IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

AMERICAN CIVIL LIBERTIES UNION OF ALASKA, DUNLEAVY FOR ALASKA and ERIC SIEBELS,

Plaintiffs,

v.

STATE OF ALASKA, and the STATE OF ALASKA DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES,

Defendants.

Case No. 3AN-18-08845 CI

REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I. INTRODUCTION

The State's partial opposition narrows the scope of the parties' dispute for purposes of the pending motion. The State effectively concedes that Alaska's sign ban is unconstitutional to the extent it prohibits temporary campaign signs on private property. The parties therefore agree that the Court should temporarily enjoin enforcement of the statute against Alaskan citizens who place small, political campaign signs on their own property, outside of the State's rights-of-way.

The remaining issue is the extent to which the State can permissibly enforce the Sign Ban within highway rights-of-way. The State's position appears to be that it has *carte blanche* to regulate speech as an "encroachment" within highway rights-of-way and to treat all other types of encroachments differently. This argument should be rejected. Plaintiffs

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do not dispute that the State has a compelling governmental interest in managing its rights-of-way to protect public safety. But the State does not need a sign ban to accomplish that goal. A separate statutory scheme, AS 19.25.200, *et seq.* (*Encroachments in Highways*), already gives the State authority to remove right-of-way encroachments. That authority is more than adequate to serve the State's interest in road safety and right-of-way maintenance without trampling Alaskans' First Amendment rights. Significantly, AS 19.25.200 does not threaten Alaskan citizens with fines and criminal prosecution for alleged violations. The State has no compelling reason to treat encroachments differently simply because they contain political or other speech.

For the reasons set forth more fully below, the Court should preliminarily enjoin enforcement of the sign ban to the extent it prohibits the placement of temporary political signs on private property. The Court should further require that any removal of campaign signs from State rights-of-way be justified by legitimate safety interests and follow the procedures set forth in AS 19.25.200, *et seq.*

II. THE STATE EFFECTIVELY CONCEDES THAT ALASKA'S SIGN BAN IS UNCONSTITUTIONALLY OVERBROAD

The State's milquetoast defense of AS 19.25.105's prohibition against "outdoor advertising" all but throws in the towel on Plaintiffs' facial challenge to the statute.[1] Plaintiffs' opening memorandum argued that the statute is unconstitutionally overbroad

[1] *See* State of Alaska's Opposition to Motion for Preliminary Injunction ("Opp.") at 35.

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because it "prohibits a substantial amount of protected speech."[2] The State offers a one-paragraph rebuttal:

> Alaska Statute 19.25.105 allows on-premises signs advertising activities conducted on private property adjacent to State rights-of-way, while prohibiting paid off-premises outdoor advertising signs adjacent to State rights-of-way. As discussed above, this on-premises/off-premises distinction is a constitutionally valid content-neutral regulation of speech.[3]

This argument is does not address the overbreadth issue at all. It merely paraphrases the State's argument that the ban is content neutral. But, as the authorities cited in Plaintiffs' opening brief make clear, a regulation can be content neutral and still prohibit too much protected speech to be constitutionally permissible. The State fails to address these authorities, and the Court should treat that failure as a concession. There is simply no reasonable rebuttal to the argument that AS 19.25.105 captures too much protected speech to pass constitutional muster.

The State also tries to save the statute by re-writing it. In an effort to limit the broad reach of AS 19.25.105, the State repeatedly insists that it only prohibits signs outside of the right-of-way if they are paid for by someone else: "[T]he State's ban on paid outdoor advertising outside of the right-of-way and its content-neutral ban on all advertising within the right-of-way are constitutional on their face...."[4] But this distinction between "paid"

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[2] *United States v. Williams*, 553 U.S. 285, 292 (2008) ("According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech.").

[3] Opp. at 35.

[4] *See also* Opp. at 1 ("Plaintiffs Dunleavy for Alaska, ACLU, and Eric Siebels ask this Court to enter an overbroad injunction that would undo the ban on paid outdoor advertising

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advertising outside of the right-of-way and all advertising within it has no basis whatsoever in the statute. With limited enumerated exceptions, the statute prohibits all "outdoor advertising" on or within 660 feet of state rights-of-way, without regard to who pays for it. The State does not point to a single provision in the statute that supports its novel interpretation.

Moreover, the State conspicuously failed to identify this purported paid/unpaid distinction in the enforcement notice it sent to political campaigns. There, it stated only that:

> Unauthorized signs ***on private or commercial property adjacent to*** the State's public right of ways are ***prohibited*** by AS 19.25.105(a) and (c) if they are ***either located within 660 feet of the nearest edge or legible from the main traveled way*** of the State's public right of way.[5]

The State's notice makes no mention of an exception for "unpaid" advertising, which would have been of obvious interest to political campaigns giving out free signs to their candidates' supporters. The State's argument appears to be a position staked out for the first time in this litigation. Its effort to contain the reach of a facially unconstitutional statute are admirable, but ultimately ineffective to save the law.[6]

The State also touts its "longstanding policy within DOTPF's Central Region to take

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overwhelmingly approved by Alaska voters in 1998."); *Id.* at 20 ("Because the Outdoor Advertising Law bars all paid off-premises advertising....").

[5] *See* Exhibit 2 to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (emphasis in original).

[6] *See, e.g. Gem Fin. Serv., Inc. v. City of New York*, 298 F. Supp. 3d 464, 499 (E.D.N.Y. 2018), *as amended* (June 27, 2018) (agency cannot save unconstitutional statute from facial challenge by voluntarily limiting scope of its enforcement).

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no enforcement action with regard to small temporary political signs located on private property outside identified highway rights-of-way."[7] But this voluntary limitation on enforcement cannot save the statute from a facial challenge either.[8] And even if it could, the State has in fact threatened to enforce the statute with criminal sanctions and fines, notwithstanding its alleged abstention policy.[9] As the United States Supreme Court has recognized, such threats are sufficient to impermissibly chill First Amendment rights:

> [T]he threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions. Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.[10]

The State cannot rely on an atextual reading of AS 19.25.105 or its history of non-enforcement to save the law from a facial challenge—especially in light of its threats to enforce the statute against Alaskan citizens.

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[7] Opp. at 16.

[8] *See, e.g. Gem Fin. Serv., Inc. v. City of New York*, 298 F. Supp. 3d 464, 499 (E.D.N.Y. 2018), *as amended* (June 27, 2018) ("That the NYPD may *voluntarily* limit the scope of its inspections only serves to further highlight the facial unconstitutionality of section 436. Although adherence to its guidelines may preclude as-administered challenges against the NYPD, the Grasso Memo has no binding effect on section 436 and cannot save the statute from a facial challenge.") (emphasis in original).

[9] *See* Exhibit 2 to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

[10] *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (internal citations omitted).

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III. THE STATE HAS ABSOLUTELY TARGETED POLITICAL SPEECH FOR ENFORCEMENT AND TREATED IT DIFFERENTLY THAN OTHER TYPES OF SPEECH

The State asserts that "the Alaska View Veggies sign and the ADN photo of DOT&PF's sign storage area are the entire basis of Plaintiffs' as-applied challenge."[11] This argument is nonsense. The Alaska View Veggies sign and DOTPF's campaign sign "graveyard" merely exemplified the selective enforcement against political campaigns that the State itself announced through direct mailers and press statements. And the State confirms in its opposition that its 2018 crackdown specifically targeted political campaigns. It acknowledges that "[i]n an effort to encourage political campaigns to comply with the laws governing roadside signs, prior to the start of election season DOTPF has traditionally sent letters or emails to campaigns advising them of the restrictions imposed by Alaska law."[12] The State confirms that these direct mailers were sent exclusively to political campaigns with addresses obtained from the Alaska Public Offices Commission ("APOC").[13] The State also confirms that its press releases were issued "in a further effort to educate candidates and their campaign volunteers."[14]

The State further confirms that the right-of-way agents enforcing the sign ban "were instructed to flag all political signs with surveyor's tape as an indication to maintenance

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11 Opp. at 22.

12 *Id.* at 9.

13 *Id.* at 10.

14 *Id.* at 13.

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personnel that the signs should be removed if they remained in that location."[15] Commercial signs, however, were treated differently: "Additionally, these ROW agents were instructed to make note of all commercial signs or other encroachments that they encountered, and to deal with them in accordance with DOTPF's encroachment policy."[16]

Given these concessions, the State cannot reasonably dispute that it has treated commercial and political speech differently under the law.[17] This is precisely the sort of selective enforcement that makes overbroad speech restrictions constitutionally suspect in the first place.

IV. THE STATE HAS AUTHORITY TO REGULATE RIGHT-OF-WAY ENCROACHMENTS FOR SAFETY WITHOUT AN UNCONSTITUTIONAL SIGN BAN

The State contends that it has a significant interest in protecting public safety by managing hazards and other encroachments within its rights-of-way. Plaintiffs do not dispute this general proposition. But as the State notes, enjoining enforcement of the sign ban would not meaningfully interfere with the State's ability to regulate encroachments

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15 *Id.* at 14.

16 *Id.*

17 The Alaska View Veggies sign was simply one example of this disparate treatment. The State dismisses that example as "specious," claiming that the sign "was not at the intersection at the time DOTPF crews flagged the other signs shown in that photo." Opp. at 15. But that assertion is not actually footnoted with a citation to any evidence in the record. The best the State can do is offer circumstantial evidence it would have noted and flagged the sign for removal if it had noticed it. *Id.* In the alternative, the State *also* notes that maybe it just missed the Alaska View Veggies sign: "But specious evidence that one sign was missed at the height of campaign season when hundreds of much larger (and therefore more hazardous) signs are present is not sufficient to demonstrate a valid claim let alone give this Court cause to enjoin the State's enforcement of its statutes." *Id.* at 23.

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under AS 19.25.200 *et seq.*[18] That statute generally prohibits encroachments within a highway right-of-way except by DOTPF permit. Under AS 19.25.240, DOTPF can summarily remove any unauthorized encroachment that presents a safety hazard.[19] Other encroachments may be removed only after notice is provided under AS 19.25.230.[20] This statute provides both the authority and procedural safeguards under which the State can regulate its rights-of-way for public safety. But unlike the sign ban, it is content neutral on its face, does not apply to private property outside of a state right-of-way, and does not authorize fines or criminal prosecution for alleged violations. The statute is therefore less problematic from a First Amendment standpoint while providing the State with sufficient means to protect Alaskan motorists.

The State is evidently unsatisfied with its statutory authority to regulate encroachments, however, and wants to treat speech differently than it treats any other potential right-of-way obstruction. It insists that it must be able to remove all "outdoor advertising" from its rights-of-way, even if it is posted by the fee owner of the underlying

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[18] Opp. at 2 ("If the Court were to enter the unduly broad injunction sought by Plaintiffs, it would not appreciably change the State's enforcement efforts against political campaign signs, which have been directed entirely at signs placed within the State's right of way under DOTPF's authority to regulate encroachments.") (citing AS 19.25.200).

[19] AS 19.25.240 ("The department may at any time remove from a state highway or road an encroachment that obstructs or prevents the use of the highway or road by the public.").

[20] AS 19.25.230 ("*Notice of Removal.* Except as otherwise provided in AS 19.25.200, 19.25.210 and 19.25.240, notice shall be given the owner, occupant, or person in possession of the encroachment, or to any other person causing or permitting the encroachment to exist, by serving upon any of them a notice demanding the removal of the encroachment. The notice must describe the encroachment complained of with reasonable certainty as to its character and location. Service of the notice may be made by certified mail.").

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real estate and poses no public safety hazard whatsoever. And although the State claims that it does not summarily remove such signs, 17 AAC 20.012 purports to provide DOTPF with exactly that authority: "Without notice to the owner of the outdoor advertising, the department may remove outdoor advertising placed within the highway right-of-way." That is, DOTPF's regulations treat encroachments differently depending on whether they fall within the broad definition of "outdoor advertising" found in AS 19.25.160.[21] Under AS 19.25.200 – .250, the State may not remove right-of-way encroachments without notice unless the encroachment "obstructs or prevents the use of the highway or road by the public." But under 17 AAC 20.012, DOTPF may remove a right-of-way encroachment without notice, regardless of whether it prevents a safety hazard, if it contains virtually any form of speech or expression. The State offers no meaningful justification for this disparate treatment, which flies in the face of the First Amendment.

Moreover, the fact that the State may permissibly regulate right-of-way encroachments under AS 19.25.200 does not mean that all signs within the right-of-way are necessarily "encroachments" subject to removal. The State seeks to enforce AS 19.25.200 as if the State owns fee title to all rights-of-way such that any physical intrusion is an encroachment. This is not the case. The State holds many of its rights-of-way by easement over private property owned by Alaskan citizens. In such instances, "the

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[21] AS 19.25.160 (4) ("'outdoor advertising' includes any outdoor sign, display, or device used to advertise, attract attention, or inform and which is visible to a person on the main-traveled way of a highway of the interstate, primary, or secondary systems in this state, whether by printing, writing, painting, picture, light, drawing, or whether by the use of figures or objects, or a combination of these, or any other thing designed, intended, or used to advertise, inform, or attract attention[.]").

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holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude."[22] This includes any physical intrusion of the easement that does not unreasonably interfere with the right-of-way's purpose. The term "encroachment" is not defined in AS 19.25, but under the foregoing principles, its meaning necessarily depends on the property rights and uses at issue. Black's Law, for example, defines "encroachment" as "an infringement of another's rights" or "an interference with or intrusion onto another's property."[23] If a servient property owner posts a sign within the right-of-way that does not interfere with the State's use of the right-of-way, it cannot reasonably be considered an "encroachment" subject to removal at the whim of the State under AS 19.25.200.

Judge Guidi recently addressed a similar issue in *Ahtna, Inc. v. State of Alaska, Department of Transportation & Public Facilities, et al.*, Case No 3AN-08-06337 CI. There, the parties disputed their respective rights in a right-of-way easement held by the State over land that Ahtna owns in fee.[24] Consistent with the foregoing authorities, Judge Guidi ruled that:

> Because the State's right-of-way in this case only grants a right to public ingress and egress, Ahtna can use the encumbered land however it sees fit so long as its use does not unreasonably interfere with the ability of the public to traverse the right-of-way. The State, in turn, can use whatever portion of

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22 *Williams v. Fagnani*, 228 P.3d 71, 74 (Alaska 2010) (quoting Restatement (Third) of Property: Servitudes).

23 ENCROACHMENT, Black's Law Dictionary (10th ed. 2014).

24 A copy of Judge Guidi's order is attached as Exhibit 3.

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the 100-foot right-of-way is reasonably necessary for ingress and egress by the public.[25]

The same is true here. The State cannot simply treat all physical intrusions into its rights-of-way as "encroachments" without regard to whether they interfere with the purposes for which its easement exists. More importantly, the State cannot single out "encroachments" for enforcement simply because they contain speech, as it purports to do under 17 AAC 20.012. By automatically treating all signage within a right-of-way as an encroachment, even where such signs are placed by the fee owner and do not interfere with State's use, the State unnecessarily and unconstitutionally infringes the First Amendment rights of its citizens.

V. CONCLUSION

For all of the forgoing reasons, the Court should enjoin enforcement of Alaska's Sign Ban.

DATED at Anchorage, Alaska this 4th day of September, 2018.

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[25] *Id.* at 16.

CERTIFICATE OF SERVICE

I hereby certify that on 4th day of September, 2018, a true and correct copy of the foregoing document to be served by email and hand delivery on the following:

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

AHTNA, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION & PUBLIC FACILTIES, et al.	)	
	)	
	)	
Defendants.	)	
	)	Case No. 3AN-08-06337 CI

ORDER RE CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT

In this action Ahtna, Inc. challenges the scope of the State of Alaska's claimed right-of-way along Klutina Lake Road, which runs approximately 25 miles in a southwesterly direction from the New Richardson highway near Copper Center to the outlet of Klutina Lake. Ahtna owns the land through which the road passes. Ahtna alleges the State trespassed by exceeding the scope of its right-of-way.[1] Ahtna also seeks declaratory judgment regarding the relative rights of parties that have property interests in the right-of-way, and so Ahtna also named a host of other individual defendants. The State has filed a counter-claim seeking to establish the scope of its right-of-way.

In November 2016, the State filed a motion for partial summary judgment asking this court to rule that the right-of-way is 100 feet wide as a matter of law. Ahtna filed a cross-motion in December 2016, seeking partial summary judgment

[1] For the purposes of this motion, the court assumes a right-of-way ("ROW") exists. Ahtna has filed a separate motion to establish that it held aboriginal title to the land in question and, therefore, no ROW ever came into existence. Even if the "aboriginal title motion" fails, the State will have to prove the elements of a RS 2477 ROW at trial.

on four points of law.[2] Athtna's cross-motion requests a ruling directly contrary to the State's request. Specifically, Ahtna maintains that the right-of-way is only as wide as is reasonably necessary for public ingress and egress. The three other points of law the cross-motion seeks to establish are: (1) that servient tenements can use the land encumbered by an easement so long as such use does not interfere with the dominant tenement's use of the easement; (2) that dominant tenements can only use the easement in a manner that is reasonably necessary to the purpose of the easement, and any unreasonable use constitutes trespass; and (3) that if the State is found to have a 100-foot wide right-of-way that permits recreational uses, then Ahtna is entitled to compensation under the takings doctrine.

I. FACTUAL AND LEGAL BACKGROUND

In 1866, Congress passed 43 U.S.C. § 932, Revised Statute 2477 (RS 2477), as part of the Lode Mining Act. RS 2477 served as a standing offer to states to establish highways across federal land for public transportation. Striking in its brevity, the entire statute provides: "[t]he right of way for the construction of highways over public land, not reserved for public uses, is hereby granted." RS 2477 rights-of-way were self-executing, which means they were valid as soon as they were established, without any additional requirement to perfect the right.[3] In 1884, the Alaska Organic Act made RS 2477 applicable to Alaska.

The State argues it first established a RS 2477 right-of-way across the land at issue in 1899 when the public regularly traveled the land to reach mines during the Alaska gold rush. In 1963, Alaska passed AS 19.10.015, which established the width of all Alaska highways at 100 feet. Alaska began construction of Klutina Lake Road ("KLR") the following year and completed construction in 1966. By 1969, the federal government ended the acceptance period for constructing new

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[2] A motion seeking to determine the controlling legal theories and law in advance of trial is a motion for partial summary judgment. *Loeb v. Rasmussen*, 822 P.2d 914, 916 n. 4 (Alaska 1991).

[3] *Price v. Eastham*, 75 P.3d 1051, 1055 (Alaska 2003).

RS 2477 rights-of-way, but all then-existing RS 2477 rights-of-way remained valid.

II. DISCUSSION

A. Width of Easement

In determining the width of the right-of-way, the first question is whether federal or state law controls the width of RS 2477 rights-of-way. On the broadest level, the State argues RS 2477 rights-of-way have two widths: a "legal width," as determined by the state statute or federal land orders, and a "scope of use," as determined by the reasonable and necessary use of the land within the 100-foot right-of-way. In contrast, Ahtna argues the "legal width" of rights-of-way used solely for public travel, like the one at issue here, is determined by, and coextensive with, the "scope of use." Under both Alaska and U.S. Supreme Court precedent, Ahtna would be correct only if neither federal nor state law specifically set the width of RS 2477 rights-of-way.

To that point, the State argues AS 19.10.015 sets the width of RS 2477 rights-of-way at 100 feet, just like the statute does for every other highway in the state.[4] The State argues, in the alternative, that either of two relevant federal land orders also set the width of RS2477 rights-of-way at 100 feet. Ahtna contests both arguments. First, Ahtna argues the U.S. Constitution prevents states from unilaterally defining the scope of federal land grants. Second, Ahtna argues the two federal land orders are inapplicable on the facts. To fill the void of governing law, Ahtna proposes the court adopt an alternative, default rule that "scope of use" determines "legal width" of RS 2477 rights-of-way because they are used exclusively for public travel.

Although the Alaska Supreme Court has not directly addressed the question of whether federal or state law controls the width of RS 2477 rights-of-way, the court has made passing comments throughout the years. First, in *Fisher v. Golden*

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[4] The definition for "highway" includes even small "trail[s]" like the one at issue here. AS 19.59.001(8).

Valley, when addressing "rights-of-way for utilities" under RS 2477, the Alaska Supreme Court rejected an argument that "federal rather than state law governs th[at] issue." The court reasoned that "'a conveyance by the United States of land which it owns . . . is to be construed, *in the absence of any contrary indication of intention*, according to the law of the State where the land lies.'"[5] Thus, the first issue the *Fischer* case requires the court to consider is whether the federal government has indicated states cannot determine the width of RS 2477 rights-of-way existing within their boundaries.

> **(1) Federal laws do not address the width of RS 2477 rights-of-way generally, nor the width of this right-of-way specifically.**

As Ahtna points out, "[t]he scope of a grant of federal land is, of course, a question of federal law."[6] It is also true, however, that "in some instances 'it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances.'"[7] The question is whether this is one of those instances.

As a preliminary matter, "[t]he rule is, that the use of an easement in lands cannot be extended or made greater than the terms of the reservation authorizes, but it may be less."[8] The federal government determines the scope of federal land grants.[9] Here, however, the operative federal statute, RS 2477, is silent as to the appropriate width of the easements created under its authority.

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5 *Fisher v. Golden Valley Elec. Ass'n, Inc.*, 658 P.2d 127, 130 (Alaska 1983), *quoting United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206, 209–10 (1943) (emphasis added).

6 *United States v. Gates of the Mountains Lakeshore Homes, Inc.*, 732 F.2d 1411, 1413 (9th Cir. 1984), *citing United States v. Oregon*, 295 U.S. 1, 28 (1935).

7 *Id.*, *quoting Oregon*, 295 U.S. at 28.

8 *Golden Valley Elec.*, 658 P.2d at 130.

9 *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917) ("[T]he power of Congress is exclusive, and [ ] only through its exercise in some form can rights in lands belonging to the United States be acquired."); *see also Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976).

Thus, the question becomes whether any other federal laws either set the width of RS 2477 rights-of-way or preclude states from doing so. The State argues the Alaska Supreme Court has already held two federal land orders—the 1949 Public Land Order ("PLO") 601 and the Department of the Interior's 1951 Department Order ("DO") 2665—establish the width for both existing and future roads over public lands, including rights-of-way created under RS 2477.[10] The State also points out that Judge Easter came to the same conclusion in a 2016 Order.[11] The facts of each of those cases, however, are distinguishable.

The State argues PLO 601 set the width of Klutina Lake Road ("KLR") at 100 feet when it "withdrew 'the public lands in Alaska lying within . . . 50 feet on each side of the center line of all local roads.'"[12] "Local roads" are defined in the negative as "[a]ll roads not classified above as Thorough or Feeder Roads, established or maintained under the jurisdiction of the Secretary of the Interior."[13] In response, Ahtna argues the Secretary of the Interior did not "construct or maintain" the KLR. Therefore, PLO 601, according to Ahtna, would not apply. This differs from Judge Easter's case in which "[t]he Alaska Road Commission, which constructed Route 20A, became an entity of the Department of the Interior."[14] It is unclear, however, what it means for a road to be "established or maintained *under the jurisdiction of* the Secretary of Interior." It could simply refer to all lands owned by the federal government.

The State also argues that DO 2665, which sought to create uniformity among Alaska's public highways,[15] established the width of all RS 2477 rights-of-way at 100 feet. DO 2665 replaced the "withdrawals" under PLO 601 with 100

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10 *State v. Alaska Land Title Ass'n*, 667 P.2d 714, 722-23 (Alaska 1983).

11 *See Dickson v. State*, 2016 WL 5625397 (Alaska Super.), 24.

12 *Alaska Land Title Ass'n*, 667 P.2d at 718, *quoting* Public Land Order 601, 14 Fed. Reg. 5048, 5048 (1949) [hereinafter PLO 601].

13 PLO 601 at 5048-49.

14 *Dickson*, 2016 WL 5625397 at 24 n.325.

15 *Id.* at 24.

foot easements for all "local roads."[16] Like PLO 601, DO 2665 defined "local roads" as "[a]ll public roads not classified as through roads or feeder roads." DO 2665, however, carried a "staking requirement"—requiring "survey stakes [to be] set on the ground and notice [to be] posted at the appropriate points along the route"—for construction of new roads.[17] Because the State has not presented undisputed evidence that KLR was an existing road, it must present undisputed evidence that it met the staking and notice requirements of DO 2665. The State has failed to do so, and DO 2665 is therefore inapplicable to KLR for the purposes of this motion.

Even if the KLR otherwise satisfies the requirements of either land order, Ahtna argues the State failed to produce any evidence, or even allege, that KLR was a "local road" that would be subject to a 100 foot easement. Indeed, in *State v. Alaska Land Title Association*, all parties *simply assumed* the road at issue was a local road at all times relevant to the land orders.[18] Additionally, Judge Easter's explanation for why the trail at issue in that case was a "local road" was simply that "the trails at issue in this case are not defined as either 'through roads' or 'feeder roads' in PLO 601 or DO 2665." Here, Ahtna argues that "[s]ince there was only an alleged foot trail until 1964 at the earliest," the right-of-way was not a "local road" for the purpose of either federal land order.[19] Ultimately, the State fails to carry their burden of showing undisputed facts that these federal land orders applied to the KLR right-of-way to establish its width at 100 feet.

Beyond disputing the application of the federal land orders, Ahtna does not point to any federal law—statutory, administrative, or judicial—that precludes states from determining the width of RS 2477. Ahtna does offer two cases, but

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16 *Alaska Land Title Ass'n*, 667 P.2d at 718-19. "[O]ne effect of PLO 757 and DO 2665 was to substitute easements for the withdrawals made in PLO 601 as to local and feeder roads." *Id.* at 720.

17 *Id.* at 722.

18 *Id.* at 718.

19 Ahtna's Reply on Cross-Motion, at 9-10.

they are not up to the task. Ahtna first relies on *U.S. v. Garfield County*.[20] Contrary to Ahtna's assertions, that case does not focus on the same issue presented here regarding the "scope of [a] R.S. 2477 right-of-way."[21] Instead, *Garfield County* focused on whether the federal or state government determines what constitutes reasonable and necessary use of a RS 2477 right-of-way.[22] Thus, the court's conclusion that "the legal rights conferred under [RS 2477] cannot be expanded today by the unilateral actions of a right-of-way claimant" means only that states do not get to decide, without consulting the federal government, what constitutes reasonably necessary use of a RS 2477 highway that cuts through a national monument.[23] Indeed, the only time the court addressed the width of RS 2477 rights-of-way was when it stated: "the scope of [the government's] right-of-way 'is limited . . . to the width permitted by state law . . . .'"[24]

Next, Ahtna argues *Clark v. Taylor* stands for the rule that when a RS 2477 right-of-way is established by public use for the sole purpose of public travel, the width of that right-of-way is limited to what is reasonable and necessary for public travel.[25] More specifically,

> The general rule is as follows: Where the right to a highway depends solely upon user [sic] by the public, its width and the extent of the

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20 *United States v. Garfield Cty.*, 122 F. Supp. 2d 1201 (D. Utah 2000).

21 Ahtna argues *Garfield County* held "that the state is not free to simply decree the width it sees fit." Reply to Cross Motion, at 7, *citing Garfield Cty.*, 122 F. Supp. 2d at 1241-42. The holding, however, is more appropriately characterized as recognizing that the state is not free to simply decree what is a *reasonable and necessary use* of the ROW *within* the legal width of the ROW. *See infra* note 22.

22 The court asks the question "of *who* gets to say . . . how [the "reasonable and necessary"] standards are actually implemented on the ground." *Garfield Cty.*, 122 F. Supp. 2d at 1234 (emphasis in original). The court eventually answered its question: "'the initial determination of whether the activity falls within an established right of way is to be made by' the federal land management agency having authority over the lands in question." *Id.* at 1243.

23 *Id.*

24 *Id.* at 1229, *quoting Sierra Club v. Hodel*, 848 F.2d 1068, 1080 (10th Cir. 1988), *overruled on other grounds by Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970, 973 (10th Cir. 1992).

25 *Clark v. Taylor*, 9 Alaska 298, 312 (D. Alaska 1938).

> servitude imposed on the land are measured and determined by the character and extent of the user, for the easement cannot upon principle or authority be broader than the user.[26]

Notably, however, the court only resorted to that "general rule" because "there were no Territorial laws fixing the width of the right of way of the road in question."[27] This qualification suggests the court would have looked to Territorial laws (now state laws) if any had been in place when the case was decided in 1938. Thirty-five years later, and during the acceptance period for RS 2477 rights-of-way, Alaska enacted AS 19.10.015 to set the width of Alaska highways at 100 feet. Accordingly, approximately 50 years after the statute was enacted, the U.S. District Court for the District of Alaska held, in an unpublished opinion, that "[w]hether a right of way has been established is a question of state law. The scope of an R.S. 2477 right-of-way is also subject to state law."[28] Ultimately, Ahtna is correct that *Clark* creates a default rule for determining the width of RS 2477 right-of-ways when no state or federal law specifies the width.[29] But the default rule became irrelevant to this case when Alaska enacted AS 19.10.015.

Moreover, Ahtna has failed to identify any federal law indicating an intent to prevent states from determining the width of RS 2477 rights-of-way. AS 19.10.015 was therefore free to do so.[30] In other words, while Ahtna is correct that the federal government has *the authority* to prevent states from unilaterally setting

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26 *Id.*

27 *Id.*

28 *Mills v. United States*, 2012 WL 12878318, at *6 (D. Alaska June 8, 2012), *aff'd in part, rev'd in part on other grounds*, 742 F.3d 400 (9th Cir. 2014). More than one court has held that the scope of an RS 2477 ROW "'is limited . . . to the width permitted by the law of the state *as of* [*January 20, 1969*, the date RS 2477 ROWs could no longer be established].'" *Garfield Cty.*, 122 F. Supp. 2d at 1229, *quoting Hodel*, 848 F.2d at 1083 (emphasis added). The acceptance period was open when AS 19.10.015 was enacted, and so AS 19.10.015 determined the width of any ROWs established in Alaska under RS 2477. See *infra* note 68 and accompanying text.

29 Logically, if no federal or state law specifically set the width of RS 2477 ROWs, then *the only option* would be to rely on reasonable use as a default rule.

30 *See Golden Valley Elec.*, 658 P.2d at 130, *quoting Oklahoma Gas & Electric Co.*, 318 U.S. at 209–10.

the width of RS 2477 rights-of-way,[31] Ahtna has not shown the federal government *exercised* that authority.

To the contrary, the Tenth Circuit identified two federal agency actions that suggest state law determines the width of RS 2477 rights-of-way. In that case, *Sierra Club v. Hodel*, the court asked "whether the scope of R.S. 2477 rights-of-way is a question of state or federal law."[32] And in answering that question, the court noted that the silence of RS 2477 "reflects the probable fact that Congress simply did not decide which sovereign's law should apply." Thus, the court looked to "the interpretation given by the federal agency with dominion over the statute's subject matter."[33] As relevant here, the federal Bureau of Land Management ("BLM") promulgated a since-repealed regulation, which provided that RS 2477 rights-of-way became "effective upon construction or establishing of [RS 2477] highways, *in accordance with State laws* . . . ."[34] The BLM also published an internal manual that stated: "State law specifying widths of public highways within the State shall be utilized by the authorized officer to determine the width of the RS 2477 grant."[35] The court even distinguished *Gates of the Mountains*, a Ninth Circuit case that Ahtna relies upon.[36] It is also noteworthy that *Garfield*

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31 *Utah Power & Light*, 243 U.S. at 404 ("[T]he power of Congress is exclusive, and [ ] only through its exercise in some form can rights in lands belonging to the United States be acquired."); *see also Kleppe*, 426 U.S. at 540.

32 *Hodel*, 848 F.2d at 1080.

33 *Id.*, *citing Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843–44 (1984).

34 *Id.*, *quoting* 43 C.F.R. § 244.55 (1939) (emphasis added). Although the regulation has been repealed, see *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 147 F. Supp. 2d 1130, 1143 (D. Utah 2001), it is still useful to show whether the federal government intended to limit states' authority to determine the width of these ROWs.

35 *Hodel*, 848 F.2d at 1080, *quoting* BLM Manual, Rel. 2–229 at 2801.48B.

36 *Id.* at 1081. Ahtna quoted *Gates of the Mountains* for the assertion that "[t]he scope of a grant of federal land is, of course, a question of federal law," but Ahtna conspicuously left out the next sentence from that case: "But in some instances it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances." *See Gates of the Mountains*, 732 F.2d at 1413. Moreover, in *Gates of the Mountains*, the Ninth Circuit rejected the argument that state law applied to the issue presented there only after finding

County, another case Ahtna relies on, quoted *Hodel* for the proposition that "the scope of [a RS 2477] right-of-way 'is limited . . . to the width permitted by state law . . . ."[37] Ultimately, the *Hodel* court "conclude[d] that the weight of federal regulations, state court precedent, and tacit congressional acquiescence compels the use of state law to define the scope of an R.S. 2477 right-of-way."[38]

Even if the two federal land orders, PLO 601 and DO 2665, do not apply, Ahtna has failed to show that the federal government exercised its authority to prevent states from determining the width of RS 2477 rights-of-way. Ahtna also has not shown that states require an affirmative delegation of that power, rather than an absence of prohibition. Indeed, the brevity of RS 2477 suggests the federal government intended to allow states to determine the scope of the rights-of-way, or at least suggest Congress did not specifically intend to prevent the states from doing so.[39] As a matter of federal law, states were free to pass their own laws during the acceptance period to determine the width of RS 2477 rights-of-way.

(2) Alaska law sets the width of RS 2477 rights-of-way at 100 feet.

Thus, we return to the analysis of Alaska case law, which ultimately agrees with *Hodel* that state law determines the width of RS 2477 right-of-ways. After *Fisher*, our supreme court again touched on the issue in *State v. Alaska Land Title Association*, but, again, only in dictum. There, the court stated that after an RS

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that "Congress had adopted a federal rule that *power transmission* is not within the scope of an RS 2477 highway right of way and had excluded any implied borrowing of state law *on this point*." *Id.* (emphases added).

37 *Garfield Cty.*, 122 F. Supp. 2d at 1229, *quoting Hodel*, 848 F.2d at 1083.

38 *Hodel*, 848 F.2d at 1083. The court also applied a three-factor balancing test to determine that applying state law would not frustrate federal policy or functions. *Id.* at 1082-83.

39 The *laissez-faire* attitude of RS 2477 is manifest: "'the establishment of R.S. 2477 rights of way required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested.'" *Our Lady of the Rockies, Inc. v. Peterson*, 181 P.3d 631, 656 (Mont. 2008) (*quoting S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 741 (10th Cir.2005)).

2477 highway had been established, "a question remained regarding the width of the right-of-way thereby created."[40] The court did not answer the question, but noted that other state courts have "held that the width was not confined necessarily to the traveled portion of the roadway, but that 'local laws, customs and usages' would control."[41]

The court again flirted with the issue, without directly addressing it, in *Fitzgerald v. Puddicombe*.[42] This time, the court noted that "an RS 2477 right-of-way would have come into existence automatically if a public highway was established across public land *in accordance with the law of Alaska*."[43] This is the same language from the now-repealed BLM regulation quoted in *Hodel*.[44] The court's citation to *Hodel* suggests the *Fitzgerald* opinion intended to embrace *Hodel*'s holding that the width of RS 2477 rights-of-way is determined by state law.

In *Dickson v. State*, Judge Easter quoted *Fitzgerald*'s language in support of the conclusion that "[a]lthough the issue has never been decided, the Court treats the scope of an R.S. 2477 right-of-way as being controlled by State law."[45] Judge Easter also noted that even where courts apply Ahtna's preferred "scope of use" test to determine width of RS 2477 rights-of-way, they only do so because the state's law required it.[46] Ultimately, Judge Easter relied on PLO 601 and DO 2556 to hold that the width of the RS 2477 right-of-way at issue in that *Dickson v. State* was 100 feet.[47]

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40 *Alaska Land Title Ass'n*, 667 P.2d at 722.

41 *Id.*, *citing City of Butte v. Mikosowitz*, 102 P. 593, 595-96 (Montana 1909); *accord Ball v. Stephens*, 68 Cal.App.2d 843 (1945)).

42 918 P.2d 1017 (Alaska 1996).

43 *Id.* at 1019.

44 *Hodel*, 848 F.2d at 1080, *quoting* 43 C.F.R. § 244.55 (1939).

45 No. 3AN-12-07260CI, 2016 WL 5625397, at *24 (Alaska Super., June 14, 2016).

46 *Id.* at *24 n.331, *citing Hodel*, 848 F.2d at 1083.

47 It is unclear whether she actually relied on AS 19.10.015 as an alternative ground for her holding. *Id.* at *24 ("Alternatively, *if* AS 19.10.015 applies, the Court finds that

The clearest statement from the Alaska Supreme Court on the subject, which Judge Easter quoted in her order, comes from an unpublished decision in a subsequent iteration of the *Fitzgerald* litigation. In that unpublished opinion, the Alaska Supreme Court held: "[T]he superior court did not err in holding that the right-of-way should be 100 feet wide. The scope of an RS 2477 grant is subject to state law. The superior court's reliance on AS 19.10.015 to determine the scope was not erroneous."[48] The unpublished opinion did not include substantive discussion of the issue, but cited *Hodel* and *Alaska Land Title Association*. Taken together, these cases provide fairly persuasive authority for the State's position: AS 19.10.015 sets the width of Alaska RS 2477 rights-of-way at 100 feet.

Ahtna responds to this parade of precedent with *Andersen v. Edwards,*[49] in which the Alaska Supreme Court found that a private land owner committed trespass despite acting entirely within the width of his own right-of-way. In that case, the state sold adjacent parcels of land to the plaintiff and to the defendant. As part of each sales contract, "the state reserved for 'itself, its successors and assigns a 100 foot right-of-way along (the) section line' between the two parcels."[50] The 100-foot tract of land was designated for use as a public highway under AS 19.10.010.[51] The defendant subsequently built a 25-foot wide road along the center line of the right-of-way,[52] but also "cleared the easement to nearly the full 100-foot width."[53] The plaintiff sued for trespass. The court noted that the "general rule regarding the scope of use of a right-of-way easement" is:

> where the width . . . of an easement for ingress and egress is expressly set forth in the instrument . . . [t]he expressed terms of the

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the scope of any valid R.S. 2477s across Plaintiffs' property to be 100-feet wide.) (emphasis added).

48 *Puddicombe v. Fitzgerald*, 1999 WL 33958803, at *1 (Alaska Aug. 25, 1999).

49 625 P.2d 282 (Alaska 1981).

50 *Id.* at 284.

51 *Id.* at 284–85.

52 The court assumed the defendant was authorized to construct the public road. *Id.* at 285.

53 *Id.*

> grant or reservation are controlling . . . and consideration of what may be necessary or reasonable to the present use of the dominant estate are not controlling.

The counterpart to that rule is: where the width "of an easement for ingress and egress are *not* fixed by the terms of the grant or reservation[,] the dominant estate is ordinarily entitled to a way of such width . . . as is sufficient to afford necessary or reasonable ingress and egress."[54]

When applying those rules to the facts of that case, the court found the government's contractual reservation was "ambiguous as to whether it refer[red] 'to the width of the way, or [wa]s merely descriptive of the property over which the grantee may have such a way as may be reasonably necessary.'"[55] This sentence, unfortunately, is imprecise and thus open to misunderstanding. To avoid that pitfall, it is helpful to note that the reservation is completely *un*ambiguous as to the width of the right-of-way; the contract unequivocally reserved a "100 foot right-of-way."[56] The ambiguity in the reservation, therefore, is not about *how wide* the right-of-way was, but instead about whether the dominant tenement was entitled to use the entire width of the right-of-way or was merely entitled to use whatever portion of the right-of-way was reasonably necessary for ingress and egress at the time.[57] Indeed, despite the confusing (and even misleading) language used toward the end of the court's analysis, the rest of the opinion repeatedly distinguishes between the concepts of "legal width" and "scope of use."[58] The width of the right-of-way in *Andersen* was never in dispute; it was 100 feet under the contractual reservation. The only issue was whether the defendant was limited

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54 *Id.* at 286 (emphasis added).

55 *Id.* at 287.

56 *Id.* at 284.

57 The court assumed the defendant had authority to act as the dominant tenement and construct the road. *Id.* at 285.

58 *See, e.g., id.* at 286 ("To sustain a contention that an easement grants the right to use any and all of a strip of land, the plaintiff must point to language in the deed which clearly and definitely fixes the width of the right of way.") (internal quotation marks, annotations, and citation omitted).

to reasonably necessary use within the 100-foot right-of-way. The court determined the defendant was so limited, that he exceeded his right, and that he therefore committed trespass warranting treble damages even though he acted within the legal width of his right-of-way.

Historical legal context suggests *Andersen* is not applicable to determining the "legal width" of RS 2477 rights-of-way, as opposed to its "scope of use." Even though *Andersen* was decided in 1981, before all of the Alaska Supreme Court RS 2477 cases discussed above, not a single one of those cases cited *Andersen*. Ultimately, *Andersen* did not specifically rule that the right-of-way in that case was less than 100 feet wide; it only held that someone can trespass on a servient estate despite acting entirely inside the legal width of their easement. *Andersen* does not support Ahtna's position that the width of a right-of-way dedicated to public travel is limited to reasonably necessary use.

The last relevant piece of Alaska law is found in an Attorney General ("AG") opinion that addressed which types of public use are permitted in RS 2477 right-of-ways. Ahtna argues the AG opinion embraced *Andersen*'s holding that the width of RS 2477 rights-of-way is determined by scope of use, not by AS 19.10.015. As explained above, however, *Andersen* did not make that specific holding. Nor does the AG Opinion clearly embrace such an interpretation. It states, in relevant part:

> Although we have not been asked to offer an opinion on the width of this road, it appears the road would be 100 feet wide under AS 19.10.015(a). However, a court may find that using the full width of this right-of-way would not be authorized if use of the full width were not reasonably necessary given traffic volume, anticipated use in the reasonably near future, and the historic uses of the road. *Andersen v. Edwards*, 625 P.2d 282, 286-87 (Alaska 1981).[59]

[59] Alaska Attorney General Opinion, 2002 WL 31555440, at *6 (Alaska A.G. July 17, 2002). The Opinion continues: "*Andersen* held that clearing the full width of a 100-foot wide easement reserved in state patents was a trespass on the privately owned servient estate because clearing the full width was not reasonably necessary for access. The court held that an award of treble trespass damages would be appropriate for cutting

As the State argues, the AG's opinion, like *Andersen*, does not equate the width of the right-of-way with its scope of use. Instead, both sources of law stand for the proposition that an easement holder can commit a trespass to the servient estate despite operating inside the legal width of the easement.

The court's analysis of federal and state precedent, as discussed above, leads it to conclude that, as a matter of both federal and state law, the width of an RS 2477 right-of-way in Alaska is 100 feet under AS 19.10.015.

B. Relative Rights of Dominant and Servient Tenements

Ahtna's cross-motion requests the court rule on the relative rights of dominant tenements and servient tenements under Alaska law. At oral argument, the State conceded there is no particular reason to deny Ahtna's requested ruling. Both requests are hereby GRANTED, as explained below.

First, Ahtna asks the court to establish the rights of the holder of the servient tenement according to RESTATEMENT (THIRD) PROPERTY: SERVITUDES § 4.9, which the Alaska Supreme Court has adopted.[60] Under RESTATEMENT § 4.9, the holder of a servient tenement "is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude."[61]

Second, Ahtna asks the court to establish that unreasonable use by the holder of the dominant tenement *within* the width of a right-of-way amounts to trespass against the servient tenement. This rule is best reflected by the holding in

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the trees outside of a 25-foot wide area, the area considered reasonably necessary for access under the circumstances of that case. *Andersen*, 625 P.2d at 289. Therefore, we recommend that DOT&PF limit improvements in the right-of-way to those that are reasonably necessary to support the historic public uses of the Klutina Lake road.").

[60] *Williams v. Fagnani* , 228 P.3d 71, 74 (Alaska 2010). Although Ahtna argues *Hansen v. Davis*, 220 P.3d 911 (Alaska 2009) is applicable under this section of the Restatement, state land interests cannot be extinguished through prescription or adverse possession. *Hansen* is therefore inapplicable.

[61] The court used slightly different language in an earlier opinion: "[t]he owner of the servient estate may utilize the easement area in any manner and for any purpose that does not unreasonably interfere with the rights of the easement holder." *Labrenz v. Burnett*, 218 P.3d 993, 1002 (Alaska 2009). The result is the same.

Andersen, discussed above. The rule is also reflected in RESTATEMENT § 4.10, which the Alaska Supreme Court has also adopted:[62] "Unless authorized by the terms of the servitude, the [holder of the dominant tenement] is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment." Under § 4.10, a dominant tenement-holder's unreasonable use of a right-of-way constitutes unreasonable interference with the servient tenement-holder's enjoyment of the servient estate. Nonetheless, as indicated in this court's earlier May 2016 Order, this rule does not diminish the dominant tenement-holder's right to use the right-of-way in a manner that is reasonably necessary for the convenient enjoyment of the servitude. Also, as stated in RESTATEMENT § 4.10, "The manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude."

Under the RESTATEMENT (THIRD) PROPERTY: SERVITUDES, the dominant tenement-holder commits trespass when using a right-of-way in a manner that is not reasonably necessary to the right-of-way's purpose.[63] Because the State's right-of-way in this case only grants a right to public ingress and egress, Ahtna can use the encumbered land however it sees fit so long as its use does not unreasonably interfere with the ability of the public to traverse the right-of-way. The State, in turn, can use whatever portion of the 100-foot right-of-way is reasonably necessary for ingress and egress by the public.

C. Recognizing the State's Rights Does not Constitute a Taking.

Ahtna's request for partial summary judgment regarding the "taking" issue evolved over the course of the briefing to include two parts. First, Ahtna argues the right-of-way does not permit recreational use within its width and that any use other than mere ingress and egress would be a taking. Second, Ahtna argues that "converting a narrow trail" to a 100-foot wide right-of-way would be a taking.

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62 *Id.* at 1000 n.15.

63 *Id.* at 999-1000.

First, an unauthorized *type* of use, such as recreation, likely would not amount to a taking so long as the recreational use occurred within the 100 foot right-of-way. In the opinion of the court, an unauthorized type of use, such as recreation, would instead give rise to a trespass claim as an unreasonable use of the right-of-way. This court's May 11, 2016 order established that the right-of-way can be used only for ingress and egress, and Section III.B. of this order establishes that any use other than ingress and egress would give rise to a trespass claim.

Ahtna's second argument fares even worse under the laws at issue here. While it may be true that "converting" a narrow right-of-way to a wider right-of-way would constitute a taking, no such conversion occurred here. The rights of all RS 2477 rights-of-way are "frozen" as they existed when the acceptance period ended in 1969.[64] Thus, Alaska RS 2477 rights-of-way are 100 feet wide today if a law established them as being 100 feet wide prior to 1969.

AS 19.10.015 did just that.[65] AS 19.10.015 set the width of all Alaska "highways" at 100 feet. It is undisputed that AS 19.10.015 was enacted in 1963, which means it applied to all state "highways" while the RS 2477 acceptance period was open. Thus, if Alaska RS 2477 rights-of-way are AS 19.10.015 "highways," then AS 19.10.015 set their width at 100 feet.

Alaska RS 2477 rights-of-way are categorically AS 19.10.015 highways. RS 2477 granted the right to establish "highways." What qualified as a RS 2477 "highway" was determined by the law of the state in which the right-of-way was established.[66] Thus, *as a matter of law*, all RS 2477 right-of-ways established in

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[64] *Hodel* found that the "freezing" policy was effective as of 1976, when RS 2477 was repealed, rather than 1969 would the acceptance period ended. *Hodel,* 848 F.2d at 1081 (*citing* FLPMA §§ 509(a), 701(a) and 701(h), 43 U.S.C. §§ 1769(a), 1701 Savings Provisions (a) and (h)). The exact date of "freezing" is irrelevant here since the ROW would have been established, if at all, before either date.

[65] As discussed *supra* in Section III.A., Alaska was free to establish the width of RS 2477 ROWs in the state.

[66] *Price v. Eastham*, 75 P.3d 1051, 1055 (Alaska 2003); *Hodel,* 848 F.2d at 1080.

Alaska are also "highways" as defined by Alaska law and, therefore, AS 19.10.015 applies to all Alaska RS 2477 rights-of-way.[67]

Putting those points together, under AS 19.10.015, the width of each Alaska RS 2477 right-of-way was 100-feet in 1969 and continues to be 100-feet today.[68] Accordingly, if the State proves at trial that it has an RS 2477 right-of-way over the land at issue, then the right-of-way is 100-feet wide. Recognizing the State's right does not constitute a taking.[69]

Ahtna also made a due process argument about insufficient notice.[70] Ahtna argues that the enactment of a statute setting the width of highways, AS 19.10.015, did not provide sufficient notice that the State may claim a foot path is an "existing highway." It is thus unfair, Ahtna argues, for private landowners to shoulder the risk that the State could claim a 100-foot right-of-way when only a small foot path exists. Ahtna, however, does not cite any case law supporting its argument. More importantly, Ahtna also fails to mention that another statute, AS

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[67] The definition of "highway" under Alaska law is irrelevant for this point. If something qualifies as an Alaska highway, and therefore as a RS 2477 highway, then it is 100 feet wide.

[68] *See id.* at 1083. The state did not "convert" a narrow ROW to a wider ROW in any way that impacts Ahtna's rights. If AS 19.10.015 had been passed after 1969, then recognizing a 100 foot ROW would be an unauthorized expansion of the ROW. If that were the case, Ahtna would likely have a takings claim. However, AS 19.10.015 was in force during the acceptance period and so that statute determines the width of RS 2477 rights-of-way. If the ROW was established prior to the enactment of AS 19.10.015, it would technically be true that the statute "converted" a narrow ROW to a wider one. But because the statute was passed during the acceptance period, the "conversion" would not amount to a taking. It would simply be a second acceptance of the federal government's offer or a modification of a previous acceptance. RS 2477 does not carry a limitation on the number of ROWs that can be accepted in one place or a prohibition on expanding a ROW during the acceptance period. The timing of the State's acceptance of the ROW is immaterial for two reasons: (1) all Alaska highways were 100 feet-wide by the time the RS 2477 acceptance period ended, and (2) all RS 2477 ROWs are Alaska highways.

[69] The right of ways were self-executing, which means they became legally valid as soon as they were established. A delay in perfecting those rights does not diminish them, especially since the state cannot lose any land interests through prescription.

[70] Ahtna Reply on Cross-Motion, at 12.

19.59.001(8), defines "highway" to include a "trail[s]." That statute has been in effect with essentially the same language since Alaska's first legislative session.[71]

It should be noted that the *Hodel* opinion found the potential for state overreach beyond the historical use of a road to be "troubling."[72] But the State's reach is constrained by what is reasonably necessary for ingress and egress within a 100-foot right-of-way.[73] In Alaska, courts must consider "the original purpose and use of the easement; any changes that have been made in the use of the easement; and, finally, the reasonableness of that change, taking into account such factors as the speed of the changes in use, damage to the estate, and the reasonable expectations of the servient landowner."[74] These considerations tend to mitigate the risk of state overreach.

III. CONCLUSION

The State's request for partial summary judgment is GRANTED and, accordingly, Ahtna's first request in its cross-motion is DENIED. Although the federal government has the authority to prevent states from unilaterally setting the width of federal land grants, it did not exercise that authority for RS 2477 rights-of-way. The states were, therefore, free to set the width of RS 2477 rights-of-way established within their boundaries. Alaska passed AS 19.10.015 during the RS 2477 acceptance period, therefore that statute controls the width of RS 2477 rights-of-way in Alaska. Under AS 19.10.015, state highways are 100 feet wide, and so the right-of-way at issue here is 100 feet wide. "Scope of use" does not determine the "legal width" of the right-of-way.

Ahtna's second and third request on partial summary judgment, however, are GRANTED. Sections 4.9 and 4.10 of the RESTATEMENT 3d PROPERTY AND SERVITUDES establish the relative rights of servient and dominant tenement-

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71 *See* Alaska Session Law 1959, Chapter 124, Section 3, Subsection 9.

72 *Hodel*, 848 F.2d at 1081.

73 *See id.* at 1083 ("We believe the 'reasonable and necessary' standard must be read in the light of traditional uses to which the right-of-way was put.")

74 *Eastham*, 254 P.3d at 1126.

holders. Ahtna can use the encumbered land so long as doing so does not unreasonably interfere with the public's ability to travel along it. The State and the public is entitled only to make reasonably necessary use of the easement, and any unreasonable use, even if wholly within the legal width of the easement, constitutes trespass against Ahtna's land.

Ahtna's fourth request on partial summary judgment is DENIED. The right-of-way, if established, was 100 feet wide in 1969. It has the same width today. Recognizing this right does not amount to a "taking" of Ahtna's property rights.

Assuming the alleged right-of-way exists, the bottom line for the parties is this: in the future, the State can expand its use of the right-of-way up to 50 feet on either side of the center line without committing a taking. However, if the State's expansion is not reasonable and necessary for public travel, then Ahtna can bring a trespass suit to enjoin the excessive use of the right-of-way. In other words, this ruling relates only to the "legal width" issue and the claims for declaratory relief. The trespass claim is unaffected by this ruling because it is based on the "scope of use" issue.

ORDERED this 11th day of May, 2018, at Anchorage, Alaska.

ANDREW GUIDI
Superior Court Judge

I certify that on 5/15/18
a copy of the above was mailed to each of the following at their addresses of record:
M. Geiger J. Alloway
H. Hickey K. Sullivan
M. Slavin K. Demerest
S. Anjilvel
Chris McNeese, Judicial Assistant

(law)