November 13,

Al Carson
Div. Research and
Development
D.N.R.

BRIEFING PAPER ON HAUL ROAD OFF-ROAD-VEHICLE POLICY

PURPOSE

The purpose of this briefing paper is to discuss the BLM draft off-road vehicle (ORV) plan for the haul road, the application of R.S road rights-of-way requests by the Department of Transportation Public Facilities, and the Governor's stated position on ORV's within the 5 mile haul road corridor.

BACKGROUND

During the last session of the Alaska State Legislature there was considerable interest and legislative activity concerning management of the haul road north of the Yukon River. The House and the Senate both passed bills to open the haul road to public use. There was a discrepancy in the haul road opening date in the house and the senate bills. As a result, the Governor returned both bills without his signature. Governor Hammond stated that it was his policy to adminis-

tratively implement the intent of the bills passed by the House and the Senate. As a result of that decision, various state agencies with authorities and responsibilities impacted by the change have organized themselves into a working team to implement the Governor's policy.

The Department of Natural Resources was designated as having lead for the haul road off-road-vehicle policy. Since the haul road right-of-way is surrounded by federally-owned land, a major component in regulating off-road-vehicle use will be the Bureau of Land Management's off-road-vehicle plan. The draft ORV plan was submitted to key state agencies for a preliminary review during the week of November 3-7, 1980. Review by these state agencies has identified two significant issues requiring attention at this time:

(1) Page 6 of the ORV draft plan states "Existing trail system State of Alaska (R.S. 2477). R.S. 2477 was a federal statute of 1866 that granted rights-of-way to the State of Alaska for the construction of highways over public lands not reserved for public uses. Although this act was repealed by the Federal Land Policy and Management Act of 1976, R.S. 2477 rights-of-way established prior to the repeal are claimed by the State of Alaska as public rights-of-way. Specific R.S. 2477 rights-of-way crossing the utility corridor (totaling approximately 520 miles of public access roads) have been taken into account in this implementation plan. These rights of way are described in section 2.2, designated vehicle routes."

Section 2.2 of the ORV draft plan states the following "state trails: The State of Alaska claims certain trails in the utility corridor as R.S. 2477 state rights-of-way, and therefore is responsible for their management. Most of these trails are suitable for winter use only. Persons interested in using these state right-of-way trails should contact the Alaska Department of Transportation and Public Facilities for specific information and use limitations. The following state rights-of-way are designated available for vehicle use, subject to other federal, state and local limitations." There follows a list of 16 specific trails that BLM acknowledges have been selected by the State of Alaska under R.S. 2477.

Review of the ORV draft plan indicates that BLM has acknowledged the legitimacy of the state's claims for rights-of-way under R.S. 2477 and is clearly stepping aside to allow the state to establish their own limitations on the vehicle use on those trails. This raises at least two significant issues:

a. What is the legal basis for the State of Alaska to be able to lay down requirements to protect and use the five mile corridor surrounding the haul road as stated in the Governor's haul road policy?

b. What are the political implications for the State of Alaska establishing some sort of a regulatory mechanism for controlling ORV use of these trails and roads on "our" R.S. 2477 rights-of-ways?

(2) The Governor's statement on off-road-vehicles says he will introduce legislation which will prohibit ORV use on land within five miles of the road, except for the necessary access to mineral claims. The BLM ORV plan is not consistent with the Governor's plans.

RECOMMENDATIONS

These are the actions that state agency representatives will need to take in order for the state to respond to BLM with a coordinated and unified voice on these two issues.

1. State agencies and the Governor's office need to agree upon how the State of Alaska wants BLM to treat Alaska Department of Transportation and Public Facilities requests for rights-of-ways under R.S. 2477 in their draft ORV plan. Subsidiary issues are discussed below

i. It will be necessary to have a legal analysis and assessment on the probability of the state's position with respect to 2477 prevailing in a court suit. A likely scenario for

this court suit would be a third party suing BLM on the grounds that BLM has not effectively enforced FLPMA.

ii. There needs to be an assessment of the implications of this R.S. 2477 issue in light of the recently passed (d)(2) bill. Sec. 1112(a) of that bill says "The State of Alaska shall have the authority to limit access, impose restrictions and impose tolls, notwithstanding any provision of federal law." This is in in effect so long as the haul road is "closed to public use".

iii. There needs to be a detailed discussion regarding the advantages and disadvantages for the state to assert the existance of right-of-ways under R.S. 2477 which connect to the haul road.

iv. There needs to be agreement on what state agency has authority and responsibility for administering DOT-PF's R.S. 2477 rights-of-way and the Governor's O.R.D. policy.

2. State agencies and the Governor's Office need to agree on what they want BLM to do about the fact that their ORV plan isn't consistent with the Governor's plans.

MEMORANDUM State of Alaska

RECEIVED
OCT 27 1980
D.O.T. & P.F.
RIGHT OF WAY
ANCHORAGE

TO: Hugh N. Williams
Deputy Chief
DOT/PF
Juneau

DATE: Octobe 6, 1980

FILE NO:

TELEPHONE NO:

FROM: Ross A. Kopperud
Assistant Attorney General

SUBJECT: Sectionline Right-of-Way

We have done a cursory review of the opinion of the Deputy Solicitor of the Department of Interior with reference to RS 2477. RS 2477 is generally the source of sectionline rights-of-way in Alaska and other states, but may also extend to non-sectionline roads as well if such a road were used by the public over the unreserved, unappropriated public lands of the United States of America.

We are not in agreement with the Solicitor's opinion principally because he indicated that the law in this area is confusing and that the Statute is ambiguous. Although there has been much litigation in this area, the law is relatively clear.

It is our belief that existing and developing law in the area of sectionline rights-of-way in Alaska will cover many of the issues raised in the Solicitor's opinion. Therefore, it is our position that sectionline rights-of-way do exist across the lands of the United States of America in Alaska if the land was unreserved, unappropriated public lands of the United States after April 6, 1923, when the Territory of Alaska accepted the RS 2477 right-of-way grant by enacting 19 SLA 1923.

Attached to this memo is a series of documents, including a 1969 opinion of the Attorney General No. 7; an Alaska Supreme Court opinion, entitled Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975); a vacated opinion of the Attorney General; and lastly a portion of a recent brief entitled Miller/M-B v. State. The Miller/M-B case is the latest analysis of sectionline rights-of-way that I am aware of. These attachments should give you a good understanding of the present state of sectionline right-of-way law in Alaska. Please keep in mind that there are other Alaska cases and decisions on sectionline rights-of-way that I have not included.

If I can be of further assistance, please contact me

STATE OF ALASKA

KEITH H. MILLER, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH

308 K STREET, SUITE 105
ANCHORAGE 99501

December 18, 1969

1969 Opinions of the
Attorney General No. 7

Mr. F. J. Keenan, Director
Division of Lands
Department of Natural Resources
Anchorage, Alaska 99501

Section Line Dedications for
Construction of Highways

Dear Mr. Keenan:

Reference is made to your request for an opinion concerning the existence of a right-of-way for construction of highways along section lines in the state.

It is our opinion, subject to the exceptions herein noted, that such a right-of-way does exist along every section line in the State of Alaska. In reaching this conclusion we rely upon the following points:

(1) Congress by Act of July 26, 1866, granted the right-of-way for construction of highways over unreserved public lands.1/ The operation of this Act within the State is well recognized,2/ and it provides as follows:

1/ Act of July 26, 1866, 14 Stat. 253, 43 U.S.C.A. 932 (1964) RS Sec. 2477.

2/ Hamerly v. Denton, 359 P.2d 121 (Alaska 1961). See also: Mercer v. Yutan Construction Company, 420 P.2d 323 (Alaska 1966); Berger v. Ohlson, 9 Alaska 389 (1939); Clark v. Taylor, 9 Alaska 298 (1938); United States v. Rogge, 10 Alaska 130 (1941); State v. Fowler, 1 Alaska LJ No. 4, p. 7, Superior Court, Fourth Judicial District (Alaska 1962); Pinkerton v. Yates, Civil Action No. 62-237, Superior Court, Fourth Judicial District (Alaska 1963).

> The right-of-way for the construction of highways over public lands not reserved for public uses is hereby granted.

(2) This grant of 1866 constitutes a standing offer of a free right-of-way over the public domain.3/ The grant is not effective, however, until the offer is accepted.4/

(3) In Hamerly v. Denton, supra note 2, the Supreme Court of Alaska stated the general rule regarding acceptance of this federal grant saying at page 123:

> ... 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. (Emphasis added.) 5/

(4) In 1923 the territorial legislature enacted Chapter 19 SLA, which provided as follows:

> Section 1. A tract of 4 rods wide between each section of land in the Territory of Alaska is hereby dedicated for use as public highways, the section line being the center of said highway. But if such highway be vacated by any competent authority, the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey. (Approved Apr. 6, 1923)

3/ Streeter v. Stalnaker, 61 Neb. 205, 85 NW 47 (1901), and Town of Rolling v. Emrich, 122 Wis. 134, 99 NW 464 (1904); See also 23 Am.Jur.2d Dedication, § 15.

4/ Hamerly v. Denton, supra note 2; Lovelace v. Hightower, 50 N.M. 50, 168 P.2d 864, (1946); Koloen v. Pilot Mound TP, 33 N.D. 529, 157 NW 672, (1916); Kirk v. Schultz, 63 Ida. 278, 119 P.2d 266, (1941)

5/ See also Koloen v. Pilot Mound TP, supra note 4; and Kirk v. Schultz, supra note 4.

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This Act was included in the 1933 compilation of laws as Sec. 1721 CLA 1933; however, it was not included in ACLA 1949, and therefore was repealed on January 18, 1949.6/

In 1951 the territorial legislature enacted Chapter 123 SLA 1951, which provided as follows:

> Section 1. A tract 100 feet wide between each section of land owned by the Territory of Alaska or acquired from the Territory, is hereby dedicated for use as public highways, a section line being the center of said highway. But if such highway shall be vacated by any competent authority the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey. (Approved March 26, 1951) 7/

In 1953 the territorial legislature enacted Chapter 35 SLA 1953, which provides as follows:

> Section 1. Ch. 123 Session Laws of Alaska 1951 is hereby amended to read as follows:
>
> Section 1. A tract 100 feet wide between each section of land owned by the Territory of Alaska, or acquired from the Territory, and a tract 4 rods wide between all other sections in the Territory, is hereby dedicated for use as public highways, the section line being the center of said right-of-way. But if such highway shall be vacated by any competent authority the title to the respective

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6/ Ch. 1 SLA 1949 provides in part that "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 repealed."

7/ This was a reenactment of the 1923 statute; however, in its amended form it applied only to lands "owned by" or "acquired from" the territory, and the width of the right-of-way was increased to 100 feet.

continued

> strips shall inure to the owner of the tract of which it formed a part by the original survey. (Approved March 21, 1953 8/

(5) The foregoing legislative acts clearly establish a section line right-of-way on all land owned by or acquired from the State or Territory while the legislation was in force. In our opinion, the 1923 and 1953 acts also express the legislature's intent to accept the standing federal right-of-way offer contained in the Act of July 26, 1866.

There is no requirement that the act of acceptance contain a specific reference to the federal offer. In Tholl v. Koles, 65 Kan. 802, 70 P. 881 (1920), the Supreme Court of Kansas discussed legislative acceptance by reference to section lines saying at page 882:

> The congressional act of 1866, as will be observed, is, in language, a present and absolute grant, and the Kansas enactment of 1867 is a positive and unqualified declaration establishing highways on all section lines in Washington county. The general government, in effect, made a standing proposal, a present grant, of any portion of its public land not reserved for public purposes for highways, and the state accepted the proposal and grant by establishing highways and fixing their location over public lands in Washington county. The act of the legislature did not specifically refer to the congressional grants, nor declare in terms that it constituted an acceptance, but we cannot assume that the legislature was ignorant of the grant, or unwilling to accept it in behalf of the state for highways. The law of congress

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8/ With this amendment the statute once again applied to both territorial and federal lands, and except for the increased width of the right-of-way on territorial lands, the statute's application was identical to the original 1923 statute. See A.S. 19.10.010 for present codification.

continued

> giving a right-of-way for highway purposes over the public lands in Washington county was in force when the legislature acted, and it was competent for it to take advantage of that law, and the general terms employed by it are sufficiently broad and inclusive to constitute an acceptance. (Emphasis added.)

Other jurisdictions have enacted similar legislation, and there is abundant authority to support acceptance by legislative reference to section lines.9/

The Alaska statutes employ the phrase "is hereby dedicated", and we recognize that this phrase is not normally used as a term of acceptance. Nevertheless, the language is not inappropriate where a legislative body is seeking to accept the federal offer, while at the same time making a dedication of land it already owns.10/

Furthermore, in attempting to construe these statutes, it is presumed that the legislature acted with full knowledge of existing statutes relating to the same subject,11/ and that it:

9/ Costain v. Turner, 36 NW 2d 382 (S.D. 1949); Pederson v. Canton TP, 34 NW 2d 172 (S.D. 1948); Wells v. Pennington County, 2 S.D. 1, 48 NW 305, (1891); Walbridge v. Board of Com'rs of Russell County, 74 Kans. 341, 86 P. 473, (1906); Korf v. Itten, 64 Colo. 3, 169 P. 148, (1917).

10/ See 23 Am.Jr. 2 Dedication § 41, where it is stated:

> Technically, offer and acceptance are independent acts. Sometimes, however, the offer and the acceptance are so intimately involved in the same acts or circumstances that the necessity and the fact of the acceptance are somewhat obscured, as where the dedication is made by some governmental agency, the property already being public in ownership, or where the dedication is by statutory proceedings, ...

11/ United States v. Rogge, supra note 2.

continued

> ... had, and acted with respect to, full knowledge and information as to the subject matter of the statute and the existing conditions and relevant facts relating thereto, as to prior and existing law and legislation on the subject of the statute and the existing condition thereof, as to the judicial decisions with respect to such prior and existing law and legislation, and as to the construction placed on the previous law by executive officers acting under it; and a legislative judgment is presumed to be supported by facts known to the legislature, unless facts judicially known or proved preclude that possibility. (82 C.J.S. 544 § 316)

The statutes of 1923 and 1953 purport to act upon all section lines in the territory. Such legislation affecting land not owned by the territory would have been in contravention of 48 U.S.C.A. 77 and invalid were it anything other than an acceptance of the Federal Grant of 1866.12/

The legislature is presumed to have known the law, and to have intended a valid act, and it follows that these statutes were intended as an acceptance of the federal offer.

(6) Like the standing federal offer, the Alaska statutes are continuous in their operation, and they apply to "each" section of land in the state as it becomes eligible for section line dedication. Public lands which come open through cancellation of an existing withdrawal, reservation, or entry, and subsequent acquisitions by the territory (or state), are all subject to the right-of-way.

(7) Our conclusion that a right-of-way for use as public highways attaches to every section line in the State, is subject to certain qualifications:

12/ 48 U.S.C.A. 77 provides in part that: "That legislative power of the territory of Alaska shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; ***."

continued

a. Acceptance under the Act of 1866 can operate only upon "public lands, not reserved for public uses". Consequently, if prior to the date of acceptance there has been a withdrawal or reservation of the land by the federal government, or a valid homestead or other entry by an individual, then the particular tract is not subject to the section line dedication.13/ (However, once there has been an acceptance, the dedication is then complete, and will not be affected by subsequent reservations, conveyances or legislation.)14/

b. The public lands must be surveyed and section lines ascertained before there can be a complete dedication and acceptance of the federal offer.15/

c. The dedication of territorial or state lands does not apply to those tracts which were acquired by the territory and subsequently passed to private ownership during periods in which the legislative dedication was not in effect; that is, prior to April 6, 1923, and between January 18, 1949 and March 26, 1951.

13/ Hamerly v. Denton, supra note 2; Bennett County S.D. v. U.S., 294 F.2d 8 (1968); Korf v. Itten, supra note 9; Stofferman v. Okanogon County, 76 Wash. 265, 136 P.484, (1913); and Leac v. Manhart, 102 Colo. 129, 77 P.2d 652 (1938).

14/ Huffman v. Board of Supervisors of West Bay TP, 47 N.D. 217, 182 NW 459, (1921); Wells v. Pennington, supra note 9; and Lovelace v. Hightower, supra note 4; Duffield v. Ashurst, 12 Ariz. 360, 100 P. 820, (1909), appeal dismissed 225 U.S. 697 (1911).

* 15/ Note, however, that the Alaska statutes apply to each section line in the state. Thus, where protracted surveys have been approved, and the effective date thereof published in the Federal Register, then a section line right-of-way attaches to the protracted section line subject to subsequent conformation with the official public land surveys

continued

d. Acceptance of the federal grant applies only to those lands which were "public lands not reserved for public uses" during periods in which the legislative acceptance was in effect; that is, between April 6, 1923, and January 18, 1949, and after March 21, 1953.

In summary, each surveyed section in the state is subject to a section line right-of-way for construction of highways if:

1. It was owned by or acquired from the Territory (or State) of Alaska at any time between April 6, 1923, and January 18, 1949, or at any time after March 26, 1951, or;

2. It was unreserved public land at any time between April 6, 1923, and January 18, 1949, or at any time after March 21, 1953.

The width of the section line reservation is four rods (2 rods on either side of the section line) as to:

1. Dedications of territorial land prior to January 18, 1949, and;

2. Dedications of federal land at any time.

The width of the reservation is 100 feet (50 feet on either side of the section line) for dedications of state or territorial land after March 26, 1951.16/

Opinion No. 11, 1962 Opinions of the Alaska Attorney General, to the extent it is inconsistent with the views expressed herein, is disapproved.

16/ For further discussion of section line right-of-way width see Opinion No. 29, 1960 Opinions of the Alaska Attorney General.

Very truly yours

G. KENT EDWARDS
ATTORNEY GENERAL

By: John K. Norman
John K. Norman
Assistant Attorney General

GKE:JKN:bl

cc: The Honorable Keith H. Miller
Governor for the State of Alaska

The Honorable Robert L. Beardsley
Commissioner, Department of Highways

The Honorable Thomas E. Kelly
Commissioner, Department of Natural Resources

Irene GIRVES, Appellant,
v.
KENAI PENINSULA BOROUGH, Appellee.
No. 2015.

Supreme Court of Alaska.
June 13, 1975.

Suit was brought by property homesteader against borough, which constructed road along northern boundary line, for alleged wrongful trespass. The Superior Court, Third Judicial District, Anchorage, James A. Hanson, J., entered judgment against plaintiff, and plaintiff appealed. The Supreme Court, Connor, J., held that borough, which possessed express power to "establish, maintain and operate" school, implicitly possessed power to establish access to site as well, that territory or state had power to claim federal grant right-of-way for construction of highway over public land and had done so, but that borough was not entitled to award of attorney's fee.

Affirmed in part and reversed in part.

Fitzgerald, J., did not participate.

1. Trial ⊂=273, 279

Rule which provides that no party may assign as error the giving or failure to give instruction unless he objects thereto before jury retires to consider its verdict, stating distinctly matter to which he objects and grounds of his objection, is intended to insure that trial court is clearly made aware of precise nature of alleged error. Rules of Civil Procedure, rule 51(a).

2. Trial ⊂=279

In suit brought by property homesteader against borough for alleged wrongful trespass, purpose behind rule, which provides that no party may assign as error giving or failure to give instruction unless objection is made before jury retires, was realized, despite alleged failure of homesteader to specify grounds for objecting to court's refusal to give requested instruction, where prior to court's decision regarding instructions homesteader argued at great length her contentions regarding applicable law which formed subject matter of requested instruction. Rules of Civil Procedure, rule 51(a).

3. Municipal Corporations ⊂=59

Insofar as municipal corporations possess implied powers, such powers are to be strictly construed against entity claiming them.

4. Municipal Corporations ⊂=59

Boroughs possess implied powers with regard to education to extent that they are clearly necessary to borough's exercise of express powers.

5. Schools and School Districts ⊂=57

Borough, which possessed express powers to "establish, maintain and operate" school, implicitly possessed power to establish access to school site by means of constructing road. AS 07.15.330(a).

6. Trespass ⊂=46(1)

Record in suit brought by property homesteader against borough, which constructed road along northern boundary line, for alleged wrongful trespass, supported finding that road did provide access to school.

7. Public Lands ⊂=64

Absence of express reservation of easement in homesteaded property did not preclude borough, which constructed road along northern boundary of homestead to provide access to school, from showing that right-of-way was established prior to homestead.

8. Public Lands ⊂=64

Although power to dispose of primary interest in soil was not delegated to territorial legislature and in fact was expressly denied territory, territorial legislature had power to accept right-of-way granted by federal statute granting right-of-way for construction of highways over public lands not reserved for public uses. 43 U.S.C.A. § 932; 48 U.S.C.A. § 77.

9. Public Lands ⊂=64

In determining whether territorial legislature accepted grant provided by federal statute of right-of-way for construction of highways over public lands not reserved for public uses in statute which did not expressly refer to such grant, Supreme Court could not assume that legislature was unaware of grant or unwilling to accept it in behalf of territory for highways. 43 U.S.C.A. § 932; AS 19.10.010.

10. Public Lands ⊂=64

In order to "accept" federal government's dedication of rights-of-way, all that is needed to complete transfer is positive act by state or territory which clearly manifests intent to accept offer. 43 U.S.C.A. § 932.

11. Public Lands ⊂=64

Territorial legislature's enactment of statute providing for dedication of four-rod tract along all section lines in territory was positive act manifesting legislature's intent to accept federal grant of right-of-way for construction of highway over public lands not reserved for public uses. 43 U.S.C.A. § 932; AS 19.10.010.

12. Appeal and Error ⊂=984(5)

Supreme Court's review of attorney's fee awards is limited to determining whether trial court has exceeded bounds of wide discretion vested in it and award will be overturned only if manifestly unreasonable.

13. Costs ⊂=172

Although judgment in suit brought by property homesteader against borough, which constructed road along northern boundary line, for alleged wrongful trespass was adverse to homesteader, where homesteader relied on attorney general's opinion and by pursuing claim litigated important public questions concerning implied powers of borough governments as well as interpretation of public laws relating to rights-of-way, borough was not entitled to award of attorney's fee.

Denis R. Lazarus, Anchorage, for appellant.

Kenneth P. Jacobus of Hughes, Thorsness, Lowe, Gantz & Powell, Anchorage, for appellee.

Before RABINOWITZ, C. J., and CONNOR, ERWIN and BOOCHEVER, JJ.

OPINION

CONNOR, Justice.

This appeal presents questions concerning the Kenai Peninsula Borough's power and right, if any, to construct a road on property homesteaded by appellant, without providing compensation to her.

I.

In 1958 appellant, Irene Girves, entered upon a homestead, pursuant to a "Notice of Allowance" issued to her by the Department of the Interior. In 1961 she obtained a patent for the property from the United States.

The northern boundary of Girves' property constituted a section line within what is now the Kenai Peninsula Borough. Sometime subsequent to 1961 the Kenai Peninsula Borough constructed a junior high school on the land adjoining this northern boundary line.

Redoubt Drive, prior to construction of the school site, ran along the section line, but terminated approximately one-quarter mile east of the boundary line between appellant's property and the school site. In 1967 the city of Soldotna extended Redoubt Drive west in order to provide access to the school site.

The Kenai Peninsula Borough then constructed a "pad" which, in effect, extended Redoubt Drive for road purposes.[1] Since this road extension rested partially on appellant's property, she brought suit against the borough, seeking damages for its alleged wrongful trespass. At the trial below, the court found that a right-of-way

1. At trial Girves argued that the extended area was not developed for road purposes, but, on appeal, appellant concedes that the project was filled for road purposes.

existed for road purposes along the section line. The jury found that the "pad" constructed by the borough was utilized for road purposes. Girves was awarded nothing, and the borough was awarded $6,500 in attorney's fees.

Girves' appeal from this adverse judgment raises three general issues:

(1) Did the Kenai Peninsula Borough have the power to build a road on appellant's property?

(2) Did a right-of-way exist so that the borough need not compensate appellant for its encroachment on her property?

(3) Was the award to the borough of $6,500 in attorney's fees erroneous?

We shall address each of these questions in turn.

II

Appellant contends generally that, at the time the borough constructed the road, it lacked the power to engage in such activity. Specifically, Girves asserts that the trial judge erred in refusing to give requested Instruction No. 19, which reads as follows:

> "The Court instructs the jury that the law of Alaska provides that second-class boroughs are governments of limited powers, and that second-class boroughs do not have the authority or power to acquire, construct or maintain rights-of-way, roads or streets."

In support of this assertion of error, appellant argues that, at the time of the road construction, the Kenai Peninsula Borough's powers were limited to those enumerated in former AS 07.15.010 et seq. (§ 3.01 et seq., ch. 146, SLA 1961),[2] which did not encompass road-building powers.

The borough initially responds to this claim by arguing that Girves failed at trial to specify her grounds for objecting to the court's refusal to give requested Instruction No. 19. The borough relies on Alaska Civil Rule 51(a) which states, in part:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

[1,2] Civil Rule 51(a) is intended to ensure that a trial judge is clearly made aware of the precise nature of the alleged error.[3] In the present case we find that prior to the court's decision regarding instructions, appellant had argued, at great length, her contentions regarding the applicable law. Since the trial judge was made fully cognizant of appellant's reasons for the proposed instruction, the purpose for Civil Rule 51(a) has been realized.

The borough also seeks to overcome appellant's claim of error on substantive grounds. It argues, generally, that municipal governments possess implied powers which arise from or are essential to the powers and purposes which are expressly granted.[4] Specifically, the borough asserts that the educational powers conferred upon the borough by former AS 07.15.330(a) necessarily imply the power to provide road access to school buildings. That statute, which was operative at the time the borough constructed the road, provided:

> "(a) Each organized borough constitutes a borough school district and the first and second class borough shall establish, maintain, and operate a system of public schools on an areawide basis." [5]

2. Title 7 was repealed in 1972 and this section was superceded at that time by § 2, ch. 118, SLA 1972, now found in AS 29.48.030.

3. Saxton v. Harris, 395 P.2d 71, 73 (Alaska 1964).

4. *See generally* 2 McQuillan, Municipal Corporations, Section 10.12 at 765 (3d ed. 1966).

5. *Compare:* As 29.33.060 presently provides: "Each borough constitutes a borough school district and establishes, maintains, and operates a system of public schools on an areawide basis as provided in AS 14.14.060."

[3, 4] We recognize that insofar as municipal corporations do possess implied powers, such powers are to be strictly construed against the entity claiming them.[6] Nevertheless, we acknowledge that boroughs possess implied powers with regard to education to the extent that they are clearly necessary to the borough's exercise of its express powers in this regard.[7]

At the time that this road project was built, the Kenai Peninsula Borough possessed the express power to "establish, maintain and operate" schools within its borders.[8] In addition, both the state and local school districts have, and did then have, certain express responsibilities concerning the administration, supervision, operation and subcontracting of transportation systems for pupils.[9] Other states have recognized that school districts possess the power to construct transportation related facilities.[10]

[5] It is apparent that a school which is inaccessible to transportation would have little or no value. We conclude, therefore, that, since the Kenai Peninsula Borough possessed the express power to "establish, maintain and operate" the school, it implicitly possessed the power to establish access to the site as well.

[6] Appellant argues that the road project was not intended to provide access to the school. We have reviewed the transcript from the trial court and find that appellant never directly argued this point below. Furthermore, there was extensive collateral testimony which demonstrates that the road did provide access to the school. Appellant's assertion in this regard is simply not supported by the record.

III.

Appellant also argues that the borough had no right to build a road across her property without compensating her for it.

[7] At the outset Girves notes that neither her "Notice of Allowance", nor her patent contained any express reservation of rights-of-way in favor of any public body. However, the absence of an express reservation of easement does not preclude the borough from showing that a right-of-way was established prior to the issuance of these documents.[11]

The borough claims a right-of-way in reliance upon 43 U.S.C. § 932 (1954).[12] That statute provides:

> "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

Girves first contends that neither the territorial nor state governments of Alaska had the power to accept this grant from the United States. She supports this argument by reference to a 1962 Attorney General's opinion.[13] There the state's Attorney General opined that, pursuant to the Alaska Organic Act, 48 U.S.C. § 77 (1952),[14] "[t]he power to 'dispose of pri-

6. *See, e. g.*, Cochran v. City of Nome, 10 Alaska 425, 435 (D.C.Alaska 1944).

7. *See, e. g.*, East End School Dist. No. 2 v. Gaiser-Hill Lumber Co., 184 Ark. 1165, 45 S.W.2d 504, 506 (1932); Cedar Rapids Community School Dist. v. City of Cedar Rapids, 252 Iowa 205, 106 N.W.2d 655, 657 (1960). *See also* Lindsay v. White, 212 Ark. 541, 206 S.W.2d 762, 767 (1947).

8. *See* former AS 07.15.330(a) (repealed 1972).

9. AS 14.09.010.
See Kenai Peninsula Borough v. State, 532 P.2d 1019 (Alaska, 1975).

10. *Cf.* City of Bloomfield v. Davis County Community School Dist., 254 Iowa 960, 119 N.W.2d 909, 912–13 (1963); Austin Independent School Dist. v. City of Sunset Valley, 502 S.W.2d 670, 675 (Tex.1973).

11. State v. Crawford, 7 Ariz.App. 551, 441 P.2d 586, 590 (1968).

12. This statute was orginally enacted in 1866. *See* Act of July 26, 1866, ch. 262, § 8, 14 Stat. 253.

13. 11 Op.Att'y Gen. (Alaska 1962).

14. 48 U.S.C. § 77 provides, in part:
"The legislative power of the Territory of Alaska shall extend to all rightful subjects

mary interests in the soil' was not delegated to the Territorial Legislature and, in fact, such power was expressly denied the Territory." [15] In effect, the Attorney General's 1962 opinion reasoned that, since the territorial legislature could not interfere with the federal government's primary disposal of soil,[16] it was powerless to accept the right-of-way granted in 43 U.S.C. § 932 (1964).

[8] In McGrath v. Kristensen, 340 U.S. 162, 176-78, 71 S.Ct. 224, 95 L.Ed. 173 (1950), Justice Jackson, in a concurring opinion, noted that an Attorney General's opinion may well be erroneous. Indeed, the Alaska Attorney General has expressly rejected the opinion on which appellant seeks to rely.[17] We hold that the 1962 Attorney General's opinion is in error insofar as it concludes that the territorial government of Alaska had no power to accept the right-of-way granted in 43 U.S.C. § 932 (1964).

Alaska's courts have long recognized the operation of 43 U.S.C. § 932 (1964) within the state or territory.[18] Numerous other territories and states, operating under organic and enabling acts forbidding interference with the primary disposal of soil by the United States, have effectively claimed the right-of-way granted under 43 U.S.C. § 932.[19] Appellant has not cited any case law which holds that the "primary disposal of soils" provision in 48 U.S.C. § 77 (1912) prevents, and renders nugatory, the right-of-way granted in 43 U.S.C. § 932 (1964). Under the circumstances, appellant's contention that the territory or state lacked power to claim the federal grant must be rejected.

Girves also argues that Alaska's territorial legislature did not in fact effectively "accept" the grant at any time prior to her lawful entry on the land. Thus, she concludes, the lower court "erred in finding there existed a right-of-way on the section line" between appellant's and appellee's property.

The borough argues that "35 S.L.A.1953 (now AS 19.10.010) constitute[s] the acceptance of the offer to dedicate made in 43 U.S.C.A. § 932 (1964). [Footnote omitted.]" Ch. 35, SLA 1953 provided as follows:

"Section 1. A tract one-hundred feet wide between each section of land owned by the Territory of Alaska, or acquired from the Territory, and a tract four rods wide between all other sections in the Territory, is hereby *dedicated* for use as public highways, the section line being the center of said right-of-way. But if such highway shall be vacated by any competent authority the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey." (emphasis added)

Girves contends that the territorial legislature's "dedication" of a four rod tract along all section lines in the territory "can-

of legislation not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil: . . . ."

15. 11 Op.Att'y Gen. at 3 (Alaska 1962).

16. 48 U.S.C. § 77 (1952).

17. 7 Op.Att'y Gen. 11, 8 (Alaska 1969).

18. *See, e. g.*, Hamerly v. Denton, 359 P.2d 121 (Alaska 1961); Clark v. Taylor, 9 Alaska 208 (D.C.Alaska 1938).

19. *See, e. g.*, Walbridge v. Board of Commissioners, 74 Kan. 341, 86 P. 473 (1906); Hillsboro National Bank v. Ackerman, 48 N.D. 1170, 189 N.W. 657 (1922); Wells v. Pennington County, 2 S.D. 1, 48 N.W. 305 (1891).

The relevant territorial organic acts are as follows:

(1) Kansas, ch. 59, § 24, 10 Stat. 285 (1854);
(2) North Dakota, ch. 56, § 6, 12 Stat. 239 (1861);
(3) South Dakota, ch. 56, § 6, 12 Stat. 239 (1861).

The relevant state enabling acts are as follows:

(1) Kansas, ch. 20, § 3, 12 Stat. 127 (1861);
(2) North Dakota, ch. 180, § 4, 25 Stat. 677 (1889);
(3) South Dakota, ch. 180, § 4, 25 Stat. 677 (1889).

not be deemed an acceptance" of the federal grant contained in 43 U.S.C. § 932 (1964).

In Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961), we held that:

> "[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." [Footnote omitted.]

In *Hamerly* the party claiming the right-of-way sought to do so by proving the existence of a public user. In the present case, the borough in effect claims that the enactment of ch. 35, SLA 1953 was a positive act on the part of an appropriate public authority which clearly manifested an intent to accept the grant in 43 U.S.C. § 932 (1964).

[9] Ch. 35, SLA 1953 did not expressly refer to 43 U.S.C. § 932 (1964). But we cannot assume that the legislature was unaware of the grant or unwilling to accept it in behalf of the territory for highways. Tholl v. Koles, 65 Kan. 802, 70 P. 881, 882 (1902).

[10] Similarly, ch. 35, SLA 1953 did not expressly "accept" the federal government's dedication of rights-of-way. 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, *supra*.[20] 43 U.S.C. § 932 (1964) is in effect, a standing offer from the federal government.[21] All that is needed to complete the transfer is a *positive act* by the state or territory which clearly manifests an intent to accept the offer. Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961).[22]

[11] We hold that the enactment of ch. 35, SLA 1953 was a positive act clearly manifesting the territorial legislature's intent to accept the federal grant. Our conclusion is bolstered by several observations.

First, if the legislature did not intend to accept the federal grant, then the "dedication" contained in ch. 35, SLA 1953 might be in contravention of the "primary disposal of soils" provision contained in 48 U.S.C. § 77 (1952). Since legislatures generally are presumed to know the law and to intend their enactments to be valid, 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. § 932 (1964).

Second, a fundamental maxim in the analogous field of contract law holds that an acceptance may be implied from acts of conduct.[23] 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.

Finally, 43 U.S.C. § 932 (1964) does not make any distinction as to the methods recognized by law for the establishment of highways. Hence highways may be established by any method recognized by law in this state.[24] Dedication is a well recognized method of establishing highways.[25]

20. *See also* Pederson v. Canton Township, 72 S.D. 332, 34 N.W.2d 172, 174 (1948); Costain v. Turner County, 72 S.D. 427, 36 N.W.2d 382, 383 (1949).

21. *See, e. g.*, Mills v. Glasscock, 26 Okl. 123, 110 P. 377, 378 (1910); Wallowa County v. Wade, 43 Or. 253, 72 P. 793, 794 (1903).

22. *Accord:* Wilderness Society v. Morton, 136 U.S.App.D.C. 121, 479 F.2d 842, 882 (1973), cert. denied, 411 U.S. 917, 93 S.Ct. 1550, 36 L.Ed.2d 309.

23. *Cf.* Prokopis v. Prokopis, 519 P.2d 814, 817 n. 5 (Alaska 1974). *See generally* 1 A. Corbin, Contracts § 18, at 39–43, § 77, at 329 (1963).

24. *Accord:* United States v. 9,947.71 Acres of Land, etc., 220 F.Supp. 328, 335 (D.Nev. 1963); Wallowa County v. Wade, 43 Or. 253, 72 P. 793, 795 (1903); Smith v. Mitchell, 21 Wash. 536, 58 P. 667, 668 (1899).

25. *See, e. g.*, Lovelace v. Hightower, 50 N.M. 50, 168 P.2d 864, 867 (1946). *See also* 23 Am.Jur.2d Dedications, § 15, at 14 (2nd ed. 1965).

Thus we conclude that the "dedication" contained in ch. 35, SLA 1953 effectively established the territory's claim to the federal right-of-way grant.

IV.

Finally, Girves contends that Judge Hanson erred in awarding $6,500 in attorney's fees to the Kenai Peninsula Borough. The claim of error is predicated on the assertion that the court based its award on the "percentage method" of determining attorney's fees, despite the fact that the prevailing party (the borough) did not recover a money judgment.[26]

Following the judgment in its favor, the borough requested $15,470.25 in attorney's fees. A supporting affidavit asserted that the borough's attorneys had spent over 400 hours of legal time on this case. Mrs. Girves opposed the request on the grounds that the amount requested was insufficiently documented and unconscionable.

Judge Hanson listened to oral argument regarding the merits of the requested amount of attorney's fees, and then took the matter under submission. Later he issued a memorandum order awarding the borough $6,500, instead of the $15,470.25 requested.

[12] Our review of attorney's fee awards is limited to determining whether the trial court has exceeded the bounds of the wide discretion vested in it.[27] We will only overturn an award if it is manifestly unreasonable.[28]

[13] Under normal circumstances, we would affirm the award because it would be well within the confines of Civil Rule 82. But we are impressed with certain distinct aspects of this case which render it, in our opinion, unfair to impose attorney's fees upon appellant. This case concerns the implied powers of borough governments, as well as interpretations of public laws relating to rights-of-way. Appellant relied upon a 1962 Attorney General's opinion in support of her legal contentions although, as we have mentioned, that opinion, was negated by a later one in 1969.

We think that appellant, faced with these conflicting opinions, properly pursued her claims. In so doing she litigated several important public questions. She should not be penalized for having done this. We hold that it was error to award an attorney's fee to appellee and to that extent we reverse the judgment below.

Affirmed in part, reversed in part.

FITZGERALD, J., did not participate.

26. Alaska Civil Rule 82(a) provides, in part:

"(1) Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the party recovering any money judgment therein, as part of the costs of the action allowed by law:

ATTORNEY'S FEES IN AVERAGE CASES

	Contested	Without Trial	Non-Contested
First $2,000	25%	20%	15%
Next $3,000	20%	15%	12.5%
Next $5,000	15%	12.5%	10%
Over $10,000	10%	7.5%	5%

Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court as a part of the costs of the action, in its discretion, in a reasonable amount.

(2) In actions where the money judgment is not an accurate criteria for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered."

27. *See, e. g.*, Malvo v. J. C. Penney Company, Inc., 512 P.2d 575, 586–87 (Alaska 1973).

28.

STATE OF ALASKA

WILLIAM A. EGAN

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL / BOX 2178 — JUNEAU

November 4, 1963

MEMORANDUM

TO: Roscoe E. Bell, Director
Division of Lands
Department of Natural Resources

FROM: David D. Ruskin
Assistant Attorney General

Re: Section line Rights of way.

You have asked this office whether the Division of Lands may abandon Section line rights of way located on state lands which are not needed for highway purposes. The section line right of way was created by AS 19.10.010. That statute states that "If the highway is vacated, title to the strip inures to the owner of the tract of which it formed a part of the original survey."

The question is not whether this land may be vacated but which state agency has the authority to vacate this right of way. A liberal view of AS 38.05.035 might indicate that the Director of the Division of Lands has the power to dispose of excess state land. However, AS 19.05.070 is more explicit. That statute states:

> "Vacating lands or rights in land. The department may vacate land, or part of it, or rights in land acquired for highway purposes, by executing and filing a deed in the appropriate recording district. Upon vacating, title reverts to the persons, heirs, successors, or assigns in whom it was vested at the time of the taking. The department may transfer land considered no longer necessary for highway purposes to the Department of Natural Resources for disposal. The proceeds of disposal by the Department of Natural Resources shall be credited to the funds from which the purchase was made originally."

Our interpretation of that statute is that the Department of Highways has jurisdiction over highway rights of way. The Department of Highways may dispose of excess land by vacating such land or transferring it to the Department of Natural Resources.

The proper procedure in this case would be for the Department of Highways to vacate the unneeded rights of way in State lands.

GEORGE N. HAINES
ATTORNEY GENERAL

By David B. Ruskin
David B. Ruskin
Assistant Attorney General

DBR/jhb

cc - Richard McVeigh, Anchorage
D.A. McKinnon, Juneau
Phil Holdsworth, Juneau

II

Section Line Rights-of-Way

The State feels that it has demonstrated that it has acquired a 100-foot right-of-way for both Muldoon and DeBarr Roads in accordance with the principles of law discussed above. At the very least, however, both DeBarr Road, which is constructed on a section line, and the section line abutting plaintiffs' property on the west, are imbued with a 66-foot right-of-way by virtue of 43 U.S.C. § 932 (repealed 1976) and 19 SLA 1923.

The State agrees with the plaintiffs that this issue is susceptible to a motion for summary judgment because there are no contested issues of fact. The relevant facts for this motion are:

1.	Congressional Act granting rights-of-way over public lands for construction of highways passed.	1866
2.	Official U.S. Survey setting section lines of subject property	1917
3.	Territorial acceptance of 1866 grant rights-of-way, 19 SLA 1923.	April 16, 1923

43 U.S.C. § 932 was repealed by the Act of October 21, 1976, PL 94-579, 90 Stat. 2744. 43 U.S.C. § 1701 et seq. Section 701(a) of the 1976 Act provided:

> Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act. (October 21, 1976) (Emphasis added.)

Accordingly, if the section line rights-of-way in question were established prior to October 21, 1976, they were not affected by the repeal of 43 U.S.C. § 932.

IIa

Authority of Territory to Accept Right-of-Way

The issue relating to section line rights-of-way was considered by the State Supreme Court at length in the

E[illegible]N. [illegible]VILES,
[illegible]ORE, HAYES
[illegible]ITMAN, INC.
ATTORNEYS AT LAW
SUITE 400
[illegible]EST 3RD AVENUE
[illegible]RAGE, ALASKA
[illegible]) 279-3581

case of Girves v. Kenai Peninsula Borough, 536 P.2d 1221.

In this case, the Supreme Court held inter alia:

> Appellant also argues that the borough had no right to build a road across her property without compensating her for it.
>
> At the outset Girves notes that neither her "Notice of Allowance", nor her patent contained any express reservation of rights-of-way in favor of any public body. However, the absence of an express reservation of easement does not preclude the borough from showing that a right-of-way was established prior to the issuance of these documents.
>
> The borough claims a right-of-way in reliance upon 43 U.S.C. § 932 (1964).
>
> That statute provides:
>
> > "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."
>
> Girves first contends that neither the territorial nor state governments of Alaska had the power to accept this grant from the United States. She supports this argument by reference to a 1962 Attorney General's opinion. There the state's Attorney General opined that, pursuant to the Alaska Organic Act, 48 U.S.C. § 77 (1952) "[t]he power to 'dispose of primary interests in the soil' was not delegated to the Territorial Legislature and, in fact, such power was expressly denied the Territory." In effect, the Attorney General's 1962 opinion reasoned that, since the territorial legislature could not interfere with the federal government's primary disposal of soil, it was powerless to accept the right-of-way granted in 43 U.S.C. § 932 (1964).
>
> In McGrath v. Kristensen, 340 U.S. 162, 176-78, 71 S.Ct. 224, 95 L.Ed. 173 (1950), Justice Jackson, in a concurring opinion, noted that an Attorney General's opinion may well be erroneous. Indeed, the Alaska Attorney General has expressly rejected the opinion on which appellant seeks to rely.
>
> We hold that the 1962 Attorney General's opinion is in error insofar as it concludes that the territorial government of Alaska had no power to accept the right-of-way granted in 43 U.S.C. § 932 (1964).
>
> Alaska's courts have long recognized the operation of 43 U.S.C. § 932 (1964) within the state or territory. Numerous other territories and states, operating under organic and enabling acts forbidding

DELA[illegible] WILES,
[illegible]DO[illegible] HAYES
[illegible] REITMAN, INC.
[illegible] ORNEYS AT LAW
SUITE 400
1007 WEST 3rd AVENUE
A HORAGE, ALASKA
07) 279-3581

interference with the primary disposal of soil by the United States, have effectively claimed the right-of-way granted under 43 U.S.C. § 932. Appellant has not cited any case law which holds that the "primary disposal of soils" provision in 48 U.S.C. § 77 (1912) prevents, and renders nugatory, the right-of-way granted in 43 U.S.C. § 932 (1964). Under the circumstances, appellant's contention that the territory or state lacked power to claim the federal grant must be rejected.

Girves also argues that Alaska's territorial legislature did not in fact effectively "accept" the grant at any time prior to her lawful entry on the land. Thus, she concludes, the lower court "erred in finding there existed a right-of-way on the section line" between appellant's and appellee's property.

The borough argues that "35 S.L.A. 1953 (now AS 19.10.010) constitute[s] the acceptance of the offer to dedicate made in 43 U.S.C.A. § 932 (1964). [Footnote omitted.]" Ch. 35, SLA 1953 provided as follows:

> "Section 1. A tract one hundred feet wide between each section of land owned by the Territory of Alaska, or acquired from the Territory, and a tract four rods wide between all other sections in the Territory, is hereby dedicated for use as public highways, the section line being the center of said right-of-way. But if such highway shall be vacated by any competent authority the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey." (emphasis added)

Girves contends that the territorial legislature's "dedication" of a four rod tract along all section lines in the territory "cannot be deemed an acceptance" of the federal grant contained in 43 U.S.C. § 932 (1964).

In Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961), we held that:

> "[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." [Footnote omitted.]

In Hamerly the party claiming the right-of-way sought to do so by proving the existence of a public user. In the present case, the borough in effect claims that the enactment of ch. 35, SLA 1953 was a positive act on the part of an appropriate public authority which clearly manifested an intent to accept the grant in 43 U.S.C. § 932 (1964).

Ch. 35, SLA 1953 did not expressly refer to 43 U.S.C. § 932 (1964). But we cannot assume that the legislature was unaware of the grant or unwilling to accept it in behalf of the territory for highways. Tholl v. Koles, 65 Kan. 802, 70 P. 881, 882 (1902).

Similarly, ch. 35, SLA 1953 did not expressly "accept" the federal government's dedication of rights-of-way. 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, supra. 43 U.S.C. § 932 (1964) is in effect, a standing offer from the federal government. All that is needed to complete the transfer is a positive act by the state or territory which clearly manifests an intent to accept the offer. Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961).

We hold that the enactment of ch. 35, SLA 1953 was a positive act clearly manifesting the territorial legislature's intent to accept the federal grant. Our conclusion is bolstered by several observations.

First, if the legislature did not intend to accept the federal grant, then the "dedication" contained in ch. 35, SLA 1953 might be in contravention of the "primary disposal of soils" provision contained in 48 U.S.C. § 77 (1952). Since legislatures generally are presumed to know the law and to intend their enactments to be valid, 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. § 932 (1964).

Second, a fundamental maxim in the analogous field of contract law holds that an 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.

Finally, 43 U.S.C. § 932 (1964) does not make any distinction as to the methods recognized by law for the establishment of highways. Hence highways may be established by any method recognized by law in this state. Dedication is a well recognized method of establishing highways.

ELAN ...WILES,
OR... ...AYES
EITMAN, INC.
...ORNEYS AT LAW
SUITE 400
...WEST 3rd AVENUE
... ORAGE, ALASKA
(7) 279-3581

Thus we conclude that the "dedication" contained in ch. 35, SLA 1953 effectively established the territory's claim to the federal right-of-way grant.

536 P.2d at 1224-1227 (Emphasis added.

IIb

The repeal of 19 SLA 1923 by the territorial legislature in 1949 did not vacate the section line rights-of-way already acquired.

Plaintiffs argue that the general repeal passed by the territorial legislature in 1949 had the effect of vacating any section line right-of-way that may have been acquired by the 1923 acceptance of the grant contained in 43 U.S.C. § 932.

In 1947, the Alaska legislature mandated the formation of the Alaska Law Compilation Commission, which was charged with the duty to compile all laws, both territorial and federal, which were in effect in Alaska. 28 SLA 1947. The laws were compiled and published by Bancroft-Whitney Company of San Francisco. The new codification was entitled Alaska Compiled Laws Annotated, 1949, and was published in three volumes.

In 1949, at an extraordinary session called by the Acting Governor prior to the regular session held in 1949, the legislature adopted the Alaska Compiled Laws Annotated, 1949, as the official Code of Alaska. 1 SLA 1949. The Act stated that all statutory provisions contained in the new compilation were reenacted as they appeared in the compilation. The legislature also said that any Acts which had not been incorporated in the compilation were expressly repealed.

For some unknown reason, the territorial legislature's acceptance of the 66-foot right-of-way contained in 19 SLA 1923 was not included in the compilation produced by the Commission. For this reason, 19 SLA 1923 was repealed by the legislature's actions in January of 1949.

In 1951, the territorial legislature reenacted the

CLANEY, WILES, MOORE, HAYES & RI AN, INC. TOR YS AT LAW SUITE 400 7 WEST 3RD AVENUE ANCHORAGE, ALASKA (907) 279-3581

acceptance of the section line rights-of-way over territory "owned by the Territory of Alaska, or acquired from the Territory " 123 SLA 1951.

In 1953, the 1951 Act was amended to include the dedication of four rods, or 66 feet, as a right-of-way between sections in the Territory other than those owned or acquired from the Territory. This legislation, unchanged since 1953, has been codified as AS 19.10.010.

The plaintiffs' argument that the general repeal in 1949 constituted a vacation of the section line rights-of-way is not well taken. The Act passed in 1923 specifically stated that the section line right-of-way was "dedicated for use as public highways." The court, in Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (1975), specifically held that the same language contained in the 1953 Act constituted "a positive act clearly manifesting the territorial legislature's intent to accept the federal grant." 536 P.2d at 1226.

It should be noted that the law as enacted in 1923 specifically stated:

> But if such highway shall be vacated by any competent authority the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey.

19 SLA 1923. (Emphasis added.)

The general repeal of laws not contained in the new compilation by the territorial legislature in 1949 was not intended to, and did not constitute, a vacation of the section line rights-of-way.

While the legislature undoubtedly has plenary power over streets and highways, including the authority to vacate them, Eastborough Corporation v. City of Eastborough, 441 P.2d 891, 894 (Kansas 1968), the mere repeal of the legislature's

DELAN WILES,
OR HAYES
EITMAN, INC.
ATTORNEYS AT LAW
SUITE 400
807 WEST 3RD AVENUE
ANCHORAGE, ALASKA
(907) 279-3581

acceptance of the grant under 43 U.S.C. § 932 does not constitute a vacation of the rights-of-way acquired by such legislation. In general, street or highway cannot be vacated unless it is for the benefit of the public that such action should be taken. Griffith v. C & E Builders, Inc., 200 S.E.2d 874, 876 (Ga. 1973).

There is no cognizable reason why the legislature would seek to vacate section line rights-of-way which had been acquired by the acceptance of the grant given under 43 U.S.C. § 932 by the territorial legislature in 1923. In the absence of an Act which expressly seeks to vacate those rights-of-way, it is submitted that this court should not find the general repealer contained in 1 SLA 1949 as a vacation of the section line rights-of-way.

IIc

Attorney General Opinion No. 7 is consistent with the State's Position.

This conclusion is supported by the State of Alaska Attorney General's Opinion No. 7 dated December 18, 1969, a copy of which is attached hereto. This opinion was a general discussion of section line rights-of-way in the Territory and State of Alska. In this opinion, the Attorney General specifically held:

> In summary, each surveyed section in the state is subject to a section line right-of-way for construction of highways if:
>
> 1. It was owned by or acquired from the Territory (or State) of Alaska at any time between April 6, 1923, and January 18, 1949, or at any time after March 26, 1951, or;
>
> 2. It was unreserved public land at any time between April 6, 1923, and January 18, 1949, or at any time after March 21, 1953.
>
> The width of the section line reservation is four rods (2 rods on either side of the section line) as to:
>
> 1. Dedications of territorial land prior to January 18, 1949, and;

ELAN[illegible] /ILES,
[illegible]RE[illegible] HAYES
[illegible]ITMAN, INC.
SUITE 400
[illegible] WEST 3rd AVENUE
[illegible]ORAGE, ALASKA
[illegible] 279-3581

2. Dedications of federal land at any time.

The width of the reservation is 100 feet (50 feet on either side of the section line) for dedications of state or territorial land after March 26, 1951.

Opinion No. 11, 1962 Opinions of the Alaska Attorney General, to the extent it is inconsistent with the views expressed therein, is disapproved.

7 Op. Att'y. Gen. at 8 (Alaska 1969) (Emphasis added.

In summary, the enactment of 19 SLA 1923 was a full and complete acceptance of the grant of 43 U.S.C. § 932. A general repealer of 1 SLA 1949 did not constitute a vacation of those rights-of-way.

G. INVERSE CONDEMNATION.

Plaintiffs allege that this action constitutes a proceeding in inverse condemnation, seeking damages for property taken.

The State would concur that an action for inverse condemnation would be the appropriate proceeding had any of the plaintiffs' property been taken by the State. However, as has already been established, the defendant acquired by conveyance from the United States of America, a 100-foot right-of-way along Muldoon and DeBarr Roads, and, by acceptance of the grant in 43 U.S.C. § 932 by 19 SLA 1923, a 66-foot right-of-way along the section line which borders plaintiffs' property on the west.

H. SUMMARY.

The State of Alaska has established its right to a 100-foot right-of-way along Muldoon and DeBarr Roads which may be based upon any of three independent grounds: (1 prior to the issuance of the final certificate to plaintiffs' predecessor in interest, the United States had the authority to and did in fact withdraw highway rights-of-way 100 feet in width along the present courses of Muldoon and DeBarr Roads pursuant to PLO 601 and S.O. 2665; (2) prior to the

DELANEY WILES, DOUGLAS, HAYES & REITMAN, INC.
ATTORNEYS AT LAW
SUITE 400
[illegible] WEST 3rd AVENUE
ANCHORAGE, ALASKA
(907) 279-3581