

# STATE OF ALASKA

STEVE COWPER, GOVERNOR

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX K—STATE CAPITOL  
JUNEAU, ALASKA 99811-0300  
PHONE: (907) 465-3600

ATTORNEY GENERAL

June 25, 1987

JUN 29 1987

4th JUDICIAL DISTRICT  
STATE OF ALASKA

Charles L. Fields  
Registered Agent  
Alaska Ski Corporation  
Box 1356  
Fairbanks, Alaska 99707

CHIEF R/W AGENT	-8-
PRE AUDIT	
ENGINEERING	
TITLE	
PLANS	
MATERIALS	
APPRAISALS	
NEGOTIATIONS	
✓ RELOCATION/PROP. MGMT.	
RETURN TO:	
FILE	

Dear Mr. Fields:

I am responding to your letter of April 6, 1987, regarding the dispute between Alaska Ski Corporation (ASC) and the State (Department of Transportation and Public Facilities, represented by Assistant Attorney General Linda Walton) over the legal status of a road that traverses property owned by ASC. I apologize for the delay in responding. However, I am sure you are aware that the legislative session has been extremely hectic.

Because you are represented by counsel in this matter, it would be improper for me to deal directly with you regarding the substance of the issues involved in your dispute with the State. However, because your letter did bring into question the manner in which Ms. Walton has dealt with you and ASC, I did feel it incumbent upon me to inquire into that aspect of the matter. In doing so, I have reviewed Ms. Walton's initial April 4, 1985, memorandum regarding the Ester Dome Road, the 24 page February 10, 1986, preliminary finding letter by the Ombudsman on the complaint you filed with his office regarding Ms. Walton's advice in this matter, Ms. Walton's 17 page letter of March 17, 1986, to the Ombudsman in response to his preliminary finding letter, and the Ombudsman's 11 page letter of April 11, 1986, modifying his preliminary findings and stating his conclusion that your complaint was unsupported. I have also received the comments of Assistant Attorney General Becky Snow, chief of the Fairbanks civil office of the Department of Law.

Based on my review, I cannot agree with you that Ms. Walton has failed to deal with you and ASC in a direct, fair, and aboveboard manner. She has certainly done so. Although you disagree with it (which you are certainly entitled to do), I

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Charles L. Fields, Registered Agent  
Alaska Ski Corporation

June 25, 1987  
Page 2

believe that Ms. Walton's legal position is reasonably held and have no reason to think that she is asserting it capriciously or for any improper reason.

Sincerely,



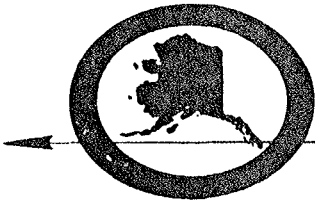
GRACE BERG SCHAIBLE  
ATTORNEY GENERAL

GBS/lg

cc: Cory R. Borgeson, Esq.  
Counsel for Ski Alaska Corporation

D. Rebecca Snow, Chief Assistant Attorney General

Linda Walton, Assistant Attorney General



# Ombudsman

John B. Chenoweth

April 11, 1986

Linda L. Walton, Assistant Attorney General  
Department of Law  
100 Cushman Street, Suite 400  
Fairbanks, Alaska 99701

RE: Ombudsman Complaint F85-0957 (Edited)

Dear Ms. Walton:

This is my response to your March 17 request for modification of my preliminary finding. We received your letter on April 3. Since your response is lengthy, I will address the points you raise under the same headings and in the same order as you presented them.

\*

AS 24.55.110(1) plainly refers to remedies such as informal contacts with state agency personnel and administrative hearings and appeals. The legislature did not intend that citizens should have to sue the state before they could turn to the ombudsman for assistance. If that were so, this office would receive few complaints, and whatever assistance we might be able to render would be irrelevant. Accordingly, neither my predecessor nor I have required complainants to appeal to the courts for review of adverse administrative decisions.

As for discussing the matter with you, the complainant said that his attempts over a long period of time to resolve this dispute through correspondence and discussions with both the Department of Transportation and Public Facilities and the Department of Law had proved unsatisfactory. The record bears him out on this point. Since, further, the former continually referred the complainant to you to discuss his concerns, and since the complainant was dissatisfied with what he perceived to be factual errors in your written communications with him and with the Department of Transportation and Public Facilities, he appealed to this office to investigate this aspect of the dispute. This we have done, and properly so.

Mr. Fields indicated, moreover, that ASC did not have counsel at the time this complaint was filed. Your repeated insistence that he communicate through counsel about alleged errors in the factual basis for your position regarding the disputed right-of-way or advise that he wished to represent himself, and Mr. Fields' unwillingness to pursue resolution of the dispute exclusively through counsel, together suggest that you and he had reached an impasse; I believe that recourse to this office at that point became a legitimate option for Mr. Fields.

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State of Alaska

Reply to:

- 3201 C Street, Suite 606  
Anchorage, Alaska 99503  
(907) 563-3673
- Pouch W0  
Juneau, Alaska 99811  
(907) 465-4970
- P.O. Box 74358  
Fairbanks, Alaska 99707  
(907) 452-4001

April 11, 1986

Furthermore, I would remind you that state's attorneys are not among those whose actions are exempted from review by the ombudsman under AS 24.55.330(2).

\*

You complain that "Mr. Webster has overlooked some critical facts in evaluating this complaint." The "first and most important" of these, you assert, is his failure to point out that you forwarded a copy of the memorandum to Mr. Fields and his associates at ASC so that they could "address any points which [ASC] considers inaccurate." I direct you to the bottom of page 13 of Mr. Webster's report for precisely this information. Furthermore, Mr. Fields responded to this memorandum in a four-page letter dated July 24, 1985. Your brief response to Mr. Fields' complaint that the memorandum contained errors is recorded in pertinent part on page 12 of Mr. Webster's report.

\*

I agree with you that Mr. Webster's characterization of the phrases "good chance of proving" and "excellent chance of proving" could be misconstrued by the casual reader. You read more into this than Mr. Webster intended or than I understood, however. That part of his report, pages 3-12, was intended to be a descriptive review of the documentary record to serve as necessary background for understanding his discussion, on pages 14-23, of your April 4, 1985 memorandum. It is indisputable that the principal point of your May 22, 1984 memo was that further research would be necessary to prove a public right of way through ASC's property. Otherwise, it might be added, why bother? It is also indisputable that this research led you to augment considerably the legal arguments for taking this position. Certainly, the record of correspondence between you and ASC supports this view. You concede, moreover, that the state's legal position was not at that point "fully developed." I leave to any disinterested party's judgment whether your subsequent arguments are not more "legally defensible" than the abbreviated statements of your position contained in earlier correspondence.

I. Justification for the state's position has not changed.

You assert:

Mr. Webster states at page 8, "The theory of adverse possession first [put] forward in Ms. Walton's September 9, 1982 letter to the complainant appears to give way without explanation to easement by prescription" (in the March 19, 1984 letter). He seems to equate easement by prescription with RS2477. Actually, adverse possession and easement by prescription are based upon one and the same theory . . . There are a few fine distinctions between the terms . . .

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While the requirements for demonstrating "adverse possession" and "easement by prescription" are indeed similar, the terms denote two different things. I take it Mr. Webster meant only to point out that the term "adverse possession" dropped out of your correspondence, and the legal theory you meant by it came in later correspondence to be referred to by its proper term, "easement by prescription." To point this out is not confusing the two, but rather distinguishing between them for the sake of accuracy. At the same time that the Alaska Court "commented on the similarity of the terms," it noted that the lower court's confusion of them was "an error in nomenclature." (You blur this distinction again, incidentally, on page 12 of your response, where you refer to "the theory of adverse possession/prescriptive easement." However, the term "adverse use," first introduced in this letter, suggests that you now share our view on this point.) Furthermore, the report makes quite clear, I think, that easement by prescription and the RS2477 right-of-way were two different lines of argument in your correspondence.

\*

You are correct that Mr. Webster was mistaken in asserting you first mentioned the Commerce Quitclaim Deed in January 1985. As you point out, your September 19, 1982 letter to the complainant refers to this document.

\*

Your assertion that Mr. Webster's report betrays "a misconception that each time one state employee writes something, that employee fully represents the state's position" is troubling. The protean nature of what "the state" has believed throughout this protracted dispute was one of the complainant's principal concerns. As you have conceded, it is not "the state" that believes something, but a representative or representatives of the state, and generally they feel free to act on these beliefs. When Mr. Fields first contacted the Department of Transportation and Public Facilities to protest damage to ASC signs and property caused by road maintenance crews, he received one explanation. That explanation was challenged by the university's Division of Land Management and was subsequently revised several times. Even your position has evolved, as evidenced by your correspondence in this dispute.

Mr. Fields contended that each time he or his counsel challenged arguments put forward by "the state," new arguments took their place. This view is not entirely accurate, as you have demonstrated to my satisfaction, but it is not unreasonable, in my judgment, for a citizen to expect that the state's position should not be a deck of cards dealt out a hand at a time. You make much in your letter of the notion that the state should not be placed at a disadvantage in this dispute; it could just as easily be said that the state's piecemeal approach to Mr. Fields' complaint has placed him at a considerable disadvantage. If Harold Hume and Harold Cameron and John Horn cannot give a citizen reasonable answers to his questions, and if Larry Wood and Linda Walton, at least initially, are not authorized to expend sufficient resources to

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research what should be the state's position and why, must the citizen then sue the state to receive answers to his questions? I do not believe that is equitable.

II. The proposed finding is based on a misunderstanding of the law.

You assert:

Mr. Webster appears to accept at face value ASC's assertion that the road shown on Exhibit A in black was an "abandoned" early trail.

I would direct you to the following passage on page 14 of the report:

It should be understood, incidentally, that I have used the road names which seem least likely to obscure which portion of the road system on Ester Dome I am discussing. The state and the complainant cannot agree on these names, and my preference for one name over another ought not to be interpreted as favoring either view.

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I do not agree that the proposed finding was based on a misunderstanding of the law. For more on this point, I refer you to section VII. of this letter.

III. Alleged misrepresentations.

In this section of his report, pages 15-19, Mr. Webster discusses "imprecise wording in the [April 4] memorandum which appears to misrepresent the factual record." He remarks that his intent is to give a few examples of "statements [which] are misleading and call for clarification."

You concede that his first example contains some imprecise wording of this sort.

The other example cited in the report purports to illustrate that C. T. Elvey of the Geophysical Institute thought of the road to the top of Ester Dome as "Ester Dome Road." Mr. Webster's point was that it is unclear which of several roads in the area is the "Ester Dome Road" referred to in the Quitclaim Document. The state has renamed virtually every road in that area. The complainant disputes, I think with considerable plausibility, your argument that the road through his property is the "Ester Dome Road" referred to in that document.

You refer to Exhibit H as evidence that Mr. Elvey's belief was probably correct. Yet Exhibit H describes "Ester Dome Road (Ullrhaven)"

as running "from the junction of the St. Patrick Road, Route 6491 [the route number specified in the Quitclaim Deed], and the Sheep Creek Road, Route 651, thence south westerly 4.3 miles to the top of Ester Dome and the Geophysical Institute Building." The only way to get to the Geophysical building from Sheep Creek Road in close to 4.3 miles is via what the complainant refers to as Ullrhaven, i.e. what the state now prefers to call "Ester Dome Road" despite the fact that no USGS map has ever labeled it so. Someone needs to demonstrate, it seems to me, that the lower portion of Ullrhaven, which the complainant contends was built in 1961, is part of the "Ester Dome Road" referred to in the 1959 Quitclaim Deed. As an impartial observer, I am bound to conclude, based on the documentary record, that the state's arguments in this regard are weak in comparison to those put forward by the complainant.

I do not subscribe, incidentally, to the notion that because the state has four or five potential legal arguments to defend its position it is somehow excused from establishing, rather than merely asserting, all but one. Supposing that you can demonstrate to the court's or a jury's satisfaction that the disputed road is an RS2477 right-of-way, I still do not see how "alternate theories [however problematic] strengthen the argument." In asserting these alternate theories on the basis of inconclusive or contradictory evidence, the state takes on the responsibility of demonstrating that it is not talking through its hat.

\*

Your objection to Mr. Webster's use of the word "testimony" in referring to Merritt Helfferich's December 3, 1980 letter to Harold Hume is well taken. I have asked him to explain in our letter to Mr. Fields that this term should be understood in the layman's sense rather than as legal terminology.

\*

You comment:

. . . whether maintenance actually began in 1963 as Mr. Hume asserted or 1970 as Mr. Helfferich asserted is completely irrelevant to my conclusion.

Since Mr. Webster's task was to comment on potential inaccuracies in your memorandum, the distinction was germane to his discussion. I refer you, moreover, to paragraph 6 of your April 4 memorandum, in which you make much of 1963 as the date maintenance actually began. I agree that this point is unimportant to your conclusion.

\*

Regarding the "imprecise wording" to which Mr. Webster took exception in this section, he states plainly on pages 18-19 that the preliminary finding he recommended was not based on the discussion in this section:

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Other examples of significantly imprecise wording could be cited, but it seems to me this kind of analysis ought properly to be performed by private counsel. Too, the significance which any given passage has in relation to the legal theory it is meant to help establish is not easy to determine, particularly since the state has not prepared a definitive statement of its position. Accordingly, while passages in the April 4 memorandum appear to misrepresent the documentary record, it is not clear that any of the passages I personally find questionable forms an erroneous basis for Ms. Walton's legal advice to DOT/PF.

IV. Alleged errors of fact.

You concede that the examples from paragraphs 4 and 5 of your memorandum contain inaccuracies, but you object that "the criticism in Paragraph 8 is not well taken":

I used the word "presumably" in the paragraph indicating a possibility that not all plat revisions were in purple although the key to the map so indicates. The presumption is not "belied by the fact that "lower Ullrhaven" is shown in black["].

"Belie: to show to be untrue; prove false; run counter to; contradict."  
Your presumption is really a syllogism:

Photorevisions are shown in purple, and  
this road is not shown in purple,  
therefore it presumably existed in 1950.

Since your major premise is demonstrably false, your conclusion is unreliable. Otherwise put, the logic of this statement is faulty. It proves ("therefore") nothing. It seems to me fair to assume that you meant something by this statement, and even mere speculation adduced in support of an argument must have a logical basis. Mr. Webster's point was that this argument produces a conclusion which is invalid and thus misleading. The fact that roads constructed since 1950 are not necessarily shown in purple on the USGS maps thus "belies" your presumption that they are.

\*

You assert:

Also, contrary to Mr. Webster's conclusion the D2 map does label the road which continues onto D3 across ASC property as "Ester Dome Road."

This aspect of the state's position is among the most troubling in all of this dispute. No USGS map so far produced in evidence labels the

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April 11, 1986

road crossing ASC's property as "Ester Dome Road." As Mr. Webster notes in his report, the road which the state now calls Ester Dome Road consists mostly of the two sections of road the complainant contends ASC built in 1959 and 1961 (which the complainant calls the upper and lower portions of the Ullrhaven Road). The lower portion of this road, at least, does not appear on USGS maps prior to 1961. The upper portion may or may not be the road to the summit shown on the apparently inaccurate 1951 maps (Exhibit L), which lack the "northward loop" remarked on in your memorandum. The road which all the USGS maps label "Ester Dome Road" is the road which the state now calls "Henderson Road."

It matters not at all, in my judgment, that the D3 maps do not have road labels near the edge when the D2 maps supply them. I draw your attention to the fact that the old Ester Dome Road (Henderson Road) ends, according to the Department of Transportation and Public Facilities at the stop sign where it intersects with the new Ester Dome Road (i.e. the road described in Exhibit H as "Ester Dome Road (Ullrhaven)"). Most of the USGS maps, including the 1952, 1958, and 1972 editions of D3, depict the old Ester Dome Road as continuing north and east away from the dome toward several mining locations, in the earlier maps as an unimproved road, in the later map as a trail.

I do not see how you can have it both ways. Either the 4.3 mile Ullrhaven route to the dome summit described in the department's road maintenance rosters is not really "Ester Dome Road" (and thus is not part of the federal road system quitclaimed to the state) or else the USGS maps are wrong. I must say that your insistence on this point despite all evidence to the contrary is quite puzzling.

\*

Your explanation regarding the "thin black line" is a helpful clarification and frankly goes far to persuade me that I ought to modify my finding. Mr. Webster informs me that the line you referred to in paragraph 8 of your memorandum is nothing more than a pen or pencil line drawn on the photocopy map roughly along the same route as the "early trail" in Exhibit A. Mr. Fields provided a copy of the same map to this office and it does not have that "thin black line" on it. Mr. Webster's conclusion--that you were asserting that the trail depicted on the USGS maps to the south of the "early trail" actually crosses ASC's property--is therefore understandable but mistaken.

I suggest to you that the inconsistencies of the USGS maps and the difficulty of visualizing ASC's property relative to the various trails on a scale of one inch to the mile, taken together, considerably lessen the value of these maps as evidence in this dispute.

V. "Further observations" by Mr. Webster.

Your point concerning the difficulty of measuring accurately the mileage of the "Ester Dome Road-St. Patrick's Goldstream" road system

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deeded to the state 27 years ago is provocative. I would point out, however, that the Department of Transportation and Public Facility's own two measurements illustrate the problem with the method they used, which was to lay a ruler on the map and measure the road lines by manipulating the ruler around curves. Asked how accurate this method of measurement is, Dan Baum said, "I wouldn't buy property on the basis of it." Mr. Baum said this method of measurement would likely underestimate the actual road mileage, since (as every motorist knows) road lines on maps do not reflect every bend in the road. The department has a vehicle with a calibrated odometer which measures accurately to three decimal places. Surely the state ought to make some attempt to measure these roads accurately before citing figures like "8.69 miles." And even this figure does not contradict Mr. Webster's point based on his measurement of the road system by driving through it, since you do not say where 7.8 miles terminates.

I find it odd, moreover, that you submit Mary Nordale's views about which roads were which as somehow authoritative. If that were true, this dispute would have been resolved in her client's favor years ago. Furthermore, the argument that the figure of 7.8 miles in the deed may not have been accurately measured at the time seems to me specious. A legal instrument means precisely what it says: the state was deeded 7.8 miles, however much more it would like to claim on the basis of that document.

\*

Mr. Webster's observations regarding the evidence you adduced to support the argument that the disputed road is an RS2477 public right of way are irrelevant, since they were based on a misunderstanding of your position.

#### VI. Alleged "Expanding Width of the Alleged Right-of-Way."

You assert:

Mr. Webster appears to conclude, without reading the law section of my April 4, 1985 memo that the 100 foot width claimed, must be erroneous, based on the fact that the present road is about 20 feet wide. Since the entire basis for the claim of 100 foot width is a question of law, not a question of fact, he cannot accurately comment on the propriety of my conclusion without reading the law.

Mr. Webster did not intend, nor did I understand, that his observation that the present road is 20 feet wide should be taken as a comment on the question of law, but merely as an assertion that the width of the right-of-way claimed by the state has not remained constant. This was indeed a facet of Mr. Fields' complaint. One of his principal concerns is his perception that the state's position, on this and other points, keeps changing. Based on the documentary record, I can understand why he believes this. For that matter, your present

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response greatly amplifies several points which were only sketchily developed in your correspondence with the complainant and his counsel. I agree that the width of any right-of-way the state is able to prove is dependent on which legal argument prevails.

VII. "Preliminary Finding."

I think you can now understand how we concluded that your advice to the Department of Transportation and Public Facilities was based on errors. It should be borne in mind that the standard Mr. Webster was applying, set out on page 3 of his report, was whether "a significant part of the agency's decision is based on a misperception or misunderstanding or misrepresentation of the relevant facts." His summary comment at the bottom of page 23 points to three significant problems with the basis for your advice to the client agency as set out in the April 4 memorandum. You concede that one of these problems--your mislocation of the disputed road on the plat of U. S. 4004--was a fair evaluation on our part. On another of these questions--your argument based on the Commerce Quitclaim Deed--we continue to disagree. However, with the question of the "thin black line" cleared up, the third and perhaps most important problem which Mr. Webster thought he detected in your memorandum turns out to have been a misunderstanding of your position. It is for this reason that I offer agencies the opportunity to request modification of a finding and to present additional information.

Accordingly, I am changing my finding to unsupported, and I will so report to Mr. Fields.

Finally, regarding your closing comment about giving Mr. Fields until July 30, 1986, to comment on any additional errors which he sees in your memorandum of advice to Harold Cameron, you should of course direct that information to Mr. Fields. The ombudsman does not serve as counsel to complainants.

Thank you for your thorough attention to this matter. This case is now closed in our files. Your cooperation is appreciated.

Sincerely,

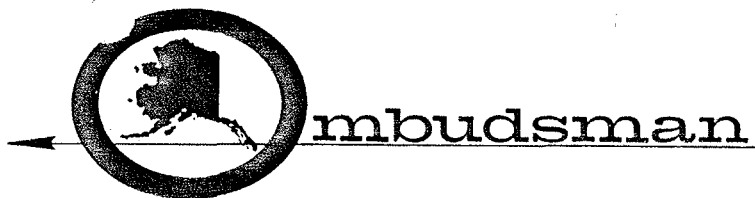
John B. Chenoweth  
Ombudsman

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MEMORANDUM

DATE: February 7, 1986  
TO: John B. Chenoweth, Ombudsman  
THRU: Sheila Gottehrer, Regional Representative  
FROM: Tom Webster, Ombudsman Assistant  
SUBJ: Ombudsman Complaint F85-0957

BACKGROUND AND ALLEGATION

This complaint was filed in the Fairbanks Office of the Ombudsman on July 12, 1985. The complainant, Charles Fields, is the registered agent of Alaska Ski Corporation (ASC), which owns an 80 acre Trade and Manufacturing site (U. S. Survey No. 4004--see plat, Appendix A) near the summit of Ester Dome, some 14 miles northwest of Fairbanks. In the past ASC operated a ski lodge and ski slopes on this site; in recent years the ski facilities have been closed. Mr. Fields said that between 1957 and 1961 the corporation improved existing roads and then built a new road (which they called Ullrhaven Road after the name of the ski lodge) from the adjoining road system to their property (see map, Appendix B). In 1961 ASC granted an easement to the University of Alaska permitting construction of a short road, roughly 1400 feet in length, connecting the road ending in the ski lodge parking lot with the property's west boundary, whence it was continued to the small optical observatory which the university built on the dome summit.

Mr. Fields' complaint is that the State of Alaska, through DOT/PF's Right-Of-Way section (ROW) and the Office of the Attorney General, is asserting that the road which now traverses Alaska Ski Corporation property is a public right-of-way 100 feet wide. To judge from documents in the ROW file going back 30 years and involving the federal Bureau of Land Management (BLM), DOT/PF, the Division of Lands of the Alaska Department of Natural Resources (DNR), the former Division of Communications of the Alaska Department of Public Works, the University of Alaska, the Attorney General's office, the Fairbanks North Star Borough, and several private citizens, this right-of-way issue is complex and apparently debatable. Since adjudication of right-of-way disputes is a matter for the courts, I will not attempt to evaluate the correctness of the legal arguments advanced by ASC and the Department of Law in support of their respective positions. Nor will I describe the full chronology of the dispute. For the purpose of understanding the

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FOURTH JUDICIAL DISTRICT

issue as it bears on this investigation, however, a brief narrative will prove helpful.

ASC entered the site in 1957, built a ski lodge and an access road (what Mr. Fields calls the "upper portion of the Ullrhaven Road") in 1957-8, and obtained its patent in 1961. That same year it granted the easement to the university and built the "lower portion of the Ullrhaven Road," which joined upper Ullrhaven Road .9 miles east of the property's east (downhill) boundary, at the junction of upper Ullrhaven Road and the "old" Ester Dome Road (which DOT/PF now calls the Henderson Road). The first correspondence in the ROW file reflecting the state's strong interest in retaining unimpaired access to telecommunications sites uphill from ASC's land is dated September 28, 1970.

The current dispute seems to have arisen in February 1980, when Mr. Fields noticed that snowplowing equipment probably belonging to DOT/PF had cleared the road across ASC's property and had damaged some "Private Road" signs ASC had posted along the shoulder. He contacted the University of Alaska Land Management Office to inquire whether the university had requested snow removal service from DOT/PF, as it had done previously on a limited basis in 1963-4. The university responded "no" and questioned DOT/PF's authority to maintain on its own initiative the easement which ASC had granted the university in 1961. ASC sent DOT/PF a letter demanding payment for the damaged signs. DOT/PF replied that the road was a public right-of-way by virtue of the service agreement entered into between the university and DOT/PF in 1963-4 and a request from the university that DOT/PF "take over full maintenance of the road." The department also pointed to legislative appropriations "for the maintenance of local service roads." ASC hired an attorney. In June 1983 DOT/PF sent ASC a state warrant in the amount of \$198.30 to pay for the signs. However, DOT/PF referred to the Department of Law ASC's May 1984 bill for further damage to its "Private Road" signs, and this bill has not been paid.

Beginning in September 1982, Mr. Fields and his attorney corresponded with Assistant Attorney General Linda Walton of Fairbanks. This culminated in an eight-page legal memorandum from Ms. Walton to ROW Chief Harold Cameron, dated April 4, 1985, advising DOT/PF that the road across ASC's land is a public right-of-way under 43 U.S.C. 932 (RS 2477) and by prescription, and was quitclaimed to the state by the U.S. Department of Commerce in June 1959. The complainant contends that Ms. Walton's memorandum to Mr. Cameron contains material errors of fact and that the state is placing an unreasonable burden on ASC by acting on this advice. Mr. Fields requested that the ombudsman review Ms. Walton's legal advice to DOT/PF.

Although it is not a usual practice of this office to evaluate opinions by the state's attorneys, you instructed me to review Ms. Walton's opinion for material errors of fact. Accordingly, this investigation considered the following allegation, stated to conform with AS 24.55.150, which specifies appropriate subjects for investigation by the ombudsman:

Attorney's advice regarding assertion of a public right-of-way across the complainant's property by DOT/PF is based on a mistake of fact.

#### JURISDICTION AND STANDARDS

AS 24.55.150(3) authorizes the ombudsman to investigate complaints about the administrative acts of state agencies which he has reason to believe might be "based on a mistake of fact."

For the purpose of evaluating complaints to the ombudsman, an administrative act is "based on a mistake of fact" if a significant part of the agency's decision is based on a misperception or misunderstanding or misrepresentation of the relevant facts.

#### BASES FOR AGENCY ACTION

The most complete statement of the basis for DOT/PF's maintenance of the road across ASC property is Linda Walton's April 4, 1985 memorandum of advice to ROW Chief Harold Cameron. I have included it in its entirety as Appendix C. The arguments advanced by the Department of Law in support of DOT/PF's administrative actions regarding this road since 1980 have evolved over time, however, and previous assertions of the state's position provide a useful perspective on this central document, as well as amplification of certain of its arguments.

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DOT/PF's Harold Hume, then Director of Maintenance and Operations, Interior Region, in a letter to the complainant dated July 22, 1980, stated:

As you know, Alaska Ski Corporation granted a 50 foot wide Right-of-Way in 1961 to the University of Alaska for an access road. The University in turn, entered into one or more agreements with the Department of Highways to assist them in maintaining the road. They also requested that the State take over full maintenance of the road. In 1963, the legislature appropriated funds for the maintenance of local service roads, and Ester Dome Road from Sheep Creek Road to the Geophysical Institute Buildings was authorized for State maintenance. It has been maintained continuously by the State since 1963 and is presently part of the State Highway System. In addition to local residents, this road provides access to facilities of the University, NASA, Motorola, Bureau of Land Management, General Electric, KJNP and perhaps some others I am not aware of. I believe it is, and should remain, a public road.

February 7, 1986

On October 10, 1980, Mary Tuten, Director of Land Management for the University of Alaska, wrote to Harold Hume:

Mr. Charles Fields recently sent me a copy of your letter to him dated July 22, 1980 regarding Ester Dome Road. In your letter you said that, "The University of Alaska entered into one or more agreements with the Department of Highways to assist them in maintaining the road. They also requested that the State take over full maintenance of the road."

I have checked our files and requested that the Geophysical Institute do the same and we have been unable to produce any such agreements.

I would greatly appreciate it if you would forward me copies of the documents referenced in your letter.

The only agreement between the university and DOT/PF in the ROW file is an "Application for Services" dated February 13, 1963, submitted by C. T. Elvey, Director and Vice President for Research and Advanced Study, University of Alaska. The services requested were:

Occasional, as needed, maintenance of Ester Dome Road to supplement or replace University equipment. To cover through June 30, 1964, not to exceed \$700.00. 1/

On February 4, 1963, Geophysical Institute Executive Director A. H. George wrote to the "Department of Highways":

It has been our desire that the State Highway Department include the maintenance of this road in their budget requests from the legislature.

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On November 19, 1980, Assistant Attorney General Larry Wood advised DOT/PF's Harold Hume on the subject of "Ester Dome Access Rd.":

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1/ In a letter to Harold Hume dated December 3, 1980 (quoted below, pp. 16-17), Merritt Helfferich, then Head of Technical Services for the Geophysical Institute, referred to this application for services and noted that it had been revised on June 28, 1963, to increase the upper spending limit to \$1500.00. There is no documentation of this in the ROW file, and Ms. Walton's memo does not mention it, but the Department of Law file contains a telegram dated June 25, 1963, from District Highway Engineer Woodrow Johansen to State Maintenance Engineer Sam Johnson which refers to the revised agreement.

It is a matter of record that the Department of Highways was first asked to maintain University access to the Geophysical site in 1963. Apparently, that one-year agreement expired in 1964. From what I am told, the State has continuously maintained the road, openly and notoriously, for nearly twenty years. I agree with that [sic] your feeling that regular public use of this road has lead [sic] to the creation of prescriptive rights. In view of the great public interest in the road and in property below and beyond the ski corporation's holdings, I believe the ski corporation's attempts to stop maintenance of the road should be resisted in court if necessary.

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The ROW file contains a letter dated July 29, 1982, from DOT/PF to the complainant, co-signed by Stephen Sisk, Director of Design and Construction, and ROW Chief Harold Cameron:

This is is [sic] reference to Alaska Ski Corporation's claim to a private access road for that portion of Ester Dome Road which passes through U. S. Survey No. 4004. Please note the Department of Transportation and Public Facilities position contained in the attached Attorney General's Opinion respective to this position.

We are requesting that Alaska Ski Corporation either remove the signs adjacent to that part of Ester Dome Road which passes through U. S. Survey No. 4004, or change the information contained thereon to the extent that it causes no interference with public use of the road.

If these signs are not removed or altered in the manner suggested within ten days from receipt of this notice, legal action will be initiated to compel adherence to the request.

At the top of the page are two notations in handwriting: "Not sent" and "Chuck, I discussed this with Harold & the decision is to postpone this indefinitely. Paul 8/2/82." According to Harold Cameron, "the attached Attorney General's Opinion" refers to Larry Wood's November 19, 1980 memorandum to DOT/PF's Harold Hume (quoted above, p. 5).

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On August 30, 1982, the complainant wrote to Harold Cameron requesting a statement of DOT/PF's "legal standing" on the disputed right-of-way. He offered the state "easement access" across ASC property, but concluded, "we hereby expressly forbid access onto or across our property located on Ester Dome to personnel of your agency



unless permission is granted by future agreement." Linda Walton replied on September 9, 1982:

This letter is in response to your letter to Mr. Cameron dated August 30, 1982. The state's position has been and remains that Ester Dome Road is a public road.

My understanding is that there was a road or trail in existence along the route of the existing road from the Old Nenana Road to the top of Ester Dome, prior to entry by or patent to Alaska Ski Corporation. In fact state records show the road was part of FAS 6491 [Federal Aid Secondary highway system--the four-digit number designates a Class B road "of the type normally constructed and maintained by states or counties"] prior to 1959. This being the case, Ester Dome Road is an RS 2477 (43 U.S.C. 932) right of way. 2/

Even if the above facts are incorrect the state would own the road by adverse possession since it has openly and notoriously maintained the road since 1963, when legislative funding was secured. As I am sure you are aware state funds would not have been expended if the road was then considered a private road.

Finally Alaska Ski Corporation subdivided its property and recorded a plat. Ester Dome Road is shown on the plat as the only access to four subdivision parcels. The road is not designated on the plat as private. AS 40.15.030 provides[:]

When an area is subdivided and a plat of the subdivision is approved and recorded[, ] all streets, alleys, thoroughfares, parks and other public areas shown on the plat are deemed to have been dedicated to public use.

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2/ On June 30, 1959, the U. S. Department of Commerce quitclaimed to the newly created State of Alaska federal roads and properties detailed in a 176-page list. FAS Route No. 6491 is described as follows:

Ester Dome Road-St. Patrick's Goldstream

From FAP [Fed. Aid Primary] Route 37 branching north and west through the Ester Dome mining area. The north branch loops northeasterly to FAS Route 651.

Constructed Mileage: 7.8

System Mileage: 7.8

Accordingly, under either or all of the foregoing theories, the road is public, and the state will continue to treat it as such unless and until you secure a court order to the contrary.

On November 9, 1982, attorney Mary Nordale wrote to Linda Walton:

Mr. Charles L. Fields of the Alaska Ski Corporation has furnished me with a copy of your September 9, 1982, letter to him regarding the status of Ester Dome Road. . .

. . .

The original plat recorded in 1967 created Ullrbahn [a side street connected to "upper Ullrhaven" by Nordstrasse] with a cul-de-sac. In 1979, a plat was approved vacating a portion of Ullrbahn which closed permanently access across Alaska Ski Corporation's property to the rest of U. S. Survey 4004. While it is true that Ullrbahn is a public street, it is not part of the Alaska Highway system. . .

. . .

In any event, the road into Alaska Ski Corporation's property was privately constructed off of the St. Patrick/Henderson Road and was never a part of the public street or highway system until 1967 when Ullrbahn was dedicated. . .

Your claim of adverse possession is not well taken. Since the road is not a public road, the "public" really did not use it. The Highway Department did not maintain it continuously enough to establish adverse possession if, in fact, under the Alaska Constitution the state could ever establish a claim to any property by adverse possession. You may be thinking of informal exercise of the power of eminent domain, but I think if you read Article I, Section 18 of the Alaska Constitution, you will see that adverse possession is a private property question, not a public property question. . . 3/

There is no further mention of these arguments based on adverse possession and AS 40.15.030 ("Dedication of streets, alleys and thoroughfares") in Department of Law correspondence on this issue.

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3/ "Eminent Domain. Private property shall not be taken or damaged for public use without just compensation." Constitution of Alaska, Article I, Section 18.

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On January 18, 1984, Frederick Smith of DNR's Division of Land and Water Management wrote the Fairbanks North Star Borough to oppose a request by ASC then before the platting board:

It is the state's contention that all of Ester Dome road is reserved for public access. As you know, there are private road signs posted along Ester Dome Road by the Alaska Ski Corporation.

We oppose the approval of any land actions of Alaska Ski Corporation on Ester Dome until they acknowledge Ester Dome Road as public access and remove the private road signs.

For your information, the State of Alaska has management authority over a large area of land west of USS 4012 and 5628 [which border on the western boundary of U. S. Survey 4004].

\*

On March 19, 1984, Linda Walton wrote to Mary Nordale. The theory of adverse possession first put forward in Ms. Walton's September 9, 1982, letter to the complainant appears to give way, without explanation, to easement by prescription. This statement of the state's position amplifies the argument based on RS 2477 (43 U.S.C. 932, repealed October 21, 1976), which stated, "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted":

. . . in 1933 there was an established trail following the ridge to the top of Ester Dome and beyond on to Nugget Creek, in the same location as the present road. I have also talked with old miners who would testify that they made improvements to that road before 1956. I have verified that Ester Dome Road did in fact begin off Henderson Road, and not Sheep Creek Road, in the old days, but from a point easterly of Alaska Ski Corporation's property, on through its property and down the other side of the dome, it follows its original route. Thus I do not see that your client has any legitimate reason to contest the public nature of the road where it crosses his property. It is clearly an RS 2477 right-of-way.

Your client may have extended the road between points below his property but that does not mean the road is not public where it crosses his property. In any case, I also understand that from below your client's property out to Sheep Creek Road, there were numerous old roads by various names which when

combined, roughly follow the alignment of what we now call Ester Dome (Ullrhaven) Road. Also enclosed is a sample of the affidavits I am collecting.

Based upon all these there is no doubt in my mind that the road is public, both as an RS2477 right-of-way, and prescriptively. Accordingly, the State will continue to treat it as a public road unless and until your client proves otherwise.

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On May 22, 1984, Ms. Walton wrote to Larry Wood, Chief, Fairbanks Office of the Attorney General:

There is a continuing dispute between Alaska Ski Corporation and the state over the public vs. private nature of Ester Dome Road.

I have done considerable factual and some legal research on this question and believe that with a little more factual research, including collection of affidavits referencing a map, we stand a good chance of proving Ester Dome Road is an RS 2477 right-of-way (possibly 100 feet in width based upon DO 2665 [see Appendix C, p. 7]) and an excellent chance of proving it is a public prescriptive easement.

The problem is that Alaska Ski Corporation, which claims the road is private, has offered DOT/PF an easement to get to its facilities, and DOT/PF has no money to pay me to do more research on this, especially factual research.

While DOT/PF's interests would be served by giving up the fight and accepting an easement to get to its facility, the public at large, specifically the Alaska Miners Association, has a strong interest in establishing that the road is public. I am aware the DNR also has an interest in declaring the road public . . . The borough has required Alaska Ski Corporation to declare the road public through Alaska Ski's subdivision (only part of its parcel), but not beyond, so DNR has not gained access to its site by virtue of the borough's access. . .

Since DNR people would have greater expertise than I in gathering and analyzing old maps, including mining maps, I would propose that DNR be asked to assign someone knowledgeable to gather maps and affidavits after reviewing my file for leads and to avoid duplication of efforts.

If DNR were willing to take on this burden, I believe I could convince DOT/PF to pay for strictly legal work in pursuing the case.

The fact that the state's attorney thought she had a "chance" of proving an RS 2477 right-of-way and a public prescriptive easement if only DOT/PF could pay for more factual research, together with the sweeping changes in the state's argument which resulted from further research (key documents unveiled, a third line of argument opened), suggests that the state did not consider its position well enough developed in May 1984 to be legally defensible.

On May 24, 1984, Larry Wood wrote to District Manager Jerry Brossia of DNR's Division of Land and Water Management:

I am enclosing a copy of a memorandum by Linda Walton . . . [DOT/PF] has already been offered a private easement if it drops the RS 2477 right of way claim. If the state accepts this limited easement, the public will have to bring their fight against Alaska Ski Corporation on their own.

[Handwritten postscript:] If DNR has land on Ester dome which is accessed by the road, it might make sense to commit DNR time to the matter.

On July 3, 1984, Jerry Brossia responded, "The short answer is yes."

\*

Apparently unaware that DNR was about to commit staff time, and DOT/PF additional funds, to enable Ms. Walton to continue her research, Mary Nordale responded to the state's then current arguments. She prepared a four-page letter to Ms. Walton, dated August 15, 1984, with copies and cover letters to DOT/PF Commissioner Richard Knapp and Northern Region Deputy Commissioner H. Glenzer, Jr. The letter to Ms. Walton disputed in detail the arguments she had advanced to support the state's assertion of an RS 2477 right-of-way across ASC's property, and concluded:

Your last point, I believe, was to the effect that because trails may have existed in the general area, DOT/PF had a right to assert that one existed where Alaska Ski Corporation constructed its road. My reading of the Hamerly and Mercer cases leads me to the conclusion that . . . if the State were in a position to accept a right of way arising because of public use, the right of way would consist only of the actual road or trail used. In other words, the

State would not acquire a "blanket" easement, but one only of a specified width and location. 4/

My client authorizes me to renew its offer of a grant of easement similar to that given to the University of Alaska in 1961 to permit DOT/PF to reach its communication sites. In the meantime, please instruct DOT/PF to cease its trespass and commission of waste upon my client's property.

Because you indicated that you were not authorized to expend funds to pursue this matter, copies of this letter are being sent to Commissioner Knapp and Deputy Commissioner Glenzer.

On September 10, 1984, Deputy Commissioner Glenzer replied to Mary Nordale:

Thank you for your letter of August 15 . . . DOT/PF still maintains that the road to the top of Ester Dome is a public road. . .

However, based upon your letter, I have authorized the attorney general's office to expend time on this matter to come up with an opinion regarding the extent and nature of the State's rights in this road. . .

\*

On May 14, 1984, the complainant wrote to DOT/PF's John Horn, Director of Maintenance and Operations, Northern Region, protesting recent DOT/PF maintenance on the road across ASC property, including the clearing of brush and small trees along the roadway, and demanding payment for signs and posts damaged by agency equipment. Mr. Horn referred this letter to Linda Walton. On January 4, 1985, the complainant wrote John Horn, "As of this writing, neither payment nor the mere courtesy of an acknowledgement of receipt of said billing has been forthcoming."

On January 24, 1985, Ms. Walton responded:

The State of Alaska will not pay for damage to property you have placed without authorization in a public right-of-way. The state maintains its

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4/ The Law file contains a telephone record form dated July 26, 1982, documenting a conversation between Chuck Moyer of ROW and an unspecified Transportation Section attorney, which refers to "the state's right of way, which runs ditch to ditch."

position that Ester Dome Road is a public right-of-way of 100 feet in width.

Enclosed with this letter is a copy of Alaska Ski Corporation's Notice of Location, dated November 13, 1959, for the property on Ester Dome Road. You will note that the notice itself states that the located property is "adjacent to or traversed by a road or highway as follows" Alaska Ski Corporation has filled in "Ester Dome Roads [sic] plotted on USGS and BLM maps."

You yourself provided DOT/PF with a copy of a 1956 USGS map showing Ester Dome Road in its present location as of that date. <sup>5/</sup> Thus we have no doubt that Ester Dome Road, as deeded to the state, by the Department of Commerce, is the road you insist on calling Ullrhaven Road, and which traverses the property of Alaska Ski Corporation.

Thus, to the arguments based on RS 2477 and easement by prescription, the state now advanced a third legal argument in support of its position: the June 30, 1959 quitclaim deed transferring federal roads and properties to the State of Alaska lists under class "B" secondary road systems, "Ester Dome Road-St. Patrick's Goldstream." This is also the state's first assertion of a right-of-way 100 feet wide.

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On April 4, 1985, Ms. Walton issued a memorandum of advice to DOT/PF's ROW section which sets out in considerable detail her factual and legal research and conclusions in support of the state's assertion of a public right-of-way through ASC's Trade and Manufacturing site. Attached to the memorandum were various maps and documents labeled as Exhibits A through O. A July 24, 1985 letter from the complainant to DOT/PF's John Horn contains a detailed rebuttal of Ms. Walton's presentation. On August 5, 1985, Ms. Walton responded:

This is a response to your July 24, 1985 letter. . .

I do not find any of your comments sufficiently convincing to change my conclusion. If you wish to provide any additional documentation, it will, of course, be considered. However, you are once again advised that the state claims Ester Dome Road as it traverses your property is a public road and intends to continue to treat it as such.

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<sup>5/</sup> The 1964 revision of the 1956 D3 map was attached to Ms. Walton's April 4, 1985 memorandum as Exhibit K.

DISCUSSIONMethod

In reviewing Ms. Walton's April 4, 1985 memorandum for material errors of fact, I relied on documents provided by the complainant and a review of the ROW and BLM files and original maps in the collection of the University of Alaska, Fairbanks library. I also drove the roads which figure in the dispute. Ms. Walton allowed me to review the Department of Law file as well. She observed that her eight-page memorandum is not a full statement of the state's position in this dispute, but should be taken together with other Department of Law correspondence as a reliable indication of the lines of argument which would be developed in a definitive treatment of the state's position should it become necessary to construct a legal defense against a suit. Ms. Walton pointed out that the state is involved in many such disputes; therefore, the Department of Law does not carry out exhaustive research unless it becomes necessary to defend the state's position in court. Accordingly, her April 4 memorandum presents only "the most obvious" and "most conclusive" arguments for the position the state has adopted.

I made no attempt to evaluate the correctness of Ms. Walton's legal arguments. As the state's attorney assigned to advise DOT/PF on this matter, Ms. Walton's job was to outline a reasonably persuasive case for the position which the state (i.e. DOT/PF, with the active encouragement of DNR) has decided to adopt. I do not underestimate the influence which the Department of Law has exerted over these agencies to maintain the position it has undertaken to defend. Two assistant attorneys general have urged that the interest of the general public places the state under an obligation to assert and defend a public right-of-way across ASC's property. Still, opinions of the attorney general are not binding on state agencies; "the state" is not so monolithic as that. DOT/PF must assume responsibility for its own actions, whatever legal advice it chooses to rely upon. Aside from the width of right-of-way which the state claims is public, the position the department has maintained in this dispute has not changed. Of course, the arguments advanced in support of this position have undergone substantial alteration.

What the complainant regards as "misconstruing the historical record," "drawing faulty conclusions from 'facts' based on supposition," and "ignoring historical fact" (supposing this to be an accurate analysis of Ms. Walton's argument) is not necessarily material error of fact. A state's attorney is not a judge and is not obliged to render impartial opinions. Rather, the state's attorney advises the client agency on its legally defensible options. In this case, Ms. Walton was writing for an audience consisting of interested state agencies and, explicitly, ASC's legal counsel: "I am sending a copy of this memorandum to ASC through its attorney, so that ASC may address any points it considers inaccurate" (paragraph 1). The legal strategy which



dictated the rhetorical construction of this opinion can be challenged definitively only in a court of law.

The representations of fact which form the basis of this opinion, however, can be measured against the documentary record. I read Ms. Walton's memorandum carefully and noted passages which seemed to me possibly debatable in light of my own understanding of the factual basis of this dispute. (The last seven paragraphs of the memo are headed, "LAW"; these I leave to the lawyers.) Interpreting "error of fact" quite broadly so as not to overlook potentially significant inaccuracies, I analyzed these passages and divided whatever appeared to be inaccurate or questionable into categories as "misquotation," "speculation or supposition," "misrepresentation," and "errors of fact." It should be understood, incidentally, that I have used the road names which seem least likely to obscure which portion of the road system on Ester Dome I am discussing. The state and the complainant cannot agree on these names, and my preference for one name over another ought not to be interpreted as favoring either view.

#### Misquotation

I noted several instances of misquotation from exhibits. The quotation from the 1959 Commerce quitclaim deed in paragraph 1, for example is misspelled (the road names should be joined by a hyphen, indicating a "road system"), as also is the passage quoted from Exhibit C in paragraph 4 (quotation marks awry). The passage from Exhibit B quoted in paragraph 3 is telescoped and misspelled, while the quotation from Exhibit A in the same paragraph ("the upper portion of Ullrhaven Road," line 28) has been transcribed inexactly. The quotation from Exhibit G in paragraph 6 is misspelled, and the information quoted from Exhibit H in paragraph 6 contains two errors in transcription, while the passage quoted from Exhibit O in paragraph 12, line 19 silently corrects a typographical error in the original document and has the words "road building" interposed between "government" and "equipment" ("road building equipment" appears one line above the quoted passage in the exhibit document). Also, the passage is misspelled.

One would like to think that passages from the documentary record adduced in support of the state's position in a dispute should be transcribed with closer attention to detail than occurred here. On the other hand, this memorandum is not a legal brief before a court of law. It does not appear, at any rate, that any of these misquotations is significant for the purpose of evaluating this complaint.

#### Speculation or Supposition

The memorandum contains several statements which could be termed speculation or supposition. These statements are clearly introduced by such words as "appears," "it appears likely," "the most likely explanation," "must have believed," "presumably," and "there is a strong probability." Such statements may be debatable, but they cannot properly be termed errors of fact.

### Misrepresentation

There is a fair amount of rather imprecise wording in the memorandum which appears to misrepresent the factual record. Inferences drawn from the documentary record are interpretive, of course, and may be debatable without being grounded on a misunderstanding of the facts. Still, some of these statements, it seems to me, are misleading and call for clarification. A few examples will illustrate what I mean.

Paragraph 1 contains the following assertion:

. . . the state has for over 25 years believed that the road is a public road 100 feet in width, quitclaimed to the state on June 30, 1959, by the Department of Commerce, described in the deed as "Ester Dome Road, [sic] St. Patrick's Goldstream." and traversing ASC's property to the top of Ester Dome and beyond. [sic mine; original punctuated as shown.]

That "the state"--more precisely, DOT/PF's Northern Region Division of Maintenance and Operations--has believed Ester Dome Road to be a public right-of-way for many years is apparently true, but the phrases beginning "100 feet in width, quitclaimed to the state . . ." came to be believed comparatively recently, to judge from the fact these arguments first appeared in state memos and letters in 1984 and 1985. The final phrase, moreover ("traversing ASC's property to the top of Ester Dome and beyond"), anticipates those portions of the memorandum which argue that the road across U.S. Survey 4004 is part of an RS 2477 right-of-way. Yet the documentary evidence shows rather clearly that as late as July 1980, DOT/PF's actions were based largely on a misunderstanding of the legal implications of agreements entered into between ASC and the University of Alaska, on the one hand, and between the university and DOT/PF on the other. The RS 2477 right-of-way was not asserted until September 1982. Indeed, the July 29, 1982 letter ROW officials proposed to send to the complainant was to have had as an attachment Larry Wood's November 19, 1980 memo to Harold Hume (above, p. 5), which mentions neither RS 2477 nor the 1959 Commerce quitclaim document.

\*

Consider another example, from paragraph 5:

In February 1963, C.T. Elvey of the University of Alaska, Geophysical Institute, requested that the DOT/PF assume maintenance responsibilities not for any private access road, but for "Ester Dome Road" presumably so that the University personnel and patrons could reach the University Geophysical Institute located beyond the property of ASC (Exhibit F).

This statement suggests that in 1963 university officials-- Mr. Elvey in particular--believed the road across U. S. Survey 4004 to be merely a part of "Ester Dome Road," and thus a public right-of-way. This line of argument presupposes that Mr. Elvey's alleged belief--that the private easement granted to the university in 1961 was part of "Ester Dome Road"--is proof of what "the state" believed in 1963. The Department of Law file contains correspondence indicating that others at the Geophysical Institute thought of the road to the dome summit as Ester Dome Road. This was perhaps inevitable, but what these people or "the state" believed is not necessarily proof of a public easement. Furthermore, the phrase "assume maintenance responsibilities" perhaps reads more into the agreement than the document itself suggests, since the application was for "Occasional, as needed, maintenance . . . to supplement or replace University equipment . . . not to exceed \$700.00."

Merritt Helfferich, former Head of Technical Services at the Geophysical Institute (now Assistant to the UAF Chancellor) and an ASC shareholder, gave a detailed history of the university's limited maintenance agreement with DOT/PF in a December 3, 1980 letter to DOT/PF's Harold Hume. This letter is in the ROW file. Mr. Helfferich's testimony, here excerpted, contradicts the notion that the university considered its private easement a portion of "Ester Dome Road":

As far as I can determine, the Geophysical Institute became interested in the Ester Dome site in 1961. At that time, Alaska Ski Corporation (ASC) was in more active operation and was maintaining the road up Ester Dome at its own expense. ASC had secured easements from the landholders on Ester Dome and had constructed the roads - both the extension of Henderson ["upper Ullrhaven"] and the new Ester Dome ["lower Ullrhaven"] roads.

. . .

After the Geophysical Institute-constructed road and optics site were completed, the road from the west side of the ASC land and occasionally the entire new Ester Dome Road were cleared of snow by the Geophysical Institute.

On Feb. 4, 1963 the Geophysical Institute attempted to interest the Department of Highways in taking on the maintenance of the Ester Dome Road [see above, p. 4], but this was refused by the Department. In [sic] Feb. 13, 1963 the Geophysical Institute engaged the Department of Highways, by means of an Application for Services in the amount of up to \$700.00, which covered the period through June 30, 1964 and which maintenance was to supplement or replace University equipment.

At this time, the Geophysical [sic] Institute operated a tracked snow vehicle, garaged on the Dolney property on Sheep Creek Road, for normal

access to the observatory. Only in cases of a need for trucked equipment was a request made to the Highway Department for services. On June 28, 1963 a revised Application for Services in the amount of \$1,500 was signed with the Department of Highways.

During October 1964, I personally purchased a 4 wheel drive vehicle. In cooperation with ASC, and for my own interest, I kept the Ester Dome Road plowed as much as I could. The road was only plowed by the Dept. of Highways when the Geophysical Institute requested their assistance, or if the ASC paid to have the road opened.

In 1965, the Geophysical Institute paid me personally to plow open the road for their purposes. The ASC also paid me for services rendered, which included supplying a backhoe to install culverts on the new Ester Dome Road.

In 1970, I believe, or perhaps the next year, at Thanksgiving there were high winds and lots of snow. The Department of Highways and the Golden Valley [electric utility] radio transmitters failed because of a power line fault, and the Highway Department transmitter tower blew down. Subsequent to this, the Highway Dept. started to maintain the road occasionally [sic], as equipment was available. Frequently, however, the road would remain closed for up to one week at a time due to heavy snow. Also, I personally paid to have the road opened by private contractors using cats on several occasions when it was essential for my purposes.

It was not until fall 1977 when a school bus started coming up Ester Dome that regular maintenance commenced. At some point, after 1970 I believe, the Department of Highways did some summer reconstruction and installed new culverts and widened the road a bit.

The ASC has steadily maintained that the road was a private road. They erected signs at the junction of the [new] Ester Dome and Happy [Sheep Creek] Roads proclaiming that information. They installed a steel post-supported, locked gate at the junction of the new Ester Dome Road and the Henderson ["old" Ester Dome] Road and kept it locked for a period of time in the 60's. ASC constantly informed persons using the road that it was available to persons going to and from Ullrhaven Lodge, to the Geophysical Institute for access to the Observatory and to stockholders of ASC.

Although the Department of Law file contains correspondence which corroborates much of Mr. Helfferich's testimony, Ms. Walton's memorandum does not mention it. Nor has the state attempted to explain why the university should have to pay DOT/PF in 1963 for occasional maintenance of the road across ASC's property at a time when, as paragraphs 6 and 7 of Ms. Walton's memorandum purport to demonstrate, the road was eligible for state-funded maintenance. Perhaps the funds that were "planned to be allocated as of 1962" were never appropriated? Ms. Walton's September 9, 1982 letter to the complainant asserted that "the state . . . has openly and notoriously maintained the road since 1963, when legislative funding was secured." Yet Exhibit I merely shows that DOT/PF proposed in 1960 to request \$337,500 for FY63, \$7,200 for FY64, and \$7,200 for FY65, to maintain "Ester Dome Ski Bowl Road." (Again, what the DOT/PF officials who listed "Ester Dome Ski Bowl Road" in the roster of local service roads believed and acted on is not necessarily determinative. A June 20, 1963 memorandum from State Maintenance Engineer Sam Johnson to District Highway Engineer Woodrow Johansen refers to the road specified in the Geophysical Institute Application for Services as "the Ester Dome non-system road.") If the state has evidence that this money was actually allocated and expended, it ought to be able to produce it. Germane to this point is an August 27, 1963 letter in the Department of Law file from Governor William Egan to John C. Doyle, Executive Director of the Legislative Council, which states that 1963 was the first year the legislature allocated money for maintenance of local service roads, and that allocation totaled only \$250,000 for the entire state.

One further point requires explanation. The ROW file contains a status plat for FAS 6491 on which the following notation is neatly entered beside the road across U. S. Survey 4004:

The State of Alaska, Dept. of Highways has maintained this section of road since 1969.  
(Emphasis added.)

Assuming for the sake of argument that this notation is correct (1969 is closer than 1963 to Merritt Helfferich's recollection of "1970, I believe, or the next year"), the fact that the state has not maintained the road since 1963 would not necessarily invalidate the legal argument that the state has done so long enough to satisfy the statutory requirement for establishment of a prescriptive right-of-way--if, indeed, the state's actions could result in easement by prescription. [The state has also put forward as evidence of public prescriptive rights the assertion that many people have "openly and notoriously" used the disputed road as a public right-of-way.]

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Other examples of significantly imprecise wording could be cited, but it seems to me this kind of analysis ought properly to be performed by private counsel. Too, the significance which any given passage has in relation to the legal theory it is meant to help establish is not easy to determine, particularly since the state has not prepared a definitive statement of its position. Accordingly, while passages in

the April 4 memorandum appear to misrepresent the documentary record, it is not clear that any of the passages I personally find questionable forms an erroneous basis for Ms. Walton's legal advice to DOT/PF.

#### Errors of Fact

In my review of the memorandum I did encounter what seem to me to be significant errors of fact. Some of these errors are central to the arguments advanced in support of the legal theories which Ms. Walton sought to develop.

Paragraph 4 discusses the U. S. Survey plat (Appendix A):

A field plat, (Exhibit D) of ASC's property prepared by surveyor Edward Taylor October 15-22, 1960, also shows a road across ASC's property, at least to a point somewhat above the ski lodge. The road is not depicted from a point slightly above the ski lodge, to a point close to the uppermost and western boundary of ASC's property, however it does begin again within the western portion of ASC's property and appears to continue westward toward the Dome and Nugget Creek.

I inspected the "road" depicted on the plat crossing the western boundary of the property, and found it terminated at a residence just on the other side of the boundary. The complainant has pointed out that this narrow road is a driveway leading to the home of Merritt Helfferich. The survey field notes in the BLM file comment that this "graded access road, 15 lks. wide" (15 links = 9.9 feet) crossed the boundary 8.55 chains (564.3 feet) north of the southwest corner of the property. Ms. Walton's supposition that Mr. Helfferich's driveway originally may have been part of a road to the dome summit and "appears to continue westward toward the Dome and Nugget Creek" does not take into account the fact that it bears southwest, downhill and away from the summit and Nugget Creek.

As for the public right-of-way now being claimed by the state, the road across U. S. Survey 4004 crosses the western boundary north of (uphill from) the power line drawn on the plat. To be more precise, the surveyor noted that at 12.20 chains (805.2 feet--see broken line on survey plat) the corner of sections 25, 30, 31, and 36 "bears East, 6.77 chs. dist." as depicted on the plat. The 50-foot wide easement ASC granted to the university in 1961 specified the private access road would bear due west 443.5 feet along the section line between sections 25 and 36 from the four-section corner just mentioned and would connect with a point near the ski lodge along a straight line to the southeast. [The BLM survey field notes also observe that a "graded road, 30 lks. wide" (19.8 feet) crossed the eastern boundary of the property 10.40 chains south of the northeast corner of the property, as depicted on the plat.] Thus, assuming the university to have constructed its road in conformance with the easement, that road crossed the western boundary at 12.20 chains from corner 4 (southwest), not where Merritt Helfferich's

driveway is depicted on the plat at 8.55 chains. The difference, not easily appreciated by looking at the plat, amounts to about 200 feet on a rather steep slope (from the disputed road you can look down on the top of the power pole nearest the driveway). Based on these considerations, the passage from paragraph 4 quoted above seems to me to be clearly erroneous.

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From paragraph 5:

It appears that at the time of granting the easement ASC must have believed that what it now refers to as an "abandoned" "early trail" across its property was a public road, otherwise, the legal description of the "private easement" deeded would have included land necessary to get from the eastern boundary of ASC's property to the "point of beginning" actually described in the easement deed.

Ms. Walton mistakes the meaning of the surveyor's term, "point of beginning." In this case, the point of beginning is 25 feet due north of the corners of sections 25, 30, 31, and 36, at the point where the road veers from its northwesterly bearing and continues due west. The point of beginning this passage intends, I take it, is the point near the ski lodge where the road constructed by the Geophysical Institute joins what the complainant terms "upper Ullrhaven Road," the public access road he contends ASC constructed in 1957/8 to enable patrons to drive to the Ullrhaven ski facility.

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From paragraph 8:

The presently available edition of United States Geological Survey (hereinafter referred to as USGS) D2 and D3 maps dated "1950 photorevised 1972" (Exhibit J) labels the existing road shown in black, and green on Exhibit A, as "Ester Dome Road," an "unimproved dirt road." Photorevisions are shown in purple, and this road is not shown in purple, therefore it presumably existed in 1950.

Leaving aside the presupposition that "the existing road shown in black [i.e. the "early trail"], and green [i.e. "upper Ullrhaven"] on Exhibit A," is one road, this passage is puzzling. The D2 and D3 maps cited in evidence do not label any portion of the road in dispute as "Ester Dome Road." Furthermore, the presumption that all revisions since 1950 are shown in purple is belied by the fact that the "new" Ester Dome Road ("lower Ullrhaven"), built in 1961, is shown in black on these maps.

*and  
what  
he now  
considers  
is not  
public*

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Also from paragraph 8:

A xerox copy of USGS D3 1952 provided to me by Charles Fields, and on which he relies to claim the road was not in existence until ASC built it, does not show the present disputed road across ASC's property as an unimproved dirt road. However, there is a thin black line following the same path as the present disputed road, across that property.

The "thin black line following the same path as the present disputed road, across that property" is a single, broken line which those accustomed to reading topographical maps will recognize as depicting a trail, rather than a road. It does not follow the same path as the road past the ski lodge. Rather, as it nears the summit it ascends steeply up the Ready Bullion Creek upper drainage and crosses the "disputed road" near or outside the western boundary of U. S. Survey 4004, as can easily be seen on the 1950 photorevised 1972 D3 USGS map labeled "Exhibit J," which also locates the ski lodge relative to the disputed road and this "thin black line." The assertion that lines which follow demonstrably separate paths are the same line--that this trail is the same as the "unimproved dirt road"--is plainly incorrect.

Furthermore, the "early trail" depicted in black in Exhibit A is not the same trail as the one depicted on the 1950 photorevised 1972 D3 USGS map. This can easily be seen by comparing that map with Exhibit A, in which the latter trail (not color coded by the complainant) is clearly visible to the south of the shorter "early trail." Thus, the argument that the USGS maps depict the "early trail" which crosses U. S. Survey 4004 is erroneous. On the other hand, the 1951 USGS maps labeled Exhibit L may actually show the "early trail" rather than the present road. This would explain the missing "1/2 mile of the northward loop" of the "old" Ester Dome Road-upper Ullrhaven route to the T & M site discussed in paragraph 8 of the memorandum. At any rate, the value of these maps as evidence in this dispute should receive closer scrutiny from both parties. The map legend for the photorevised maps notes that revisions based on aerial photography are "not field checked" for accuracy.

#### FURTHER OBSERVATIONS

##### The Quitclaim Deed

Although I have not specifically attempted to evaluate the legal arguments in support of "the state's" position on the Ester Dome Road right-of-way dispute, at least one of the three principal theories which the state has advanced appears untenable. If the 1959 Commerce quitclaim document really deeded the disputed road to the state, that, as the saying goes, would be that. It must not be that clear. The state first proposed this argument in 1984. I am frankly puzzled how a road which no one has seriously argued existed in any form other than,



perhaps, a trail prior to 1961 was deeded to the state in 1959 as part of a system of class B secondary roads "of the type normally constructed and maintained by states or counties." The quitclaim deed speaks of a road system described as "Ester Dome Road-St. Patrick's Goldstream."

This dispute concerns roads, not just "the present disputed road." Indeed, the current DOT/PF map of FAS 6491 has arrows depicting the termini of "Henderson Road" (which is mostly the "old" Ester Dome Road) and "Ester Dome Road," which is composed of part of the "old" St. Patrick Road (as labeled on USGS maps), the "lower portion of the Ullrhaven Road" (which the state concedes ASC built in 1961), the "upper portion of the Ullrhaven Road" (which Merritt Helfferich terms "the extension of Henderson"), and the road which the Geophysical Institute built in 1961 (which C. L. Buck, Director of the Division of Communications, Department of Public Works, in September 1970 termed "the Geophysical road").

Furthermore, the fact that the state has renamed virtually every road in that area significantly obscures the issues in this dispute. Happy Road became Sheep Creek Road, Ester Dome Road (as labeled on USGS maps) became Henderson Road, Ullrhaven Road became (the "new") Ester Dome Road. The quitclaim deed states that the Ester Dome Road-St. Patrick's Goldstream road system contains 7.8 "constructed miles." Surely, it ought to be determined which 7.8 miles were meant if the 1959 document is to be taken as determinative. I checked the mileage of this system when I drove through it. What the quitclaim document terms "the north branch" of this system (see above, p. 6 note) stretches 5.0 miles between FAP Route 37 (the old Nenana Highway, now called Gold Hill Road) and FAS 651 (Sheep Creek Road). The west branch (the "old" Ester Dome Road, as labeled on the USGS maps) of the deeded system, which does not have a specific terminus, stretches 2.4 miles to the present junction with the Ullrhaven Road (the "new" Ester Dome Road). All the USGS maps except the 1951 maps (Exhibit L) show the road continuing north and east past this point, away from the summit. Even assuming that the deeded route turned uphill toward the summit at this point, however, the remaining .4 deeded miles terminate .5 miles short of the eastern boundary of U. S. Survey 4004. It seems clear that "the present disputed road" cannot be squeezed into the class B road system deeded to the state in 1959.

#### RS 2477 Right-of-Way

The assertion that early miners established an RS 2477 right-of-way was not put forward until 1982. The evidence here shifts from one "thin black line" to another. There are three of them, actually: the one coded black in Exhibit A, the one depicted on the USGS maps, and the one shown in the 1931 Interior Department lode deposits sketch (Exhibit N). The state has argued that these three trails are really the same trail. The first two are demonstrably not the same trail, while the third, which may be the "early trail" of Exhibit A, is sketched somewhat freely. This sketch shows two trails leading to the top of the dome. If the 1951 USGS maps with the missing northward loop really show the "early trail" of Exhibit A, rather than "the present disputed road," then the 1931 lode map may be intended to represent the "early trail"

across the dome near the summit and, to the south, the trail shown on the USGS maps. With a map so inexact, however, such conclusions are mere conjecture.

#### Expanding Width of the Alleged Right-of-way

A ROW status plat shows that DOT/PF thinks it began maintaining the road in 1969, and that the road consisted of two parts: a 50-foot wide easement through which the university built its road, and a section of unspecified width connecting upper Ullrhaven and the Geophysical road. The telephone record in the Department of Law file mentioned above (p. 10) appears to show that in July 1982 the department believed the right-of-way it was asserting across ASC's property was "ditch to ditch." The same record comments that the "Private Road" signs which ASC had placed along the road "are out of the state's right of way." Yet in January 1985 the Department of Law advised the complainant differently:

The State of Alaska will not pay for damage to property you have placed without authorization in a public right-of-way. The state maintains its position [here presented for the first time] that Ester Dome Road is a public right-of-way of 100 feet in width.

The ROW file contains photographs of these signs taken in 1982 which confirm that the placement of the signs has not changed between then and the present.

The road which the complainant terms lower Ullrhaven and which the state has renamed (the "new") Ester Dome Road is shown on the ROW status plat as a 100-foot wide right-of-way. For the past year the state has asserted a 100-foot wide right-of-way across U. S. Survey 4004 as well. This is presented as a point of law in the April 4 memorandum (paragraph 19), so I will not comment other than to observe that the road as it presently exists is about 20 feet wide.

#### PRELIMINARY FINDING

Regardless of the real merits of the state's legal position in this dispute, I recommend that you find the complainant's allegation justified. If the state is in the right, it ought to be able to advance sound reasons why. The representation of the documentary record advanced in support of the argument based on the 1959 Commerce quitclaim deed appears seriously flawed. Similarly, the state's argument that the disputed road as it crosses U. S. Survey 4004 is the same as the trail depicted on the USGS maps seems to me plainly wrong. So, too, does the state's representation of where exactly the disputed road is located on the BLM survey plat. These errors of fact seem to me clear and material and form the basis for a significant part of Ms. Walton's advice to DOT/PF regarding the asserted public right-of-way across the complainant's property.

The complainant should be advised, however, that this finding does not necessarily indicate that the attorney's legal advice to DOT/PF is wrong. While each of the three legal theories put forward in support of the state's position in this dispute must stand or fall on its own merits, any one of the three, if sound, would be sufficient to establish the public right-of-way. If this report finds fault with the state's representation of the documentary record, still it cannot pretend to stand as an evaluation of the correctness of the state's legal arguments. Nor can the Ombudsman provide a legal resolution of this dispute.

Further, while it is understandable that the complainant and those he represents think it oppressive to be forced to litigate to preserve what they perceive as their legal property rights, it is easy to understand why the state has not constructed a definitive legal defense of its position in advance of a possible suit. There are undoubtedly many disputed rights-of-way, and it requires little effort to imagine the practical limitations on how much effort a state's attorney can justifiably expend in researching any one of them. Many of the lessor errors and inaccuracies uncovered in this investigation are likely the result of limited resources rather than mere carelessness: the documentary record is extensive and complex. Even the more significant errors noted here could be committed by a reasonable and reasonably busy person. Whether they (or others which competent counsel might detect) reflect legal shortcomings which render the state's position untenable I am unable to judge.

The state's position may well be viable despite anything that is said in this report. However, since the state ought to correct errors in the arguments it has so far advanced, I suggest you consider offering a formal recommendation to the department that it carefully re-evaluate its position in the Ester Dome Road dispute.

TFW:jb



of filing, a ski lodge and parking area were already in existence, and that ASC had occupied the land since 1957. Although Mr. Fields apparently contends that the location notice was referring to Ester Dome Road in the location shown on Exhibit A rather than the present disputed road, that contention is both unsupported and illogical. Exhibit A makes it clear that except for the road which is presently in dispute, no other road either "traversed" or was "adjacent to" ASC's property. The road identified as "Ester Dome Road" by the preparer of the key to Exhibit A is approximately one mile east of the eastern edge of ASC's property. Exhibit A also shows in black, a road identified by Mr. Fields as an "early trail" which does "traverse" ASC's property and appears to continue to the top of Ester Dome along the same route as that shown on current USGS maps, the same route which the state asserts is Ester Dome Road as conveyed by the Department of Commerce. The key recites that ASC used this "early trail" for initial access to its property prior to the construction of the roads immediately adjacent to this trail shown in green and brown as "the upper portion of Ullrhaven Road," allegedly constructed by ASC and the easement allegedly constructed by the University of Alaska, respectively. Thus it is hard to imagine that ASC's location notice, in reciting that the land was traversed by "Ester Dome Road," referred to any road other than the one traversing its property, shown in black, and identified on the key to Exhibit A as an "early trail." (Although the key contends that road was "abandoned," there is no showing of any formal vacation of the road by the United States or by the state nor has any proof of abandonment been offered.)

Another form in the BLM file entitled "Lands Adjudication Division Final Case Audit, recommending patent as of 1961 lists under 'Status Reports, subject to' 'Ester Dome Road' as plotted on USGS and BLM maps" (Exhibit C). A field plat, (Exhibit D) of ASC's property prepared by surveyor Edward Taylor October 15-22, 1960, also shows a road across ASC's property, at least to a point somewhat above the ski lodge. The road is not depicted from a point slightly above the ski lodge, to a point close to the uppermost and western boundary of ASC's property, however it does begin again within the western portion of ASC's property and appears to continue westward toward the Dome and Nugget Creek. In view of snow conditions observed by the undersigned in March 1984, it appears likely that the portion of the ASC's property across which the road is not drawn, is the same portion of the road presently subject to extreme drifting of snow. Thus, the most likely explanation for the field diagram, is that because of drifts in October of 1960 the surveyor could not see the portion of the road between the ski lodge and the

upper portion of ASC's property, and drew in only those portions he could clearly observe.

In June 1961, an easement was granted by ASC to the University of Alaska for a "private access road" (Exhibit E). The key to Exhibit A recites that the University of Alaska constructed a road diverging from the "early trail" which ASC contends was "abandoned" and which the state asserts was Ester Dome Road as it existed in the early 1960's. The legal description for the easement granted to the University states as a beginning point, a point above the ski lodge well within ASC's property. It appears that at the time of granting the easement ASC must have believed that what it now refers to as an "abandoned" "early trail" across its property was a public road, otherwise, the legal description of the "private easement" deeded would have included land necessary to get from the eastern boundary of ASC's property to the "point of beginning" actually described in the easement deed. In February 1963, C.T. Elvey of the University of Alaska, Geophysical Institute, requested that the DOT/PF assume maintenance responsibilities not for any private access road, but for "Ester Dome Road" presumably so that the University personnel and patrons could reach the University Geophysical Institute located beyond the property of ASC (Exhibit F).

Business records of DOT/PF filed with documents applicable to Ester Dome Road reflect that on June 21, 1963, Woodrow Johansen, District Highway Engineer for Fairbanks, telexed the Deputy Commissioner as follows: "One of the local representatives has informed me that the legislature appropriated some \$15,000 to perform maintenance work on roads to recreation ski areas. Is such a fund available." A reply the same day stated that if the road to a ski area is in the local service road class it would be eligible for funding (Exhibit G). From 1963 forward DOT/PF has maintained the road, to at least minimum standards for local roads maintenance, which no doubt was of benefit to ASC while it was operating a ski resort on Ester Dome, known as Ullrhaven. On the 1963 roster of Local Service Roads (Exhibit H) the road is listed with the following notations:

Ester Dome Road (Ullrhaven)  
Length: 4.3 miles  
Terminø: From the junction of the St. Patrick Road, Route 6491 and the Sheep Creek Road, Route 651, then south westerly 4.3 miles to the top of Ester Dome and the Geophysical Institute Building.

The 1960 Department of Public Works records obtained from University of Alaska archives, reflect that \$337,500 was planned to be allocated as of 1962 for improvement/maintenance of "Ester Dome Ski Bowl Road" (Exhibit I, Sheet 9 of 10).

The presently available edition of United States Geological Survey (hereinafter referred to as USGS) D2 and D3 maps dated "1950 photorevised 1972" (Exhibit J) labels the existing road shown in black, and green on Exhibit A, as "Ester Dome Road," an "unimproved dirt road." Photorevisions are shown in purple, and this road is not shown in purple, therefore it presumably existed in 1950. The road is similarly shown on USGS D3 "1956 Minor Revisions 1964" (Exhibit K). Two USGS maps dated 1951 (Exhibit L), and a USGS map dated "1956 revised 1976" (Exhibit M) all show an unimproved dirt road leading to the top of Ester Dome, and traversing ASC's property in approximately the same location as the present road. The 1951 and "1956 photorevised 1976" maps do not however show approximately 1/2 mile of the northward loop entirely to the east of ASC's property which is shown on the Fairbanks D3 1950 photorevised 1972 USGS map. The existence or nonexistence of the northward loop does not have any significant effect on resolution of this dispute, as no portion of that loop crosses property of ASC. A xerox copy of USGS D3 1952 provided to me by Charles Fields, and on which he relies to claim the road was not in existence until ASC built it, does not show the present disputed road across ASC's property as an unimproved dirt road. However, there is a thin black line following the same path as the present disputed road, across that property. (This 1952 map does show as a road the northward loop (not shown in the 1951 and 1956 revised 1976) which comprises part of the present road, and which is shown on the "1950 photorevised 1972" map.)

A map contained in Bulletin 849-B (Exhibit N) of the United States Department of Interior entitled "Lode Deposits of the Fairbanks District," Alaska, by James M. Hill 1931 published 1933 shows lode mines on the top of Ester Dome and also shows a trail traversing what is now ASC property continuing as far as Nugget Creek following roughly the same line as shown in the above USGS maps dated 1951 and "1956 revised 1976." It appears therefore that a road following the ridgetop to Ester Dome and beyond has been in existence in close to the same location across what is now ASC's property since at least 1931.

Old records of the Alaska Road Commission (hereinafter referred to as ARC), the entity originally responsible for Alaskan roads under the "War Department," and the Department of Interior make it clear that public funds were expended on the

beginnings of this road in 1927 and continued until 1956. The name "Ester Dome Road" first shows up in the 1927 report as Route 7DB, a branch of Route 7D "Ester Creek Road." "St. Patrick's Road" is relabeled Route 7DC (formerly labeled 7DB in 1925-1926). The Territorial Road Commission, (hereinafter referred to as TRC) an entity created by the Territorial Legislature to share road responsibility and financing with ARC also expended time and funds on the Ester Dome Road, according to the 1927 report.

The functions of the ARC were transferred first to the Department of the Interior. (47 statutes 446) 48 U.S.C. 321, and from there to the Department of Commerce P.L. 627 (Highway Act of 1956). The last narrative ARC report dated 1932 reflects that as of that date the mining trail shown in Bulletin 849B had been improved only part way up the Dome, to a point near the headwaters of St. Patrick's Creek. The point appears to be where the "early trail" and the road referred to as "Ester Dome Road," on ASC's Exhibit A, diverge.

After 1933, the reports are not clear as to location or mileage of the routes constructed and maintained. However, the 1943 and 1944 reports show that public funds continued to be spent on "Ester Creek Road and Branches." During the years immediately preceding and including World War II reports of the road authorities are very sparse. The 1941-1942 Territorial Highway Report (Exhibit O) (Sam Johnson collection University of Alaska Fairbanks archives) states: "Because the war makes it necessary to delete much of the text that would otherwise be incorporated herein and also because a policy of economy is prudent in all matters that do not relate to the war, this is a statement of road fund disbursements rather than a report." The report also mentions that road expenditures have been curtailed due to laws curtailing gold mining during the war years, and mentions a shortage of labor available for road work due to employment in defense-related projects. The 1945-1946 reports of the TRC reflect that it worked in cooperation with municipal or private groups interested in road projects, and that "where there is no government road building equipment available the Highway Engineer may enter into an agreement with a local miner or contractor to construct a section of road. Records from the "Dimond Collection" (U of A Fairbanks archives) reflect that during the war years antimony and molybdenum mines (strategic metals) were being developed in the Fairbanks vicinity. Although I have thus far not confirmed it, there is a strong probability that the disputed road was used even during the war years to obtain access to antimony deposits beyond Ester Dome.



It appears from the above facts that private funds/and or efforts of miners were initially used to construct Ester Dome Road as far as Nugget Creek and that public funds have been expended over the years to improve and maintain Ester Dome Road, at least as far as the Geophysical Institute. The road has existed, in at least rough form at least since 1931. The United States Government in quitclaiming the road to the state stated it was a, "Class B route," part of the Federal Aid Secondary Highway System. The quitclaim deed, dated June 30, 1959, prior to the record entry of ASC on November 13, 1959, states that Class B routes are 100 feet in width. Both PLO 601 dated August 10, 1949 and Secretarial Order 2665 dated October 6, 1951, establish the width of local roads at 50 feet each side of the center line.

LAW

By ASC's own admission, prior to its occupancy of the property in dispute, there was an early trail crossing its property in the exact location of "Ester Dome Road," as shown on 1950 photorevised 1972 USGS maps. ASC has also admitted that it built what it refers to as the "upper portion of Ullrhaven Road" and what the state refers to as Ester Dome Road, in a location immediately adjacent to if not overlapping the travelled portions of that "early trail" in 1957 and 1958 before the location notice, pursuant to which it eventually received patent, was filed. Given these admissions, and the fact that the road was quitclaimed to the State of Alaska by the federal government prior to any record entry by ASC, it is clear that the road was in place in 1959 and is a public road.

One applicable law is 43 U.S.C. 932 (RS 2477). That law, repealed in 1976 without affecting rights already acquired thereunder, provided: "The right-of-way for the construction of highways over public lands not reserved for public uses, is hereby granted."

A public road can be created under this statute in several ways. Either there must be some positive act on the part of appropriate public authorities of the state or territory manifesting an intention to accept the grant, or there must be public use for such a period of time and under such conditions as to prove the grant has been accepted. Hammerly v. Denton, 359 P.2d 121 (Alaska 1961).

Since Bulletin 849-B establishes that a clearly defined and apparently well used trail existed across this land as early as 1931, long before any entry by ASC, a right-of-way was created under 43 U.S.C. 932, by public use, and that right-of-way extends well beyond the top of Ester Dome, and well beyond what is now

ASC's property, at least to Nugget Creek. Even if this early trail had not existed, an RS 2477 right-of-way would have come into being when ASC allegedly built the upper portion of Ullrhaven Road, and numerous persons used it.

The width of this RS 2477 right-of-way is unclear. It would at least be a ditch-to-ditch right-of-way, and probably would be held to be 60 feet in width based on Territorial Session Laws 1919 Ch. 11, Section 14 (P. 21) which provides:

Section 14. The Divisional Commission shall classify all public Territorial roads and trails in the division as wagon roads, sled roads, or trails and shall be appropriate signs or notices posted on each public bridge and ferry in the division, prescribe the maximum load which may be hauled thereon. The lawful width of right-of-way of all roads or trails shall be sixty (60) feet. The width of traveled ways, the grade and character of improvement of each road or trail, shall be determined by the Territorial Board of Road Commissioners in view of the requirements of the traffic on each road.

The width of that portion of the road extending to the top of Ester Dome, was later established by the federal government at 100 feet by PLO 601 1949 and Secretarial Order 2665 Section (2) (1955) which provide, respectively:

ORDER NO. 2665 (1951)

Sec. 2. Width of Public Highways. (a) The width of the public highways in Alaska shall be as follows:

(3) For local roads:

All public roads not classified as through roads or feeder roads shall extend 50 feet on each side of the center line thereof.

PUBLIC LAND ORDER 601, AUG. 10, 1949

Subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes, the public lands in Alaska lying within 300 feet on each side of the center line of the Alaska Highway, 150 feet on each side of the center line of all other through roads, 100 feet on each side of the center line of all feeder roads, and 50 feet on each side of the center line of all local roads, in accordance with the

following classifications, are hereby withdrawn from all forms of appropriation under the publicland laws, including the mining and mineral-leasing laws, and reserved for highway purposes:

LOCAL ROADS

All roads not classified above as Through Roads or Feeder Roads, established or maintained under the jurisdiction of the Secretary of the Interior.

Regardless who built the road across federal property, until the filing of an acceptable entry of record, the federal government had the right to treat the road as federally owned, to determine its width and to convey it to third parties. A homesteader or entryman who resides upon and improves public land with the intention of later filing for a homestead acquires no vested right or claim and such acts do not impair the government's power to set aside land for public use. United States v. Hurlburt 72 F.2d 427 (Col 1934). The government retains the right to dispose of the land otherwise than under pre-emption or homestead laws or to appropriate it to any public use. United States v. Norton 19 F.2d 836 (CA Fla. 1927) Tarpley v. Madsen 178 U.S. 215, 208 Ct 849 (1899). Thus, at least until ASC's record entry in November 1959, the federal government would have been entitled to create a public road, even if there had been no prior RS 2477 road in that location. The federal government conveyed the road and a right-of-way 50 feet each side of the center line by deed to the State of Alaska prior to any cognizable entry of record by ASC. Through the quitclaim deed, the state received a proprietary interest in the road. A proprietary interest can be extinguished only by formal vacation of a right-of-way, in accordance with AS 19.05.070.

LLW/cmh

Attachments