0410		
Fax #	279-5832	Fax #	264-0504		

Case No. 3AN-97-7188-CIVIL

**DECISION AND ORDER**

This case involves the rights to a relatively small parcel of land which is nevertheless very important to both parties. It is located in the New Seward Highway right-of-way on the southeast corner of the intersection with Tudor Road, adjacent to the land currently occupied by Tony Roma's Restaurant. Specifically, it involves land granted as a roadway and denominated as the "Becharof Easement."

Plaintiff, Safeway Inc., has moved for summary judgment declaring that: (1) the 1959 dedication of the Becharof Easement was a common law dedication which granted only an easement to the public while the fee title was retained by the original dedicators/grantors; (2) the State Department of Transportation/Public Facilities (DOTPF) failed to assert any interest in the easement area during the Municipality's 1983 vacation of the Becharof Easement and should now be prohibited under principles of estoppel and/or quasi estoppel from asserting any interest in the easement area; and (3) the State DOTPF has no claim of right, title or interest to the Becharof Easement.

The State DOTPF has filed a cross-motion for Summary Judgment, asserting that: (1) the Becharof Easement (which became Becharof Street) was never vacated as to the state, and the state therefore retains authority and control over the Becharof Easement; and (2)

alternatively, the vacation of the Becharof Easement resulted in the northernmost 110 feet of Becharof and at least the west 30 feet being vested in the state.

Based upon a review of the briefing filed in support of the motions and the oral argument presented, and upon a review of the entire record herein, the court:

- (1) agrees with Safeway's argument that the 1959 dedication of the Becharof Easement was a common law dedication which granted only an easement to the public while the fee title was retained by the original dedicators/grantors; and
- (2) agrees with the state that the Becharof Easement was never vacated as to the state, particularly with respect to the state's New Seward Highway right-of-way, and that the state therefore retains authority and control over the Becharof Easement.

#### FINDINGS

On September 15, 1959, the owners of the parcel, Modern Electric, Inc., and Mr. and Mrs. McCutcheon each dedicated and recorded a 30' strip of property for an easement and right-of-way for use by the public. This combined 60' right-of-way became Becharof Street, which was thereafter maintained by the Municipality of Anchorage as a city street.

On September 30, 1963, the McCutcheons deeded a portion of their land to the east of the Modern Electric by conveyance to Calais Co., Inc., (Calais) but specifically excepted the western 30 feet which had been dedicated to the public as a public roadway.

On June 24, 1964 the Greater Anchorage Borough approved plat number 64-50 by which Calais subdivided part of its property into Bancroft Subdivision. This plat makes specific reference to the Becharof Easement, and to Becharof Street.

On August 8, 1967, plat number 67-136 added Shelikof Street as a second access to Tudor, and the 60' area previously dedicated by Modern Electric and the McCutcheon's was again referred to as "Becharof Street."

In the 1960's the state had begun work on a design for the New Seward Highway, which was planned as a controlled access high speed highway with frontage roads on each side for

local access. In this process the state prepared a Right-of-Way Map, which the state asserts is the official document setting out the areas over which the state has control for the design, construction and maintenance of a public highway. This map includes all of Becharof Street within the public right-of-way available for state use.

The court agrees with the state's position that inclusion of Becharof Street on the Right-of-Way Map accomplished the state's formal acceptance of the Modern Electric/McCutcheon dedication of the easement to the public at large. The Right-of-Way Map of March 18, 1968 which included Becharof was followed by State Declarations of Taking dated July 29, and October 15, 1968, which included maps recorded with declarations showing Becharof included within the state right-of-way. On March 22, 1969, the Municipality of Anchorage and the State entered into a subordination agreement, (which was recorded) whereby the city assented and agreed that all municipal utility easements located within the right-of-way as set forth on the Right-of-Way Map would be subordinate to the state's rights in the property. Shortly thereafter, on May 15, 1969, the city entered into a utility relocation agreement requiring city powerlines to be moved because they were located within the state right-of-way which included Becharof.

The portion of Becharof at issue became part of the state right-of-way to allow for the diamond shaped, separated grade interchange constructed for the intersection of the New Seward Highway and the Tudor Road overpass. Calais, the successor in interest, was aware that Becharof was included within the state right-of-way in light of Declarations of Taking dated July 29 and October 15, 1968. Calais recognized this fact when, in a letter dated July 1, 1969, its attorney Ken Atkinson wrote to Assistant Attorney General Kaye Richey and referred to Becharof as being "now located within the constructed right-of-way of the New Seward Highway." On August 5, 1969 the state granted a permit to Calais which allowed Calais to extend Becharof Street further south in the state right-of-way.

In 1972 pursuant to a stipulation for a settlement and final judgment in a condemnation action, the State took all rights of access to and egress from Becharof.

In 1983 a lessee of Calais requested that the city vacate the portion of Becharof located just south of Tudor Road and adjacent to the Calais property. Once this request was brought to the State's attention, the State objected. On March 2, 1983, the State DOT Planning Staff advised the Municipality Platting Officer that:

This vacation request will be denied by DOT/PF pending the definition of a project to upgrade the Tudor Interchange. The scheduling of this project has not yet been determined. The applicant may wish to consult with DOT/PF Right-of-Way Section concerning a permit or lease for use of this area.

On April 12, 1983, the State again advised the Municipal Platting Officer of its objection to the vacation:

Please refer to our letter of March 2, 1983 concerning Plat S-6762 (copy attached). DOT & PF is opposed to the vacation of Becharof Street. The applicant may use that area by permit or lease from DOT & PF.

These objections by the State were recognized by the Municipal Platting Officer in a letter dated May 2, 1983 to the planning section of DOTPF. In the letter he referred to the dedications of easements for Becharof, but he did not refer to the State's 1968 Right-of-Way Map, the Utility Agreements, or the 1968 Condemnations and Takings.

The long and short of the remaining facts are that on July 26, 1983, the Municipality of Anchorage vacated its interests in the Becharof easement, over the objections previously raised by the State. Safeway, Inc., as a successor to Calais, is now claiming that it contacted various individual state employees who made representations upon which Safeway may now rely to assert its claims. The State disputes the representations made regarding the statements, and denies that they form any basis for reasonable reliance by Safeway.

#### DISCUSSION

The court agrees with the State's position that its 1968 Right-of-Way Map, which was repeatedly referred to and recorded as an attachment to various agreements with the Municipality, gave the State control and authority over the Becharof easement. The original common law dedication of this easement was to "the public," and while the city may have had the right to "vacate" any right, title or interest the city may have claimed in the easement, it

had no authority whatsoever -- particularly in light of state objections -- to vacate any and all interests the State had in the property.

The Right-of-Way Map the State submitted for the New Seward Highway Project served as public notice that the State was asserting its right of control and authority over any easement dedications -- made either by common law or statutory dedication -- which were located within this right-of-way. The State objected to any vacation of the particular easement in question and never assented to it in any way.

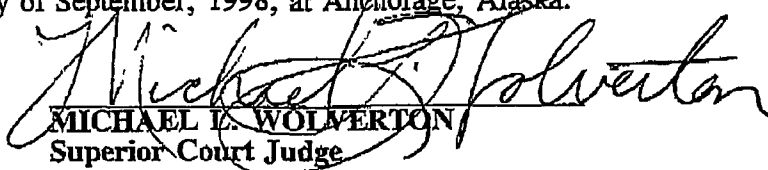
Further, even if individual employees of the State made equivocal comments to Safeway regarding the easement -- comments which the State by no means agrees were made -- these statements could not serve to divest the State of its valid interests in the Becharof easement which was located in the New Seward Highway Right-of-Way Map of 1968.

As the State pointed out at oral argument on these motions, the State of Alaska holds many interest in property, whether in fee or otherwise, throughout the state. There is no basis in the law, reason, or logic to assume that any local governmental entity has the authority, particularly over State objection, to vacate any interest the State may have in any property in Alaska. Therefore,

IT IS HEREBY ORDERED that:

1. Plaintiff Safeway's Motions for Summary Judgment are **DENIED**; and
2. Defendant State of Alaska's Motion for Summary Judgment is **GRANTED**.

ENTERED this 23rd day of September, 1998, at Anchorage, Alaska.

  
MICHAEL L. WOLVERTON  
Superior Court Judge

*I certify that on: 9-28-98*

a copy of the above was  
mailed to each of the  
following at their  
addresses of record.

Secretary/Clerk

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
2 THIRD JUDICIAL DISTRICT AT ANCHORAGE

3 SAFEWAY, INC., )  
4 )  
5 Plaintiff, )  
6 )  
7 vs. )  
8 )  
9 STATE OF ALASKA, DEPARTMENT )  
10 OF TRANSPORTATION AND PUBLIC )  
11 FACILITIES, )  
12 )  
13 Defendant. )

**COPY**  
Original Received  
FEB 19 1998  
Clerk of the Trial Courts  
By \_\_\_\_\_  
Case No. 3AN-97-1288 CI

14 STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION AND PUBLIC  
15 FACILITIES' MEMORANDUM IN REPLY TO SAFEWAY'S OPPOSITION TO  
16 STATE'S CROSS-MOTION FOR SUMMARY JUDGMENT

17 I. INTRODUCTION

18 Contrary to Safeway's claim, the state is not trying to  
19 distract the court from the key issues. In a quiet title action  
20 the court may inquire into the whole title of the property in  
21 question. Davis v. Tant, 361 P.2d 763, 765 (Alaska 1961). Here,  
22 the lengthy history of title requires some effort to digest, but  
23 that history, taken in context of the activity on the property  
24 surrounding the Becharof right-of-way, provides the basis for a  
25 sound decision.

26 Safeway, as Calais' lessee, has sued the state to quiet  
title. All transactions and conveyances affecting title,  
including declarations of taking filed in eminent domain actions,  
admissions by Calais made in documents filed with the court such

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
ANCHORAGE BRANCH  
1031 W. FOURTH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 269-5100

1 as pre-trial briefs and settlement agreements, and DOT&PF right-  
2 of-way permits applied for by Calais, are relevant to bar Safeway  
3 from claiming it had no actual notice of the state's interest in  
4 and authority over the Becharof right-of-way. The correspondence  
5 surrounding the 1983 attempt to replat, in like manner, shows  
6 clearly the state's opposition to vacation because the state  
7 claimed the right-of-way. That documentation, together with the  
8 actual terms of the ordinance attempting to vacate, is relevant.  
9 There is simply no other way to ascertain the title on a parcel  
10 than to examine the history of the real property, and surrounding  
11 parcels, in context. The "context" is the series of relevant  
12 legal principles that apply to that history of title.<sup>1</sup>

14 Some of those principles are as follows. AS 09.45.010  
15 provides that a person in possession of real property or a tenant  
16 of that person may bring a quiet title action. A quiet title  
17 action is not aimed at a particular instrument or conveyance, but  
18 is directed towards any person or instrument that might threaten  
19 title. The whole title of the property is at issue. See Davis v.

---

21  
22 <sup>1</sup> Safeway has submitted an affidavit of a title company  
23 employee who was unable to find recorded state interests. To the  
24 extent Safeway relied on a title company to ascertain the title to  
25 the Becharof right-of-way, that may be the basis for an action  
26 between Safeway, Calais and the title company. That dispute  
however, has no bearing on this action where the state has  
presented extensive evidence showing that Calais not only had  
record notice, but actual notice of the state's claim to Becharof,  
and, moreover, Calais had repeatedly acknowledged and assented to  
the state's claim, in court filings, in settlement agreements and  
in right-of-way permits. (Exhibits M, N, O).



1 Tant, 361 P. 2d 763, 765 (Alaska 1961), Miscovich v. Tryck, 875  
2 P.2d 1293, 1304 (Alaska 1994). Generally, no statute of  
3 limitation applies to quiet title actions. Clary v. Stack Steel  
4 and Supply Corp., 611 P.2d 80, 83 (Alaska 1980). A party cannot  
5 prevail by simply attacking the title of another. A party  
6 prevails through the strength of its own title and must  
7 demonstrate title or a substantial interest in the property which  
8 is superior to other title. Shilts v. Young, 643 P.2d 686, 689  
9 (Alaska 1981). A party's title or interest can be equitable or  
10 legal in nature. Shope v. Sims, 658 P.2d 1336, 1339 (Alaska  
11 1983).

## 12 **II. FACTS**

13  
14 The facts are lengthy, but important to a full  
15 understanding of the status of title, although Safeway would like  
16 to ignore them. The transactions that occurred on the property  
17 abutting the Becharof right-of-way affected the interests in the  
18 right-of-way. The following short chronology summarizes the facts  
19 as supported by the exhibits, previously discussed at length in  
20 the state's memorandum in opposition to Safeway's motion for  
21 summary judgment.

22  
23 8/24/51 patent -- 120 acres to McCutcheons (Exhibit A,  
24 Illustration A).  
25 8/24/59 warranty deed -- McCutcheon to Modern Electric,  
26 Inc. (Exhibit B, Illustration B).

1 9/15/59 dedication of easement -- Modern and McCutcheon,  
2 "to the public at large a permanent easement and  
3 right-of-way for use by the public as a public  
4 road" over 60' (one-half from each) (Exhibit C,  
5 Illustration C).  
6  
7 9/30/63 warranty deed -- McCutcheons to Calais. "excepting  
8 ... the West 30' heretofore dedicated to the  
9 public as a public roadway." (Exhibit D,  
10 Illustration D).  
11 6/24/64 plat 64-50 for Calais' Bancroft subdivision  
12 "existing 60' easement for Becharof". (Exhibit E,  
13 Illustration E).  
14 8/8/67 plat 67-136 for Calais; Bancroft subdivision,  
15 addition no. 1; "Becharof St." (Exhibit F,  
16 Illustration F).  
17 3/18/68 Department of Highway plans include Becharof  
18 within state right-of-way. (Exhibit G,  
19 Illustration G).  
20  
21 7/29/68; 10/15/68 Declarations of Taking -- Calais, Modern -- maps  
22 recorded with declarations show Becharof included  
23 within state right-of-way. (Exhibits J, K,  
24 Illustration G).  
25 3/25/69 standard subordination agreement -- City of  
26 Anchorage to state for utility easements,

1 including state right-of-way maps showing state  
2 right-of-way includes Becharof. Recorded.  
3 (Exhibit H).  
4  
5 5/15/69 Utility relocation agreement -- state with City,  
6 Municipal Light and Power Department. Shows  
7 Becharof within state right-of-way. (Exhibit I).  
8  
9 7/1/69 K. Atkinson letter to Asst. A.G. Kaye Richey.  
10 Becharof "now located within the constructed  
11 right-of-way of the New Seward Hwy." (Exhibit L).  
12  
13 8/5/69 Permit to construct roadway on public right-of-  
14 way. DOT issues to Calais to extend Becharof  
15 further south. (Exhibit M).  
16  
17 6/11/71 Stipulation for Dismissal of Appeal, Settlement,  
18 Final Judgment and Disbursal of Funds - Calais,  
19 parcel 317. Settled for \$21,590. (Exhibit Q).  
20  
21 9/12/71 Calais pre-trial brief, Parcel 307. "Before the  
22 taking, Calais had public right-of-way access to  
23 its land on the south and west. After the taking  
24 of parcel A-307, no right-of-way on the west  
25 exists. . . . This right-of-way . . . was taken as  
26 a part of parcel 307. . . ." (Exhibit O).  
27  
28 5/31/72; Stipulation for Settlement and Final Judgment in  
29 6/2/72  
30 Condemnation Action - Calais, parcel 307 settled  
31 for \$20,500. (Exhibits N and P).

1 8/25/72 Final Judgment - Modern. \$140,700 plus interest,  
2 costs and fees. Taking includes all rights of  
3 access to and from Becharof. Attached here as  
4 Exhibit Z.  
5  
6 Spring 1983 Letters from DOT&PF objecting to vacation of  
7 Becharof, requiring permit or lease for Calais'  
8 lessee to be within state right-of-way. (Exhibits  
9 R, S, U).  
10 3/3/83 Platting Authority resolution to vacate Becharof.  
11 (Exhibit V).  
12 6/21/83 Mayor's memo to assembly objecting to vacation.  
13 (Exhibit W).  
14 7/26/83 Ordinance authorizing vacation of Municipality's  
15 interest in Becharof, effective upon valid replat  
16 pursuant to AMC 21.15.130. (Exhibit X).  
17 7/20/84 Municipality of Anchorage plat 84-221 ostensibly  
18 vacating Becharof. No signature of state.  
19 Right-of-way vacated in violation of AMC  
20 21.15.130. (Exhibit Y).  
21

22 Safeway inaccurately represents the state's presentation  
23 of the facts on a number of matters. First, for the purposes of  
24 these cross-motions for summary judgment, the state does not claim  
25 that the Becharof right-of-way, as created by the  
26

1 McCutcheon/Modern dedication, plats was fee. Safeway has  
2 extensively attacked the state on a matter that is not at issue.

3  
4 The second inaccuracy is Safeway's claim that the state  
5 did not object to the 1983 vacation. Safeway ignores the three  
6 separate letters from DOT&PF to the Municipality discussed at  
7 pages 9-10 of the state's memorandum in opposition to Safeway's  
8 motion for summary judgment and in support of the state's cross-  
9 motion. (Exhibits R, S, U). In those letters DOT&PF states "the  
10 vacation request will be denied," . . . "DOT&PF is opposed to the  
11 vacation of Becharof Street." And DOT&PF <sup>employees</sup> repeatedly state that an  
12 application could be made to DOT&PF for a lease or permit to use  
13 the area. The permit approach is the same method DOT&PF had  
14 previously used with Calais to pave Becharof one block south in  
15 the late 60's and early 70's. There was nothing more for DOT&PF  
16 to do to make its claim to Becharof clear.

17  
18 Indeed, DOT&PF's position was sufficiently clear for  
19 Municipality of Anchorage Platting Officer, Jerry Weaver, to  
20 understand. He acknowledged DOT&PF's objections. Exhibit T.  
21 Indeed the mayor and his executives, including the municipal  
22 manager and the director of community planning, all signed a  
23 memorandum to the assembly stating they did not concur in the  
24 vacation of Becharof because of the state's objections.  
25 Exhibit W.

1           The third and fourth points, highlight Safeway's lack of  
2 knowledge and understanding of the facts. Safeway attacks the  
3 legitimacy of the state's Right-of-Way Maps. These Right-of-Way  
4 Maps are the documents regularly prepared by the state showing the  
5 location and extent of the state's interest in land on which  
6 millions of dollars of public improvements will be built. Right-  
7 of-Way Maps such as those attached as Exhibit G are typically used  
8 to determine whether existing right-of-way is sufficient or  
9 whether more must to be acquired and whether a project as designed  
10 will fit within the right-of-way. The maps are regularly used as  
11 the basis for determining which municipal utilities are in state  
12 right-of-way and whether they will have to be moved at state or  
13 municipal expense to accommodate construction.  
14

15           Even if the Right-of-Way Maps here were not recorded  
16 until 1988, Calais was on actual notice of their contents. The  
17 maps or "schedules" attached to the state's 1986 declarations of  
18 taking for Calais are based on the Right-of-Way Maps and show the  
19 identical information which forms the basis of the state's claim  
20 of an interest in the Becharof right-of-way: the edge of the  
21 state's right-of-way line (shown as "R/W" on the maps and  
22 schedules) encompasses Becharof and makes it part of the state  
23 right-of-way. Exhibit K, pages 4 and 7, Exhibit G, page 2. In  
24 the pre-trial brief it later filed in the condemnation case,  
25  
26

1 Calais stated that the state had condemned Calais' interest in the  
2 Becharof right-of-way. Exhibit O.

3  
4 Finally, Safeway makes reference to the proposed Tudor  
5 upgrade never being built. Safeway's Reply, page 7. Safeway may  
6 be confusing Tudor Road with the extension of International  
7 Airport Road to connect with the New Seward Highway, which has not  
8 occurred. In fact, Tudor has been upgraded. When the New Seward  
9 Highway was first built, its intersection with Tudor Road was not  
10 grade separated (i.e. traffic stopped at a traffic light at the  
11 intersection). Later, a grade separation project built the  
12 Tudor/New Seward Highway interchange as it exists today.

13 **III. LEGAL ARGUMENT**

14 A. Safeway Fails to Provide any Law that Controverts the  
15 Principle that the State of Alaska, as the Sovereign,  
16 has Ultimate Control of the Highways within the State.

17 As set out at length in the state's memorandum at pages  
18 13-16, the attempt by Calais' lessor, Steve Noey, to vacate  
19 Becharof is ineffective for numerous reasons. One basic principle  
20 is that a local government such as the Municipality of Anchorage  
21 cannot vacate right-of-way claimed by the sovereign State of  
22 Alaska. Control of highway right-of-way is a paramount state  
23 power.

24 In this country the control of highways has  
25 generally been regarded as primarily a state duty,  
26 which however, ordinarily is delegated, at least  
to some extent to municipal corporations or other  
public agencies within the limits of  
constitutional requirements. A variety of reasons

1 have been advanced to support or explain this  
2 general doctrine. The use of the streets is  
3 designed for the public at large, as distinguished  
4 from the legal entity known as the city, or  
5 municipal corporation and its residents.

6 \*\*\*

7 Municipal home-rule provisions of state  
8 constitutions do not ordinarily withdraw  
9 legislative power to enact general laws or laws  
10 relating to municipal streets and affecting their  
11 public use. This control has been held to be  
12 exclusive, and any surrender of control thereover  
13 must come from the legislature; nor may such  
14 surrender or relinquishment be otherwise than by  
15 affirmative action.

16 \*\*\*

17 Aside from constitutional restriction, since the  
18 highways of the state, including streets and  
19 public ways in cities, towns and villages are  
20 under the primary and paramount control of the  
21 legislature, all municipal powers over them must  
22 depend upon the proper construction of the grant  
23 of authority contained in the charter of the  
24 municipal corporation and in the applicable  
25 statutes. Accordingly, a municipality has no  
26 inherent power of control over streets, but as  
mentioned, the state may surrender to any  
municipality part or full control of the streets  
and thoroughfares within its limits, thereby  
making the municipal corporation, with respect to  
the matters delegated to it, the state's agent.

\*\*\*

Municipal control and regulation of streets must  
harmonize with the laws and policy of the state.  
This is so because all public highways are under  
the paramount control of the state, and municipal  
powers related thereto are mere delegations of  
state authority. All power of lesser  
municipalities over such streets is simply  
delegated power from the state whether exercised  
by the county, the city, or the town. It follows  
therefore that no municipality has power to make



1 any law affecting public highways or their use  
2 which contravenes the policy of the state touching  
3 such control and use. Streets are for the public  
4 use, but do not exist for the use of the  
5 municipality in which they are situated alone or  
6 its inhabitants. In numerous judicial decisions,  
7 this doctrine has been considered in relation to  
8 ordinances and statutes governing traffic in  
9 streets, operation of vehicles, mutual and  
10 reciprocal rights of users of street, property  
11 rights in and along highways, and other matters.

12 (Footnotes, quote marks omitted). E. McQuillen, The Law of  
13 Municipal Corporations §§ 30.39, 30.40 (3rd ed. 1981). When the  
14 state designed the New Seward Highway right-of-way in the late  
15 60's and incorporated the Becharof right-of-way into the state's  
16 design for a new highway, it was exercising its authority as the  
17 sovereign. AS 19.05.010, .030, .040, and .080.

18 When Becharof was subsumed into state right-of-way, it  
19 became an integral part of the design of the New Seward Highway.  
20 At its northern intersection with Tudor Road, Becharof was located  
21 at the eastern edge of the New Seward Highway right-of-way.  
22 However, at its southern edge, the Becharof right-of-way runs  
23 right through the middle of the New Seward Highway right-of-way.  
24 Illustration G.

25 If DOT&PF were to vacate any right-of-way in which it  
26 claimed an interest, the state is required by the constitution and  
by statute to give appropriate public notice and to execute and  
file a deed in the appropriate recording district. Alaska Const.  
art. VIII, § 10, AS 19.05.070. The specific method provided for

1 in the statute (vacation by deed) must be followed. The  
2 legislature did not authorize vacation of state right-of-way by  
3 plat .

4  
5 Neither the passage of time nor inaction on the part of  
6 the sovereign can work to the state's detriment. For Safeway to  
7 prevail, the court must find that AS 38.95.010, which prohibits  
8 alienation of any title or interest in state land by adverse  
9 possession, does not protect the sovereign's interests in this  
10 case. Calais proceeded at <sup>his</sup> own risk with full knowledge it  
11 previously had acceded to the state's interests in Becharof and  
12 with full knowledge of the state's objections. It filed a replat  
13 without DOT approval in violation of the municipal ordinance  
14 requiring all property owners to sign off.

15 Such facts fit exactly within the policy behind  
16 AS 38.95.010 barring adverse possession against the state. The  
17 State of Alaska does not have to be vigilant everywhere at all  
18 times against its title being eaten away. The State of Alaska  
19 does not have to go into court repeatedly and continuously to  
20 protect its interests; that is the purpose of the statute.

21  
22 Here, Safeway urges that the state should have taken  
23 steps to regain control of its right-of-way and that it should now  
24 be barred from doing so. In addition to the statute which  
25 protects the state from adverse possession claims, the Alaska  
26 Supreme Court has made clear that estoppel does not lie against

1 the state for affirmative acts inconsistent with state ownership.  
2 In this case, the state's inaction in attacking encroachments into  
3 the state's right-of-way cannot be sufficient to bar the state  
4 from protecting public rights.

5 The facts in State v. Simpson, 397 P.2d 288 (Alaska 1964)  
6 provide instruction as to the Alaska Supreme Court's bias against  
7 finding an estoppel as related to highway right-of-way. In  
8 Simpson, the state itself had actually levied and collected taxes  
9 on land which was dedicated as a public right-of-way.  
10 Nevertheless, the state was not estopped from asserting its rights  
11 in the parcel as against a private party who had constructed  
12 improvements in the right-of-way. Such affirmative acts would not  
13 bar ejectment of the private party. The tax payment offset the  
14 rent-free enjoyment and use of the controverted parcel.

15  
16 B. Safeway's Attempts to Distinguish Common Law and  
17 Statutory Dedications Do Not Assist in the Determination  
18 of Ownership Upon Vacation.

19 Even if the court were to rule the 1984 vacation was  
20 effective, there is nothing in Safeway's repeated discussion of  
21 the Becharof dedication as being by common law which changes the  
22 result proffered by the state: that the abutting property owners  
23 -- the state on the west and Calais (Safeway) on the east -- will  
24 each get 30 feet, except at the top (northernmost) 110 feet of  
25 Becharof, which will go to the state as the abutting owner on both  
26

1 sides. None of the authorities relied on by Safeway requires any  
2 other result.

3 All the authorities relied on by Safeway (see Reply  
4 Brief, page 8) distinguish between the fee simple conveyance that  
5 occurs with a statutory or "plat" dedication of right-of-way and  
6 the conveyance of an easement that occurs where there is a  
7 dedication of right-of-way, made by a conveyance document, known  
8 as a "common law" dedication. But when Safeway examines the  
9 results of the vacation of right-of-way originally created by the  
10 two different methods it focuses on a distinction that makes no  
11 difference in this case. It doesn't matter whether the right-of-  
12 way is vacated to the original dedicators (or their successors) or  
13 the abutting owners. Here, the owners of the abutting land and  
14 the successors-in-interest to the original dedicators are one and  
15 the same -- Calais (Safeway) to the east and the state to the  
16 west. Not only is such a result anticipated by the authorities  
17 relied on by Safeway, at least one treatise discusses the  
18 correctness of such a result.  
19  
20

21 Traditionally, common law dedication grants to the  
22 public an easement in a roadway that will cease  
23 when the use of the roadway ceases. . . . This  
24 contrasts with the grant by a statutory dedication  
25 of a form of limited fee interest to the statutory  
26 grantee. When the roadway ceased to be used, the  
property used for the easement by common law  
dedication would then return to those from whom it  
had been dedicated, rather than the abutting  
landowners. It would not be unreasonable, though,  
for courts to assume that the fee ownership would

1                   have passed with the adjoining land absent an  
2                   explicit statement to the contrary. . . .

3 (emphasis added). 7 Davis A. Thomas, Thompson on Real Property,  
4 § 60.03(a)(3)(ii) (1994).

5                   This result is no different from that briefly mentioned  
6 in the 1983 attorney general's opinion so heavily relied on by  
7 Safeway. Inf. Op. Att'y Gen., January 11, 1983, file no. 166-426-  
8 83. Citing a previous edition of Powell on Real Property, the  
9 opinion states the accepted distinction between common law and  
10 statutory dedication (easement versus fee) and then later  
11 generally opines as to what the supreme court might determine.

12                   Five years later the Alaska Supreme Court did address  
13 the difference between common law and statutory dedications, but  
14 as applied to the facts of this case, the result is again the  
15 same. If Becharof were to be vacated, it would go to Calais and  
16 the state as both the owners of the abutting land and the  
17 successors to the original dedicators. Grand v. Municipality of  
18 Anchorage, 753 P.2d 141, 143, n.2 (Alaska 1988).

19  
20                   C. The Court Can Rule that the State Inversely Condemned A  
21 Fee Simple Interest Along the Entire Length of the  
22 Becharof Right-of-Way when it Incorporated Becharof Into  
23 the Right-of-Way for the New Seward Highway.

24                   An inverse condemnation occurs when a governmental  
25 entity with the power of eminent domain, such as the State of  
26 Alaska, takes or appropriates interests in real property without  
a formal condemnation action being filed. In State v. Crosby, 410

1 P.2d 724 (Alaska 1966), the state mistakenly, but in good faith,  
2 believed it could rely on a reservation of a right-of-way in the  
3 patent to an owner's land. The failure to institute a  
4 condemnation action did not change the essential nature of the  
5 state's action in appropriating the owner's property:  
6

7 Such action was still the exercise of the power of  
8 eminent domain because private property was being  
9 taken by the state for a public use. Since under  
10 Art. 1, § 18 of the Alaska Constitution private  
11 property may not be taken or damaged for public  
12 use without just compensation, the fundamental  
13 basis of [the owner's] claim for damages is the  
14 constitutional provision mentioned, and the acts  
15 of the state in appropriating [the owners] land  
16 are in the nature of inverse condemnation.

17 Id. at 728-729.

18 Here, formal condemnation actions were filed to acquire  
19 Modern Electric's and Calais' real property interests sufficient  
20 to build the New Seward Highway and to pay just compensation for  
21 the interests taken. In Modern, the declaration of taking  
22 describes the acreage adjacent to the western 30 feet of Becharof  
23 Street and it specifically states that all of Modern's access  
24 along Becharof, except at certain points as determined by the  
25 state, was being acquired. (A limited access highway was built on  
26 Modern's property. The controlled access line is the western edge  
of Becharof). Exhibit J, pages 5 and 6. The acquisition of the  
Modern fee adjacent to the Becharof right-of-way, together with  
its access via Becharof, rendered the 30 strip on the west side of  
Becharof so without use or value as to constitute an appropriation

1 of that strip by the state for public use. After a two-day  
2 trial, final judgment was entered for over \$141,000 for Modern.  
3 Exhibit 2. In the Calais condemnation, Calais recognized that any  
4 interest it had in Becharof was being acquired by the state.  
5 Exhibit O.  
6

7 The actual Becharof right-of-way may not have been  
8 included in the state's declaration of taking documents because  
9 the state in good faith and with good reason determined that all  
10 the interests necessary to build the New Seward Highway were under  
11 public control. However, even if Becharof was not acquired  
12 through formal condemnation proceedings, there is no need for the  
13 state to initiate a new action.

14 We believe that such a requirement is unrealistic.  
15 The property has already been taken. It would  
16 serve no useful purpose to insist now the state  
17 must initiate a condemnation action and take the  
18 initial steps as required by law and rule as a  
19 condition to the exercise of its power of eminent  
20 domain.

21 Id. at 729. In like manner, the time for Calais or Modern to  
22 raise any objection or to seek additional compensation has long  
23 since passed. See Weidner v. State, 860 P.2d 1205, 1212 (Alaska  
24 1993). (After time to perfect prescriptive easement has run,  
25 landowner barred by statute of limitations from bringing an  
26 inverse condemnation action to seek just compensation).

The court can take the opportunity afforded by this  
litigation to clarify that the state has a fee simple interest

1 along the entire length of the area formerly known as Becharof  
2 Street. Such a result would avoid the occurrence of an  
3 uneconomic, non-utilitarian remnant of fee underlying an easement  
4 running through the middle of state right-of-way.  
5

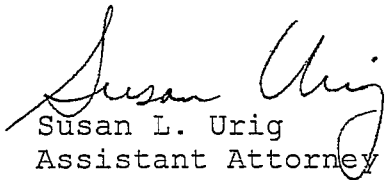
6 **IV. CONCLUSION**

7 There are two bases upon which the court can quiet title  
8 in all 60 feet of the Becharof right-of-way in the state along its  
9 entire length. First, the state exercised its sovereign authority  
10 over right-of-way and incorporated the Becharof easement into  
11 state right-of-way for the New Seward Highway. Second, the state  
12 inversely condemned both the Becharof right-of-way and its  
13 underlying fee.

14 If the court were to find the Municipality's later  
15 attempt to vacate Becharof was in some way effective, title as to  
16 the northernmost 110 feet of Becharof and the western 30 feet  
17 would vest in the state.

18 DATED this 19th day of February, 1998 at Anchorage,  
19 Alaska.

20  
21 BRUCE M. BOTELHO  
22 ATTORNEY GENERAL

23 By:   
24 Susan L. Urig  
25 Assistant Attorney General  
26



IN THE SUPERIOR COURT OF THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

SAFEWAY INC., )  
)  
Plaintiff, )  
)  
vs. )  
)  
STATE OF ALASKA, DEPARTMENT )  
OF TRANSPORTATION AND PUBLIC )  
FACILITIES, )  
)  
Defendant. )

RECEIVED

FEB 17 1998

Department of Law  
Office of Attorney General  
3rd Judicial District  
Anchorage, Alaska

Case No. 3AN-97-7188 CI

OPPOSITION TO STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION AND  
PUBLIC FACILITIES' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY TO  
OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff, Safeway Inc., by and through its attorneys of record, PRICE & PRICE, in a combined pleading to oppose the State of Alaska, Department of Transportation and Public Facilities' (hereinafter "State") cross-motion for summary judgment and reply to opposition to Plaintiff's motion for summary judgment. As will be discussed below, the State avoids obvious principles of real estate law and concentrates on "facts" and "arguments" that are either irrelevant or simply incorrect.

I. THE STATE'S RELIANCE ON IRRELEVANT MAPS AND AGREEMENTS IS MISPLACED.

The State distracts us from the real issue at hand by discussing a series of plat maps, an area right-of-way map and a utility agreement. Unfortunately for the State, none of these

PRICE & PRICE  
COUNSELORS & ATTORNEYS AT LAW  
550 WEST SEVENTH AVENUE, SUITE 1370  
ANCHORAGE, ALASKA 99501  
PH. (907) 277-6666 • FAX (907) 277-6667

documents controverts the fact that the recorded dedication is the controlling document for the Court's title determination.

The dedication of easement at issue in this case conveyed to the public an "easement and right of way for use by the public as a public road." Fee simple title was not conveyed—rather, the document conveyed a limited right of use to the public. This grant to the public was accepted by the municipality and never relinquished. The State had no opportunity to "accept" the offer.

The State begins its parade of irrelevant facts by discussing Plat No. 64-50 which "referred" to the Becharof easement. Implicit in the State's argument is that the recordation of this plat instantaneously created both an offer and acceptance of a grant of fee title to the State. This argument is outrageous.<sup>1</sup> First, a plat affects only that land contained *within* the boundary of the subdivided property, an obvious fact of real estate law. Roads shown outside the platted property are included for illustrative purposes only and are intended to show access routes to the property. The Municipal Code specifically provides in its platting requirements that "...the plat shall show the names of all streets within and peripheral to the subdivision." See AMC 21.15.120. Second, as is discussed in Safeway's motion, this suggestion violates the Municipal Code

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<sup>1</sup> To take the State's argument to its logical conclusion, one must ask, whether the State asserts that the person who submitted the plat for approval intended to impact Tudor Road, as the plat references Tudor Road?

PRICE & PRICE  
COUNSELORS & ATTORNEYS AT LAW  
550 WEST SEVENTH AVENUE, SUITE 1370  
ANCHORAGE, ALASKA 99501  
PH. (907) 277-6666 • FAX (907) 277-6667

requirement that when a *statutory dedication* of land to the public is proposed, the final plat shall bear a statement of ownership and dedication signed by the grantors. Moreover, the Code specifically provides that the dedication be made to the municipality.<sup>2</sup> AMC 21.15.120. Finally, how does the State believe it is a benefactor to a local street easement under municipal platting ordinances, especially when the street was maintained by the borough/city?

The State then moves to Plat No. 67-136. The purpose of this plat was to subdivide twenty-three lots and to dedicate Shelikof Street to the municipality. Here the McCutcheons and Calais Company, Inc. signed the certificate of ownership and dedication on the plat. The recordation of this plat, however, in no way affects the 60' strip of land formerly known as Becharof Street. Again, that is included for reference only. See argument above.

The State next argues its "official" 1967 Right-of-Way map included Becharof Street and, therefore, the right-of-way was available for State use. The State fails to mention that the Right of Way Map offered as Exhibit G to the State's Opposition, was not recorded until 1988, which is well after the municipality had vacated the easement. What happened to the Constitution and the principles of taking and condemnation? Surely, the State does not

<sup>2</sup> Perhaps this simple fact clears up the controversy. It is the municipality that accepts an easement for a public right-of-way, and, therefore, is the proper entity to vacate the easement.

Price was  
not  
with any  
numbers

assert that it can create its own map, call it official and magically take title to the land. It is *legally impossible* for this map to create the State's alleged interest in the property. The obvious reality is that the right-of-way map is irrelevant to the determination of title to the subject parcel. The map has no relevancy other than to show the audacity of the State. (Remember, in 1997, even the State did not think that it owned this parcel during discussions with Safeway Inc.)

The State then produces a 1969 standard utility subordination agreement between itself and the municipality and once again tries to breathe credibility into its argument that it somehow owns the vacated easement area. As was discussed above, the law is clear and unambiguous. The State cannot acquire by map that which it does not own. Similarly, documents of convenience between the State and the municipality that improperly characterize ownership cannot create any such ownership. The State had the opportunity to condemn the reversionary interest of the Becharof right-of-way along with the other condemned parcels, but (probably by mistake) it failed to do so. The State cannot attempt to "repair" its mistake by now arguing that fee title had been offered and that it accepted that offer.<sup>3</sup> Facts indicate that the municipality accepted that offer. The State cannot

<sup>3</sup> The State asserts at page 4 n.2, "Even if Becharof right-of-way was not formally dedicated in fee by the various plats, the easement with the assent of City and Calais became part of the State right-of-way for the Seward Highway and under State control." This assertion is unsupported by fact.

PRICE & PRICE

COUNSELORS & ATTORNEYS AT LAW  
550 WEST SEVENTH AVENUE, SUITE 1370  
ANCHORAGE, ALASKA 99501  
PH. (907) 277-8866 • FAX (907) 277-6867

*June 28, 84*  
*Price & Price*

avoid the principles of taking nor the requirement of just compensation.

**II. THE STATE MISREPRESENTS THE LAW WITH REGARDS TO ADMISSIONS AGAINST INTEREST.**

An admission against interest must be made voluntarily and deliberately and with full knowledge and understanding of its contents. Fuller v. U.S., 12 Alaska 170 (C.A.9 (Alaska) 1948).

The State relies solely <sup>No, court ruling is final</sup> on the strength of a letter written by attorney Kenneth R. Atkinson in 1969 in his capacity as counsel for Calais Company, Inc. The letter references the State's condemnation actions and discusses access to an unrelated portion of the property adjacent to the area the State acquired via an eminent domain action. Neither the letter, nor the access permit, refers to, or impacts, the parcel involved in this suit. Thus, this letter has no impact on the determination of title to the 60 foot strip.

This letter, however, does raise some unanswerable questions. If the letter and permit did concern the parcel at issue in this case, wouldn't the State have required Calais to grant a specific easement over this parcel? Moreover, why didn't the state know in 1997, that it had an easement over the entire length of Becharof? And most importantly, why didn't the State tell the municipality in 1983 during the vacation that it owned

**PRICE & PRICE**  
COUNSELORS & ATTORNEYS AT LAW  
550 WEST SEVENTH AVENUE, SUITE 1370  
ANCHORAGE, ALASKA 99501  
PH. (907) 277-6666 • FAX (907) 277-6667

the fee or easement right, not the city? Moreover, why didn't the State object to the 1984 replat until now?<sup>4</sup>

Similarly, the condemnation actions are irrelevant to the State's claim of title to the subject parcel. The condemnation actions are telling, however, as to the boundaries of the State land. The one and only relevant fact concerning the condemnation actions is that they do not include the 60 foot strip of land at issue in this case. The State's hollow protestation found at page 24 of its Opposition that it would have to "pay again" for the parcel, is misguided at best and a misrepresentation at worst. To date, the State has never "paid" for the parcel! On the other hand, Safeway did pay for the land in reliance upon the 1984 replat and after meeting with the State.

III. SEARCH OF THE TITLE RECORDS INDICATES THAT THE STATE IS NOT THE RECORD OWNER OF THE VACATED EASEMENT AREA.

Despite the State's attempt to confuse the issue, this is a relatively simple case. One where the foundational principal of real estate law is at issue. *Title to real property is finite and can be searched through the chain of title.* All of the issues raised by the State in its lengthy brief violate this basic tenant. Most, if not all, the documents raised as "facts" by the State do not touch upon the real property involved in this suit. The State hopes to point to unrelated plats, unrecorded

---

<sup>4</sup> How can the State argue that Safeway Inc. is bound by the recorded documents yet it is not bound by the 1984 replat?

PRICE & PRICE  
COUNSELORS & ATTORNEYS AT LAW  
550 WEST SEVENTH AVENUE, SUITE 1370  
ANCHORAGE, ALASKA 99501  
PH. (907) 277-6666 • FAX (907) 277-6667

right-of way-maps and utility agreements that have nothing to do with the title to the 60 foot strip of land at issue in this case. Even more inappropriate, the State relies on highway maps it developed itself.<sup>5</sup>

Title to real property can be easily <sup>not</sup> traced. The integrity of over 600 years of common law relies on this simple concept. A review of the chain of title to this parcel is not only critical, but should be the only issue before this Court. The State does not, and could not, refute the simple fact that the McCutcheons and Modern Electric Inc. dedicated, by common law, an easement over the parcel in question for a public roadway in 1959. Fee title never left the original grantor. What happens next in the chain of title is the real question. See affidavit of Bill G. McAdams attached hereto as Exhibit "A."

The answer is a vacation. Despite several fee title conveyances to the neighboring property, there has been no other change. Title was not impacted until the municipality of Anchorage vacated the Becharof easement. Consequently a replat was required. The parcel incorporating the vacated easement area became known as Tract 2A, Bancroft Subdivision.

It is telling that the State ignores the 1983 opinion of one of the best Assistant Attorney General's to ever work for the

---

<sup>5</sup> The State offers "illustrations" of the proposed Tudor upgrade to the Court. Considering the fact that the Tudor interchange has not been upgraded and nearly thirty years have passed since the original drawings, these illustrations are irrelevant and inadmissible. The original recorded documents are sufficient.

PRICE & PRICE  
COUNSELORS & ATTORNEYS AT LAW  
550 WEST SEVENTH AVENUE, SUITE 1370  
ANCHORAGE, ALASKA 99501  
PH. (907) 277-6666 • FAX (907) 277-6667

State, Donald W. McClintock. This opinion is directly on point. It follows existing common law and recognized authors of every major treatise on real estate to conclude that when a common law dedicated easement is vacated, the fee title reverts to the original dedicator. Office of the Attorney General, 1983 WL 42450 File No. 166-426-83; State of Alaska v. Fairbanks Lodge Co. 1392, Loyal Order of Moose, 633 P.2d 1378 (Alaska 1981); see also, 4 Herbert T. Tiffany, The Law of Real Property, Sec. 1112 (1975); 7 Davis A. Thompson, Thompson on Real Property, Sec. 60.03 (a) (3) (ii) (1994); Southwestern Bell Tel. Co. v. State Corp. Comm. of the State of Kansas, 664 P.2d 798, 800-01 (Kan. 1983); Terwelp v. Sass, 443 N.E.2d 804, 807 (Ill. App. 1982).

There is good reason for the fact, that until 1997 when approached by Safeway Inc. about access to its proposed store, the State did not think it owned the vacated easement area. (In fact, the State did not even think it held an easement over the area.) For fourteen years, the owners had been paying taxes on the parcel and had exercised total control over the property since the easement was vacated in 1983. The affidavit of Bill McAdams, an experienced title abstractor, demonstrates that there is absolutely nothing in the "chain of title" reflecting any claim of the State to the 60 foot strip of land in question. Exhibit "A" attached hereto.

Equally telling, the State allowed Stephen w. Noey and his successors to enter the Tudor property owned by the State and



seal off the curb cut where Becharof met Tudor Road. Where was the State when this occurred?

The legal principal is clear and simple, regardless of the State's attempt to obfuscate it. Upon vacation by the municipality, the fee reverted to the original dedicators, the McCutcheons and Modern Electric Inc. Safeway's lessor, Calais Co, Inc., is the successor to the McCutcheons and has since 1983 adversely possessed the 30 foot portion reverted to Modern Electric, Inc.. Never having condemned the parcel, the State does not, and cannot, claim to be the owner of the vacated easement area. Safeway is, as all citizens of this State should be, outraged that the State *only now* claims to be the owner of the vacated easement area, fifteen years after the property was legally vacated by the municipality, over the objection of the State.

IV. THE 1983 VACATION OF THE EASEMENT WAS VALID AND PASSED TITLE TO THE ORIGINAL DEDICATORS.

Under the common law principles of dedication, the State has no right, title or interest in the vacated Becharof easement. The dedication by the McCutcheons and Modern Electric, Inc. specifically granted to the public a limited right to use the property. The easement was vacated in March of 1983 after the Anchorage Platting Authority determined that the right of way was of no substantial value to the municipality. All procedures necessary to vacate the easement area were followed, including

*State has had  
- 15 years - 2005  
- 15 years - 2005  
- 15 years - 2005  
- 15 years - 2005*

public notice, comment and hearing. The State objected to the vacation, not because it owned the easement area, but because it might need the area during the Tudor Interchange upgrade.<sup>6</sup> Despite this objection, the vacation was approved and granted. At the time of the vacation, the fee title reverted to the grantors. The State gained no right, title or interest to the vacated area.

V. THE STATE FAILS TO REFUTE SAFEWAY'S CONTENTION THAT THE PRINCIPLES ESTOPPEL/QUASI ESTOPPEL PREVENT THE STATE FROM TAKING A POSITION INCONSISTENT WITH ITS PREVIOUS POSITION.

The State attempts only to refute allegations concerning Safeway's preliminary meeting with the State. The State does not comment on its failure to object to the 1983 vacation on the grounds of its ownership to the easement area. It is curious why only recently the State raised this ownership argument.

The State is bound by its 1983 objection. It cannot now raise new objections. Safeway is prejudiced by the State's new objection based on a claim of ownership to the easement area. The State has not denied that Safeway officials met with State representatives prior to purchase of the leasehold estate and that the State representative did not assert any ownership right to the vacated easement area at the time of the meetings. Only after

---

<sup>6</sup> The State objects the vacation/1984 replat on two grounds. One, that Jerry Weaver, the Municipal Platting Officer, in approving the 1984 replat, failed to consider the various plat maps, right of way map and utility documents. (Why, then didn't the State file suit on this issue years ago?) Second, the State DOTPF had thousands of other matters before it at this time. It is shocking the State even asserts this "excuse," it is irrelevant how many other platting matters were before the State.

PRICE & PRICE  
COUNSELORS & ATTORNEYS AT LAW  
550 WEST SEVENTH AVENUE, SUITE 1370  
ANCHORAGE, ALASKA 99501  
PH. (907) 277-6666 • FAX (907) 277-6667

Safeway invested significant time and money into the project did the State raise its new claim of ownership.

Applying the principles used by the Alaska Supreme Court in Dressel v. Weeks, 779 P.2d 324 (Alaska 1989), the State is prevented from asserting its new found claim of ownership. The time for the State to have raised this objection was in 1983. The State did not have to permit Mr. Noey to seal off the curb cut for the old Becharof Street. Moreover, the State should have filed suit on this issue years ago. At the very least, the State could have recorded a notice of objection to the vacation or replat in the land records. It did not and more than fourteen years have passed. The State had not once acted as if it was the owner of the vacated parcel.


There is no issue as to any material fact that until recently the State never objected the 1984 replat or use of the vacated easement area. Safeway Inc. is entitled to judgment as a matter of law that this behavior (and Safeway's reliance thereon) is grounds for application of estoppel and/or quasi estoppel.

#### VI. CONCLUSION.

Safeway Inc. has met its burden entitling it to judgment as a matter of law that: (1) a dedication of the Becharof easement was a common law easement where the fee remained with the dedicator/grantor; and (2) the State is prohibited under theories of estoppel and quasi estoppel from taking a position inconsistent with its earlier position.

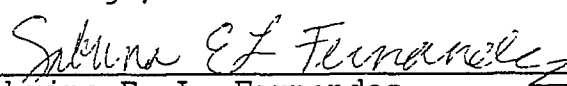
Respectfully submitted at Anchorage, Alaska, this 13 day  
of February, 1998.

PRICE & PRICE  
Attorneys for Safeway Inc.

By:   
Michael W. Price

I HEREBY CERTIFY that on the  
13<sup>th</sup> day of February, 1998,  
a true and accurate copy of the  
foregoing was mailed to:

Susan L. Urig  
Assistant Attorney General  
1031 West 4<sup>th</sup> Avenue, Suite 200  
Anchorage, AK 99510-1994

  
Sabrina E. L. Fernandez

85-68-46 SJ Memo

PRICE & PRICE  
COUNSELORS & ATTORNEYS AT LAW  
550 WEST SEVENTH AVENUE, SUITE 1370  
ANCHORAGE, ALASKA 99501  
PH. (907) 277-6666 • FAX (907) 277-6667

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

SAFEWAY, INC., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 STATE OF ALASKA, DEPARTMENT )  
 OF TRANSPORTATION AND PUBLIC )  
 FACILITIES, )  
 )  
 Defendant. )

**COPY**  
Original Received  
JAN 27 1998  
Clerk of the Trial Courts  
By \_\_\_\_\_ Deputy

Case No. 3AN-97-7188 CI

**CROSS-MOTION FOR STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION  
AND PUBLIC FACILITIES FOR SUMMARY JUDGMENT**

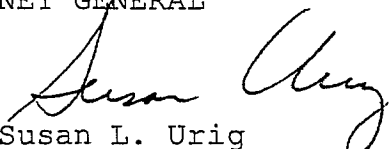
State of Alaska, Department of Transportation and Public  
Facilities requests this court to grant summary judgment as  
follows:

1. The right-of-way known as Becharof Street was never vacated and the state retains authority and control over Becharof Street.
2. Alternatively, the vacation of the Becharof right-of-way resulted in the northernmost 110 feet of Becharof and at least the west 30 feet being vested in the state.

This motion is supported by the attached memorandum, exhibits and affidavits.

DATED this 27th day of January, 1998 at Anchorage, Alaska.

BRUCE M. BOTELHO  
ATTORNEY GENERAL

By:   
Susan L. Urig  
Assistant Attorney General

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
ANCHORAGE BRANCH  
1031 W. FOURTH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 269 5100

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
2 THIRD JUDICIAL DISTRICT AT ANCHORAGE

3 SAFEWAY, INC., )  
4 )  
5 Plaintiff, )  
6 )  
7 vs. )  
8 )  
9 STATE OF ALASKA, DEPARTMENT )  
10 OF TRANSPORTATION AND PUBLIC )  
11 FACILITIES, )  
12 )  
13 Defendant. )

**COPY**  
Original Received  
JAN 27 1998  
Clerk of the Trial Courts  
By \_\_\_\_\_ Deputy

Case No. 3AN-97-7188 CI

14 **MEMORANDUM OF STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION**  
15 **AND PUBLIC FACILITIES IN OPPOSITION TO SAFEWAY'S MOTION FOR**  
16 **SUMMARY JUDGMENT AND STATE'S CROSS-MOTION FOR SUMMARY JUDGMENT**

17 **I. INTRODUCTION**

*in support of*

18 The history of title of the property which is in dispute  
19 in this case is rather lengthy and complex, requiring a measured  
20 discussion of the documents supporting the transfer of real  
21 property interests in, and the control of, public right-of-way.  
22 The State of Alaska, Department of Transportation and Public  
23 Facilities ("the state," "the Department," or "DOT&PF") does not  
24 dispute the discussion by Safeway, Inc. ("Safeway")<sup>1</sup> of the legal  
25 standards for summary judgment applicable to the facts. The state  
26 does dispute a number of the statements presented by Safeway as

<sup>1</sup> Safeway's status as plaintiff apparently is based on a lease of property from Calais Co. Inc. ("Calais"). Safeway and Calais are filing a Ratification Agreement with the court by which Calais as the fee owner agrees to be bound by the outcome of this litigation. Otherwise, it is the state's position that this action could not go forward without Calais as an indispensable party. Alaska Rules of Civil Procedure 17(a) and 19(a).

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
ANCHORAGE BRANCH  
1031 W. FOURTH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 269-5100

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
ANCHORAGE BRANCH  
1031 W. FOURTH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 269-5100

1 undisputed. Additionally, the state will present facts, supported  
2 by admissible evidence, which support a summary judgment finding  
3 that the 60 foot right-of-way, formerly occupied by Becharof  
4 Street, remains public right-of-way.  
5

6 **II. STATEMENT OF FACTS**

7 The real property at issue is located at what is now  
8 the southeast quadrant of the New Seward Highway/Tudor Road  
9 interchange, near the Tony Roma's Restaurant in Anchorage, Alaska.  
10 In 1951, Hubert and Elaine McCutcheon received patent to 120 acres  
11 of real property located at the south side of Tudor Road and a  
12 short distance east of the Seward Highway in the Greater Anchorage  
13 Area Borough. The New Seward Highway had not yet been built.  
14 Warranty Deed attached as Exhibit A. Illustrative maps showing  
15 the area over time are included with the affidavit of surveyor  
16 Norman Johnson, also attached to this memorandum. See  
17 Illustration A for a depiction of the McCutcheon patent.  
18

19 On August 24, 1959, the McCutcheons deeded an eastern  
20 portion of their land to Modern Electric, Inc. Exhibit B,  
21 Illustration B. Weeks later, on September 15, 1959, the  
22 McCutcheons and Modern Electric, conveyed "to the public at large  
23 a permanent easement and right-of-way for use by the public as a  
24 public road" totaling 60 feet, running north and south along their  
25 shared property line. Modern Electric dedicated 30 feet from its  
26

1 eastern boundary and the McCutcheons dedicated 30 feet from their  
2 western boundary. Exhibit A attached to the complaint and  
3 attached again here, for convenience, as Exhibit C. See also  
4 Illustration C.

5  
6 On September 30, 1963, the McCutcheons deeded a portion  
7 of their land to the east of the Modern Electric conveyance to  
8 Calais Co., Inc. (Calais), specifically excepting the west 30 feet  
9 "heretofore dedicated to the public as a public roadway." Exhibit  
10 D, and Illustration D.

11 On June 24, 1964, the Greater Anchorage Area Borough  
12 approved plat number 64-50 by which Calais subdivided a portion of  
13 its property into Bancroft subdivision. The plat refers to  
14 "existing 60' easement Becharof Street," in the area where the  
15 dedication of the 60 foot easement had been made by Modern  
16 Electric and the McCutcheons. Becharof Street provided all the  
17 access for the subdivision. Exhibit E, Illustration E.

18  
19 In 1967, plat number 67-136 was approved, adding  
20 Shelikof Street as a second access to Tudor and a row of lots to  
21 the subdivision. The 60 foot area previously dedicated by Modern  
22 and the McCutcheons was again referred to as "Becharof Street" on  
23 the plat.<sup>2</sup> Exhibit F, Illustration F.

24  
25 <sup>2</sup> Safeway's argument, set out in section B of its brief at  
26 pages 8-12, that the various plats do not accomplish a fee  
(continued...)



1           In the 1960's, the state was beginning work on a design  
2 for the New Seward Highway, which was to be a controlled access  
3 high speed highway with frontage roads on each side for local  
4 access. The state's Right-of-Way Map, which is the official  
5 document setting out the areas over which the state has control  
6 for the design, construction and maintenance of a public highway,  
7 includes all of Becharof Street within the public right-of-way  
8 available for state use.

9  
10           Inclusion of Becharof on the Right-of-Way Map  
11 accomplished the state's formal acceptance of the Modern  
12 Electric/McCutcheon dedication of the easement to the public at  
13 large. The map shows "R/W," or "R/W line" at intermittent points  
14 along a bold black line running east and west just south of the  
15 existing Tudor right-of-way, then angling down to include the  
16 eastern edge of Becharof, continuing south over Campbell Creek and  
17 then flaring out to accommodate a diamond shaped interchange for  
18

19 \_\_\_\_\_  
20 <sup>2</sup> (...continued)  
21 dedication of Becharof Street is not necessary to resolution of  
22 the ownership of the area formerly occupied by Becharof Street.  
23 The state is not conceding Becharof was not a platted street and  
24 therefore not dedicated in fee. But even if the Becharof right-  
25 of-way was not formally dedicated in fee by the various plats, the  
26 facts show that the easement, with the assent of the City of  
Anchorage and Calais Co., became part of the state right-of-way  
for the New Seward Highway and under state control. The 1984  
attempted replat to vacate the public right-of-way in Becharof  
could not be effective as to the state's interest without the  
state's concurrence, which was never given. See argument below.

1 the then-proposed extension of International Airport Road to the  
2 New Seward Highway. Pages 24 and 25 of the Right-of-Way Map for  
3 the New Seward Highway from Potter [Marsh] to Northern Lights,  
4 Project Number F-031-2(18), dated March 18, 1968, are attached as  
5 Exhibit G. See also Illustration G.<sup>3</sup>

6  
7 The state Right-of-Way Map was used repeatedly as the  
8 basis for identifying the respective interests of the state, the  
9 borough and the city in the public right-of-way in the area around  
10 and including Becharof Street. For example, the City of Anchorage  
11 assented to the state's exercise of authority and control over the  
12 Becharof right-of-way by agreeing that municipal utility easements  
13 located within the right-of-way line as set out on the Right-of-  
14 Way Map would be subordinate to the state's rights in the property  
15 "as shown on the Right-of-Way Map of State Project No. F-031-  
16 2(18)" attached to the agreement and made part of it. The  
17 subordination agreement between the city and the state is dated  
18 March 22, 1969 and recorded at Misc. Book 171, pages 96-129,  
19 Anchorage Recording District, including pages 24 and 25 of the  
20

21  
22 <sup>3</sup> The International Airport Road extension was not built, but  
23 the later extension of Becharof south into this area follows the  
24 flared out shape of the right-of-way. Illustration H. See also  
25 letter of Kenneth Atkinson, Calais attorney, requesting permission  
26 to be in state right-of-way to extend Becharof and state permit to  
Calais subsequently issued by state authorizing Becharof extension  
within state right-of-way attached as Exhibit L and discussed in  
greater detail below.

1 Right-of-Way Map. The subordination agreement with the relevant  
2 pages 24 and 25 of the Right-of-Way Map attached to the agreement,  
3 are attached here as Exhibit H. Again, on May 15, 1969, the city  
4 signed a utility relocation agreement requiring city power lines  
5 to be moved at city expense under AS 19.25.020,<sup>4</sup> because they were  
6 "located ... within a state right-of-way." The maps attached to  
7 the agreement show Becharof Street within state right-of-way.  
8  
9 Exhibit I.

10 Becharof, in the area of Tudor, became part of state  
11 right-of-way to accommodate the "flair out" or diamond shaped,  
12 separated grade interchange designed and constructed for the New  
13 Seward Highway- Tudor Road intersection. Tudor Road crosses over  
14 the New Seward Highway. The New Seward Highway has on/off ramps  
15 in addition to the frontage road that must be accommodated within  
16 the right-of-way, requiring the "V" shaped acquisition on each  
17 side of the Highway. See the 1968 Right-of-Way Map, Exhibit G.  
18

19  
20 <sup>4</sup> AS 19.25.020 provides, in part:

21 If, incident to the construction of a highway  
22 project, the department determines and orders that  
23 a utility facility located across, along, over,  
24 under, or within a state right-of-way must be  
25 changed, relocated, or removed, the utility owning  
or maintaining the facility shall change,  
relocate, or remove it in accordance with the  
order.

26 (emphasis added)

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Private property was also required to design the interchange. Actions in eminent domain were filed to acquire land from both Modern Electric on the west of Becharof and Calais on the east. Two different parcels (numbers 307 and 317) were acquired from the Calais property. Exhibits J (Modern Electric) and K (Calais), declarations of taking with real property maps identified as schedules "A" - "C." On the Calais property to the north adjacent to Tudor, the right-of-way was required for the Tudor/New Seward Highway interchange. To the south, the acquisition was for the interchange for the proposed extension of International Airport Road and the New Seward Highway. Illustration G.

Calais understood the consequences of the state's acquisitions in the area and the state's taking control of the ~~of~~ the Becharof right-of-way. In a letter from Calais attorney, Kenneth Atkinson, dated July 1, 1969, to Assistant Attorney General Kaye Ritchey, Calais sought permission for Calais to extend Becharof south within what had become the state right-of-way. Exhibit L. The letter refers to parcel number 307 to the south, but the nature of the interest acquired in Becharof in parcel number 317 to the north by Tudor Road is identical, the Becharof right-of-way having been created along its entire length by the August 1959 dedication of easement between Modern and the

1 McCutcheons. Mr. Atkinson refers to "Becharof Street which was a  
2 60 foot dedicated public street used for north-south access to  
3 Bancroft subdivision," and that the street, as dedicated, extended  
4 the full depth of Calais' real estate. "It is now within the  
5 constructed right-of-way of the New Seward Highway," admits  
6 Atkinson.<sup>5</sup>  
7

8 On August 5, 1969, the state granted a permit to Calais  
9 to construct and maintain a roadway along Becharof Street within  
10 the public right-of-way and Bancroft subdivision with the  
11 permittee, Calais, indemnifying the state. Exhibit M. As part of  
12 the later condemnation action settlement, Calais was released from  
13 its indemnification obligations under the permit, but there was no  
14 change related to DOT&PF's management and control of the Becharof  
15 right-of-way. Exhibit N. The settlement amount for parcel 307  
16 was \$20,500 and for parcel 317 was \$21,590. Exhibits P and Q,  
17 respectively.  
18

19 About ten years later in 1983, a request (identified as  
20 plat number S-6762) was before the Municipality to vacate the  
21 portion of Becharof just south of Tudor Road adjacent to Calais.  
22 The request was made by Stephen Noey, apparently a lessee of  
23 Calais. State planners contacted the Municipal Platting Officer,  
24

25 <sup>5</sup> Calais makes the same admission that Becharof was part of  
26 state right-of-way in the pretrial brief it filed in the  
condemnation case on December 9, 1971. Exhibit O.

1 Jerry Weaver, objecting to the vacation of Becharof and asserting  
2 the state's interest in the right-of-way.

3 On March 2, 1983, DOT&PF planning staff<sup>6</sup> wrote to  
4 Mr. Weaver, specifically to amend a previous response to plat  
5 number S-6762. Staff wrote:

6 This vacation request will be denied by DOT/PF  
7 pending the definition of a project to upgrade the  
8 Tudor Interchange. The scheduling of this project  
9 has not yet been determined. The applicant may  
10 wish to consult with DOT&PF Right-of-Way Section  
11 concerning a permit or lease for use of this area.

12 (emphasis added) Exhibit R.

13 Again on April 12, 1983, DOT&PF repeated its objection  
14 to the vacation of Becharof Street to Mr. Weaver, stating:

15 Please refer to our letter of March 2, 1983  
16 concerning Plat S-6762 (copy attached). DOT&PF is  
17 opposed to the vacation of Becharof Street. The  
18 applicant may use that area by permit or lease  
19 from DOT&PF. Tract 2A should have only one access  
20 to Tudor, at a point near the existing building,  
21 and no access to the New Seward off a ramp.

22 (emphasis added) Exhibit S, page 3.

23 <sup>6</sup> All platting matters within the Municipality of Anchorage are  
24 presented to a small DOT&PF Central Region staff for review and  
25 comment. In addition, platting matters for the Kenai and  
26 Matanuska-Susitna and Kodiak Island Boroughs, and other cities  
such as Dillingham and Bethel are presented to DOT&PF for review.  
In 1983, when the replat proposal was presented for review and  
comment, thousands of such matters crossed the desks of those  
assigned to review them. For example, the April 12, 1983 letter,  
Exhibit S, contains 42 other platting matters submitted to DOT&PF  
for review at that time.

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
ANCHORAGE BRANCH  
1031 W. FOURTH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 268 5100

1           On May 2, 1983, Mr. Weaver wrote to the planning section  
2 of DOT&PF. Exhibit T. He acknowledged DOT&PF's objection to the  
3 proposed vacation and requested more information about DOT&PF's  
4 position. Weaver provided the dedication of easement documents  
5 signed by the McCutcheons and Modern in 1959, but he did not  
6 reference the state's 1968 Right-of-Way Map that includes  
7 Becharof, the utility agreements, or the 1968 condemnation  
8 acquisitions or their terms. On May 20, 1983, DOT&PF responded,  
9 discussing the status of DOT&PF's future construction plans for  
10 the area, and again recommending no vacation of Becharof Street.  
11 Exhibit U.

12  
13           The Municipal Platting Authority had previously passed  
14 a resolution approving the vacation of Becharof as having "no  
15 substantial value to the Municipality." The resolution  
16 incorrectly described Becharof as a 60 foot right-of-way along the  
17 west boundary of Tract 2, Bancroft Subdivision, Addition Number 1  
18 (the Calais property), when in fact the 60 foot right-of-way  
19 straddled the Calais western property line, so that only 30 feet  
20 was on the Calais property lot. Exhibit V. In a June 21, 1983  
21 memorandum from the mayor to the assembly, the mayor, the  
22 municipal manager and the director of community planning did not  
23 concur in the request to vacate Becharof, because information had  
24

1 been provided by the state "indicating the vacation request should  
2 be denied." Exhibit W.

3  
4 Nevertheless, on July 26, 1983, the Municipal Assembly  
5 passed an ordinance entitled, "An ordinance authorizing a  
6 conveyance by the municipality of certain interests in the  
7 vacation of: 15 foot screening easement and a 60' right-of-way  
8 known as Becharof Street along the west property line of Tract 2,  
9 Bancroft subdivision, Addition No. 1.<sup>7</sup> Exhibit X. The ordinance  
10 provides that the conveyance of the Municipality's interest in the  
11 right-of-way

12 shall be accomplished by, and effective upon, the  
13 recording of the approved final plat depicting the  
14 subject vacation in accordance with the  
15 requirements of the subdivision regulations.

16 Plat number 84-221, approved by Jerry Weaver and signed  
17 by representatives of Calais, was recorded on July 7, 1984.  
18 Exhibit Y. The plat does not contain the signature of a DOT&PF  
19 representative as a record owner of the property to be replatted  
20 as required by AMC 21.15.120(4)(c). (A copy of the ordinance is  
21 attached to this memorandum for ease of reference.) It is  
22 disagreement as to the effect of this plat which is the basis of  
23 this litigation.

24  
25 <sup>7</sup> Again, the reference to all 60 feet of Becharof being located  
26 along the western property line of Becharof only, is incorrect.  
Only 30 feet of the Becharof easement was located on Calais  
property.



DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
ANCHORAGE BRANCH  
1031 W. FOURTH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 268 5100

1 Calais also alleges additional counts based on estoppel  
2 and quasi-estoppel. The facts related to those issues are  
3 provided in the affidavits of Keith Morberg, recently retired Pre-  
4 construction Engineer for the Central Region of DOT&PF, and John  
5 Jensen, Chief of the Right-of-Way Section for the Central Region,  
6 attached here.

7  
8 In summary, the affidavits show there was more to Keith  
9 Morberg's statements than recalled by Tim Potter, and that Keith  
10 Morberg made no hard promises on which it would have been  
11 reasonable for any owner to rely. Importantly, Morberg states he  
12 has not changed his view, which is, that if the triangular fee  
13 parcel acquired as part of the Calais 1968 condemnation ("the  
14 triangle") is not adjacent to state right-of-way, the state is  
15 willing to initiate its disposal process as to that triangle.<sup>8</sup>  
16 However, additional research has shown otherwise.

17 In addition, John Jensen told Safeway's representative,  
18 Tim Potter, that DOT&PF staff were required to follow a public  
19 process for disposing of right-of-way and that the final outcome  
20 could not be determined until after that public comment period.  
21 There were no statements made to Safeway or its representatives by  
22

23  
24 \_\_\_\_\_  
25 <sup>8</sup> It is the state's understanding that Safeway is not claiming  
26 title to the triangle, despite Safeway's position that the 1984  
plat is otherwise effective to divest the state of its interests  
in the Becharof right-of-way.

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
ANCHORAGE BRANCH  
1031 W. FOURTH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 269 5100

1 DOT&PF employees which can form the basis for estopping the state  
2 from claiming its interest in the Becharof right-of-way.

3 **II. ARGUMENT**

4 A. The 1984 Attempt to Replat is Ineffective.

5 1. No Proper, Valid Plat, Complying with the Requirements  
6 of the Anchorage Municipal Code, has been Recorded.

7 The state requests that the court quiet title in the  
8 parties according to their interests as they existed prior to the  
9 1983-84 attempt to vacate Becharof. First, no plat "depicting the  
10 [Becharof] vacation in accordance with the subdivision  
11 regulations" as required by the ordinance authorizing the replat  
12 has been filed. Exhibit W. Anchorage Municipal Code  
13 § 21.15.120(B)(4)(c) requires all "owners of record, including all  
14 parties holding any recorded equitable or beneficial interest in  
15 the land being platted" to sign the certificate to plat. As a  
16 result of the 1968 condemnation of Calais parcel number 317, the  
17 state owns the fee in a triangular-shaped piece of property at the  
18 east corner of the Becharof-Tudor intersection. Additionally, the  
19 1968 Right-of-Way Map, which was repeatedly relied on and recorded  
20 as an attachment to various agreements with the city, gave the  
21 state control and authority over the Becharof right-of-way. The  
22 signature of a representative of DOT&PF was required to comply  
23 with the requirements of the ordinance and the municipal code.

24 //  
25

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
ANCHORAGE BRANCH  
1031 W. FOURTH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 269-5100

1           2.    The Municipality Cannot Vacate Right-of-Way over the  
2                    Objection of the Sovereign State of Alaska.

3                    The State of Alaska, Department of Transportation and  
4   Public Facilities, is responsible for supervision of the highway  
5   system in Alaska. AS 19.05.010 provides that the Department "is  
6   responsible for the planning, construction, maintenance,  
7   protection, and control of the state highway system." As part of  
8   its duties, the Department is obligated to "direct approved  
9   highway planning and construction and maintenance, protection and  
10   control of highways." AS 19.05.030. Under its enumerated powers,  
11   the Department may "acquire property," AS 19.05.040. "As part of  
12   the cost of constructing or maintaining a highway," the Department  
13   "may . . . acquire [or] take over land in fee simple or easements  
14   that it considers necessary. . . ." AS 19.05.080.

15                    Using its statutorily authorized powers to meet its  
16   statutory duties and obligations, the Department acquired control  
17   and responsibility for the Becharof right-of-way in 1968 when it  
18   incorporated Becharof into the right-of-way for the New Seward  
19   Highway. The original dedication in the right-of-way easement  
20   from the McCutcheons and Modern Electric did not limit the  
21   governmental entity which could accept the dedication "to the  
22   public at large." Exhibit C. Although the local government may  
23   have accepted the dedication previously, the state was not barred  
24   from accepting, as well, by taking control in 1968.  
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*Handwritten notes and signatures:*  
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1           Nothing that occurred afterwards shows that the state  
2 relinquished that control.<sup>9</sup> In written statements between the  
3 state and both the adjacent owner, Calais, and the Municipality,  
4 and acknowledged by both, DOT&PF has stated its interests, and  
5 stated that a lease or a permit was required to be within the  
6 state right-of-way. Exhibits N, R and S.  
7

8           Before the state can transfer or relinquish its  
9 interests, it must follow both the Alaska Constitution and the  
10 appropriate statutes. Article VIII, section 10 of the Alaska  
11 Constitution states:

12                   Public Notice. No disposals or leases of state  
13 lands or interests therein, shall be made without  
14 prior public notice and other safeguards of the  
public interest as may be prescribed by law.

15 After the requisite public notice, the Department may vacate  
16 rights in land acquired for highway purposes by executing and  
17 recording a deed.

18                   Upon filing, title to the vacated land or interest  
19 in land inures to the owners of the adjacent real  
20 property in the manner and proportion considered  
equitable by the commissioner and set out in the  
deed.

21 AS 19.05.070. See also AS 29.40.160.  
22

23 <sup>9</sup> The Attorney General's opinion (1987 Alaska Op. Att'y Gen.  
24 Inf. 17) relied on by Safeway at p. 13 of its brief addresses a  
25 factual situation different from the one here, although many of  
26 the same statutes apply. The question addressed there was whether  
the state could choose to transfer control of part of the state  
highway system to a local government. The question here is  
whether a local government can wrest control from the state.

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
ANCHORAGE BRANCH  
1031 W. FOURTH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 269 5100

1           The Municipality of Anchorage, as a creation of the  
2 State of Alaska, may have had the power to vacate whatever  
3 interest it may have had in the Becharof right-of-way in 1984.  
4 Indeed, the ordinance is actually limited to authorizing vacation  
5 of the Municipality's interest only. The Municipality had no  
6 authority to vacate the state's interests in right-of-way, and  
7 certainly no authority to do so over the state's objections.  
8

9           3. The Ordinance Authorizes Municipal Interests Only to be  
10           Vacated.

11           The 1983 ordinance ostensibly vacating Becharof only  
12 speaks to the interests of the Municipality in Becharof Street.  
13 Exhibit W. It authorizes "a conveyance by the Municipality of  
14 Anchorage of certain interests." The Assembly ordered that  
15 "vacation of certain portions of a municipal right-of-way . . .  
16 may be accomplished through the conveyance and relinquished by the  
17 Municipality of its interests in the said right-of-way." The  
18 ordinance correctly does not address the interests of the state.

19           B. Even if the Plat were in Some Way Found to be Effective  
20 and Becharof Vacated, the State is the Property Owner to  
21 which at Least the Western 30 feet and all the  
22 Northernmost 110 feet of Becharof Must be Vacated.

23           1. The Plat Provides for the Becharof Right-of-Way to be  
24 Vacated to the Adjacent Property Owners.

25           The 1983 Ordinance Authorizes the Vacation of the  
26 Municipality's Interests in Becharof "to those parties receiving  
the benefits of the said vacation under the terms of AMC

1 21.15.130. Section 130 concerns approvals of vacations.

2 Subsection 21.15.130(D) addresses title to the vacated area:

3 The title to the street or other public right-of-  
4 way vacated on a plat attaches to the lot or lands  
5 bordering on the area in equal proportions, except  
6 that if the area was originally dedicated by  
7 different persons, original boundary lines should  
8 be adhered to so that the street area which lies  
9 on one side of the boundary line shall attach to  
10 the abutting property on that side, and the street  
11 area which lies on the other side of the boundary  
12 line shall attach to the property on that side.

13 AMC 21.15.130 is attached to this brief.

14 In directing that any vacation of Becharof be made  
15 according to AMC 21.15.130, the Assembly ordained that when  
16 Becharof was vacated, the Municipality's interests would attach in  
17 equal parts to the adjacent or abutting land on each side of  
18 Becharof. In this case, that allocation is also in keeping with  
19 the original dedication which come in equal parts from Modern and  
20 from the McCutcheons. As successors in interest to Modern and the  
21 McCutcheons, the state and Calais, respectively would each take 30  
22 feet of the 60 foot vacated right-of-way.

23 C. Even If Neither the State Statute Relevant to the  
24 Vacation of Real Property nor the Municipal Code Section  
25 Applicable to the Vacation of Real Property Apply Here,  
26 Common Law Principles for the Vacation of Right-of-Way  
Provide that the State is the Property Owner to which at  
Least the Western 30 feet and all the Northernmost 110  
feet of Becharof Must be Vacated.

AS 19.05.070, like AMC 21.15.130 discussed above,  
provides that if DOT&PF determines it will vacate land or rights

1 in land acquired for highway purposes, it will be deeded to the  
2 owners of the adjacent real property in the manner and in the  
3 proportion considered equitable by the Commissioner of DOT&PF.  
4 Safeway argues that such legislatively enacted vacation procedures  
5 would not apply here, apparently despite the Assembly's specific  
6 reference to the municipal ordinance procedure for vacating in AMC  
7 21.15.130. Safeway argues that common law principles apply.  
8

9 Even assuming Safeway's approach, the proper result, if  
10 a vacation of right-of-way was found to be proper here, would be  
11 for the eastern 30' of the Becharof to go to the state as the  
12 successor-in-interest to original dedicator, Modern, and most of  
13 the western 30' of Becharof to go to Calais as the successor to  
14 the original dedicator, the McCutcheons. As to the northernmost  
15 110 feet of Becharof, however, the entire 60' would also be  
16 vacated to the state, since the state also has the fee adjacent to  
17 Becharof on the west via the triangle obtained from Calais in the  
18 1968 condemnation. See Schedule "B-2," attached to the  
19 Declaration of Taking, Exhibit K for dimensions of triangular  
20 parcel.  
21

22 The dominant public policy, repeatedly addressed by the  
23 courts when quieting title in right-of-way, is to avoid long,  
24 skinny strips of land in ownership other than the adjacent owners.  
25 Thus, when the treatises and cases examine subsequent transfers of  
26

1 the real property from which a common law dedication had  
2 previously been made by the original dedicators, they conclude the  
3 fee underlying the right-of-way does not remain with the  
4 dedicator, but generally is conveyed together with the fee  
5 abutting the right-of-way. Specific language to the contrary is  
6 required. Roger A. Cunningham, et al., The Law of Property,  
7 § 11.6 (2d ed. 1993). Under a section entitled, "Relinquishment  
8 of Dedicated Land," Professor Cunningham and his colleagues  
9 address the disputes that often arise after public land is  
10 vacated:  
11

12 If the public's interest was only an easement, the  
13 land is simply freed of the servitude and the  
14 owners of the servient estate (usually those who  
15 own the abutting lots) now have unencumbered  
16 possession. But if the public interest was a  
17 possessory fee simple, the cases are divided as  
18 between the original donor and the owners of the  
19 abutting land. The donor will usually prevail if  
20 he or she expressly reserved a reversionary  
21 interest. If this was not done, the courts often  
22 find a way to award the land to the abutting  
23 owners. This result is sometimes hard to explain  
24 in theoretical terms, but it generally represents  
25 sounder policy, particularly in the case of a  
26 long, thin strip of land created by the vacation  
of a street.

Support for the proposition that upon vacation, right-  
of-way reverts to ~~original~~ abutting owners, unless the original  
dedicators specifically reserved the underlying fee, also can be  
found in Powell on Real Property. 6A Richard R. Powell, Powell on  
Real Property, § 926[2], p. 84-110 (1982). One treatise on the



1 law of surveying and boundaries has stated that upon vacation of  
2 a right-of-way

3 the land is freed from the burden of user of the  
4 public and the right to exclusive possession is  
5 restored to the original dedication or those  
claiming under him.

6 (emphasis added). F. Clark Law of Surveying and Boundaries, § 642  
7 (4th ed. 1976).

8 It is not clear why Safeway limits its argument that the  
9 right-of-way reverts to the original dedicator. If that were the  
10 case, the western Becharof right-of-way would revert to the  
11 McCutcheons or their heirs, and not to Calais.

12 D. Neither the Facts, nor the Law Supports the Reasonable  
13 Reliance, or Unconscionability Requirements for an  
14 Estoppel or Quasi-estoppel to Exist.

15 The facts here do not show that the state ever asserted  
16 any position concerning the Becharof right-of-way or the  
17 triangular area on which it would have been reasonable for Safeway  
18 or its development expert, Tim Potter of DOWL Engineering, to  
19 rely. The parties here were sophisticated, experienced  
20 professionals. Keith Morberg, the Preconstruction Engineer for  
21 DOT&PF, who attended many such meetings with developers, cautioned  
22 that he could not speak for the Department. Morberg opined that,  
23 if the facts were as Potter presented them, Morberg thought  
24 personally, that the Department "would likely be willing to  
25 initiate the disposal process." However, as the Department began  
26

1 its own title research, the facts were found not to be as  
2 presented. Affidavit of Keith Morberg attached.

3 Mr. Potter also spoke with John Jensen, Chief Right-of-  
4 Way, Central Region. John Jensen reminded Mr. Potter of the  
5 public notice and opportunity for public comment requirements  
6 prior to disposal of right-of-way and that no decision could be  
7 made until the close of the public comment period. Affidavit of  
8 John Jensen attached.  
9

10 There is no reasonable basis for converting a  
11 preliminary, exploratory, informal meeting with a DOT&PF staff  
12 member who disclaimed any authority to speak officially on behalf  
13 of the Department and who had only the developer's version of the  
14 facts before him, into an official position taken on behalf of  
15 DOT&PF on which to solely rely in going forward with a large  
16 commercial transaction. Moreover, DOT&PF clarified that any  
17 disposal of right-of-way was subject to a public process.  
18

19 It is important to note that Mr. Morberg stresses that  
20 DOT&PF has not changed its position: If the triangular piece of  
21 property is not adjacent to state right-of-way (i.e. if Becharof  
22 has been properly vacated, and if the state has not interest in  
23 Becharof as vacated), then the state is willing to recommend the  
24 disposal process, subject to public notice and comment. There has  
25 been no change in position by the state.  
26

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
ANCHORAGE BRANCH  
1031 W. FOURTH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 269 5100

1           Aside from the factual considerations, the parties here  
2 were discussing interests in real property, which fall under the  
3 statute of frauds. Alaska's statute of frauds requires that  
4 alleged agreements to convey interests in land must be in writing  
5 to be enforceable. AS 9.25.010(a)(6). In addition, since  
6 interests in public land are at issue, the Alaska Constitution,  
7 Article VIII, section 10, requires notice to the public before any  
8 transfer. King v. Alaska State Housing Authority, 512 P.2d 887,  
9 891 (Alaska 1973). (State not estopped to deny preference to  
10 former owners who expended funds in reliance on staff  
11 representations, since state housing authority not empowered to  
12 grant a preference.)  
13

14           As to any contention that the state is estopped from  
15 claiming under the 1968 Right-of-Way Plans, the opinion of the  
16 Alaska Supreme Court in State v. Simpson, 397 P.2d 288 (Alaska  
17 1964) is dispositive. Even a lengthy failure by many governmental  
18 officers to assert rights in a street could not form the basis to  
19 estop the state from asserting title against occupying landowners.  
20

21           After the state had made its objection to the 1984  
22 replat and notified the Municipality that any use of the Becharof  
23 right-of-way would require a lease or a permit from the state, and  
24 after those responsible for the plat failed to present it to the  
25 state for signing as a fee owner of the triangle, with an interest  
26

1 in the Becharof right-of-way, the state was required to do no  
2 more. In the years following the 1984 attempted replat, the  
3 passage of time did not work to deprive the state of its interest  
4 in Becharof.

5 One legal principle that is of prime importance here is  
6 that there can be no adverse possession against the state. It  
7 appears Safeway may be confusing its estoppel claims with an  
8 adverse possession cause of action, which is unavailable as to the  
9 state. AS 38.95.010 provides:

11 **State's interest may not be obtained by adverse**  
12 **possession or prescription.** No prescription or  
13 statute of limitations runs against the title or  
14 interest of the state to land under the  
15 jurisdiction of the state. No title or interest  
16 to land under the jurisdiction of the state may be  
17 acquired by adverse possession or prescription, or  
18 in any other manner except by conveyance from the  
19 state.

20 See also AS 9.45.052 (no presumption of title as against the State  
21 of Alaska); Classen v. State, Dept. Of Highways, 621 P.2d 15,  
22 (Alaska 1980), (An easement may not be acquired by prescription  
23 against the state.)

24 In fact, the passage of time has worked to the state's  
25 advantage. To the extent the state acquired interests in the  
26 Becharof right-of-way in 1968, it is accurate to describe such  
acquisition as an inverse condemnation in terms of the fee  
interests of Modern Electric and Calais (or any others claiming

1 the fee) underlying the Becharof right-of-way. The statute of  
2 limitations for such a taking has long since passed.

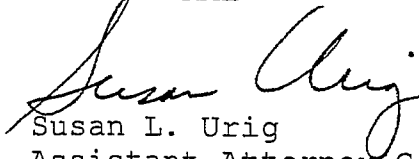
3 **IV. CONCLUSION**

4  
5 The state will be damaged if the 1984 attempt to replat  
6 is found to be effective as to Becharof Street. If the state were  
7 required to reacquire an interest in Becharof, any commercial  
8 enterprise operating on the site and the landowner would claim  
9 business damages for decreased parking and overall utility of the  
10 site. The state could be forced to pay again for the interests it  
11 had within its right-of-way in 1968. The state has an obligation  
12 to protect its right-of-way and the public fisc.

13 DATED this 27th day of January, 1998 at Anchorage,  
14 Alaska.

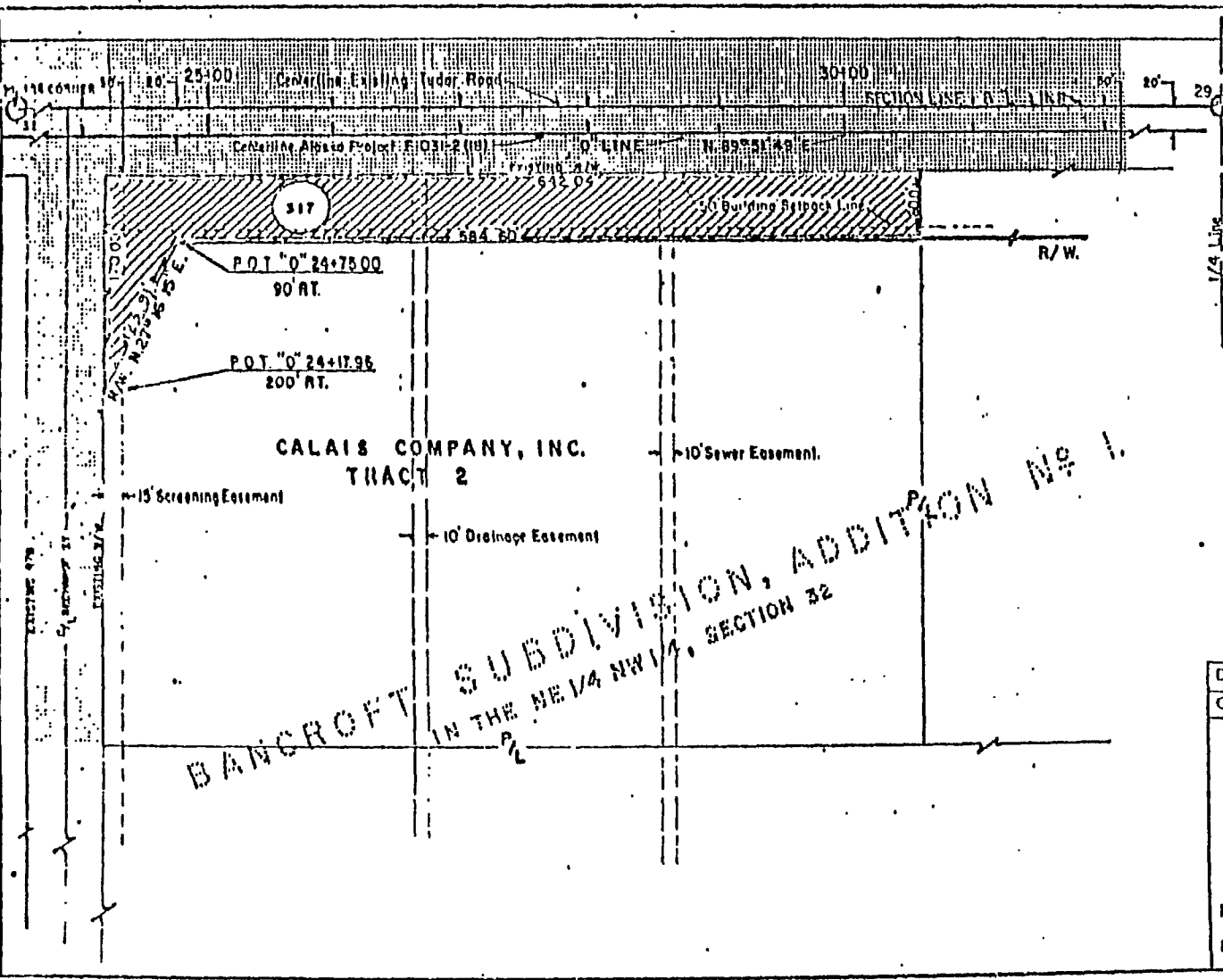
15  
16 BRUCE M. BOTELHO  
17 ATTORNEY GENERAL

18 By:

19   
20 Susan L. Urig  
21 Assistant Attorney General

22  
23  
24  
25  
26  
DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
ANCHORAGE BRANCH  
1031 W. FOURTH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 269-5100

BOOK 112 TRACT 134  
Anchorage Recording District



1" 32+92.38  
1/4 Corner  
29  
32  
1/4 Line

T-13-N  
S. (EN) R-3-W  
M.

DWN:	leh	SCALE:	ARTA
CKD:	Jms	1" = 100'	0.956 Acres ±.

STATE OF ALASKA  
DEPARTMENT OF HIGHWAYS  
MAP  
SHOWING RIGHT OF WAY REQUIRED  
FOR  
PROJECT F-031-2(18), ANCHORAGE DISTRICT  
PARCEL NO. 317  
DATE May 14, 1968

**BANCROFT SUBDIVISION, ADDITION No. 1.**  
IN THE NE 1/4 NW 1/4, SECTION 32

CALAIS COMPANY, INC.  
TRACT 2

10' Sewer Easement.  
10' Drainage Easement  
15' Screening Easement

50' Building Setback Line

R/W.

SCHEDULE "B"

7/11/68  
 100' 16" x 100' 15"  
 Anchorage District

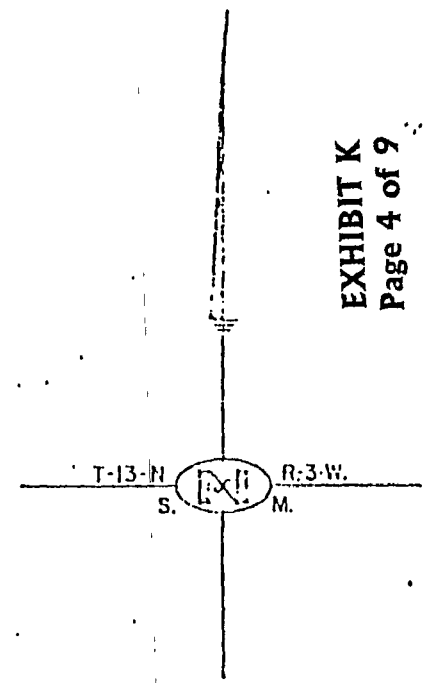
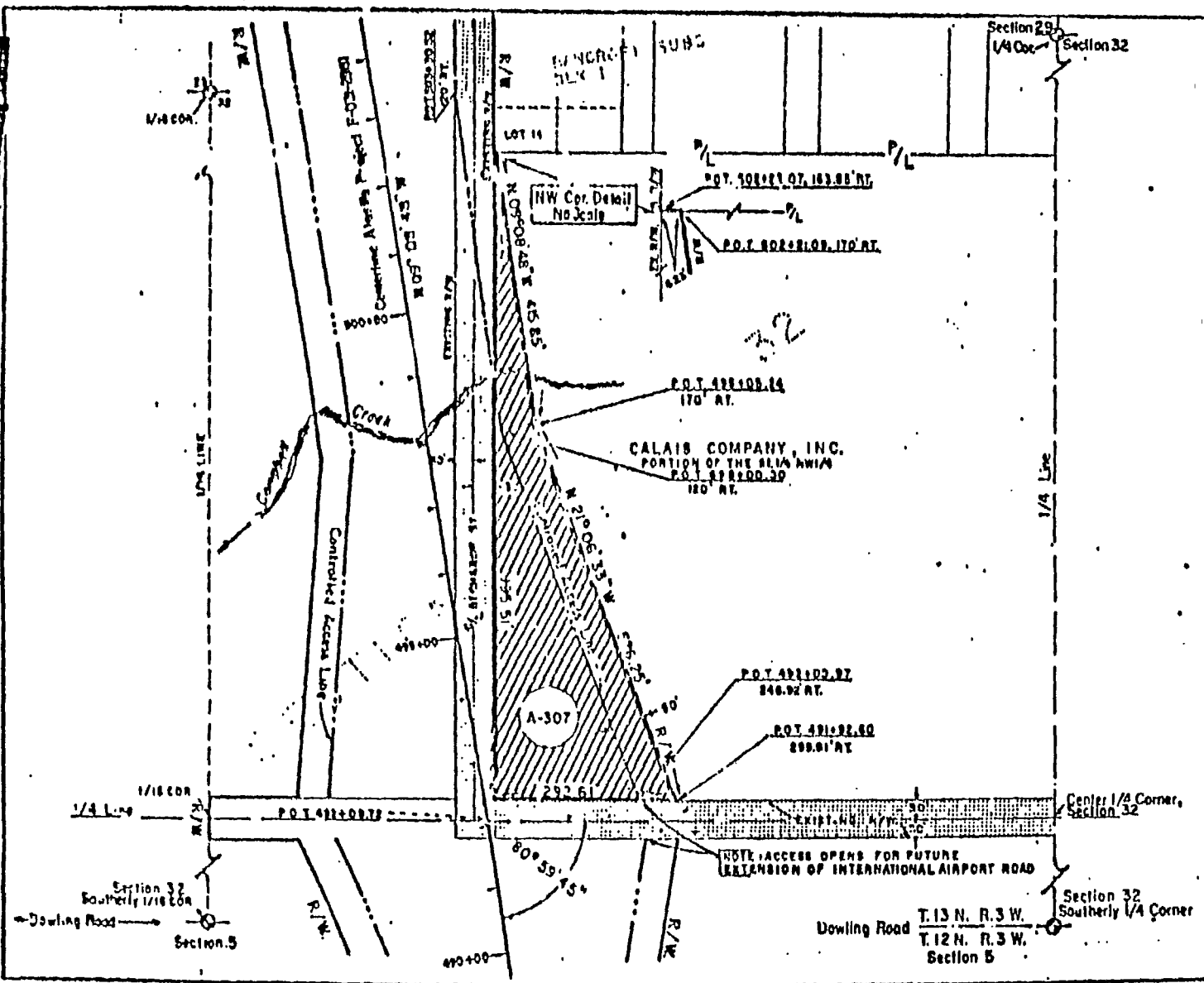
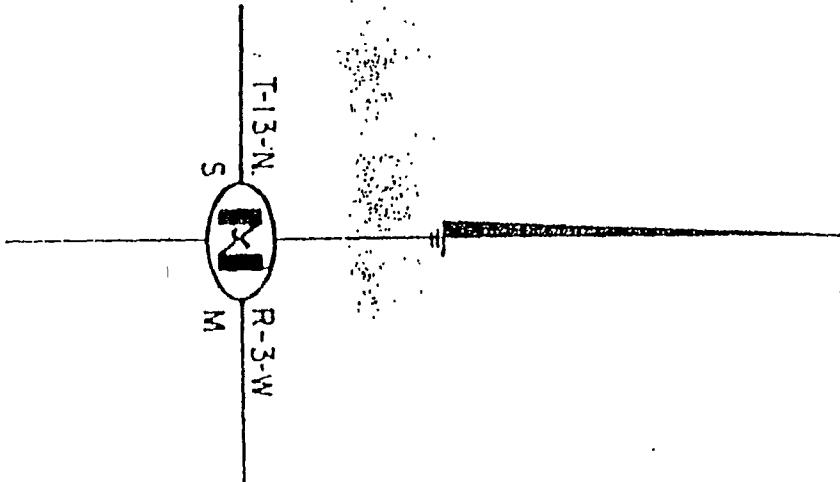
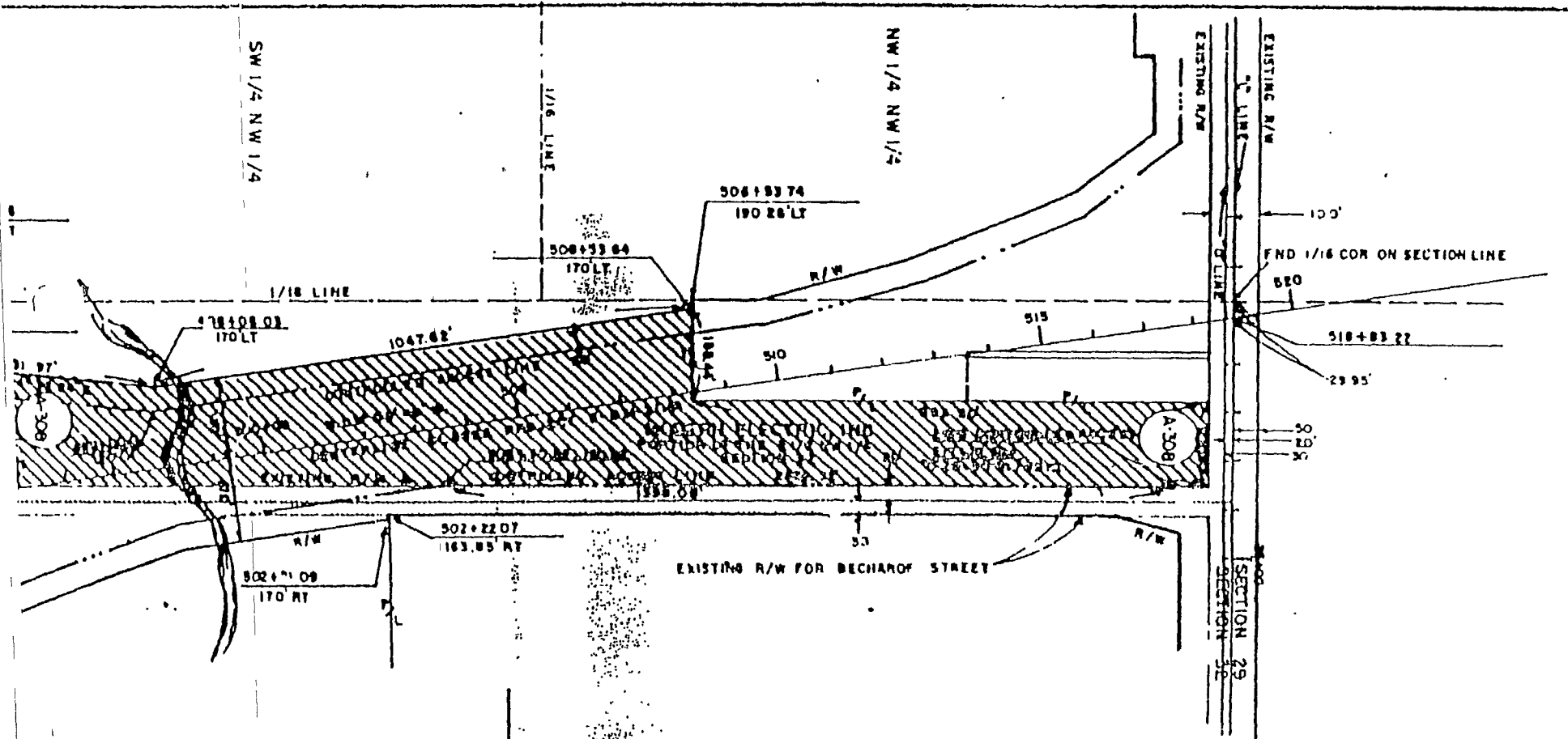


EXHIBIT K  
 Page 4 of 9

DWN: jeh	SCALE: 1" = 200'	AREA: 2795 Acres ±
CKD: JKA		

STATE OF ALASKA  
 DEPARTMENT OF HIGHWAYS  
 MAP  
 SHOWING RIGHT OF WAY REQUIRED  
 FOR  
 PROJECT F-031-2(1B). ANCHORAGE DISTRICT  
 PARCEL NO. A-307  
 DATE May 14, 1968



DWN: jeh	SCALE: 1" = 300'	AREA: 13.664 Acres ±
CKD: jeh		
STATE OF ALASKA DEPARTMENT OF HIGHWAYS MAP SHOWING PIGHT OF WAY REQUIRED FOR PROJECT F-031-2(18) ANCHORAGE DIS PARCEL NO A-300      DATE June 18, 1960		

SCHEDULE "B"  
 EXHIBIT J  
 Page 6 of 7