Girves v. Kenai Peninsula Borough
536 P.2d 1221 (1975)

Neither the notice of allowance of entry, nor the patent to Ms. Girves reserved an easement for highway purposes along the section line.

AUTHORITY TO CONSTRUCT ROAD:

- At the time of the suit the Kenai Peninsula was a second class borough.
- Road construction was not a statutorily enumerated power of a second class borough.

Court found:

- Borough's had implied power to construct roads to schools.

- Basis - Borough's authority to "establish, operate and maintain schools".

- However; implied "powers are to be strictly construed against the entity claiming them."

VALIDITY OF THE EASEMENT:

1) No express reservation.

- Borough claimed an easement under 43 U.S.C. Sec. 932.

- Court held that the absence of an express reservation did not preclude the borough from claiming a valid easement existed prior to issuance of the notice or patent.

2) Territorial and state governments lacked authority to accept.

- Girves claimed territory could not accept the grant since 11 Op. Att'y Gen. at 3 (Alaska 1962), opined that the Alaska Organic Act did not allow the territory to "dispose of primary interests in the soil".

- Citing a later Attorney General's Opinion, 7 Op. Att'y Gen. 1, 8 (Alaska 1969), the court determined that other states had effectively accepted the grant with similar language in their organic acts.

- Hamerly v. Denton, 359 P.2d 121 (Alaska 1961) and Clark v. Taylor, 9 Alaska 298 (D. Alaska 1938) precedence that state and territorial courts recognized the grant.

3) Legislature did not effectively accept the grant.

Girves: "dedication" was not an acceptance of the grant.

Court followed Hamerly:

[B]efore a highway may be created, there must be either some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted.

Court distinguished this case from Hamerly:

- Hamerly claimed a grant by public user.

- In this case the enactment of the statute was a positive act on behalf of the state to accept the grant.

4) Chapter 35, SLA 1953 did not expressly refer to 43 U.S.C. Sec. 932.

Girves: Statute did not specifically refer to or expressly accept to 43 U.S.C. Sec. 932.

Court found:

- "[W]e cannot assume that the legislature was unaware of the grant or unwilling to accept it in behalf of the territory for highways....”
- “[I]t is well recognized that a state or territory need not use the word 'accept' in order to consummate the grant."
- “The grant was a standing federal offer that only needed the positive act of the state or territory to accept it.”
- "[A]cceptance may be implied from acts of conduct.”

- “Since it is obvious that one cannot 'dedicate' property to which one has no rights, the 1953 'dedication' must have also constituted an act of implied acceptance."

- “The grant doesn't make a distinction on how the highway is established - dedication is an accepted method of establishing a highway, the 1953 statutory dedication effectively established a highway.

ATTORNEY FEES:

Litigation of important public issues and the conflicting Attorney General's Opinions, prevented assessment of attorney’s fees against Ms. Girves.

Andersen v. Edwards
625 P.2d 282 (1981)

100 foot right public highway pursuant to A.S. 19.10.010.
Andersen constructed a 25 foot wide roadway, cleared a 100 foot width.

Reasonable Use:

Andersen:

- Right to clear 100 feet "where there is an expressly reserved and dedicated defined highway right-of-way...."

Court:

- General Rule:

“The law appears to be settled that where the width, length and location of an easement for ingress and egress have been expressly set forth in the instrument the easement is specific and definite. The expressed terms of the grant or reservation are controlling in

such case and consideration of what may be necessary or reasonable to the present use of the dominant estate are not controlling. If, however, the width, length and location of an easement for ingress and egress are not fixed by the terms of the grant or reservation the dominant estate is ordinarily entitled to a way of such width, length and location as is sufficient to afford necessary or reasonable ingress and egress.

- “To sustain (a) contention (that an easement grants the right to use any and all of a strip of land), the plaintiff must point to language in the deed which clearly and definitely fixes the width of the right of way ”

- “A grant or reservation of a right of way ‘over’ a particular area, strip, or parcel of ground is not ordinarily to be construed as providing for a way as broad as the ground referred to.”

- Here reference to width ambiguous:
  - "as to whether it refers 'to the width of the way, or is merely descriptive of the property over which the grantee may have such a way as may be reasonably necessary.'"

  - intent of the dedication language to only dedicate the land necessary for the use of the highway,

  - the width of the highway and area necessary to construct it

  - only reasonable use allowed.

Trespass Damages: A.S. 09.45.730 a trespassory cutting of timber -- treble damages.

The measure of damages is:

> Generally speaking, damages in trespass to land are measured by the difference between the value of the land before the harm and the value after the harm, but there is no fixed inflexible rule for determining with mathematical certainty, what sum shall compensate for the invasion of the interests of the owner. Whatever approach is most appropriate to compensate him for his loss in the particular case should be adopted. Thus the damages awarded... reflected, in part, the cost of restoring the land to a condition of usefulness - by filling up stump holes and cleaning up the toppings and other debris left behind by the trespassers.

CHUNG v. RORA PARK, 339 P.3d 351, 2014

“[A] party who is injured by an invasion of his property not totally destroying its value may choose as damages either the loss in value or reasonable restoration costs.” But “reasonable restoration costs are an inappropriate measure of damages when those costs are disproportionately larger than the diminution in the value of the land and there is no reason personal to the owner for restoring the land to its original condition.” A reason personal is one that is “peculiar or special to the owner.” “We require the landowner to demonstrate a reason personal because we believe it indicates circumstances where the owner holds property primarily for use rather than for sale and where the owner is likely to make repairs with the restoration costs award rather than to pocket the funds and enjoy a windfall.”

Brice v. State, Division of Forest, Land & Water
669 P.2d 1311 (1983)

Did the implied repeal of Chapter 19 SLA 1923, Section 1, by Chapter 1, SLA 1949, repeal or vacate a section line easement?

Chapter 1, SLA 1949, Section 1, legislated:

"All acts or parts of acts heretofore enacted by the Alaska Legislature which have not been incorporated in said compilation because of previously enacted general repeal clauses or by virtue of repeals by implication or otherwise are hereby expressly repealed."

The 1949 compilation did not include 19 SLA 1923 or its subsequent reenactment by 1721 CLA 1933.

Entry was in 1950 with a patent 1952, between the January 17, 1949 repeal date and the March 26, 1953 enactment of Chapter 35, SLA 1953.

Court ruled:

[T]he repeal of the statute does not necessarily vacate previously created easements. The grant of 43 U.S.C. Sec. 932 was a continuing one, as was its acceptance by 19 SLA 1923. As lands came into the public domain after 1923, they became impressed with section line highway easements. 1969 Op. Att'y Gen. No. 7 at 6 (Alaska, December 18, 1969).

Savings statute - 19-1-1 ACLA 1949:

“The repeal or amendment of any statute shall not affect any... right accruing or accrued... prior to such repeal or amendment; ....", and found that repeal did not vacate the prior established easement.

Repeal of the prior easement would be retrospective and the common law rule is statutes are prospective unless there is clear legislative intent the statute is to apply retroactively.

Fisher v. Golden Valley Electric Association, Inc.
658 P.2d 127 (1983)

AS 19.25.010, which allows the use of highway rights-of-way for the construction of utilities, permits "powerline construction as an incidental and subordinate use of a highway easement".

Jurisdictional Approaches:

1) Construction of a powerline which does not interfere with highway travel is a proper incidental subordinate use and not an additional burden or servitude on the servient estate.

2) Powerlines are allowable in urban area highway rights-of-way, but are not allowed within the rights-of-way in rural areas.

3) Powerlines are allowable (no additional servitude) if electricity is incidental to highway travel itself, such as street lighting.

4) Powerlines are beyond the scope of a highway easement and constitute an impermissible additional burden on the servient estate.

Unused reservation allowed for lesser uses of that reservation

In dicta Court recognized telephone lines as:

> additional incidental and subordinate uses that "are the progression and modern development of the same uses and purposes" (referring to the "transmission of intelligence, the conveyance of persons, and the transportation of commodities").

0.958 Acres, More or Less (Parrish) v. State
762 P.2d 96 (1988), modified 769 P.2d 990 (1989)

- Tract bounded by Peger Road on the east
- Undeveloped 33 foot section line easement reservation on the north
- Waiver of subdivision into four 20 acre parcels
- State condemned a 100 foot wide strip adjacent to the section line for a controlled access highway

Direct Access:

Supreme Court adopted the majority rule on access stating:

"The general rule in Alaska is that an abutter to a public highway owns a right of reasonable access to it. Triangle Inc. v. State, 632 P.2d 965, 967 (Alaska 1981). In Triangle, we stated:"

All jurisdictions recognize that an owner of abutting land has a right of access to and from a public street or highway. In Alaska, this incident of ownership is limited to a "right of *reasonable* access."

In B&G Meats [Inc. V. State, 601 P.2d 252 (Alaska 1979)] we set forth the principles controlling a claim of taking caused by a change in access to streets or highways:

"No hard and fast rule can be stated, but courts must weigh the relative interests of the public and the individual and strike a just balance so that government will not be unduly restricted in its function for the public safety, while at the same time, give due effect to the policy of eminent domain to insure the individual against an *unreasonable* loss occasioned by the exercise of the police power. … While an abutter has the right of access to the public highway system, it does not follow that he has a direct-access right to the main traveled portion thereof; circuity of travel, so long as it is not unreasonable, is non-compensable."

Only unreasonable access would entitle owners to compensation.

Compensation for direct loss of access to a section line easement would be inconsistent with the purpose of AS 19.10.010 to provide an easement for the state to build highways.

If the state were required to compensate for loss of direct access to the section line, the "cost could be conceivably be higher than the cost of acquiring a fee interest where no easements and thus no rights of access exist, leading to the absurd result that it could be more expensive for the state to build new highways on section line easements than elsewhere."

Nominal Damages:

Actual damages, a showing of special value or that special value existed, would be require for payment of other than nominal damages.

Reasonable Access:

To evaluate reasonable access the Court requires:

> … an examination of the potential uses of the property. The use of the property will influence the number, size, and type of vehicles requiring access. Access that is reasonable for a single-family dwelling may be entirely unreasonable for an industrial subdivision. Furthermore, even if a road to the property is capable of handling the expected traffic, that road may not provide reasonable access if a river or cliff cuts it off from a major usable part of the property.

Common Law Dedication:

A 25 foot easement along the north boundary of the property to the south was recorded. During the waiver of subdivision process, Parrishes submitted a diagram to the borough indicating a 50 foot wide easement along that south boundary. Depiction of the additional 25 foot width constituted a common law dedication. Following Swift v. Kniffen, 706 P.2d 296 (Alaska 1985), the Court found an objectively manifested intent to dedicate (the 25 foot strip on the waiver request) and acceptance by the public (the borough's approval of the waiver).

Luker v. Sykes, 357 P.3d 1191 (2015)

Walker application for homestead October 1948

Walker 2nd for homestead and notice of proof July 1961

Rectangular survey accepted April 16 1962

August 28, 1963 BLM records noted “Authorization Issued ENTRY ALLOWED”

RS 2477 Claim

Supreme Court:

- An RS 2477 right-of-way automatically came into existence if a public highway was established across public land in accordance with the law of Alaska.”
- Alaska, like other public authorities, could accept the federal grant and create a right of way for road construction by taking “some positive act ... clearly manifesting an intention” to do so.

- Territorial legislature accepted the federal grant by its passage of chapter 35, § 1, SLA 1953 (now codified as AS 19.10.010),

Question: Was the land vacant, unappropriated public land – “public land not reserved for public uses.” as of the date of the survey April 16, 1962.

- Lukers contended the original 1958 application segregated the lands

- Sykeses contended the date the entry was allowed, October 27, 1963, was the applicable date and the section line easement attached to prior approved survey.

Supreme Court:

- Allowance of entry by the BLM was not the entry

- Entry was on July 10, 1961 which lead to the issuance of the patent.

Under the now-repealed homestead laws, a party established a claim to land not when the federal authorities allowed entry but rather when the party took the steps necessary to have entry recognized. “ ‘[Entry] means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim’ in the appropriate land office.” In Walker’s case, that “inceptive right” was acquired when he filed his application for entry. Completing the application requirements and “fil[ing] his application in the United States Land Office” was “all that [an applicant] could possibly do to ... [make] a lawful homestead entry.” At that point, the lands at issue became “subject to individual rights of a settler.... [T]he portion covered by the entry [was] then segregated from the public domain ... and until such time as the entry may be cancelled by the government or relinquished, the land [was] not included in grants made by Congress under [RS 2477].” At page 1197. [Citations omitted.]

Footnote 25 defines what constitutes an entry:

> “Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made, the land is entered.” Ault v. State, 688 P.2d 951, 954 (Alaska 1984) (quoting 348.62 Acres, 10 Alaska at 359)

Footnote 20 Survey Note

“A survey of public lands does not ascertain boundaries; it creates them.... [T]he running of lines in the field and the laying out and platting of townships, sections and legal subdivisions are not alone sufficient to constitute a survey. Until all conditions as to filing in the proper land office and all requirements as to approval have been complied with, the lands are to be regarded as unsurveyed and not subject to disposal as surveyed lands.... In other words, to justify the application of the term ‘surveyed’ to a body of public land something is required beyond the completion of the field work and the consequent laying out of the boundaries, and that something is the filing of the plat and the approval of the work of the surveyor.”