

MEMORANDUM

State of Alaska

Department of Law

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TO: Mike Tinker
Region Environmental Coord
DOT/PF, Northern Region

DATE: May 1, 1992

FILE NO: 225-92-0137

TEL NO.: 451-2811

MAR 04 1992

Northern Region DOT & PF

FROM: Leone Hatch *CH*
Assistant Attorney General

SUBJECT: State v. Benshoof, et al.
Project No. RS-0620(6)
Parcel No. 118
4FA-92-479 Civil
(Access for soil testing)

THRU: E. John Athens *John Athens*
Chief, Fairbanks Dot/Section

CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION

Parcel 118a at one time had commercial underground storage tanks (USTs) for fuel. Because such tanks are known to leak and cause contamination to surrounding soils,¹ DOT retained a contractor to collect and analyze soil samples. I understand DOT did this pursuant to a FHWA policy or directive.² Eric and Kathy in your office have informed me, however, that the landowner, Mr. Lyman, has refused access to state's contractor for the purpose of collecting those samples.

DOT may gain access to a potential condemnee's property pursuant to AS 09.55.280. While this statute authorizes DOT to "make examinations, surveys and maps and locate boundaries" it does not specifically authorize DOT to take samples and test for hazardous substances. Courts in other states have interpreted similar statutes inconsistently. Most of these courts have come to the conclusion that general access statutes do not authorize the taking of soil samples without the landowner's permission. Hailey v. Texas New Mexico Power Co, 757 S.W.2d 833 (Texas App. 1988); Missouri Highway and Transportation Commission v. Eilers, 729 S.W.2d 471 (Missouri App. 1987); County of Kane v. Elmhurst National Bank, 443 N.E.2d 1149 (Ill.App. 1982). At least two other state courts have disagreed and allowed the entry. Square Butte Electric Cooperative v. Dohn, 219 N.W.2d 877 (N.D. 1974); Puryear v. Red River Authority, 383 S.W.2d 818 (Texas Civ App 1964).³ Therefore, it is unclear whether the

¹ There are both state and federal programs relating to leaking underground storage tanks (LUSTs).

² I have not seen this document. I would appreciate a copy.

³ The taking of a core sample in Puryear was allowed for the purpose of determining suitability of the land for building a dam. However a later court in the same state did not allow a utility
(continued...)

Alaska statute authorizes soil sampling. It can be argued either way. Although it is reasonable for the state to take the position that it does have such authority, you should be aware that there is a substantial risk that a court could rule otherwise.

Last year DOT attempted to have AS 09.55.280 amended to specifically allow soil testing for hazardous substances. Unfortunately that attempt was unsuccessful. Amendment remains the best option for resolving the question. Without the amendment of AS 09.55.280, the state may not be able to test for hazardous substances over the objection of the landowner on property it contemplates acquiring.

Because this statute is arguably broad enough to allow such testing, even without amendment, DOT may attempt to do the testing. However, if a landowner refuses entry the state should seek a court order interpreting the statute and expressly giving DOT access. If the state simply goes onto the property against the landowner's express wishes, the state runs the risk of a court finding a trespass and awarding damages. The state also runs the risk of compromising the safety of DOT employees and contractors.

If the state does not force the access issue, it risks acquiring contaminated property. In this particular case, it appears that the risk would constitute taking on a petrochemical cleanup related to a seven year history of UST operation at this site.⁴ The significance of this risk is something that DOT should weigh against the delay and expense of litigation over access. If the state acquires this property through a condemnation proceeding and determines that it is indeed contaminated after title becomes vested in the state, this may be a basis for reducing the deposit or perhaps obtaining a deficiency judgment reflecting the cost of any remediation effort. See Redevelopment Agency of the City of Pomona v. Thrifty Oil Company, 5 Cal Rptr.2d 687 (Cal App. 1992).

This memo supersedes any prior memos on AS 09.55.280 access for soil sampling from this office, including the memo dated June 2, 1988 from John Athens to Mike Tinker.

³(...continued)

condemnor to take soil samples. Hailey, 757 S.W.2d 833. The Puryear court felt that the statute would be useless to the agency if it was interpreted any other way under the circumstances.

⁴ Nothing has been brought to my attention which would indicate that this site is a potential superfund site like Arctic Surplus. At this time it appears that any remediation efforts would be governed by state standards, and overseen by DEC rather than EPA.

Mike Tinker
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If you have any questions, please do not hesitate to call me.

Please let me know if you would like me to file for access or begin the condemnation.

LH/jag

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cc: John Miller
Dan Sterley
Eric Gerke
Kathy Talbert