MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities
Statewide Design & Engineering Services Division
Central Region - Right of Way Section

To: See Distribution

From: K. Kim Rice, Chief Right of Way Agent, and Central Region KKR

Re: **Court Order - Summary Judgment**
DOT vs. James R. Bridges d/b/a Grumpy Grandpa's Campground

Attached is a copy of the court order granting the Department's summary judgement, imposing a permanent injunction against Grumpy Grandpa's (on the Park's Highway near Willow) and dismissing the Grumpy Grandpa's counterclaim of nuisance.

Summary This order upholds the following:

1) A pullout is a highway appurtenance and a standard feature of highway design and construction and therefore a reasonable, necessary use of the right of way;

2) An individual holding underlying fee of a highway easement may not place obstructions in a pullout or signs in the right of way and the state has the absolute right to ban signs within the right of way; and

3) The State of Alaska is immune from suit under tort for its discretionary decisions. The state does not have sufficient funds to clean up and monitor every pullout. The decision to clean up a particular pullout is driven in substantial part by budgetary considerations and therefore the department is immune from nuisance claims from the adjacent property owner in regard to maintenance of the pullout.

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Attachment

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT PALMER

STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES, Plaintiff, vs. JAMES R. BRIDGES, d/b/a GRUMPY GRANDPA'S CAMP-GROUND, Defendant.	)	CASE NO. 3PA-99-487 CIV

ORDER

The state has moved for summary judgment as to all claims except for its claim for damages in this case and as to defendant's counterclaim for nuisance. The state requests an injunction barring defendant from interfering with the highway pullout located on his land and from constructing a sign and flagpole in violation of state law within the highway right of way. Defendant opposes the injunction on the grounds that: i) the pullout is not reasonably necessary and so the state has no right to regulate defendant's use of that land; ii) the land on which the sign and flagpole would be located also is not reasonably necessary for the highway; and iii) no

injunction is needed. The court will grant the state's motion as to the pullout because defendant's challenge is not timely, the easement is precisely defined, and the state has met the reasonably necessary requirement. The court will grant the state's motion as to the sign and flagpole by enjoining any sign or flagpole located in the right of way pursuant to AS 19.25.105(d). Finally, the court will dismiss defendant's counterclaim because the state's ability to clean up any particular pullout is governed in substantial part by budgetary considerations and hence is a discretionary function immune from suit.

Factual background

This case primarily involves a highway pullout located largely on defendant's land at mile 81 of the Parks Highway. The land previously was owned by Bill and Gwen Wilfret. On August 9, 1961, the Wilfrets sold an easement to the state granting a right of way for highway purposes. The easement was rather precisely described in the deed, a copy of which is attached as an appendix to this order.

At some time in the late 1960's, the state built the portion of the Parks Highway in the vicinity of Mile 81. According to the uncontradicted report of Dennis Morford, the Regional Traffic Engineer:

> As the highway goes north it crosses several creek drainages, Greys Creek being one. The south bank of the Greys' Creek drainage is quite high. As the highway alignment enters the drainage from the south a large cut in the bank was required to reduce the grade approaching the creek to an acceptable level. This cut resulted in an excess amount of fill material. Typically excess fill material is wasted adjacent to the roadway to form pullouts. Pullouts are normally constructed at locations where it is likely motorists will stop such as scenic viewpoints and fishing streams. Near MP 81 several pullouts were constructed to waste the excess material.

Mr. Morford went on to assert that these pullouts are now used "to provide access for fishing in Greys Creek among other things," an assertion defendant denies. Mr. Morford also stated that pullouts are used as rest stops for motorists, that the pullouts can be left "in an undesirable condition," and that "there is not sufficient maintenance funding to clean up pullouts when it is needed." Finally, he asserted that the pullout in question "has never been an operational problem," that the pullout was acceptably designed from a safety standpoint, and that he could "see no reason why this pullout should not remain as it is. It provides a service to the motoring public."

Defendant and his wife purchased their property in August 1996. Fee to the land underlying the right of way easement was formally transferred to them in March 1997. All but 22 feet of the pullout at issue lies on defendant's land. Defendant constructed a driveway at the south end of

the pullout, and built his house to the east of the highway. He began to notice that people were using the pullout as a toilet and, at least once, to fire weapons.

In May 1997 defendant placed logs and trees in the pullout, in part as a staging area for logs for his home and in part to keep people out of the pullout. After the state Department of Transportation received complaints, he took the logs out. Defendant also constructed a sign for "Grumpy Grandpa's Campground" in the right of way sometime in June. Defendant did not obtain a permit prior to installing the sign, although he moved it to another spot within the right of way after receiving a letter from DOT.

Defendant placed rocks in the pullout in 1998; they were removed by DOT without incident. He then made gravel berms in the pullout in May 1999. When DOT personnel came to remove the berms, he lay down in front of the grader. The state then filed this suit and obtained a preliminary injunction against further interference. DOT removed the berms in August 1999, at which time defendant voluntarily cut down his sign.

Standard of review

Pursuant to Civil Rule 56, the state may be granted summary judgment only if there are no material facts in dispute and the state is entitled to judgment as a matter

of law. The relevant facts must be viewed in a light most favorable to defendant as the non-moving party. Burcinau v. City of Ketchikan, 902 P.2d 817 (Alaska 1995); Wilson v. Pollett, 416 P.2d 381, 383-84 (Alaska 1966).

Analysis

There are three principal issues raised by the state: the allegedly unauthorized obstruction to the highway pullout; the placing of unauthorized signs in the right of way; and defendant's counterclaim for nuisance. The court will address each issue in turn.

The pullout

The state claims that defendant may not obstruct the pullout because it is located within the easement granted the state for highway purposes, and hence the state, not defendant, has the right to control access of the pullout. Defendant responds that the state is entitled to only that portion of the easement which is "reasonably necessary" for highway purposes and that there are issues of fact as to whether this particular pullout is reasonably necessary for highway purposes.

There are at least three difficulties with defendant's response. First, it is untimely. By asserting that the easement does not include the pullout in question, defendant is effectively seeking to recover possession of

that pullout. But the pullout has been in existence since the late 1960's. The property owner at the time had to have had notice of the pullout at that time, since it was openly built on that owner's property and has been in use ever since then. The statute of limitations as to the state's right to build the pullout therefore began to run when the pullout was built. Since more than ten years has passed since that time, defendant's challenge is barred by the statute of limitations set forth in AS 09.10.030.

Second, the doctrine of reasonable necessity only applies to a grant of a right of way which is ambiguous as to the precise amount of land that is to be used for the highway. Anderson v. Edwards, 625 P.2d 282, 286-87 (Alaska 1981). While defendant asserts that the easement here only grants a 200 foot wide stretch of land, the description of the land over which the easement applies is quite detailed, for it sets out the precise boundaries of the easement itself. See the appendix to this order. As such, the reasonable necessity standard does not apply. See Simon v. State of Alaska, No. 5244, Slip Op. at 3 n.5 (Alaska March 3, 2000).

Finally, even if the reasonable necessity standard does apply, the state has demonstrated that this pullout is reasonably necessary, even if the facts are viewed most

favorably to him. Defendant makes two claims in this respect. He argues first that the state lacks any authority whatsoever to build a pullout along the highway. But there can be no question that the term "highway" includes the highway right of way. AS 19.45.001. Perhaps more important, the easement itself included "the appurtenances and privileges thereto incident, for so long as the same shall be used for highway purposes." Pullouts clearly fall within this description.

Second, defendant argues that the state has not shown that this pullout is reasonably necessary for highway purposes. This is incorrect. Defendant does not and cannot deny that the pullout has been used by motorists for many years for a variety of purposes and that it has been properly built according to the applicable safety standards. It also is difficult to credit defendant's claim that there is nothing of particular interest at the location of the pullout, when defendant himself is running a campground there. Finally, the court has some difficulty with defendant's claim that he may challenge the need for a specific pullout within a right of way. As the state points out, there are thousands of pullouts in Alaska, which indicates that pullouts are a standard feature of highway design and construction. As such, including a

pullout in a right of way is considerably more similar to using the subsurface of a right of way to relocate a highway than it is cutting down all of the trees in a right of way when there was no apparent need to do so. Compare Simon, supra, with Anderson, supra.

The state therefore is entitled to summary judgment on its claim that defendant may not place obstructions in the pullout located mostly on defendant's land at or near Mile 81 of the Parks Highway.

The sign and flagpole

The state seeks a declaration that defendant may not construct a sign or flagpole within the highway right of way without first obtaining a permit. Defendant basically repeats his argument that the land on which the flagpole and sign would sit is not reasonably necessary for highway purposes. But this is beside the point, for the applicable law is clear that defendant may not construct any sign within a highway right of way.

AS 19.25 was enacted to protect the safety and scenic values of Alaska's highways. AS 19.25.080. All signs within a highway right of way are flatly prohibited unless they meet one of the exceptions set forth in the statute. AS 19.25.105(d). While advertising signs like that used by defendant were previously authorized under certain

circumstances by AS 19.25.105(e), subsection (e) was repealed by 1998 Ballot Measure No. 5, § 4, eff. Mar. 1, 1999. The state accordingly has an absolute right to ban defendant's sign within the right of way.

Nuisance

Defendant asserts in the alternative that even if the state does have the right to construct the pullout, it has created a nuisance by virtue of the pullout's use as a toilet and, occasionally, for target practice. The state raises a number of objections to defendant's claim, one of which is that that claim is barred by sovereign immunity under AS 09.50.250. This court agrees.

The State of Alaska is immune from suit under tort for its discretionary decisions, but not for its operational decisions. See State Dep't of Transp. & Public Facilities v. Sanders, 944 P.2d 453, 456 (Alaska 1997). One significant factor that has driven the Court's analysis is whether budgetary considerations played a role in the decision; if so, then the action is discretionary, even if it might otherwise arguably be operational. For example, decisions on highway maintenance are operational, State v. Abbott, 498 P.2d 712, 717-22 (Alaska 1972); but decisions regarding dust control on the Dalton Highway are discretionary in substantial part because they are driven

by budgetary constraints. Freeman v. State, 705 P.2d 918, 920 (Alaska 1985). Similarly, the decision whether to install a warning sign is operational, as it involves no real policy considerations, State v. I'Anson, 529 P.2d 188, 192-93 (Alaska 1974); but the decision whether to install a guardrail is discretionary because there is a limited amount of funding available to install guardrails. Industrial Indemnity Co. v. State, 669 P.2d 561 (Alaska 1983).

The state has attached two affidavits which assert without contradiction that the state does not have sufficient funding to clean up every pullout when such cleanup is needed. This entails that the decision whether to clean up a particular pullout is driven in substantial part by budgetary considerations. As such, the decision whether to clean up a pullout is more akin to that of suppressing dust or installing a guardrail in a particular place, and hence is a discretionary decision immune from suit.

Relief

The state requests a permanent injunction against further encroachments in the pullout and against installation of any signs within the highway right of way. Defendant argues that no injunction is needed because he

will abide by the decision of the court. While defendant's willingness to do so is laudatory, the court believes that an injunction is needed to ensure that all parties understand precisely what the law is and what defendant may or may not do.

For the foregoing reasons, it is ORDERED that:

1. Plaintiff's motion for summary judgment is GRANTED.

2. Defendant's counterclaim is DISMISSED WITH PREJUDICE.

3. A permanent injunction will issue with the same terms as those set forth in the preliminary injunction presently in place. The state shall prepare a proposed final injunction for the court's signature within seven (7) days of the date of distribution of this order.

4. The trial of May 8, 2000, is vacated. The court will hold a trial setting conference at 1:00 p.m. on May 8, 2000, to address the remaining issues.

Dated at Palmer, Alaska, this 26th day of April 2000.

Eric Smith

ERIC SMITH
SUPERIOR COURT JUDGE

I certify that on 4-27-00 a copy of this document was sent to:
☐ CSED ☒ Attorney(s) of Record Gantz, AAG Goltz
☐ Plaintiff ☐ Defendant
☐ Other
at the address(es) of record.
Date Deputy Clerk