Oregon
Theodore R. Kulongoski, Governor

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April 30, 2007

To: Interested Persons

From: Lane Shetterly, Director

Re: Ballot Measure 37 (ORS 197.352) Claim Number M130601

Claimant: Phillip Kendall Cates

Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (ORS 197.352), is the Final Staff Report and Recommendation of the Department of Land Conservation and Development, and the Final Order.

This Final Staff Report and Recommendation and the Final Order constitute the final decision on this claim. No further action will be taken on this matter.

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

IN THE MATTER OF THE CLAIM FOR COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF Phillip Kendall Cates, CLAIMANT	))))	FINAL ORDER CLAIM NO. M130601

Claimant: Phillip Kendall Cates (the Claimant)

Property: Township 9S, Range 6W[1], Section 23: tax lot 200; Section 25: tax lot 500; Sections 23 and 26: tax lot 100; Sections 26, 27, 34 and 35: tax lot 100, Polk 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 Department of State Lands (the DSL Report), attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Department of State Lands for the reasons set forth in the DSL 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 Phillip Kendall Cates' desired division and development of the 682.66-acre subject property, as described above in Section I: applicable provisions of Goals 3, 4 and 11, ORS 215 and OAR 660, divisions 6, 11, and 33. 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 only to the extent that use was permitted when the claimant acquired the property on February 28, 1972.

Goal 11 will not apply only to the extent that it prohibits the claimant from establishing an urban level of public facilities and services to serve the development of the property. Goal 11 will

[1] The subject property includes four tax lots. Tax lot 100 (sections 23 and 26) consists of 107.19 acres, tax lot 100 (sections 26, 27, 34 and 35) consists of 314.47 acres, tax lot 200 consists of 124.8 acres and tax lot 500 consists of 82.2 acres.

continue to apply to public service providers seeking to extend or establish public facilities to serve the subject property.

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 when Phillip Kendall Cates acquired the property on February 28, 1972.

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 property by the claimant.

6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

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

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

Cora R. Parker, Deputy Director
DLCD
Dated this 3rd day of May, 2007.

FOR THE DEPARTMENT OF ADMINISTRATIVE SERVICES:

David Hartwig, Administrator
DAS, State Services Division
Dated this 3rd day of May, 2007.

FOR THE DEPARTMENT OF STATE LANDS:
Louise C. Solliday, Director

By: Jeannette Holman, Assistant Director
DSL, Administration and Finance Division
Dated this 3rd day of May, 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 STATE LANDS

Final Staff Report and Recommendation
May 3, 2007

OREGON CLAIM NUMBER:	**M130601**
NAME OF CLAIMANT (S):	**Philip Kendall Cates**
MAILING ADDRESS:	**529 NW Jasper Street** **Dallas, Oregon 97338**
IDENTIFICATION OF PROPERTY:	Township 9S, Range 6W[1] and Section 23: tax lot 200 Section 25: tax lot 500 Sections 23 and 26: tax lot 100 and Sections 26, 27, 34 and 34: tax lot 100 Polk County
OTHER CONTACT INFORMATION:	**c/o Charles E. Cates** **CEC Services, LLC** **485 Cross Creek Drive** **Roseburg, OR 97470**
DATE RECEIVED BY DAS:	**November 6, 2006**
180—DAY DEADLINE:	**May 5, 2007**

I. SUMMARY OF CLAIM

Philip Kendall Cates is the claimant. The claimant seeks compensation in the amount of $6,320,308 for the reduction in the fair market value of the property he alleges has resulted from the enforcement of certain land use regulations to restrict his use of the

[1] The subject property includes two separate properties. The first property consists of tax lot 100 (sections 26, 27, 34 and 35), containing 314.47 acres. The second property consists of three tax lots: tax lot 100 (sections 23 and 26), containing 107.19 acres; tax lot 200, containing 124.8 acres; and tax lot 500 containing 82.2 acres.

III. COMMENTS

On March 23, 2007, pursuant to OAR 125-145-0080, the Department of Administrative Services (DAS) sent notices of this claim to owners of surrounding properties and other interested parties. According to DAS, no comments have been received.

Comments concerning the effects a use of the subject property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effect may become relevant in determining which claims to pay compensation for rather than waiving a state law.

IV. TIMELINESS OF THE 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 December 2, 2004, written demand for compensation must be made on or before December 2, 2006, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later.

2. For claims arising from land use regulations enacted after December 2, 2004, written demand for compensation must be made 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 May 2, 2006, for processing under OAR Chapter 125. The claim identifies Oregon Revised Statutes and Oregon Administrative Rules pertaining to removal and fill of material, statewide land use planning, subdivisions and partitions as amended since 1972, and county planning and zoning as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim.

Conclusions

The claim has been submitted on or before December 2, 2006. The claim is directed at land use regulations enacted before December 2, 2004. As a result, the claim is timely.

The claim alleges that Philip Kendall Cates has owned the property identified as Township 9 South, Range 6 West, Sections 23 and 25, tax lot 200 and 500, Sections 23 and 26, tax lot 100, and Sections 26, 27, 34 and 35, tax Lot 100 located in Polk County at Maple Grove Road and the Luckiamute River since February 28, 1972. The claim includes a notice of contract of sale and a title report to substantiate this.

Conclusions

The claimant, P. Kendall Cates, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C) as of February 28, 1972.

3. The Desired Use of the Property

The claim indicates the desired use of the property is the right to develop the first property (tax lot 100 in sections 26, 27, 34 and 35) for the following uses:

- To establish aggregate mining sites on the property;
- To partition a 7-acre portion from the 313-acre portion of the subject property and to develop a lodge;
- To establish a private hunting and fishing preserve, including accessory uses;
- To establish a guiding, dog raising and training services;
- To establish shooting facilities;
- To establish overnight camping facilities including tents, yurts and recreational vehicles and accessory uses;
- To establish ponds and other facilities to rear and stock game birds, trout, and other fish species for recreational fishing and hunting;
- To establish a residence on the remaining parcel;
- To establish a caretaker's residence on the property;
- To establish individual or community sewer and water systems as necessary to serve the above uses; and
- To fill wetlands on the property.

The claimant desires compensation or the right to develop the second property (tax lots 100, 200 and 500) for the following uses:

- To establish a private hunting and fishing preserve, including accessory uses;
- To establish a guiding, dog raising and training services;
- To establish shooting facilities;
- To establish overnight camping facilities including tents, yurts and recreational vehicles and accessory uses;
- To establish ponds and other facilities to rear and stock game birds, trout, and other fish species for recreational fishing and hunting;
- To divide the property into eight parcels (five parcels of two acres or more, and three parcels of more than 80 acres) and to establish a dwelling on each;
- To establish a private use airport;

whether regulation under ORS chapter 196 is a regulation of land use under ORS 197.352.

5. Laws in Effect When the Present Owners Acquired the Property

Requirement

ORS 197.352 requires the state to compensate the present owners of the property if a current state law restricts the use of the property. If the state is paying compensation, then the amount of compensation is determined by the difference in fair market value of the property with the current state land use regulations in place and the fair market value of the property if it were subject to whatever state land use regulations applied to the property when it was acquired by the present owners or a family member of the present owners (whichever occurred first). If the state elects not to pay compensation, however, it may only allow the present owners to use the property for a use permitted when they acquired the property (not when it was acquired by a family member).

As a result, in this section the report summarizes both the laws that were in effect when the present owners acquired the property, and the laws in effect when a family member of the owners acquired the property (if a family member conveyed the property to the present owners).

Findings of Fact

The Removal-Fill Law requires a permit for removal or fill within waters of the state, including wetlands and estuaries, and requires DSL to include in such permits conditions designed to mitigate for impacts to wetlands and estuaries. When the claimant acquired the property in 1972, the Removal-Fill Law was in effect. The use that the claimant states in his claim is to fill wetlands on the property; establish a private hunting preserve including accessory uses (offices, sales rooms, restrooms, caretaker residence, parking, and enclosed and unenclosed gathering areas); establish a guiding service and dog raising and training service; establish shooting facilities including target ranges, parking and restrooms; establish overnight camping facilities including tents, yurts and recreational vehicles, including accessory uses (offices, sanitary and potable water facilities); establish ponds and other facilities to rear and stock game birds, trout, and other fish species for recreational fishing and hunting use of guests; develop a private use airport; install an individual or community sewer and water systems as necessary to serve the above uses; and to conduct aggregate mining. If the development of the property will affect a jurisdictional wetland or other waters of the state, then state statutes administered by the DSL may require a permit for filling and/or removing more than 50 cubic yards of material within any such waters of the state.

Until the claimant submits an application for a removal-fill permit, however, DSL is unable to determine whether state land use regulations administered by DSL restrict the use of the property. In addition, under ORS 197.352(1), DSL is authorized to provide relief to claimants only when it has enforced an existing state law through some action

- Restrict or prohibit activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;
- To the extent the land use regulation is required to comply with federal law;
- Restrict or prohibit the use of a property for the purpose of selling pornography or performing nude dancing; or that were
- Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

Findings of Fact

The claim is based in part on the provisions of the state Removal-Fill Law (ORS 196.800 to 196.990), which were initially enacted in 1967. The claimant Philip Kendall Cates acquired the subject property in 1972. As a result, there are no laws that have been enacted after the date the claimant acquired his interest, and any laws that took effect prior to that date are exempt under ORS 197.352(3)(E). Other exemptions may apply to the Removal-Fill Law.

The claimant should be aware that depending on the nature of the use of the property that is finally proposed, one or more of the exemptions in ORS 197.352(3)(A)-(D) may apply. However, until the claimant applies for a removal-fill permit, DSL is unable to determine what laws and what exemptions may apply.

Conclusions

Laws in effect when the claimant acquired an interest in the property are exempt under ORS 197.352(3)(E), and will continue to apply to the claimant's use of the property. The Removal-Fill Law was in effect when the claimant acquired his interest in the property.

This report addresses only those state laws that are identified in the claim, or that DSL is certain apply to the property based on the use(s) 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 DSL in the claim. Claimant should be aware that the less information provided to DSL in the claim, the greater the possibility that there may be additional laws administered by DSL that will later be determined to continue to apply to the claimant's use of the property.

VI. FORM OF RELIEF

1. Is the Present Owner Entitled to Relief

Requirement

A claimant is entitled to relief if:

whether the Removal-Fill Law applies to or restricts the claimant's desired use until final action is taken on the permit application.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

May 3, 2007

STATE CLAIM NUMBER:	M130601
NAME OF CLAIMANT:	Phillip Kendall Cates
MAILING ADDRESS:	529 NW Jasper Street Dallas, Oregon 97338
PROPERTY IDENTIFICATION:	Township 9S, Range 6W[1] Section 23: tax lot 200 Section 25: tax lot 500 Sections 23 and 26: tax lot 100 and Sections 26, 27, 34 and 35: tax lot 100 Polk County
OTHER CONTACT INFORMATION:	Charles E. Cates, CEC Services LLC 485 Cross Creek Drive Roseburg, Oregon 97470
DATE RECEIVED BY DAS:	November 6, 2006
180-DAY DEADLINE:	May 5, 2007

I. SUMMARY OF CLAIM

The claimant, Phillip Kendall Cates, seeks compensation in the amount of $6,320,308 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 develop the first property (tax lot 100 in sections 26, 27, 34 and 35) for the following uses:

- To establish aggregate mining sites on the property;
- To partition a 7-acre portion from the 313-acre portion of the subject property and to develop a lodge;
- To establish a private hunting and fishing preserve, including accessory uses;
- To establish a guiding, dog raising and training services;
- To establish shooting facilities;

[1] The subject property includes two separate properties. The first property consists of tax lot 100 (sections 26, 27, 34 and 35), containing 314.47 acres. The second property consists of three tax lots: tax lot 100 (sections 23 and 26, containing 107.19 acres; tax lot 200, containing 124.8 acres; and tax lot 500, containing of 82.2 acres.

- To establish overnight camping facilities including tents, yurts and recreational vehicles and accessory uses;
- To establish ponds and other facilities to rear and stock game birds, trout, and other fish species for recreational fishing and hunting;
- To establish a residence on the remaining parcel;
- To establish a caretaker's residence on the property; and
- To establish individual or community sewer and water systems as necessary to serve the above uses.[2]

The claimant desires compensation or the right to develop the second property (tax lots 100, 200 and 500) for the following uses:

- To establish a private hunting and fishing preserve, including accessory uses;
- To establish a guiding, dog raising and training services;
- To establish shooting facilities;
- To establish overnight camping facilities including tents, yurts and recreational vehicles and accessory uses;
- To establish ponds and other facilities to rear and stock game birds, trout, and other fish species for recreational fishing and hunting;
- To divide the property into eight parcels (five parcels of two acres or more, and three parcels of more than 80 acres) and to establish a dwelling on each parcel;
- To establish a private use airport; and
- To establish individual or community sewer and water systems as necessary to serve the above uses.

The subject property is located at 17395 Maple Grove Road and 18745 Depot Street, near Monmouth, in Polk 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 Phillip Kendall Cates' desired uses listed above in Section I: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), Goal 4 (Forest Lands) and Goal 11 (Public Facilities and Services), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, 11, and 33. 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 only to the extent that use was permitted when the claimant acquired the property on February 28, 1972. (See the complete recommendation in Section VI. of this report.)

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[2] The claimant also desires to "fill the wetlands on the property." However, this report only addresses statutes and rules administered by the department. The desired use to "fill the wetlands on the property," will be addressed in a Department of State Lands (DSL) report. The draft staff report made reference to the report by Oregon Department of Fish and Wildlife (ODFW). However, the Department of Justice has determined that there is no need for their participation.

III. COMMENTS ON THE CLAIM

Comments Received

On March 23, 2007, 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, one written comment was received in response to the 10-day notice.

The comment does not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment letter in the department's claim file.)

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 November 6, 2006, for processing under OAR 125, division 145. The claim identifies ORS 196, 197 and 215 and OAR 660, divisions 6, 11, 12, 15, and 33, 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.

[3] This report addresses only those state statutes and rules administered by the department. Statutes and rules administered by DSL are addressed in the report prepared by that agency.

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, Phillip Kendall Cates, acquired the subject property from his parents, Eldon and Benella Cates, on February 28, 1972, as reflected by a contract included with the claim. Eldon and Bernella Cates acquired tax lot 100 (sections 26, 27, 34 and 35) on April 5, 1945, and tax lots 100 (sections 23 and 26), 200 and 500 on January 2, 1948, as reflected by a warranty deed and bargain and sale deed included with the claim. The Polk County Assessor's Office confirms the claimant's current ownership of the subject property.

Conclusions

The claimant, Phillip Kendall Cates, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C) as of February 28, 1972. The claimant's parents are "family members" as defined by ORS 197.352(11)(A) and acquired tax lot 100 (sections 26, 27, 34 and 35) on April 5, 1945, and tax lots 100 (sections 23 and 26), 200 and 500 on January 2, 1948.

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 and develop the property as described in Section I, and that the desired use is not allowed under current state land use regulations.[4]

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) and forest zoning and restrict uses on EFU- and forest-zoned lands.

Tax lots 100 (sections 23 and 26), 100 (sections 26, 27, 34 and 35), 500 and a portion of 200 are zoned EFU by Polk County as required by Goal 3, in accordance with ORS 215 and OAR 660,

[4] The claimant summarily cites numerous state land use laws as applicable to this claim, but does not establish how the laws either apply to the claimant's desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of these regulations either do not apply to the claimant's property or do not restrict the claimant's desired use of the property with the effect of reducing its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimant's desired use of the subject property, based on the claimant's description of that desired use.

division 33, because the claimant's property is "agricultural land" as defined by Goal 3.[5] Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for the development of dwellings on existing or any proposed parcel 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 (2005 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) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

ORS 215.283 also establishes standards for commercial uses allowed in an EFU zone, and prohibits commercial uses except those specifically listed, which are generally in conjunction with farm or forest use. ORS 215.283(2)(c) allows hunting and fishing preserves, and campgrounds in EFU zones, subject to approval of the local governing body. However, such uses are not allowed on high-value farmland.

ORS 215.283(2)(a) authorizes aggregate operations on land zoned for exclusive farm use, along with ORS 215.298.

Dog kennels are authorized on land zoned for exclusive farm use under ORS 215.283(2)(n).

It does not appear that a "shooting facility" or a private-use airport is authorized on land zoned for exclusive farm use.

A portion of tax lot 200 is zoned Timber Conservation (TC) by Polk County 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, 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.

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[5] The claimant's property is "agricultural land" because it contains National Resources Conservation Service Class I–IV soils.

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, enacted or adopted pursuant to Goal 4, prohibit the division of forest land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on those lands. Goal 4 and the Goal 4 rules also would prohibit or restrict most of the claimant's desired uses.

Goal 11, which became effective on January 25, 1975, generally prohibits urban levels of public facilities and services on lands that are outside an Urban Growth Boundary (UGB). Goal 11 and its implementing rules have two components: one that prohibits an owner from utilizing urban-level facilities or services to serve the property, and another that prohibits service providers from extending their facilities to serve property outside a UGB. The former can restrict a claimant's use of property. The latter is a restriction on service providers. Goal 11 and OAR 660, division 11, apply to the claimant's use of the property only to the extent that they would restrict the claimant's development of urban-level public or community sewer or water facilities on the subject property.

The claimant's family first acquired tax lot 100 (sections 26, 27, 34 and 35) in 1945 and tax lots 100 (sections 23 and 26), 200 and 500 in 1948, and the claimant acquired the subject property on February 28, 1972, all prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the subject property in 1945, 1948 and 1972.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goals 3, 4 and 11, ORS 215 and OAR 660, divisions 6, 11, and 33, were all enacted or adopted after the claimant's family acquired the subject property in 1945 and 1948 and after the claimant acquired the property in 1972, and do not allow the desired division or development of the subject property. These laws restrict the use of the property relative to the uses allowed when the claimant and his family acquired the property.

Those elements of Goal 11 that prohibit a public service provider from extending or establishing public facilities or services outside of a UGB restrict the actions of local government rather than the claimant's use of the property. That component of Goal 11 is not subject to ORS 197.352 and will continue to apply to those service providers. Only the general prohibition under Goal 11 on the claimant's establishment of an urban level of public facilities and services is subject to ORS 197.352 and restricts the claimant's desired use of his 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 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 currently apply to and may continue to 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 $6,320,308 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. This amount is based on the claimant's estimate of the value of either aggregate mining or the other desired use.

Conclusions

As explained in Section V.(1) of this report, the claimant is Phillip Kendall Cates whose family acquired the property in 1945 and 1948, and who acquired the subject property in 1972. 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 and his family acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulations on the subject property's fair market value is a reduction of $6,320,308.

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 Goals 3, 4 and 11, ORS 215 and OAR 660, divisions 6, 11, and 33, which Polk County has implemented through its current EFU and TC zones. All of these land use regulations were enacted or adopted after the claimant and his family acquired the subject property.

Conclusions

Without a specific development proposal for the 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 residential division and development of the subject property were in effect when the claimant's family acquired tax lot 100 (sections 26, 27, 34 and 35) on April 5, 1945, and tax lots 100 (sections 23 and 26), 200 and 500 on January 2, 1948, and when the claimant acquired the subject property on February 28, 1972. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant and his family acquired the subject property are exempt under ORS 197.352(3)(E) and will 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, particularly OAR 660-006-0029, include standards for siting dwellings in forest zones. Those provisions include fire protection standards for dwellings. 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).

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 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 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 $6,320,308. 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 to claimant's desired use of the subject property was allowed under the standards in effect when the claimant and his family acquired the property. Nevertheless, based on the record for this claim, the department acknowledges 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 the claimant to use the subject property for a use permitted at the time the Phillip Kendall Cates acquired it on February 28, 1972.

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 Phillip Kendall Cates' desired division and development of the 682.66-acre subject property, as described above in Section I: applicable provisions of Goals 3, 4 and 11, ORS 215 and OAR 660, divisions 6, 11, and 33. 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 only to the extent that use was permitted when the claimant acquired the property on February 28, 1972.

Goal 11 will not apply only to the extent that it prohibits the claimant from establishing an urban level of public facilities and services to serve the development of the property. Goal 11 will continue to apply to public service providers seeking to extend or establish public facilities to serve the subject property.

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 when Phillip Kendall Cates acquired the property on February 28, 1972.

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 property by the claimant.

6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on April 12, 2007. 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.