

MEMORANDUM

State of Alaska Department of Law

TO: John F. Bennett
Right of Way Agent VI
Transportation and Public Facilities

DATE: April 1, 2010

OUR FILE: 303-09-0006


FROM: Susan D. Cox
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SUBJECT: Vacation of Right
of Way, Settlement
of Wax v. State,
case no.
3AN-0811004 CI

In 2008 Lisa Wax filed a lawsuit against the State of Alaska, alleging that negligent maintenance of two culverts by the Department of Transportation & Public Facilities (DOT) caused flooding damage to her property, the Tsaina Lodge at Mile 34.7 of the Richardson Highway, in October 2006. Her complaint also included an inverse condemnation cause of action, based on the same allegations of negligent culvert maintenance and/or the Richardson Highway blocking drainage of water off her property.

The state denied liability for the flooding of the Tsaina Lodge property and vigorously defended this lawsuit for more than a year. Extensive discovery was conducted, which included the exchange of thousands of pages of documents, historical research into past construction projects, numerous on-site visits, and several days of depositions in Valdez. DOT staff assisted in investigation of plaintiff's liability and damages claims, as did retained expert witnesses with specialized backgrounds in engineering and hydraulics.

Several months before the scheduled trial date, the parties initiated discussions about possible settlement of the case without further litigation. Ms. Wax's attorney proposed a settlement that includes the conveyance of a portion of old state Right of Way associated with an unused section of the former Richardson Highway ("old highway Right of Way"); that portion is not part of the Right of Way for the existing Richardson Highway. After inter-agency consultation, it has been determined that it is in the state's best interest to reach a settlement with Ms. Wax that includes vacating the portion of old highway Right of Way depicted with cross-hatching on the attached plat identified as Exhibit A. The background of that decision is provided in more detail below.

I. THE LODGE PROPERTY

The Tsaina Lodge is located on the east side of the Richardson Highway, at approximately Milepost 34.7, about 10 miles north of Thompson Pass. The Tsaina River flows somewhat parallel to the highway in that area, and is on the opposite side of the highway from the lodge. Just south of the lodge property is the creekbed of Cascade Creek, a drainage that flows northwest to empty into Tsaina River.

The Tsaina Lodge was built in the early 1950's, essentially as a roadhouse. The property wasn't surveyed and patented until later (U.S. Survey 3905); it amounted to a near-rectangular 6.19 acre parcel, with the old Richardson Highway serving as its western boundary. Under federal law, the property was subject to a highway Right of Way that extended 150 feet from the centerline, which included essentially the entire front yard and parking area for the lodge.

In 1979-80, the state undertook a project to realign the Richardson Highway between miles 25 and 35; in the area of the Tsaina Lodge the project entailed straightening an S curve. The new highway also required a 150' Right of Way on either side of the centerline. The state already owned most of the Right of Way needed for the new highway, except for one triangular piece (0.183 acres) that the state acquired from the lodge's owner at the time, Josephine Johnson. Once constructed, the new highway surface was slightly elevated above the level of the lodge parking area.

Sometime back in the 1940's a wooden bridge was installed for the old highway to cross Cascade Creek. That bridge was replaced with a metal pipe culvert in 1967. When the highway was straightened in the 1979-80 realignment project, the new highway crossed Cascade Creek much further west than the old highway. A new 10' metal pipe culvert was installed for the creek to pass under the new highway and flow into the Tsaina River. The old highway crossing over Cascade Creek and culvert, upstream and east of the new highway, were left in place, apparently at the request of the lodge owner.

Lisa Wax acquired the lodge property at a federal judicial foreclosure sale in 1994. A number of improvements were made to the property in the ensuing years. In addition, a seasonal heli-skiing business has operated there annually, from March into early May. Over the years some commercial activities have taken place within the state Right of Way for the old highway.

II. THE OCTOBER 2006 STORM

In early October 2006 a massive storm melted early mountaintop snow and dropped heavy rain on the Kenai Peninsula and Prince William Sound. The storm culminated in a major deluge on the night of Monday, October 9, 2006, that resulted in

numerous landslides, washouts, road collapses, and the closure of over 60 miles of the Richardson Highway, from Keystone Canyon around Mile 14, near Valdez, almost to Mile 80.

During the night of October 9, 2006, the area between the main lodge building of the Tsaina Lodge and the new highway filled with water. Water seeped into the lodge and the garage/shop building. At an unknown time during the night, the old highway crossing at Cascade Creek washed out and the old culvert pipe washed downstream. On the morning of October 10, 2006, the parking area between the main lodge building and the new highway was underwater and resembled a small lake. When the water receded, it left a layer of fine silt behind – both inside and outside the main lodge building and garage/shop. Floors, appliances, and other fixtures in the main lodge building were most affected by water damage, as well as some items in the shop building. Additionally, plaintiff Lisa Wax claimed that lodge structure foundations were undermined and vehicles were rendered inoperable.

III. SETTLEMENT OF CLAIMS

In the lawsuit plaintiff primarily claimed that, due to negligent maintenance of the old culvert under the old highway crossing, during the storm Cascade Creek backed up behind that culvert and overtopped the road, then flowed down into the lodge parking area and filled it up. The state contended that failure of the old culvert was not the cause of the flooding; on the contrary, the state's position was that water backed up where the newer culvert installed in 1980 passed under the new Richardson Highway, because the storm greatly exceeded the new culvert's design capacity.

While the parties fundamentally disagree over liability for the flooding of the Tsaina Lodge and responsibility for damages incurred, they have agreed that settlement of this case is preferable to litigation through trial. The state has expended significant resources to date in staff time, attorney time, and litigation expenses. To prepare the case for trial would entail dedication of substantial additional time and money. In addition, a portion of the old highway Right of Way has been used for commercial purposes without obtaining an encroachment permit from the state. That portion of old highway Right of Way is not used by the state, nor is it maintained by DOT. It is in the state's interest to convey that old highway Right of Way area to the owner of the underlying fee simple estate, to avoid the need for future enforcement action regarding encroachments, and to eliminate liabilities, past or future, associated with that Right of Way interest.

To this end, the state intends to vacate that portion of the old highway Right of Way shown in the cross-hatched area of Exhibit A, by Commissioner's Deed of Vacation, to Chugach Frontier Basecamp, Inc., the record owner of the underlying fee simple estate.

