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*via electronic mail*

Mr. Gerard Herbage  
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Re: recent activity by County Commissioners Rhodes, Waddle, and Itzen to acquire the Cape Blanco Airport

Dear Counsel,

I am writing to you on behalf of my client, the Oregon Coast Alliance (“ORCA”), concerning the Curry County Board of Commissioners’ recent activity with regard to the Cape Blanco Airport. ORCA has been closely following the Board of Commissioners’ commitment of substantial County resources in an attempt to acquire the Cape Blanco Airport, which is owned and managed by the Oregon Department of Aviation (“ODA”).

In a work session on January 12, 2011, Commissioner Rhodes indicated that the ODA had “shown interest in the county assuming ownership of the [Cape Blanco] airport.” The January 27, 2011, meeting minutes from the ODA state that it was “approached by Curry County with an offer to permanently take over and operate Cape Blanco Airport.” On February 24, 2011, the Curry County public notice of an executive session stated that “[t]his concerns possible real estate transactions with the State of Oregon regarding property at the Cape Blanco Airport and adjacent lands.” On April 27, 2011, the Curry County Board of Commissioners considered the acquisition, transfer, or exchange of property with the ODA. On that same day, the Commissioners also passed an intent letter, stating that the Commissioners “agreed to pursue the transfer of the Cape Blanco Airport from the State of Oregon to Curry County.” The Aviation Board’s April 28, 2011, agenda included a working lunch with Commissioner George Rhodes about a possible Cape Blanco Airport Transfer. In addition, the County prepared an Application for the Acquisition of Cape Blanco State Airport. In advance of this meeting, ORCA and others submitted letters to ODA prior to their Board meeting discussion. Despite the County’s efforts

to procure the Cape Blanco Airport, the public has thus far had very little voice in these discussions, and the County has released virtually no information on the issue.

County ownership of Cape Blanco Airport would be a financial liability

The issue of County ownership over the Cape Blanco Airport has been addressed in the past. In January 2008, an Economic Feasibility study was released that assessed Curry County's potential acquisition of the Cape Blanco Airport. Overall, the study determined that developing the airport faced significant financial and legal hurdles.

Many general aviation airports rely on federal funding from the Federal Aviation Administration ("FAA") to satisfy maintenance and other costs, but the Cape Blanco Airport does not qualify for federal funding because it is not included in the National Plan of Integrated Airport Systems ("NPIAS"). In fact, as noted below, the Cape Blanco Airport would not qualify for the NPIAS status, and, therefore, it would not qualify for federal financial assistance. The airport offers scarce resources for economic development because the future expansion of the facility is severely limited by the small acreage, the runway length, the lack of taxiways, lack of navigational aids, lack of terminal amenities, lack of fixed based operation services (e.g. fuel)<sup>1</sup>, and lack of parking and storage. In addition, the airport has little ability to generate operating funds because it has no landing fees.

The County has not demonstrated that it could afford to operate the airport, which will likely lose money and become a permanent fiscal liability for the County and its residents. According to an assessment on General Aviation Airports, many small general aviation airports do not generate enough revenue to pay for operating and maintenance expenses. For example, Brookings Airport loses roughly \$25,000 a year in the operation of its airport even though it is eligible to receive federal funding as part of the NPIAS.

In its application, the County states that it will "improve airport facilities," as well as "enhance safety of the airport, improve existing assets, and develop support facilities." According to recent assessments, the Cape Blanco Airport will need substantial repairs in the near future, costing over \$1,000,000. Previous assessments have identified the apron and taxiway require new pavement because there are significant cracks with vegetation growing up through the surface and the airport has broken lights and the beacon is missing. In fact, the County's application assumes that in the years following acquisition of the airport, the County will incur significant financial liability.<sup>2</sup> To fund these significant improvements, the County

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<sup>1</sup> If the County attempts to install airport fueling facilities on the property, it must comply with OAR 738-025-001 *et seq.*

<sup>2</sup> The application proposes to "work on asphalt pavements; including re-marking"; "complete maintenance to (a) airport beacon, (b) upgrade non-standard Segmented Circle, and (c) upgrade tie-downs"; "update ALP"; "overlay runways and taxiways"; install airfield guidance signs"; "install weather monitor/reporting equipment"; "construct/rehabilitate parking Apron, Ramp, and

proposes to use general funds. The County also intends to solicit private investment and acquire NPIAS status to potentially access federal funds. It should be noted that both of the latter alleged sources of funding are speculative. In fact, federal funding via the NPIAS would be foreclosed. FAA Order 5090.3C requires that an existing airport may be included in the NPIAS if it

has at least 10 based aircraft *and* serves a community located 30 minute average ground travel time (for the purpose of systems analysis, a 20 mile radius is often used as the equivalent of 30 minutes ground travel time) from the nearest existing or proposed NPIAS airport.

FAA Order 5090.3C.2-5(b). Currently, the Cape Blanco Airport does not have 10 based aircraft and it is within a 30 minute drive and a twenty mile radius of the Bandon State Airport, which is in the NPIAS. Therefore, the County cannot rely on federal funding to operate the Cape Blanco Airport because it cannot obtain NPIAS status for the Cape Blanco Airport. Even if the Cape Blanco Airport were able to generate funds from air traffic, it would likely experience significant competition from the North Bend-Coos Bay Airport.

In light of the above financial liabilities posed by the airport, it seems dubious at best that County ownership of the airport would provide “for the general economic and public benefits to the County and its residents,” which the County states in its application. Considering a proposal of this magnitude without the financial wherewithal is a questionable decision that does not comport with fiscal responsibility. This proposal is also puzzling given that the County, like many others in the state, is cutting back by reducing staff and eliminating departments. In addition to acting as a financial liability for the County, the operation of the airport would likely increase the administrative burden on the County. *See* ORS 836.600 *et seq.*

#### Leasing or purchasing the Cape Blanco Airport

If the County intends to lease the Cape Blanco Airport for commercial or non-commercial purposes or purchase the Cape Blanco Airport, then it must satisfy numerous requirements. *See* OAR 738-015-0005 *et seq.*; ORS 270.005 *et seq.*, ORS 271.005 *et seq.*, and OAR 125-045-0200 *et seq.* If the County intends to lease the Cape Blanco Airport, then it must satisfy all application requirements, *see* OAR 738-015-0050, and it must demonstrate the financial capability and responsibility to initiate proposed commercial aeronautical activities; construct proposed improvements; and provide working capital to perform proposed activities for the lease term, OAR 738-015-0010(1)(a)-(c); *see also* OAR 738-015-0010(2)(a)-(c); *see also* OAR 738-015-0010(3)(a)-(d) (requiring performance bond, irrevocable letter of credit, and so forth); *see also* OAR 738-015-0010(4) (applicant must demonstrate past experience in providing commercial aeronautical services). Accordingly, ODA may deny such an application for

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tie-downs”; fueling (self-service)”; “hangar development”; “security fencing”; “airport access road and way finding signage”; “utilities infrastructure (power/water/sewer/telcoetc.)”; “terminal facilities (parking/restrooms/telephone/etc.)”; and so forth.

numerous reasons. *See* 738-015-0015(2). In addition, any commercial aeronautical lessee must abide by all lease provisions, including full compliance with operating minimum standards, airport rules and regulations, rates and charges policy, leasing policies, and insurance requirements. *See also* OAR 738-015-0060 *et seq.* (leasing requirements for non-commercial aeronautical activities); *see also* OAR 738-020-0010 (setting forth minimum standards for airports).

If the County intends to purchase the Cape Blanco Airport and other ODA administered property in the vicinity, then it must comply with ORS 270.005 *et seq.*, ORS 271.005 *et seq.*, and OAR 125-045-0200 *et seq.* Importantly, the state agency involved in the potential transfer can require that the property “shall be for use for a public purpose or benefit, and not be for resale to a private purchaser.” ORS 270.100(b). Depending on the value of the land to be sold or transferred, the state agency would have to “consider all the value of the property to the people of th[e] state, including values for fish and wildlife habitat and public access to other real property” and “invite public comment” on the proposal. ORS 270.105(1)-(2). If the County intends to relinquish its ownership of public lands to acquire the Cape Blanco Airport, then it may only do so in the event that the public lands are not needed for public use or that the public would benefit from such a transfer. ORS § 271.310(1); *see also* ORS § 271.335 (requiring valuation in exchange to be equal). State agencies that intend to sell, transfer, exchange, or otherwise dispose of interests in real property must abide by the requirements in OAR 125-045-0200 *et seq.* These include but are not limited to obtaining an appraisal; a notice of disposition, including the reasons for the disposal; consider the highest and best use of the real property at issue; written notices to other agencies potentially interested in acquiring the property; obtain approval from the Administrator or Director of the Department of Administrative Services. *Id.*

#### County property and property surrounding the airport contains ESA-listed species

Curry County is unique in that it is home to numerous species listed under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (“ESA”). Curry County and the areas adjacent to the airport contain ESA-listed species, candidate species, and species of concern under the jurisdiction of the U.S. Fish and Wildlife Service. A list of species that may occur within Curry County is attached as Exhibit A. The list contains numerous species of vital importance to the United States, Oregon, and Curry County.

The County’s land is underlain by low nutrient blacklock soils, which means that trees that grow here are often stunted and not suitable for timber production. The low-nutrient environment means that there is a high likelihood of rare and unusual plants, including the Western Lily (*Lilium occidentale*). The Western Lily is a rare plant that grows only in areas with blacklock soils within six miles of the sea in southern Oregon and northern California. The Western Lily is listed as a federally endangered species under the ESA. The County property adjacent to the airport contains Western Lilies. In the event that the County enters into a land exchange with Oregon Parks and Recreation Department (OPRD), the County must prepare an

environmental review of the land at issue (*see infra*), and it is highly likely that the environmental review will reveal additional ESA-listed species.

If the County intends to develop the area surrounding the airport that contains ESA-listed species, then the County may well be opening itself (including any developers) to liability under the ESA for actions that result in a “take” of a listed species or of their habitat. Under the ESA, “take” is defined very broadly.<sup>3</sup> The “take” prohibition in the ESA applies to both citizens and to local government officials.<sup>4</sup> A number of courts have now held that the “take” prohibition extends not only to acts of parties that directly kill or harm a listed species or its habitat, “but also bans those acts of a third party that bring about” the taking, which can include acts by a governmental party who is authorizing the conduct at issue. *See e.g., Strahan v. Cox*, 127 F.3d 155, 163 (1<sup>st</sup> Cir. 1997) *cert. den.* 525 US 830 (1998) (Mass. officials liable under ESA for licensing commercial fisherman who used methods that harmed listed whales).<sup>5</sup> Even causing an “imminent threat” of harm to a listed species constitutes a “take” under the ESA.<sup>6</sup> ORCA intends to use every mechanism, including the judicial system, to ensure that species listed under the ESA are protected.

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<sup>3</sup> “Take” is defined to include: “to harass, harm...[or]...kill” See, 16 U.S.C. 1532(19). To “harm” is then further defined to be “an act which actually kills or injures” including “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding of sheltering.” 50 § C.F.R. 17.3.

<sup>4</sup> See 16 U.S.C. § 1532(13) (defining person to include “any officer, employee, agent, department, or instrumentality...of any...municipality...”).

<sup>5</sup> See also *Palila v. Hawaii Dept of Land & Nat. Res.*, 639 F.2d 495, 497-98 (9<sup>th</sup> Cir. 1981)(holding state’s practice of allowing feral goats and sheep in palila’s habitat constituted a taking); *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8<sup>th</sup> Cir. 1989)(holding EPA caused illegal take by registering certain pesticides for specific uses that would likely harm listed species); *Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5<sup>th</sup> Cir. 1991)(holding USFS caused illegal take of listed woodpeckers by approving timber management plan that allowed timber companies to clear cut certain lands); *US v. Town of Plymouth*, 6 F.Supp 2d 81, 90-91(D.Mass 1998)(holding town liable for take of piping plovers caused by off road vehicle use that town allowed on its local beach); *Loggerhead Turtle v. County Council of Volusia*, 148 F.3d 1231, 1249 (11<sup>th</sup> Cir. 1998) *cert den.* 526 US 1081 (1999)(County Council held liable for take created by inadequately protective lighting ordinances); *Pacific Rivers Council v. Oregon Forest Indus. Council*, No. 02-243-BR, 2002 U.S. Dist. LEXIS 28121, 2002 WL 32356431 at \*11 (D. Or Dec. 23, 2002) (finding that state forester's authorization of logging operations that are likely to result in a take is itself a cause of a take); *Seattle Audubon Soc’y v. Sutherland*, 2007 U.S. Dist. LEXIS 39044 (W.D. Wash. May 30, 2007)(holding that WA DNR officials implementing the state Forest Practices Act could potentially be liable for take of spotted owls); and *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1079 (D. Minn. 2008)(holding the Minn. DNR violated ESA take prohibition by authorizing lynx trapping).

<sup>6</sup> See, *Forest Conservation Council v. Rosboro Lumber*, 50 F.3d 781, 784-85 (9<sup>th</sup> Cir. 1995).

### Engaging in a land exchange

If the County is proposing a land exchange with the State of Oregon's Parks and Recreation Department ("OPRD") which manages land adjacent to Floras Lake in the vicinity of the Cape Blanco Airport, then the County faces a heavy burden in satisfying the rules governing such exchanges in OAR 736-019-0000 *et seq.* Specifically, the rules have recently been amended, which significantly raises the bar for parties attempting to engage in a land exchange with OPRD. The amended rules define "overwhelming public benefit"; add criteria for exchange of land transfers from Oregon Parks and Recreation Department to other parties; and establish an internal environmental review, appraisal standards, and directions.

Under the title "Criteria for Acquisition," any land that OPRD would receive in exchange for park lands, the OPRD would have to satisfy one of several objectives. *See* OAR 736-019-0060. As of yet, there has been no indication that any of the objectives listed therein would be satisfied by exchanging County land for OPRD land.

OAR 736-019-0070(3) lists "Criteria for Exchange" when OPRD or another party initiates the potential exchange. If the County has, in fact, initiated an exchange of lands, it must overcome a heavy burden by demonstrating that the "exchange aligns with the Department's mission strategies, objectives, and work plan"; inquire as to whether "the local county and local communities support the exchange"; determine whether the exchange "will accommodate public use and access, and be in the best interest of the Department"; must "provide the Department a written environmental review for all lands the Department is to receive in the exchange," of which the Department may require additional or supplemental environmental analysis. OAR 736-019-0070. In addition, the County would have to provide, "in writing with adequate detail," the impacts to and protection of "natural and cultural resources" and an "overwhelming public benefit to the park system." *Id.*; *see also* OAR 736-019-0120(5) (elements important to land acquisitions include "[a] demonstration that the county, local community, interested state and federal agencies support the acquisition, and that the acquisition accommodates public uses and access"). In the event the County attempts to enter into a land exchange with the OPRD, ORCA will ensure that public uses will be fully identified and considered, ensure the best interests of the OPRD will be identified, ensure the environmental review will consider every environmental impact, natural and cultural resource, and ensure that the exchange would, in fact, serve an *overwhelming public benefit*.

ORCA notes that significant opposition has already arisen, especially in light of the lack of transparency and information provided to the public on this matter. *See* OAR 736-019-0120 (important whether "[t]he potential partner engages with the Department early in the process, and frequently throughout, *including full disclosure and transparency of all the details of the proposal*") (emphasis added).

If the County intends to exchange any forest, park, or recreational lands to meet the overwhelming public benefit and other public interest criteria contained within OAR 736 -019-0000 *et seq.*, then the County must meet the additional and significant burden of complying with ORS 275.335, which requires that “such exchange is for equal value and is in the best interest of the county.” ORS 275.335(1). In addition, the “county shall hold a hearing at which objection to the proposed exchange of real property may be heard.” ORS 275.335(2). ORCA will participate in any future hearing(s) on the issue, and utilize any and all legal means to ensure the proper implementation of Oregon laws and the protection of Oregon’s natural resources.

If the County is considering exchanging lands that have been offered for sale and not sold, then the County must follow additional procedural requirements, and if “[a]t any time before an exchange is actually made, written objection thereto may be filed by any interested person and the governing body of the county shall consider any such objection, ....” ORS 275.060.

If the County intends to transfer or lease land, then the County is also constrained by the requirements of ORS 271.300 *et seq.* The County can engage in such a transfer if the land is not needed for “public use” and only when the “public interest” would be furthered. ORS 271.310(2). An exchange of property must be of equal value, and the County “shall cause [the land] to be appraised by one or more competent and experienced appraisers.” ORS 271.350. In all likelihood, ORCA and many other interested parties will carefully scrutinize such an appraisal.

In addition, if the County intends to exchange or purchase land from the State of Oregon, then it must abide by the procedures found in OAR 141-067-0130 *et seq.* that govern “sale, exchange, and purchase of all types and classifications of lands ....” While ORCA has identified some requirements and obligations of the County in facilitating a transfer of land, the provisions provided *supra* are not exhaustive. ORCA will scrutinize the process to ensure that the County lawfully implements the legal requirements and to ensure that Oregon’s natural resources are protected.

#### Land Use Exceptions, Conditional Use Permits, Zone Changes, and Amendments

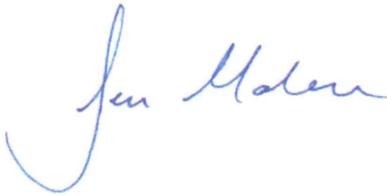
If the County attempts to pursue a land use exception, a conditional use permit, or a zone change/plan amendment to facilitate development in and around the Cape Blanco Airport or any surrounding properties, ORCA will participate fully in the public process and use any and all means at its disposal to ensure the fair and proper implementation of Oregon’s land use goals. The County will have to comply with the procedures for making land use decisions, including complying with application requirements and providing notice and hearings. *See* CCZO § 2.010 *et seq.*; CCZO § 2.060 (application requirements); CCZO § 2.070-080 (notice requirements). If the County intends to seek an exception, then it must comply with CCZO § 5.010 *et seq.* If the County intends to seek a conditional use permit, then it must abide by CCZO § 7.010 *et seq.*; *see*

*also* CCZO § 7.040 (setting forth standards governing conditional uses). Finally, if the agency intends to develop the area by way of a zone change or amending the zoning ordinance, then it must comply with CCZO § 9.010. The State faces a particularly heavy burden if it attempts a zone change or a plan amendment. ~~See~~ CCZO § 9.021 (setting forth standards for a zone change); CCZO § 9.031 (setting forth the requirements for a zone change).

Conclusion

ORCA trusts that Curry County, accounting for the heavy financial burden and numerous and onerous legal requirements, will realize that there are less controversial avenues and more economically sensible ways to encourage sustainable development in Curry County. Before the County has even provided information on the issue, a great deal of concern among diverse parties has arisen. In closing, ORCA is very troubled not only by the County's lack of transparency, but also by the little information that has emerged thus far. ORCA will continue to closely follow any subsequent developments and proposals. In any subsequent developments, please provide ORCA directly with any information about the County Commissioners' actions regarding the Cape Blanco Airport.

Sincerely,



Sean T. Malone, Attorney at Law  
On behalf of the Oregon Coast Alliance

cc: Oregon Coast Alliance