

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,  
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, AND  
THE BOARD AND DEPARTMENT OF FORESTRY  
OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR	)	FINAL ORDER
COMPENSATION UNDER ORS 197.352	)	CLAIM NO. M129848
(BALLOT MEASURE 37) OF	)	
Kent Tresidder, CLAIMANT	)	

Claimant: Kent Tresidder (the Claimant)

Property: Township 28S, Range 13W, Section 29, Tax lot 1001, Coos County (the Property)

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

Claimant 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 Report and Recommendation of DLCD (the DLCD Report), and the Oregon Department of Forestry (the ODF Report), attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Oregon Department of Forestry or the Oregon Board of Forestry, for the reasons set forth in the ODF 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 Kent Tresidder's division of the 67.13-acre subject property into two parcels or to his development of a dwelling on each parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after April 30, 1979. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on April 30, 1979.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on April 30, 1979. On that date, the property was subject to compliance with the provisions of Goal 4 and ORS 215 then in effect.

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 claimant first obtains 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 claimant 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 claimant to use the subject property, it may be necessary for him 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 claimant 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 claimant.

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 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 Oregon Board and Department of Forestry as a final order of the Board under ORS 197.352, OAR 629-001-0057, and OAR Chapter 125, division 145.

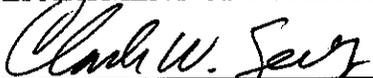
FOR DLCD AND THE LAND  
CONSERVATION AND DEVELOPMENT  
COMMISSION:

  
\_\_\_\_\_  
Lane Shetterly, Director  
DLCD  
Dated this 6<sup>th</sup> day of February, 2007.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
\_\_\_\_\_  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 6<sup>th</sup> day of February, 2007.

FOR THE OREGON BOARD OF  
FORESTRY AND THE OREGON  
DEPARTMENT OF FORESTRY:

  
\_\_\_\_\_  
Clark Seely, Acting State Forester  
ODF  
Dated this 6<sup>th</sup> day of February, 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**

February 6, 2007

**STATE CLAIM NUMBER:** M129848

**NAMES OF CLAIMANT:** Kent Tresidder

**MAILING ADDRESS:** 92206 Highway 42 South  
Coquille, Oregon 97423

**PROPERTY IDENTIFICATION:** Township 28S, Range 13W, Section 29  
Tax lot 1001  
Coos County

**OTHER INTEREST IN PROPERTY:** Methane Energy Corp.

**DATE RECEIVED BY DAS:** August 14, 2006

**180-DAY DEADLINE:** February 10, 2007

**I. SUMMARY OF CLAIM**

The claimant, Kent Tresidder, seeks compensation in the amount of \$247,000 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 claimant desires compensation or the right to divide the 67.13-acre subject property into two parcels and to develop a dwelling on each parcel.<sup>1</sup> The subject property is located at the geographical coordinates listed above near Coquille, in Coos 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 Kent Tresidder's division of the 67.13-acre subject property into two parcels and to his development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 6, enacted or adopted after April 30, 1979. These laws will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and

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<sup>1</sup> The claimant also seeks to carry out a forest operation. That aspect of the claim is being addressed in a separate report by the Oregon Department of Forestry (ODF).

only to the extent that use was permitted when he acquired the property in 1979.<sup>2</sup> (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS ON THE CLAIM**

#### **Comments Received**

On December 5, 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 August 14, 2006, for processing under OAR 125, division 145. The claim identifies all land use laws, regulations and rules as the basis for the claim.<sup>3</sup> Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

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<sup>2</sup> The claim also indicates that the claimant may desire to sell or transfer the newly created parcels for development. In effect, the claimant may request that a decision of the department to "not apply" (waive) certain laws as set forth in this report be transferable with the property. ORS 197.352 only authorizes a state agency to waive a law in order to allow the current owner a use of the property permitted at the time that owner acquired the property. A determination of transferability is beyond the scope of relief that the department may grant under ORS 197.352. The Oregon Department of Justice has advised the department that "[i]f the current owner of the real property conveys the property before a new use allowed by the public entity is established, then the entitlement to relief will be lost."

<sup>3</sup> This report addresses only those state statutes and rules administered by the department. Statutes and rules administered by the Oregon Department of Forestry are addressed in reports by that agency.

## **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.

## **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**

The claimant, Kent Tresidder, acquired the subject property on April 30, 1979, as reflected by a deed included with the claim. On April 23, 1999, the claimant transferred the property to a revocable trust, the Kent C. Tresidder Living Trust, as evidenced by a deed included with the claim.<sup>4</sup> The Coos County Assessor’s Office confirms the claimant’s current ownership of the subject property.

### **Conclusions**

The claimant, Kent Tresidder, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of April 30, 1979.

### **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 claimant’s 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 claimant or a family member acquired the property.

### **Findings of Fact**

The claim indicates that the claimant desires to divide the 67.13-acre subject property into two parcels and to develop a dwelling on each parcel, and that land use laws, regulations and rules adopted since the claimant acquired the property prevents the desired use.

The claim is based generally on the applicable provisions of state law that require forest zoning and restrict uses on forest-zoned land. The claimant’s property is zoned by Coos County as Forest (F) as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the claimant’s property is “forest land” under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660,

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<sup>4</sup> Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

The claimant acquired the subject property after the adoption of the statewide planning goals but before the Commission acknowledged Coos County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged the county's plan and land use regulations when the claimant acquired the subject property on April 30, 1979, the statewide planning goals, and Goal 4 in particular, applied directly to the claimant's property when he acquired it.<sup>5</sup>

Goal 4 went into effect on January 25, 1975, and was intended to "conserve forest lands for forest uses" and required, "Lands suitable for forest uses shall be inventoried and designated as forest lands. Existing forest land uses shall be protected unless proposed changes are in conformance with the comprehensive plan." Those forest uses were defined as follows: "(1) the production of trees and the processing of forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of clean air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock." Specifically, Goal 4 only allowed land divisions that would protect commercial forest lands for commercial forest uses. Dwellings in forest zones could only be allowed if found to be "necessary and accessory" to one of the enumerated forest uses listed in Goal 4.<sup>6</sup>

No information has been presented in the claim to establish that the claimant's desired division of the 67.13-acre subject property into two parcels and his development of a dwelling on each parcel comply with the Goal 4 standards in effect when the claimant acquired the subject property in 1979.

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<sup>5</sup> The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's land use regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly applied to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Foster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

<sup>6</sup> Goal 4 prohibited uses that were not enumerated by Goal 4 as permissible uses for forest lands as well as those that were not necessary and accessory to an enumerated forest use. *Lamb v. Lane County*, 7 Or LUBA 137 (1983). Dwellings in forest lands were required to be "necessary and accessory" to show that such dwellings complied with the Goal 4 requirement that local land use regulations must "conserve forest lands for forest uses." *1000 Friends v. LCDC (Curry County)*, 301 Or 447 (1986). A dwelling that may "enhance" forest uses is not "necessary and accessory" to a forest use to the extent required by Goal 4. *1000 Friends of Oregon v. LCDC (Lane County)*, 305 Or 384 (1988). For additional guidance, the Goal 4 provisions were interpreted under OAR 660, division 6, effective on September 1, 1982, in *1000 Friends of Oregon v. LCDC (Lane County)* and in *1000 Friends v. LCDC (Curry County)*.

## **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established pursuant to Goal 4, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 660-006-0027 were all enacted or adopted after the claimant acquired the subject property in 1979 and do not allow the claimant's desired division or development of the property. However, the claim does not establish whether or to what extent the claimant's desired use of the subject property complies with the standards for land divisions and development under Goal 4 in effect when the claimant acquired the property on April 30, 1979.

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 claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to apply to the claimant's 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 claimant seeks 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 regulations (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 \$247,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. A portion of this estimated reduction in fair market value is attributed to land use regulations other than forest practice regulations. This amount is based on the claimant's estimate of the effect of the regulations on the fair market value of the property.

## **Conclusions**

As explained in Section V.(1) of this report, the claimant is Kent Tresidder who acquired the subject property on April 30, 1979. Under ORS 197.352, the claimant is 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 claimant acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the land use regulations on the fair market value of the subject property is a reduction of \$247,000.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimant's desired use of the subject property was allowed under the standards in effect when he acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the 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 4, ORS 215 and OAR 660, division 6, which Coos County has implemented through its current Forest zone. With the exception of provisions of Goal 4 and ORS 215 adopted before the claimant acquired the subject property on April 30, 1979, these state land use regulations were not in effect when the claimant acquired the 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 the general statutory, goal and rule restrictions on residential division and development of the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after the claimant acquired the property. Provisions of Goal 4 and ORS 215 in effect when the claimant acquired the subject property in 1979 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimant acquired the subject property are exempt under ORS 197.352(3)(E) and will also continue to apply to the claimant's use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . ." Accordingly, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B). These standards include OAR 660-006-0029.

There may be other laws that continue to apply to the claimant's 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 claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws currently apply to that use and may continue to 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 claimant has identified. 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 claimant

should be aware that the less information he has 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 his 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 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 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 claimant's desired use of the subject property. The claim asserts that existing land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$247,000. 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 claimant's desired use of the property was allowed under the standards in effect when he acquired the property. Nevertheless, based on the record for this claim, the 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 Kent Tresidder to use the subject property for a use permitted at the time he acquired the property on April 30, 1979.

### **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 Kent Tresidder's division of the 67.13-acre subject property into two parcels or to his development of a dwelling on each parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after April 30, 1979. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on April 30, 1979.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on April 30, 1979. On that date, the property was subject to compliance with the provisions of Goal 4 and ORS 215 then in effect.

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 claimant first obtains 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 claimant 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 claimant to use the subject property, it may be necessary for him 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 claimant 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 claimant.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on January 22, 2007. OAR 125-145 0100(3), provided an opportunity for the claimant or the claimant's 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 FORESTRY**

**Final Staff Report and Recommendation**

February 6, 2007

**STATE CLAIM NUMBER:** M129548

**NAMES OF CLAIMANT:** Kent C. Tresidder

**MAILING ADDRESS:** 92206 Highway 42 S  
Coquille, Oregon 97423

**PROPERTY IDENTIFICATION:** Township 28 S, Range 13W, Section 29  
Tax lot 1001  
Coos County

**OTHER INTEREST IN PROPERTY:** Methane Energy Corp.

**DATE RECEIVED BY DAS:** August 14, 2006

**180-DAY DEADLINE:** February 10, 2007

**I. SUMMARY OF CLAIM**

See Department of Land Conservation and Development (DLCD) Final Staff Report.

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Forestry (ODF) has determined the claim is not valid as to land use regulations administered by ODF or the Oregon Board of Forestry (Board) because claimant has not demonstrated how any of the state land use regulations identified in the claim and administered by the Board or ODF have been enforced in a manner that restricts the claimant's desired uses of the subject property: to harvest timber unrestricted by Oregon Forest Practices Act and Rules, including leaving snags and downed logs, harvesting rules, reforestation rules, water protection rules, and vegetation restoration along streams, and to divide the 67.13- acre property into two parcels and develop a dwelling on each parcel. ORS 527.730 provides that "[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." One of the claimant's desired use of the property is a conversion. In the one case where the claimant submitted a notification to carry out a "forest operation" (a commercial activity relating to the establishment, management or harvest of forest tree species) on the subject property since the effective date of the Measure 37 (December 2, 2004), the use of the property was subject to the Forest Practices Act, but the regulations that applied are exempt under ORS 197.352(3). (See the complete recommendation in Section VI. of this report.)

### III. COMMENTS ON THE CLAIM

#### Comments Received

See DLCD Final Staff Report.

### 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 August 14, 2006, for processing under OAR 125, division 145. The claim identifies a list of statutes and rules, which includes ORS 526 and 527, and OAR 629, as the basis for the claim. 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.

### V. ANALYSIS OF CLAIM

#### 1. Ownership

ODF adopts the findings of fact and conclusions of law regarding ownership contained in the DLCD Final Staff Report for this claim.

#### 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 state land use regulation must restrict the claimant's desired use of private real property, and that the enactment

or enforcement of the regulation has had the effect of reducing the fair market value of the property.

### **Findings of Fact**

The claimant desires compensation of \$247,000 or “(1) To harvest timber unrestricted by OR Forest Practices Laws Regulations and Rules, including leaving snags and downed logs, harvesting rules, reforestation rules, water protection rules, and vegetation restoration along streams, and (2) To develop two residential lots.” The claim lists the following state statutes and rules administered by ODF or the Board<sup>1</sup> as laws that restrict the use of the property as the basis for the claim: ORS 527.676 and 527.724; and OAR 629-610, 629-625, 629-630, 629-637, 629-640, and 629-665. The claim states that many of the regulations restrict or may restrict the ability to harvest economically, that some restrict aspects of development for residential use, and that one, OAR 629-635 causes a loss in timber value for trees left along streams.

The property is zoned for forest use. Nothing in ORS chapter 527 or OAR chapter 629 relates to the division of land, or to the development of residential uses. The state laws listed in the claim that are administered by ODF only apply to forest operations and not to the second use identified in the claim – to develop two residential lots.

ORS 527.730, Conversion of forestland to other uses, states, “Nothing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use.” No laws enforced by the Board or ODF restrict the division of property or the establishment of dwellings.

With respect to the first desired use identified in the claim – to harvest timber on the property – ODF has not enforced any existing “land use regulation” in a manner that restricts the claimant’s desired use of the property. On June 1, 2006, ODF received a notification of operations from the claimant, (Notification Number 06-60847) to remove a culvert on the subject property. The culvert was subsequently installed in another location on other property the claimant owns. The claim does not demonstrate how the statutes or rules administered by ODF or the Board and related to this activity restricted the claimant’s use of the subject property or had the effect of reducing its fair market value.

ODF has not enforced any other existing “land use regulations” with regard to the claimant’s desired use of the property since the effective date of Measure 37 (ORS 197.352). ODF is unable to determine whether or how existing “land use regulations” administered by ODF or the Board may apply to the claimant’s desired use of the property until the claimant submits a written notification that gives a specific description of the operation that the claimant desires to conduct. The claimant submitted a letter in response to the draft ODF report on this claim in which he asks for clarification. Measure 37 requires that there have been some form of enforcement of a “land use regulation” administered by ODF in order for the claim to be valid. Because no notification has been filed describing what it is that the claimant wishes to do, the department has not enforced a state “land use regulation.” In addition, in order for the claim to establish that a “land use regulation” administered by ODF restricts the claimant’s desired use of

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<sup>1</sup> This report addresses only state land use regulations administered by ODF or the Board of Forestry. The state land use regulations listed in the claim include statutes administered by the Oregon Department of Land Conservation and Development (DLCD). These statutes and rules are addressed in a separate report for this claim, by DLCD.

the property, ODF needs to know with some particularity what it is that the claimant wishes to do. Whether the Forest Practices Act and its implementing rules do prohibit or otherwise restrict a forest operation will depend on exactly what is proposed. Finally, the claimant's comments on the draft ODF report assert that ODF must identify all specific state statutes and rules that restrict the claimant's desired use. The claimant is wrong; that burden lies with the claimant.

### **Conclusions**

ODF is unable to determine, based on the information in this claim, that a state "land use regulation" administered by ODF or the Board apply to or restrict the claimant's desired use of the property. ODF has not enforced any existing "land use regulation" with regard to the claimant's use of the property since the effective date of Measure 37, with the sole exception of the claimant's removal of a culvert. The claim does not establish how any "land use regulation" relating to the removal of the culvert has restricted the claimant's use of the property. As a result, ODF has no basis upon which it may determine that the claimant is entitled to relief under ORS 197.352.

### **3. Effect of Regulations on Fair Market Value**

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulations (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 claimant provided an estimated amount of loss in fair market value of \$247,000. The estimate is based primarily on the value of proposed residential development of the subject property as well as for trees required to be retained along a fish-bearing stream on the property. Those trees were retained as part of a forest operation for which a notification and written plan were submitted on November 5, 2004, before the effective date of Measure 37 (December 2, 2004); therefore, any effect on the value of the property occurred prior to the time when it could be the basis for compensation under ORS 197.352. In addition, when the property was acquired in 1979, the Forest Practices Act (1977 edition) and forest practice rules (September 29, 1978 edition) applied to the claimant's use of the property. The claim does not demonstrate that any other land use regulations administered by ODF or the Board have restricted his use of the subject property or have had the effect of reducing its fair market value compared to the uses allowed when he acquired the property. The remaining information in the claim regarding loss of market value is based on laws not administered by ODF or the Board. As a result, there is no relevant evidence in the record for this claim relating to the effect of laws administered by ODF or the Board on the fair market value of the subject property.

### **Conclusions**

The claimant has not demonstrated that laws enforced or administered by ODF or the Board restrict his desired use of this property or affect its fair market value.

#### **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**

ORS 197.352(3) exempts laws that were enacted before a claimant acquired its interest in the property. Based on the findings and conclusions in the DLCD report on this claim, Claimant acquired the property on April 30, 1979.

The FPA was first enacted in 1971 and the first forest practice rules to administer the FPA became effective on July 1, 1972. The FPA and rules have been amended at various times since then. The FPA and rules have been amended at various times since then. The FPA, 1977 edition, and the forest practice rules effective September 28, 1978 are exempt under ORS 197.352(3)(E).

Some FPA regulations were enacted to control water pollution resulting from forest operations. One of the stated purposes of OAR 629-625 and 629-630 is to protect water quality. ORS 197.352(3)(B) specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety..., including pollution control.” The culvert removal under Notification Number 06-60847 was conducted in accordance with OAR 629-625, which is exempt under OAR 197.352(3)(B)..

Other FPA regulations listed in the claim may be exempt under 197.352(3).

#### **Conclusions**

ODF concludes that some of the listed land use regulations are likely exempt under ORS 197.352(3). Specifically, OAR 629-625 is exempt and is the only regulation enforced in any way with respect to the claimant’s use of the property since the effective date of Measure 37.

Laws in effect when the claimant acquired the subject properties are exempt under ORS 197.352(3)(E), and will continue to apply to the claimant’s use of the property. There may be other laws that continue to apply to the claimant’s use of the subject property that have not been identified in the claim. When the claimant submits future notifications, 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 (3)(D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject properties based on the uses that the claimant has identified. 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 claimant should be aware that the less information it has 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 its use of the subject property.

## **VI. FORM OF RELIEF**

Based on the current record, the claimants are not entitled to relief under ORS 197.352 from ODF or the Board. ODF denies any relief for this claim because neither the Board nor ODF has enforced laws that restrict the division of the subject property into parcels or lots, or the use of the property for residential purposes. ODF also denies any relief for this claim because neither the Board nor ODF has enforced any non-exempt laws relating to commercial forest activities on the subject property.

## **VII. COMMENTS ON THE DRAFT REPORT**

ODF issued its draft staff report on this claim on July 21, 2006. OAR 125-145-0100(3), provides an opportunity for the claimant or the claimant's 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. Comments received have been taken into account by the department in the issuance of this final report.

**From:** "Schumock Mark F" <mark.f.schumock@doj.state.or.us>  
**To:** "BEALS Alice" <Alice.Beals@state.or.us>, "AWLASEWICZ Heather" <Heather.A...>  
**Date:** 2/6/2007 11:39 AM  
**Subject:** Fitzwater M130138 CR - TITLE WORK NEEDED

**CC:** "EASTLUND Melissa" <Melissa.Eastlund@state.or.us>, "Cotell Tonie M" <ton...>  
Revised based on new information.

The claimant is Patsy R. Fitzwater.

The subject property is tax lot 101 (Clackamas County, Township 3S, Range 1E, Section 15), located at 28101 SW Pete's Mountain Rd.

The claimant originally acquired an interest in the property on October 25, 1965, as reflected by a contract included with the claim. On May 17, 1971, claimant (and her then husband) conveyed all of their interest in the property to her parents-in-law, Clarence L. Fitzwater and Hildur E. Fitzwater, as reflected by the Bargain and Sale Deed included with the claim. On May 27, 1971, the vendors under the October 25, 1965 contract executed a fulfillment (warranty) deed to Clarence L. Fitzwater and Hildur E. Fitzwater. On January 1, 1974, claimant re-acquired an interest in the property as reflected by the Memorandum of Land Sales Contract included with the claim. Clarence L. Fitzwater and Hildur E. Fitzwater were the vendors under said contract. On December 26, 1989, the surviving vendor, Hildur E. Fitzwater, executed a fulfillment (warranty) deed to claimant in fulfillment of the January 1, 1974 Land Sales Contract. Based on the foregoing, for purposes of M37, claimant's date of personal acquisition is January 1, 1974 based on the Land Sales Contract included with the claim.

Claimant is entitled to a family acquisition date as of the date of her original acquisition, to wit: October 25, 1965.

On August 25, 1993, the claimant transferred her interest in the property to a revocable trust, the TXL 100, I Trust, as reflected by the deed included with the claim. On August 25, 1997, the property was transferred to another revocable trust, the Patsy R. Fitzwater Trust, as reflected by the deed included with the claim.

On January 19, 2007, the Clackamas County Assessor's Office confirmed claimant's current ownership.

The claimant demands compensation of \$2,249,947, based on claimant's attorney's assessment of value.

The claimant's desired use of the 18.33-acre property is to divide the property into six to ten 1-acre to 2.5-acre parcels and to develop a dwelling on each parcel.

The claim identifies SB 100, ORS 197, 197.175, 197.251, 197.625(3), 215, 215.203, Statewide Goals 2, 3, 4, 14, OAR 660-004, 660-033, 660-006, 660-004-0040 as restricting the claimant's desired use of the subject property.

Based on the laws identified in the claim, the Department of Land Conservation and Development is the regulating agency.

Mark Schumock, AAG

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