RS 2477 SECTION LINE EASEMENT & TRAIL CASES

RS 2477 Trail Cases

1. Hamerly v. Denton, 359 P.2d 121 (1961).

At issue was whether a roadway across Hamerly's home site was a public highway for RS 2477 establishment purposes. The case involved questions on acceptance of the RS 2477 grant, segregation of public lands by homestead entry, dedication of public roads and prescriptive easement.

RS 2477 (43 U.S.C.A. sec. 932): Alaska recognizes the grant of right of way for public highways.

> But before 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.

At 123.

Since there was not an act by a state entity, public use was required in this case. Consequently Denton had the obligation to prove "(1) that the alleged highway was located 'over public lands', and (2) that the character of its use was such as to constitute acceptance by the public of the statutory grant." At 123.

The court defined public lands on page 123 as: "lands which are open to settlement or other disposition under the land laws of the United States. It does not encompass lands in which the rights of the public have passed and which have become subject to individual rights of a settler." Once there is a valid entry the land is segregated from the public domain.

In this case there were a number of entries which were subsequently relinquished or closed prior to the Hamerly's home site entry which went to patent. The public usage needed to accept the grant had to occur when the land was not subject to an entry. The court found that there was no evidence of public user during the times the land was not subject to an entry. "Where there is a dead end road or trail, running into wild, unenclosed and uncultivated country, the desultory use thereof established in this case does not create a public highway." At 125.

Dedication: "There is a dedication when the owner of an interest in land transfers to the public a privilege of use of such an interest for a public purpose." At 125. In finding that Denton did not meet the burden of proof the court stated on page 125:

> Dedication is not an act or omission to assert a right; mere absence of objection is not sufficient. Passive permission by a landowner is not in itself evidence of intent to dedicate. Intention must be clearly and unequivocally manifested by acts that are decisive in character.

Prescriptive Use: "Use alone for the statutory period - even with the knowledge of the owner - would not establish an easement." Such use is presumed to be permissive unless the claimant proves the use was "openly adverse to the owner's interest by ... distinct and positive assertion of a right hostile to the owner of the property." At 126. The burden is on the claimant of the prescriptive use to show that his claim is not permissive and is in derogation of the true owner's rights.

2. Dillingham Commercial Company, Inc. v. City of Dillingham, 705 P.2d 410 (1985).

City claimed fee title to a roadway by virtue of 43 U.S.C. 932 (RS 2477) or by adverse possession. It also claimed alleys on two other boundaries of the Dillingham Commercial Company property under the same theories.

Section 932: In citing Hamerly v. Denton, 359 P.2d 121,123 (1961), the Supreme Court ruled:

> Case law has made it clear that section 932 is one-half of a grant - an offer to dedicate. In order to complete the grant "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.

In this case the roadway was used prior to the original homestead entry. The original homesteader squatted on the land prior to making the entry; however, official action such as a homestead entry was required to withdraw the land from the public domain, mere possession did not suffice.

The public's acceptance of the grant required public use for a period of time and under conditions proving the grant had been accepted. That use must have specific termini and a definite location. Once the public use and location is established "it may be used for any purpose consistent with public travel." At 415.

Section 932 grants a right of way and according to the court's ruling in Wessells v. State Department of Highways, 562 P.2d 1042, 1045 n. 5 (1977) the general rule in Alaska is that a "'right of way' is synonymous with 'easement'". At 415.

Adverse Possession: The Court ruled that adverse possession was not applicable due to the lack of uninterrupted and continuous possession. Consequently the city did not get fee simple title. However, the Court did rule that a public highway may be created by prescriptive use.

At page 416, the Dillingham Court applied the three tests for adverse possession established in Alaska National Bank v. Linck, 559 P.2d 1049, 1052 (1977), to prescriptive easements.

> (1) the possession must have been continuous and uninterrupted; (2) the possessor must have acted as if he were the owner and not merely one acting with the permission of the owner; and (3) the possession must have been reasonably visible to the record owner.

Adverse possession involves the fee simple interest therefore the true owner must be excluded. The occupancy by the adverse possessor must be exclusive; whereas, a prescriptive easement does not require exclusive use. The use makes the property subject to an easement, but it does not divest the owner of the underlying fee title.

Implied Dedication: Alternatively the theory of implied dedication was discussed. Implied dedication requires (1) an intent to dedicate the road or easement to a public use, and (2) an acceptance of that dedication on behalf of the public. Establishment of the intent to dedicate must be "clear and unequivocal", a heavy burden on the party claiming the dedication. At 416.

3. Shultz v. Department of the Army, United States of America, 10 F.3d 649 (9th Cir. 1993)

Paul Shultz filed a quiet title action claiming a public right of way across Fort Wainwright. His claims was that an RS 2477 right of way, or other forms of easements, existed prior to establishment of the army base. The Federal District Court ruled that no right of way existed, or in the alternative, the statute of limitations for Shultz to bring a quiet title action against the Army had expired. A three judge panel of the Ninth Circuit Court of Appeals reversed the decision of the District Court.

FACTS: The panel's factual recitation on pages 652 and 653 follows:

> Shultz owns property to the northeast of Fort Wainwright and east of Fairbanks. To get to Fairbanks, he must cross the base. Fort Wainwright is situated on land acquired by the federal government in a series of purchases and withdrawals beginning in 1937. All of the acquisitions were made "subject to valid existing rights." Shultz

> traces his title through George Nissen who homesteaded in the first half of the century and through Nissen's successors. Nissen was a German immigrant who made entry on the property in October 1907, built his cabin the following month and, by February 1908, established residency. He was among a handful of homesteaders occupying land along the Chena River and for a while raised potatoes and other vegetables with great success. He transported a portion of his crop to market in Fairbanks every year. Nissen left the area in 1918. The homestead patent, for which he had filed in 1914, was issued in 1924.
>
> In the early days of homesteading the routes to Fairbanks across present day Fort Wainwright were difficult to travel. At trial one witness described swimming horses in the summer across sloughs lacking bridges. These same sloughs served as frozen highways in the winter. Much of the land surrounding Shultz' property, especially to the north, is swampy, due to the underlying permafrost that prevents the melted snow from draining. In Alaska, more than in most locations, the season dictates the nature and means of passage. The trial involved the introduction of extensive evidence of the various historical routes across the land now occupied by the Army.... No other land route is available. Without access through Fort Wainwright, Shultz is landlocked.

The modern base roads essentially follow the river and "[i]n part they follow the same course as the trails and wood paths used by early settlers in the Chena River area." Page 654. In 1981 the Army instituted a pass system for the base. Mr. Shultz refused to obtain a pass. Ultimately he filed the quiet title action in 1986.

Three major issues were addressed by the decision: Mr. Shultz's standing to bring the quiet title action, the validity of the RS 2477 claim, and the statute of limitations to bring the action.

STANDING: The Army challenged Shultz's right to bring the litigation on the grounds that Shultz did not have standing, or the legal right, to bring a quiet title action for any roads that did not abut his property. Its contention was that since Shultz was not an abutter to the roads on the base, he did not have "a 'special and vital interest' in roads that do not abut his property." At page 653. The panel dismissed that argument and ruled that Shultz did have standing because he:

> has a "particularized" interest in crossing the base to reach roads that lead to his property. Not to have access to those roads would "affect [him] in a personal and individual way" by sealing him off from his property. Second, Shultz seeks to quiet title as against the Army which asserts an unrestricted right to regulate access to Fort Wainwright's roads. A clear causal connection exists between his

> claim and the restrictions he challenges. Finally, were Shultz able to prove that the combination of roads leading to his property do constitute public rights of way the "favorable decision" would redress the injury he asserts. [Citations and footnote omitted].

At page 653.

RS 2477 RIGHT OF WAY: The panel determined that Alaska's conditions presented unique situations that relate to RS 2477 rights of way.

> Due to its geography, its weather, and its sparse and scattered population, Alaska's "highways" frequently have been no more than trails and they have moved with the season and the purpose for the transit--what traveled best in winter could be impassable knee-deep swamp in summer; what best accommodated a sled was not the best route for a wagon or a horse or a person with a pack. By necessity routes shifted as the seasons shifted and the as the uses shifted What might be considered sporadic use in another context would be consistent or constant use in Alaska. We conclude that as long as the termini of the right of way are fixed (the homesteaders' cabins on one end, Fairbanks on the other), to establish public right of way the route in between need not be absolutely fixed (as it might be in other settings).... Right of access is the issue, not the route. [Footnotes omitted].

At page 655

Although RS 2477 is a federal grant, acceptance of the grant is a matter of state law. In referring to Standard Ventures, Inc. v. Arizona, 499 F.2d 248, 250 (9th Cir. 1974), Sierra Club v. Hodel, 848 F.2d 1068, 1083 (10th Cir. 1988), and Fisher v. Golden Valley Electric Association, Inc., 658 P.2d 127, 130 (Alaska 1983), at page 655, the panel stated: "An RS 2477 right of way comes into existence 'automatically when a public highway [is] established across public lands in accordance with the law of the state.' Whether a right of way has been established is a question of state law." However, doubts to the extent of the RS 2477 right of way must be construed in favor of the government.

Moreover, at pages 655 and 656, the court recognized two methods under Alaska law to establish RS 2477 rights of ways:

> [B]efore a highway may be created, there must be either [1] some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or [2] there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted.

Hamerly v. Denton, 359 P.2d 121, 123 (1961). "To prove RS 2477 rights by the second of these methods, a claimant must show "(1) that the alleged highway was located 'over public lands,' and (2) that the character of its use was such as to constitute acceptance by the public of the statutory grant." Hamerly, 359 P.2d at 123. Shultz at page 656.

The panel determined that A.S. 19.45.001(9) "broadly defines 'highway' to include a 'road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof.'" At page 656. Lands that have been withdrawn or entered are not public lands available for an RS 2477 claim.

Public user is necessary to create the acceptance.

> Although the law of RS 2477 rights of way suggests that "infrequent and sporadic" use is insufficient, Hamerly, 359 P.2d at 125, and that "regular" and "common" use by the public is necessary, Kirk v. Schultz, 110 P.2d 266, 268 (Idaho 1941), and that travel across the route may not be "merely occasional," the test is what is "substantial" under the circumstances, Ball v. Stephens, 158 P.2d 207, 210 (Cal. 1945).

At page 656.

In finding a foot path was sufficient to establish an RS 2477 right of way under Alaska law, the panel found: "we have noted the manner of travel (by foot or beast or vehicle) is legally irrelevant to the RS 2477 determination. What matters is that there was travel between two definite points." At page 658. Footnotes 10 and 11 on page 658 expand on the preceding quote in regard to the Army's contention that since a neighbor, who entered his property later than Nissen, had to build a road to his homestead there was no basis for a road to Nissen's property. The panel stated:

> Both the judge and the Army clearly misunderstood the import of A.S. 19.45.001(9) for RS 2477 law. Such a right of way need not be "buil[t]" or constructed'. Nor need it be "susceptible to wagon or motor vehicle use". An unimproved trail suffices as a "road" for the purposes of this law. The government pose the problem incorrectly. It argued to the court that "if you're going to find an RS-2477, you have to know not only that he got from Fairbanks to his property, but how he did it." As long as it is clear that Nissen traveled overland, how he did it is immaterial.

Public Prescriptive Easement: The fact that the public used a route does not automatically qualify it as an RS 2477. It must cross public lands that were not withdrawn or reserved prior to establishment of the use. While the Panel did not

find that all segments of the trail were established under RS 2477, it did rule that Shultz was not required to show that all portions of the trail were created under RS 2477. The panel concluded Alaska law allows for public prescriptive easements. It cited Dillingham, and listed the three tests for prescriptive easement as stated in McGill v. Wahl, 839 P.2d 393 397 (Alaska 1992): "To establish a prescriptive easement a party must prove that (1) the use of the easement was continuous and uninterrupted; (2) the user acted as if he or she were the owner and not merely one acting with the permission of the owner; and (3) the use was reasonably visible to the record owner." The panel dismissed the lower court's finding that no public prescriptive easement existed. As to the route along the Chena River the panel stated at page 661:

> To assert a public easement by prescription, the public need only act "as if [it] were claiming a permanent right to the easement." Swift, 706 P.2d 296. Since overland travel to Fairbanks from the homesteads of the base clearly required some kind of right of way, all interested parties were on notice that an easement was being established. [Citations omitted]. Moreover, the public nature of the route, and its shared use, reinforce Shultz's claim that at the very least an easement by prescription took hold. The route was there. The homesteaders used it. No one challenged their right."

Quiet Title Action: The Army alleged that Shultz did not bring his quiet title action for the easement claim within the 12 statute of limitations under 28 § U.S.C. 2409a(g). Even though the military base was established in 1937, the panel found that Shultz was not put on notice that Army disputed the right of way until it blocked the road in 1981. Consequently, his suit, filed in 1986 was within the statute of limitations.

NOTE: The above opinion was withdrawn by the 9th Circuit.

Opinion 1996 WL 532312 (9th Cir.(Alaska)) decided September 20, 1996, in its entirety states:

> The government's petition for rehearing is granted, the opinion of November 30, 1993 at 10 F.3d 649 is withdrawn, and the following opinion is substituted in its place.
>
> Paul G. Shultz appeals the district court's judgment in favor of the government in his quiet title action under 28 U.S.C. § 2409a. Schultz argued that he has a right-of-way across Fort Wainwright to

> get back and forth between Fairbanks and his property under either R.S. 2477, 43 U.S.C. § 932, or Alaska common law, or both. Because we ultimately agree with the district court that Shultz has not sustained his burden to factually establish a continuous R.S. 2477 route or a right-of-way under Alaska common law, we affirm the district court. We do not reach Shultz's argument that the district court erred by holding that his action was time barred by 28 U.S.C. § 2409a(g).

Circuit Judge Alarcon's dissent was:

> I respectfully dissent.
>
> I would deny the petition for a rehearing and reverse the district court's judgment for the reasons set forth in Judge Fletcher's scholarly opinion in Shultz v. Department of the Army, 10 F.3d 649 (9th Cir. 1993).

4. Fitzgerald v. Puddicomb, 918 P.2d 1017 (1996)

Fitzgerald claimed a RS 2477 right of way across Puddicomb's property. The key question was there sufficient public use to accept the RS 2477 grant. The Court extracted language from several cases to identify the criteria for examining acceptance of the RS 2477 grant by public use:

> The extent of public use necessary to establish acceptance of the RS 2477 grant depends upon the character of the land and the nature of the use. *See* Shultz, 10 F.3d at 655 ("Our decision must take into account the fact that conditions in Alaska present unique questions ... What might be considered sporadic use in another context would be consistent or constant use in Alaska."); *Ball v. Stephens*, 68 Cal.App.2d 843, 158 P.2d 207, 211 (1945) ("The travel over the road ... was irregular but that was due to the nature of the country and to the fact that only a limited number of people had occasion to go that way."). Although "infrequent and sporadic" use is not sufficient to establish public acceptance of the grant, *Hamerly*, 359 P.2d at 125, continuous use is not required. Shultz, 10 F.3d at 656; *cf.* *McGill v. Wahl*, 839 P.2d 393, 397 (Alaska 1992) (requiring proof of continuous use to establish prescriptive easement). Nor does the route need to be significantly developed to qualify as a "highway" for RS 2477 purposes; even a rudimentary trail can qualify. *See* Dillingham, 705 P.2d at 414; Shultz, 10 F.3d at 656-57.

At page 1020.

The Court went on to say with regards to the lack of a specificly defined route : "In any event, it is not necessary . . . that the precise path of the trail be proven. It is enough for one claiming an RS 2477 right-of-way to show that there was a generally-followed route across the land in question." Citing Schultz, at page 1021-1022.

RS 2477 - SECTION LINE EASEMENT CASES

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

During the construction of a Redoubt Drive to a junior high school, the Kenai Peninsula Borough claimed a 33 feet wide section line easement right of way across lands owned by Ms. Girves. Ms. Girves entered on the property in 1958 and received patent in 1961. Neither the notice of allowance of entry or the patent issued to Ms. Girves reserved an easement for highway purposes along the section line. Ms. Girves disputed the Borough's authority to construct the roadway, the validity of a section line easement across her property and the award of attorney fees to the Borough.

AUTHORITY TO CONSTRUCT ROAD: At the time of the suit, the Kenai Peninsula was a second class borough. Road construction was not one of the statutorily enumerated powers of a second class borough. In response to Ms. Girves' argument that the Borough did not have the authority to acquire, construct or maintain roads, the court found that the Borough's authority to "establish, operate and maintain schools" gave it the implied power to construct roads to schools. Such implied "powers are to be strictly construed against the entity claiming them." At page 1224. Nevertheless, the court found building transportation systems for schools was implicit within the school powers.

VALIDITY OF THE EASEMENT: Ms. Girves advanced several arguments against the validity of the section line easement: 1) no express reservation in her notice of allowance or patent, 2) the territorial and state governments lacked authority to accept the 43 U.S.C. Section 932 Grant (RS 2477), 3) the legislature did not effectively accept the grant, and 4) Chapter 35, SLA 1953 did not expressly refer to 43 U.S.C. Sec. 932.

1) No express reservation. The Borough claimed an easement under 43 U.S.C. Sec. 932. The court held that the absence of an express reservation did not preclude the borough from claiming that a valid easement existed prior to issuance of the notice or patent.

2) Territorial and state governments lacked authority to accept. Girves referred to a 1962 Attorney General's Opinion, 11 Op. Att'y Gen. at 3 (Alaska 1962), which opined that the Alaska Organic Act did not allow the territory to "dispose of primary interests in the soil" and therefore the territory could not accept the grant. In relying on 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. It also cited Hamerly v. Denton, 359 P.2d 121 (Alaska 1961) and Clark v. Taylor, 9 Alaska

298 (D. Alaska 1938) as precedence that state and territorial courts had recognized the grant.

3) Legislature did not effectively accept the grant. Girves argued that the "dedication" was not an acceptance of the grant. Quoting from page 123 of Hamerly the court stated:

> [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.

At page 1226.

The court distinguished this case from Hamerly, in that Hamerly was a case claiming the grant by public user, here 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. Although the statute did not specifically refer to or expressly accept to 43 U.S.C. Sec. 932, the court found: "we cannot assume that the legislature was unaware of the grant or unwilling to accept it in behalf of the territory for highways.... However, it is well recognized that a state or territory need not use the word 'accept' in order to consummate the grant." Tholl v. Koles, 70 P. 881, 882 (Kansas 1902). The grant was a standing federal offer that only needed the positive act of the state or territory to accept it. The court supported its reasoning by indicating statutes are presumed to be valid, therefore "it is fair to assume that the legislature intended the 1953 'dedication' to also constitute an acceptance of the grant under 43 U.S.C. Sec. 932 (1964)." At 1226. It also concluded that "acceptance 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." At 1226, citations omitted. Lastly it reasoned that the grant doesn't make a distinction on how the highway is established. Since dedication is an accepted method of establishing a highway, the 1953 statutory dedication effectively established a highway.

ATTORNEY FEES: Due to the fact there were conflicting Attorney General's Opinions and that case litigated important public issues, the court held Ms. Girves should not be assessed attorney's fees.

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

This case dealt with a very narrow issue: 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 (references below to 19 SLA 1923 also include 1721 CLA 1933).

Between the time 19 SLA 1923 was repealed on January 17, 1949, and the enactment of Chapter 35, SLA 1953 on March 26, 1953, which again dedicated section line easements on lands held by the federal government, Brice's predecessor in interest, entered and received patent to the property at issue. Entry was in 1950 with the patent issued in 1952.

At page 1315, the court stated:

> [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).

The court quoted the savings statute in effect at the time, 19-1-1 ACLA 1949, "[t]he 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. At 1315. It further indicated a repeal of the prior easement would be retrospective and that the common law rule of law is statutes are prospective unless there is clear legislative intent the statute is to apply retroactively.

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

The State of Alaska reserved a 100 foot right of way along the section line in various contracts for sale. The 100 foot right of way was dedicated for use as a public highway pursuant to A.S. 19.10.010. Andersen constructed a 25 foot wide roadway, but cleared nearly the full 100 foot width. The primary question was whether clearing the full 100 foot width was reasonable for the construction of a 25 foot wide road.

Reasonable Use: Andersen claimed that there was an absolute right to clear the entire 100 feet "where there is an expressly reserved and dedicated defined highway right-of-way...." At 286. The Court found the reference to width in the reservation to be 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.'" At 287. It interpreted the legislative intent of the dedication language to only dedicate the land necessary for the use of the highway, essentially the width of the highway and area necessary to construct it. Therefore Andersen could only make reasonable use of the right-of-way. As a factual matter, Andersen's use was not found to be reasonable.

In footnote 10, page 287, the court contrasted the results in this case with Wessells v. State Dept. of Highways, 562 P.2d 1042 (1977) by stating "although grant of an easement should be interpreted according to the reasonable expectation of the parties, it is not reasonable to think parties intended extensive destruction of the property."

Trespass Damages: Since the Court found the use was not reasonable, Andersen's clearing of the full width constituted trespass. Under A.S. 09.45.730 a trespassory cutting of timber makes the trespasser liable for 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.

At 289 (citations omitted).

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

This case addresses the right to use a section line easement dedicated for highway purposes to construct a powerline. The Court found that 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". At 129.

Concerning the use of highway rights-of-way for construction of electric lines, the Alaska Supreme Court identified at least four different approaches used in different jurisdictions:

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 withinthe 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 impermissable additional burden on the servient estate.

In adopting rule 1 above, the Court still found that an unused reservation allowed for lesser uses of that reservation, such as a powerline, even though the section line easement was not being used for a highway. In dicta the Court recognized telephone lines as another incidental use. At 129. Footnote 5, page 129, leaves room to argue for 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").

5. 0.958 Acres, More or Less (Parrish) v. State, 762 P.2d 96 (1988), modified 769 P.2d 990 (1989).

Parrishes owned an 80 acre tract bounded by Peger Road on the east and a section line on the north. The section line had an undeveloped 33 foot section line easement reservation. Parrishes subdivided the property into four 20 acre parcels through the waiver of subdivision process and ultimately owned all but 10 acres on the northeast corner of the property. The State of Alaska condemned a 100 foot wide strip of land adjacent to the section line for a controlled access highway, which precluded Parrishes right to use the section line easement.

Parrishes disputed the compensation, claiming the State was required to pay for their lost of direct access to the section line easement and that the taking damaged their remainder property due to the loss of access. The trial court denied their right of direct access, awarded nominal damages for the land encumbered by the section line easement and denied damages to the remainder. Parrishes appealed.

Direct Access: Parrishes claimed a right of direct access to the section line easement. In ruling against them, the Supreme Court stated:

"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 if ownership is limited to a "right of *reasonable* access." This rule is in accord with that adopted by a majority of jurisdictions.
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> 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 if Parrishes remaining access was unreasonable would they be entitled to compensation for their loss of access to the section line.

The Supreme Court went on to say 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." At page 100.

Nominal Damages: The award of nominal damages for the land subject to the section line easement was affirmed. Only if Parrishes could prove that actual damages rather than nominal damages should be paid without a showing of special value, or that special value existed, would they be entitled to other than

nominal damages. They failed to raise the issue that actual damages were required, and did not show special value (mineral or resource rights) existed. The court found nominal damages were appropriate for the underlying fee interest absent any special value.

Reasonable Access: In remanding the case to the trial court to determine if the Parrishes' remaining access after the taking was reasonable, the Supreme Court enunciated the necessity to perform:

> ... 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. In this case, the superior court erred by determining that remaining access was reasonable without finding and taking into account the highest and best use of the property. At page 101.

Common Law Dedication: One additional issue was the existence of a 25 foot wide easement along the southerly boundary of the property. 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).