BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, AND
THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR	)	FINAL ORDER
COMPENSATION UNDER ORS 197.352	)	CLAIM NO. M129759
(BALLOT MEASURE 37) OF	)	
Glen and Gretchen Donaldson, CLAIMANTS	)	

Claimants: Glen and Gretchen Donaldson (the Claimants)

Property: Township 1S, Range 2W, Section 28, Tax lot 600, Washington County (the Property)

Claim: The demand for compensation and any supporting information received from the Claimants by the State of Oregon (the Claim).

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Reports and Recommendation of DLCD (the DLCD Report), and the OregonWater Resources Department (the OWRD Report), attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Oregon Water Resources Department for the reasons set forth in the OWRD Report.

The Claim is denied as to the claimants' desired operation of a water extraction and bottling facility on a five-acre portion of the subject property for reasons set forth in the DLCD report.

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Glen and Gretchen Donaldson's division of the 9.84-acre subject property into three parcels or to their development of a dwelling on the undeveloped parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when Gretchen Donaldson acquired the property on March 11, 1963, and when Glen Donaldson acquired the property on April 5, 1968.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on

March 11, 1963, for Gretchen Donaldson, and April 5, 1968, for Glen Donaldson. On those dates, ORS 215.203 may have applied to the use of the property if Washington County's F-1 zone was a qualified farm use zone under ORS 215.203(1).

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

This Order is entered by the Director of the OWRD as a final order of OWRD under ORS 197.352, and OAR Chapter 125, division 145.

FOR DLCD AND THE LAND CONSERVATION AND DEVELOPMENT COMMISSION:
Lane Shetterly, Director

Michael Morrissey, Manager
DLCD, Measure 37 Services Division
Dated this 22nd day of January, 2007.

FOR THE FOR DEPARTMENT OF WATER RESOURCES:

Phillip C. Ward, Director
OWRD
Dated this 22nd day of January, 2007

FOR THE DEPARTMENT OF ADMINISTRATIVE SERVICES:

David Hartwig, Administrator
DAS, State Services Division
Dated this 22nd day of January, 2007.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to the following judicial remedies:

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.

2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation

January 22, 2007

STATE CLAIM NUMBER:	M129759
NAMES OF CLAIMANTS:	Glen and Gretchen Donaldson
MAILING ADDRESS:	24411 SW Daniel Road Beaverton, Oregon 97007
PROPERTY IDENTIFICATION:	Township 1S, Range 2W, Section 28 Tax lot 600 Washington County
OTHER INTEREST IN PROPERTY:	The Donaldson Family Revocable Living Trust
DATE RECEIVED BY DAS:	July 27, 2006
180-DAY DEADLINE:	January 22, 2007

I. SUMMARY OF CLAIM

The claimants, Glen and Gretchen Donaldson, seek compensation in the amount of $250,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 9.84-acre subject property into three parcels, with two of the parcels each containing an existing dwelling, and to develop a dwelling on the undeveloped third parcel. The subject property is located at 24411 SW Daniel Road, near Beaverton, in Washington County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Glen and Gretchen Donaldson's division of the 9.84-acre subject property into three parcels and to their development of a dwelling on the undeveloped parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the uses described in this report, and only to the extent those uses were permitted when Gretchen Donaldson acquired the property on March 11,

1963, and when Glen Donaldson acquired the property on April 5, 1968. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On November 17, 2006, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no written comments were received in response to the 10-day notice.

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or

2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on July 27, 2006, for processing under OAR 125, division 145. The claim identifies ORS 197.213, 197.263 and 215.780, OAR 660,[1] division 33, and the Bull Mountain-Cooper Mountain Critical Groundwater Area Requirements[2] as the basis for the claim.[3] Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

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[1] The claim cites OAR 680. It is presumed that the claimants meant to cite OAR 660 as OAR 680 does not exist.
[2] Critical Groundwater Area Restrictions are administered by the Oregon Department of Water Resources and are addressed by that agency in a separate report on this claim.
[3] The claim also identifies Washington County regulations as the basis of the claim: CDC section 340, 424 and 430-37.2.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for "owners" as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines "owner" as "the present owner of the property, or any interest therein."

Findings of Fact

Claimant Gretchen Donaldson acquired an interest in the subject property on March 11, 1963, as reflected by a warranty deed included with the claim. Claimant Glen Donaldson acquired an interest in the subject property on April 5, 1968, as reflected by a bargain and sale deed included with the claim. The Washington County Assessor's Office confirms the claimants' current ownership of the subject property.

Conclusions

The claimants, Glen and Gretchen Donaldson, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C), as of March 11, 1963, for Gretchen Donaldson and April 5, 1968, for Glen Donaldson.

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimants' use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimants or a family member acquired the property.

Findings of Fact

The claim indicates that the claimants desire compensation or the right to divide the 9.84-acre subject property into three parcels of unspecified acreage, two of which are presently developed and one undeveloped, and to develop a dwelling and a well on the undeveloped parcel.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The claimants' property is zoned by Washington County as EFU as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.[4] Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.

Current land use regulations for marginal land counties (including Washington County), particularly ORS 215.213(3) to (8), 215.263 and 215.780 and OAR 660, division 33, adopted

[4] The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I–IV soils.

pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings on high-value farmland in Marginal Land counties) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.213(1)(g). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.213(3) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The claimants acquired the subject property on March 11, 1963, (Gretchen Donaldson) and April 5, 1968, (Glen Donaldson), prior to the adoption of the statewide planning goals and their implementing statutes and regulations. The claim indicates that the subject property was zoned by Washington County as F-1 at the time the property was acquired. Washington County's staff report for a county claim filed under ORS 197.352 for the same property indicates that the F-1 zone allowed dwellings provided they were farm dwellings or farm help dwellings, but did not specify a minimum lot size for land divisions. It is not clear whether the F-1 zone was a qualified farm zone under ORS 215.203 (1963).

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants acquired the subject property in 1963 and 1968 and do not allow the desired division or residential development of the property. These laws restrict the use of the subject property relative to the uses allowed when the claimants acquired the property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (described in Section V.(2) of this report) must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim includes an estimate of $250,000 as the reduction in the subject property's fair market value due to the regulation(s) that restrict the claimants' desired use of the property. The claim has not provided a basis for this amount.

Conclusions

As explained in Section V.(1) of this report, the claimants are Gretchen Donaldson who acquired the subject property on March 11, 1963, and Glen Donaldson, who acquired the subject property on April 5, 1968. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the property is a reduction of $250,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

4. Exemptions Under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Washington County has implemented through its current EFU zone. All of these land use regulations, with the exception of some provisions of ORS 215, were enacted or adopted after the claimants acquired the subject property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that none of the general statutory, goal and rule restrictions on division and development

of the claimants' property were in effect when the claimants acquired it in 1963 and 1968. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimants acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have identified.[5] Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced laws that restrict the use of the subject property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the subject property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimants' desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by $250,000. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when they acquired the property. Nevertheless, based on the record for this claim, the

[5] This report addresses only those state statutes and rules administered by the department. Statutes and rules administered by the Oregon Department of Water Resources concerning the claimants' request for a well are addressed by that agency in a separate report on this claim.

department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Gretchen Donaldson to use the subject property for a use permitted at the time she acquired the property on March 11, 1963, and to allow Glen Donaldson to use the subject property for a use permitted at the time he acquired the property on April 5, 1968.

Conclusions

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Glen and Gretchen Donaldson's division of the 9.84-acre subject property into three parcels or to their development of a dwelling on the undeveloped parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when Gretchen Donaldson acquired the property on March 11, 1963, and when Glen Donaldson acquired the property on April 5, 1968.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on March 11, 1963, for Gretchen Donaldson, and April 5, 1968, for Glen Donaldson. On those dates, ORS 215.203 may have applied to the use of the property if Washington County's F-1 zone was a qualified farm use zone under ORS 215.203(1).

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the

necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on December 29, 2006. OAR 125-145 0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF WATER RESOURCES
Final Staff Report and Recommendation

January 22, 2007

STATE CLAIM NUMBER:	M129759
NAMES OF CLAIMANTS:	Glen W. and Gretchen A. Donaldson
MAILING ADDRESS:	24411 SW Daniel Street Beaverton, Oregon 97007
PROPERTY IDENTIFICATION:	Township 1S, Range 2W, Section 28 Tax lot 600 Washington County
OTHER INTEREST IN PROPERTY:	The Donaldson Family Revocable Living Trust
DATE RECEIVED BY DAS:	July 27, 2006
180-DAY DEADLINE:	January 23, 2007

I. SUMMARY OF CLAIM

The claimants, Glen W. and Gretchen A. Donaldson, seek compensation in the amount of $250,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 9.84 property into three parcels, with two parcels each containing an existing dwelling, and to build a dwelling on the third parcel along with a new groundwater well to serve the new dwelling. The subject property is located at 244411 SW Daniel Street, near Beaverton, in Washington County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Water Resources (OWRD) has determined that the claim is not valid as to state laws administered by OWRD. Department staff recommends that the claim be denied as to laws administered by OWRD. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

OWRD incorporates by reference section III of the DLCD draft report on this claim.

IV. TIMELINESS OF CLAIM

OWRD incorporates by reference the findings and conclusions of DLCD concerning the timeliness of the claim.

V. ANALYSIS OF CLAIM

1. Ownership

OWRD incorporates by reference the findings and conclusions of DLCD concerning the present owners of the property, and when they and any family member acquired an interest in the subject real property.

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimants' use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimants or a family member acquired the property.

Findings of Fact

The claim provides that the claimants would like to divide the 9.84 property into three parcels, with two parcels each containing an existing dwelling, and to build a dwelling on the third parcel along with a new groundwater well to serve the new dwelling. The claimants identify "Division 33 chapter 680,[1] critical ground water area" as state laws administered by OWRD that restrict their desired use of the property. The Property is within a critical ground water area, which was established on May 17, 1974.

The Oregon Water Code was enacted in 1909. Under this authority (ORS 536), the Water Resources Commission is obligated to adopt rules and standards to allow the orderly development of waters of the State and to protect senior water right holders. The Commission is further instructed to progressively formulate an integrated, coordinated program for the use and control of all the water resources of this state. Ground water is specifically managed under the 1955 Ground Water Act (ORS 537.505). Waters of the State of Oregon are owned by the state, and there is no property right to the use of ground water except by permit or other vested authorization. The Donaldsons may have a right to use ground water for domestic purposes under the exempt use authorization provided in statute (ORS 537.545) for the two *existing* dwellings, to the extent that this right was vested prior to 1974. After 1974, when the State Engineer adopted the Cooper Mountain-Bull Mountain Critical Groundwater Area, the claimants could not acquire a new the right to use ground water except as allowed under the terms of the State Engineer's order, which provides that a new well to withdraw water from the basalt aquifer is allowed for domestic uses only on parcels of land that are at least ten acres in size. As a result, the issuance of the order designating the critical groundwater area did not and does not restrict

[1] It appears that the claimants' reference to chapter 680 is a typographical error and that the intended citation is chapter 690, division 33.

the claimants' rights to establish a well for a new dwelling on a parcel of less than ten acres, because the claimants have no legal right to use water in this manner.[2]

The existence of the Cooper Mountain-Bull Mountain Critical Groundwater area is recognized in an administrative rule (OAR 690-502-160). The rule does not restrict any private property right that the claimants have, nor does it have any effect independent of the State Engineer's order referenced in the rule.

The claim also identifies "Division 33, Chapter [690]" as a land use regulation on which the claim is based. That division of administrative rules provides additional procedures and standards to aid OWRD in determining whether a proposed use will impair or be detrimental to the public interest with regard to sensitive, threatened or endangered fish species. These rules apply to some applications to appropriate ground water that is hydraulically connected to surface water. The claimants have not demonstrated that the Division 33 rules would apply to a water right application filed in conjunction with the proposed use of the Property.

The claimants have not asserted that OWRD has denied an application for a permit, or limited the use of water under an existing water right with respect to the claimants' use of the property. According to information in OWRD's water right information system, Glen Donaldson filed an application with OWRD for irrigation of land that includes at least part of the Property. To date, OWRD has neither approved nor denied that application.

OWRD has not enforced any state land use regulation that it administers in a manner that has restricted the claimants' desired use of real property that they own. Finally, under ORS 197.352(11), "land use regulations" do not include the orders or rules of the Oregon Water Resources Commission or the State Engineer. As a result, the identified rules and order are not "land use regulations" under ORS 197.352.

For the foregoing reasons, OWRD is not authorized to provide relief for this claim.

Conclusions

The Department has not denied an application filed by the claimants for an additional water right for use of water on the Property. OWRD has not taken any action since December 2, 2004, to enforce an existing state law that restricts the claimants' right to use tax lot 800 for any purpose. Further, the laws identified in the claim are not "land use regulations" under ORS 197.352(11). For all of these reasons, there is no basis upon which OWRD may approve this claim under ORS 197.352. As a result, OWRD recommends that this claim be denied as to laws administered by OWRD.

[2] The State Engineer's order applies only to the use of water from the basalt aquifer within the critical groundwater area. A further reason for denial of this claim is that the use the claimants have described does not identify the use of water from this aquifer as the claimants' desired use.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (described in Section V.(2) of this report) must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim includes an estimate of $250,000 as the reduction in the subject property's fair market value due to the regulation(s) that restrict the claimants' desired use of the property. The claim has not provided a basis for this amount. Further, this estimate appears to include the presumption that the claimants have the right to a new use of state waters. As explained above, the claimants do not hold that right. As a result, the claimants' estimate is not relevant to determining whether laws administered by OWRD have had the effect of reducing the fair market value of real property owned by the claimants.

Conclusions

Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the property and have the effect of reducing the fair market value of real property rights held by the claimants. Based on the findings and conclusions in Section V.(2) of this report, the identified laws administered by OWRD that were enacted or adopted since the claimants acquired the subject property do not restrict the claimants' real property rights. As a result, the claimants have not demonstrated that these laws have had any effect on real property rights held by claimants.

4. Exemptions Under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

Findings of Fact and Conclusions

The claim is based on state land use regulations that are alleged to restrict the use of the subject property relative to the rights held by the claimants when they acquired the property. The claimants have not established that they hold property rights that have been restricted by state land use regulations administered by OWRD.

Some of the laws administered by OWRD may be exempt under particular exemptions of ORS 197.352(3). Because claimants have not established that they have a right to compensation, OWRD makes no determination concerning these exemptions at this time.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department

may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the current owner acquired the property.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by OWRD do not restrict any real property interest held by claimants, and OWRD has not enforced any state "land use regulation" to restrict the claimants' desired use of their property. As a result, OWRD recommends that this claim be denied as to laws administered by OWRD.