

**Girves
v.
Kenai Peninsula Borough**

536 P.2d 1221 (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.