

March 2, 2000

Assembly Bill 650 (Albers/Burke)

Expenditure of \$9,926 from DOT's appropriation in payment of a claim against the state made by Robert and Dorothy Messner.

Summary of Bill -

The Messner's are seeking payment of \$9,926 from DOT's appropriation to replace 136 apple trees on their apple farm which they claim were destroyed by as a result of DOT's salt spraying of STH 49 which is adjacent to the trees. The payment would cover one year's worth of production and earnings from those trees.

Staff Comments -

A state pathologist supports the claim that the trees were damaged as a result of the salt spray. However, DOT has recommended denial of the claim because not salting the roadway near the Messner's property would jeopardize the safety of motorists traveling along HWY 49. Furthermore, they feel the Messners should not have planted trees so close to the highway or planted a row of salt resistant plants to block the salt spray.

DOT has expressed concern that payment of the claim sets a dangerous precedent of compensating land owners for the indirect effects of maintaining safe roadways. Finally, they are concerned that payment of this claim may encourage the Messners to submit claims for previous years since they assert that the trees have been damaged each year since 1980.

This one is your call, but it seems like it would set a fairly bad precedent.

Recommended JFC Action -

~~Recommend~~ ^{oppose} AB 650.

Prepared by: Julie



Legislative Fiscal Bureau

One East Main, Suite 301 • Madison, WI 53703 • (608) 266-3847 • Fax: (608) 267-6873

March 2, 2000

TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Assembly Bill 650: Claim by Robert and Dorothy Messner

BACKGROUND

In 1998, the claimants filed a claim with the Claims Board alleging that salt spray originating from road salt applied to STH 49 in northeastern Dodge County has resulted in the destruction of or damage to 136 apple trees on their 23-acre apple farm, which is adjacent to the highway. Although the Messners indicate that the damage has occurred since they purchased the farm in 1980, their claim only seeks compensation for 1998 economic losses. They estimate that their loss in that year, based on 1998 actual production and earnings and the estimated loss of production from the destroyed and damaged trees, was \$9,296.

As evidence that salt spray has caused the destruction, the Messners note that the trees immediately adjacent to the highway have been completely destroyed, while trees in rows slightly further from the highway are only partially destroyed, with all of the damage occurring on the sides of the trees facing the highway. Trees in other parts of the orchard have been unaffected. A plant pathologist with the UW-Extension, Ms. Patricia McManus, has examined the Messners' trees and has submitted a letter supporting the Messners' contention that the damage is the result of salt spray. She notes that the damage on the Messners' farm is inconsistent with that caused by any known disease or pest or from the misuse of agricultural chemicals, but that it is consistent with the damage caused by salt spray, particularly the spatial pattern of the damage. She notes also that apple trees are particularly sensitive to salt spray damage and that the rest of the orchard is healthy and well-maintained.

The Department of Transportation has recommended denial of this claim. DOT asserts that Ms. McManus has not conclusively demonstrated that salt has caused the damage, noting that she did not take any samples of trees or soil to do testing. Ms. McManus has responded, however, by noting that sampling was not needed to detect salt spray damage. Inspection of the type of damage to rule out other causes and to note the patterns of destruction, which are consistent with well-substantiated cases of salt spray damage, is sufficient. She also notes that sampling of the trees

would not provide any additional information because any damaging salt would be washed off the trees by rain and, therefore, could not be detected. Taking samples of soil for testing also would not be useful since it is not soil salinity that causes the damage, but direct contact between the salt and the tree foliage.

DOT also notes that, while an attempt has been made to closely monitor salt usage to avoid applying excessive amounts of salt on the highway, the use of salt is necessary for ensuring safe highways during the winter. The Department notes that a factory near the Messners farm generates significant truck traffic on the highway and, therefore, reducing salt usage drastically in the area is not a viable option. Furthermore, DOT claims that deicing alternatives to salt, while available, are either not as effective as salt or are far more expensive. The Department maintains that landowners should use prudent planting practices by not planting salt-sensitive trees close to highways or by planting a barrier of salt-resistant plants to help block salt spray.

DOT states that paying this claim may create a precedent of compensating land owners for the indirect effects of building and maintaining the state's transportation system. Several DOT district maintenance managers indicated that, while there are apple orchards close to state highways in certain parts of the state, they are unaware of similar complaints made by other growers.

The Claims Board recommended payment of this claim on October 19, 1999.

SUMMARY OF BILL

The bill would direct the Department of Transportation to pay the Messners \$9,926 from the appropriation for state highway maintenance and traffic operations. The bill specifies that acceptance of this payment would release the state from any further liability resulting from damage to the claimants' property incurred during 1998. The bill would not preclude the Messners from making a claim for damages incurred in other years.

FISCAL EFFECT

The bill would require DOT to pay the Messners \$9,926 from the state highway maintenance appropriation. The bill would not appropriate additional funds to make this payment, so it would have to be paid from the SEG amounts appropriated for state highway maintenance by Act 9 (\$154,228,300 in 1999-00).

Although the Messners claimed total losses of \$9,296 in 1998, the claim fact sheet available to the Claims Board for review reported the amount of the claim as \$9,926, or \$630 more than the Messners claimed. The Board's recommendation was based on a payment of this higher amount and the bill reflects that recommendation.

Prepared by: Jon Dyck