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BEFORE THE LIQUOR CONTROL COMMISSION  
OF THE STATE OF OREGON

In the Matter of the	)	
Application for a	)	
Seasonal Dispenser (Seas. D)	)	
License by:	)	FINAL
	)	FINDINGS OF FACT,
Donna J. Melzer	)	CONCLUSIONS OF LAW,
BRANDING IRON	)	AND ORDER
Route 1, Box 42	)	
Moro, Oregon	)	
- - - - -	)	
Sherman County	)	

A hearing in the above matter was held on the 16th day of November, 1982, in The Dalles, Oregon, before Hearings Examiner Douglas Crumme'. The Applicant appeared in person and was not represented by legal counsel. The Commission was not represented by legal counsel. The Commission having considered the record of the hearing, the Proposed Order of the Hearings Examiner, and the entirety of the Criteria for the Issuance and Maintenance of Licenses and applicable statutes and regulations, enters the following:

FINDINGS OF FACT

1. Donna J. Melzer has applied for a Seasonal Dispenser license at the BRANDING IRON, Route 1, Box 42, Moro, Oregon. Ms. Melzer has operated under a Retail Malt Beverage (RMB) license at the Branding Iron since September 7, 1982.

2. The Commission's Regulatory Staff Committee has recommended that the Applicant's application be refused, citing the following:

- a. ORS 472.160(1) (sufficient licensed premises and not demanded by public interest or convenience).

- b. OAR 845-04-040 (a Seasonal Dispenser license may be issued based upon evidence furnished by the applicant indicating a seasonal demand resulting from tourism or from activities such as fishing, hunting or skiing which are determined by weather conditions or state regulation.
- c. OAR 845-05-030(1) and OAR 845-05-040(2)(c) (sufficient licensed premises; declining or static population).
- d. OAR 845-05-040(3)(f) and OAR 845-05-040(2)(a) (unfavorable consideration may be given if applicant's premises will provide lesser services, facilities and economic benefit to the area or to the general public).
- e. OAR 845-05-040(2)(b) (applicant's premises will not provide dining service or atmosphere which is unique or substantially different in quality or type from that offered by other licensees within a 20-mile radius.

(Commission's Exhibit G.)

3. Dispenser licenses were held at the Branding Iron premises by persons other than Donna Melzer from at least 1973 until 1979 or early 1980. Dispenser licenses may have been held at that location as long ago as 1935. In 1979 or 1980 the then licensee failed to renew the dispenser license. The premises remained vacant until Ms. Melzer went into business at the Branding Iron in 1982. Ms. Melzer spent approximately \$10,000 to furnish the premises and to open for business on September 7, 1982.

4. The Branding Iron is located in Moro.

5. Moro has a population of 335 persons. Moro is the county seat of Sherman County. There are 16 businesses in

Moro, including a branch of the First Interstate Bank, an antique shop, a hardware store, a movie house, a service station, a hotel and a motel. Government facilities located in Moro include a State Highway Department office, the Sherman County High School, an Oregon State University Experimental Station and the Sherman County Extension Service. Service clubs centered in Moro include the Masons, Veterans of Foreign Wars, the Sherman County Boosters and the Lions Club. There are 94 homes in Moro.

6. The Branding Iron has a dining room, a lounge and a banquet area. The banquet area is separable from the lounge by means of a folding door. The dining room has seating for 30 persons. The lounge has seating for 40. The banquet area has seating for 30.

7. The lounge of the Branding Iron has a foosball table, a pool table, a jukebox and a Pac Man game. The dining room of the premises has one jukebox.

8. Ms. Melzer has obtained approval from the City of Moro to operate a 21 table and a poker table upon adoption by the City of a social gambling ordinance.

9. The Branding Iron is now open six days a week. Ms. Melzer would operate the premises seven days a week if issued a dispenser's license.

10. Ms. Melzer's present operating hours at the Branding Iron are from 10:00 a.m. until 10:00 p.m. in the restaurant and from 11:00 a.m. until 1:00 a.m. in the lounge. Ms. Melzer

would extend the operating hours with a dispenser's license if business demand allowed.

11. The Branding Iron has breakfast, lunch and dinner menus.

12. The Branding Iron's lunch menu includes the following: hamburger (\$1.65); hamburger with fries (\$2.00); cheeseburger (\$1.85); cheeseburger with fries (\$2.25); Branding Iron Burger (\$3.50); grilled cheese sandwich (\$1.00); cold cheese sandwich (\$.90); ham sandwich (hot or cold) (\$2.25); bacon, lettuce and tomato sandwich (\$2.50); roast beef sandwich (\$2.25); tuna sandwich (grilled or cold) (\$1.50); egg sandwich (\$1.00); ham or bacon and egg sandwich (\$2.50); French dip sandwich with tossed salad (\$3.25); club sandwich with potato or macaroni salad (\$3.50); French fries (\$.95); soup (\$.50/cup and \$.75/bowl); potato salad (\$.95); and macaroni salad (\$.95). (Commission's Exhibit C.)

13. The Branding Iron's dinner menu includes the following items: T-bone steak (\$8.50); top sirloin steak (\$8.50); rib steak (\$8.50); pork chops (\$4.50); ham steak (\$3.95); prawns (\$6.50); scallops (\$6.50); seafood plate (\$7.50); grilled oysters (\$5.50); fish sticks (\$4.50); shrimp salad (\$5.75); chef salad (\$3.50 and \$4.75); and tuna salad (\$3.25). Dinners are served with soup, salad, potato or vegetable, bread and coffee. (Commission's Exhibit C.)

14. In addition to the lunch and dinner items listed above, the Applicant now also offers some Mexican items. These

Mexican items are available at all hours and include the following: taco burger (\$1.75); burrito (\$1.85); tacos (\$1.50 for two); enchiladas (\$3.95); and taco salad (\$3.50).

15. Ms. Melzer has experienced the following sales at the Branding Iron with an RMB license:

ACTUAL SALES

<u>MONTH</u>	<u>FOOD SALES</u>	<u>BEER &amp; WINE</u>	<u>TOTAL SALES</u>
<u>1982</u>			
September 7-30	\$5,679.30	\$ 332.75	\$6,012.05
October	5,838.80	1,543.25	7,382.05
November 1-8	1,267.60	304.00	1,571.60

16. Ms. Melzer projects that with a Seasonal Dispenser license she would average \$6,870 a month in food sales, \$7,525 a month in alcoholic beverage sales and \$14,395 a month in total food and alcoholic beverage sales. (Applicant's Exhibit No. 4.)

17. Ms. Melzer's sales projection with a dispenser license stated in the Finding of Fact above was based upon a number of supporting projections. Ms. Melzer projected she would have ten breakfast patrons per day with an average ticket of \$1.95. She projected she would average 25 lunch patrons a day with an average ticket of \$2.95. She projected she would average 30 dinner patrons a day with an average ticket of \$4.50. She projected that she would average \$250 a day in alcoholic beverage sales. (Applicant's Exhibit No. 4).

Ms. Melzer's projections about the number of patrons she would average at the Branding Iron are based upon her experience as a DA licensee at the Wasco Inn in Sherman County

between 1978 and 1982. Her projections about average ticket prices are based upon the prices on the menus that she serves.

18. The Branding Iron experienced the following total monthly sales in 1978:

BRANDING IRON SALES - 1978

<u>MONTH</u>	<u>TOTAL SALES</u>
January	\$ 7,000
February	8,500
March	5,000
April	4,800
May	3,500
June	7,200
July	14,000
August	17,000
September	23,000
October	25,000
November	16,000
December	14,500

19. The Commission takes official notice from the 1981-82 Oregon Blue Book that the populations of Moro and Sherman County have been the following for the years indicated:

	<u>1950</u>	<u>1960</u>	<u>1970</u>	<u>1978</u>	<u>1980</u>
City of Moro	359	327	290	365	335
Sherman County	2,271	2,446	2,139	2,200	2,200

20. The following areas contain the populations and numbers of dispenser's outlets indicated:

<u>AREA</u>	<u>POPULATION</u>	<u>POPULATION DIVIDED BY 2,000</u>	<u>DISPENSER'S LICENSES ISSUED OR COMMITTED</u>		
			<u>DA</u>	<u>DB</u>	<u>DC</u>
City of Moro	335	0.17	0	0	0
Sherman County	2,225	1.11	3	0	0

21. The locations and the recent average monthly sales of the nearest DA outlets to the Branding Iron are as follows:

<u>OUTLET</u>	<u>DISTANCE &amp; DIRECTION FROM BRANDING IRON</u>	<u>FOOD SALES</u>	<u>TOTAL SALES</u>
Jack's Fine Foods - Riviera Cafe	16 miles N. in Biggs	\$62,737	\$69,984
Caravan Lounge	16 miles N. in Rufus	1,113	3,296
<u>Wasco Inn</u>	9 miles N. in Wasco	<u>1,400</u>	<u>4,340</u>
County Average		\$21,750	\$25,873

22. The Wasco Inn does not open until 3:00 p.m. each day. Jack's Fine Foods closes each day at 10:00 p.m.

23. None of the three DA outlets in Sherman County serve Mexican food. Additionally, none of these premises has social gambling.

24. The nearest dispenser's outlets south of the Branding Iron are in Madras, 81 miles away. The Branding Iron then would be the nearest dispenser outlet to most of the residents of southern Sherman County. The communities in southern Sherman County include Grass Valley, nine miles south of Moro, and Kent, 27 miles south of Moro.

25. The dispenser outlets in Biggs and Rufus, 16 miles from the Branding Iron, are located on Interstate 84 along the Columbia River. These dispenser outlets are oriented primarily towards serving the freeway traffic.

26. The City of Moro is separated geographically, socially and economically from the Cities of Rufus and Biggs. Moro is located on a plateau at an elevation of over 2,000 feet. The economy around Moro centers on wheat ranching as opposed to the emphasis in Rufus and Biggs on providing services to the travelers along the Columbia River. The Branding Iron would put a greater emphasis on serving the local residents.

27. Ms. Melzer held six banquets at the Branding Iron between September 7, 1982 and the date of her hearing on November 16, 1982.

28. Moro is located on Highway 97. Highway 97 is one of the major north-south highways in Oregon east of the Cascade Mountains. Tourists travel along Highway 97 in significant numbers with perhaps the exception of December, January and February. Despite the emphasis on serving the local residents, the Branding Iron would also serve Highway 97 travelers during much of the year.

29. The Tall Winds Motel and the Moro Hotel are located in Moro. The Tall Winds Motel has 12 units. The Moro Hotel has 26 rooms. The Moro Hotel closed in September due to lack of business. Since then, however, the hotel has opened back up a few rooms due to an increase in demand.

30. A number of the potential guests who stop at the Tall Winds Motel or the Moro Hotel travel on to the next city rather than staying in Moro after learning that there is not a restaurant with cocktails in Moro.

31. The combined sales at the Moro Hotel and at the antique business in Moro owned by the same person decreased by approximately \$100,000 a year after the former licensee at the Branding Iron did not renew the dispenser's license there in 1980.

32. Moro is located approximately halfway between the Deschutes and John Day Rivers. Fishing, bird hunting and some deer hunting occur in the Moro area. These activities result

in increased restaurant sales in Sherman County between June and January.

33. Approximately 126 persons have signed a petition in support of the issuance of a dispenser license at the Branding Iron. This petition was collected at the Branding Iron over a period of approximately one week. (Applicant's Exhibit No. 1.)

34. Jack Healy, who owns the Moro Hotel and other businesses in Moro, and Dan Prinzing, owner of the Tall Winds Motel in Moro, testified at the Applicant's hearing in support of license issuance. (Applicant's Exhibit No. 2.)

35. The Commission has received a letter from the City of Moro in support of the issuance of a dispenser license to Ms. Melzer at the Branding Iron.

#### DISCUSSION

The Applicant testified that her main interest was to apply for a Dispenser Class A (DA) license rather than a Seasonal Dispenser license. She testified that she applied for a Seasonal Dispenser license rather than a DA license because she was advised to do so by the local Commission License Investigator who handled her application.

Ms. Melzer testified that the local License Investigator advised her to apply for the Seasonal Dispenser license because her chances were higher of obtaining one of those quickly.

Ms. Melzer testified that subsequently she was in contact with the Commission's License Staff in Milwaukie and was advised by the Milwaukie Staff that she had applied for the wrong

license. Ms. Melzer testified she then contacted her local License Investigator again and tried to apply for a DA license, but that the local License Investigator would not sell her a DA application packet. Ms. Melzer testified that the Investigator told her she could not apply for a DA license at that time.

The local License Investigator in question, Robert Deeter, was not present at the hearing to offer testimony on this subject.

Hearings Specialist Syron testified that the License Division's standard policy is to not allow an applicant to apply for a second type of dispenser license once an initial application for a dispenser license is being processed with a refusal recommendation.

The Commission advised Ms. Melzer at the November 16, 1982 hearing that the Proposed Order on the instant application would be limited to consideration of a Seasonal Dispenser license since this is the only type of license that the License Staff has accepted and considered.

However, the Commission notes that Ms. Melzer's true desire is for a Dispenser Class A license. Ms. Melzer desires to do whatever is necessary to be considered for a Dispenser Class A license.

#### ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. A Seasonal Dispenser license which is valid for a season, as fixed by rule of the Commission, may be issued or renewed. The Commission shall designate the term of the license without regard to the calendar year. ORS 472.205(1).

As used in [ORS 472.205], "season" means a period not exceeding seven months which is generally suitable for or associated with certain activities including but not limited to hunting, fishing, skiing or usually associated with vacations or other specialized activities. ORS 472.205(5).

A Seasonal Dispenser license may be issued based upon evidence furnished by the applicant indicating a seasonal demand resulting from tourism or other activities such as fishing, hunting or skiing which are determined by weather conditions or state regulation. The term of a Seasonal Dispenser license shall be fixed by the Commission, be valid for not more than seven months and may be divided into no more than two periods. The term may vary from season to season if demand or conditions warrant it. OAR 845-04-040.

The record establishes that demand at the Branding Iron would be sufficiently seasonal to justify the issuance of a Seasonal Dispenser's license under ORS 472.205(5) and OAR 845-04-040. Ms. Melzer has projected that her sales at the Branding Iron would approximately double between June and January as a result of fishing, hunting and tourists traveling along Highway 97. This projection appears reasonable in light of the summer tourists that travel along Highway 97 and in light of the fishing and hunting activities that occur in the Moro area.

Because there is sufficient evidence that the Branding Iron's business would show the type and degree of seasonality required under ORS 472.205(5) and OAR 845-04-040, the Applicant has been established to qualify for a Seasonal Dispenser license.

2. The existence of sufficient licensed premises in the locality set out in an application shall weigh against granting the application. For purposes of this section, the

applicant's community will be a 10-mile radius for dispenser licenses and a two-mile radius for other licenses, unless the applicant establishes that a substantial portion of the patronage of the premises is or would be from a larger or smaller area. OAR 845-05-030(1).

There are no dispenser outlets in the City of Moro, population 335. The nearest dispenser outlet is in Wasco, nine miles north. The next nearest DA outlets are in Rufus and Biggs, 16 miles north. The DA outlets in Rufus and Biggs are located down along the Columbia River on Interstate 84 and are oriented primarily towards freeway travelers. The outlets in Rufus and Biggs do not serve the residents of the wheat ranching country around Moro and in southern Sherman County.

Although Sherman County contains more than one dispenser outlet per 2,000 population, and although the population of Moro fell by 30 between 1978 and 1980, the fact that the nearest dispenser outlet to the Branding Iron is nine miles from Moro and is even further from other communities to the south such as Kent and Grass Valley indicates that the Branding Iron's community is not adequately served by existing dispenser outlets. A preference for license issuance is therefore shown under OAR 845-05-030(1).

3. An application for a dispenser license may be granted or denied on the basis of a comparison with existing dispenser licenses in the same city or county or a comparison with other pending dispenser's applications. OAR 845-05-040(1). Preference in licensing may be given to applicants providing greater economic benefit to the area or public as indicated by actual or reasonably projected

number of patrons served, seating capacity, banquet facilities, hours of operation, number of employees, extent of investment in facilities, amenities, entertainment or such characteristics. Gross sales figures may be used as a basis for determining the number of patrons served. OAR 845-05-040(2)(a).

a. The Applicant's total sales at the Branding Iron since opening with a beer and wine license in September, 1982 have been on the order of \$6,000 to \$7,300 a month. The projection that sales with a dispenser license would increase to over \$14,000 a month does not seem reliably established. However, an increase of some significant magnitude is likely given the lack of other dispenser outlets in the Moro area. An increase in average monthly total sales to \$9,000 a month seems reasonable.

A \$9,000 average monthly sales level would be far below the recent average sales of the three DA outlets in Sherman County of \$25,873. However, the sales average of the three Sherman County DA outlets is greatly skewed by the unusually high sales at Jack's Fine Foods in Biggs. The Branding Iron's likely sales level would be more than double the sales figures of the other two DA outlets in Sherman County. See Finding of Fact No. 22. These other two DA outlets have particularly low food sales averages, indicating that the Branding Iron offers substantially more in the way of food service than these two outlets. This indicates a preference for license issuance under OAR 845-05-040(2)(a).

b. The Applicant has longer operating hours than at least two of the three dispenser outlets in Sherman County.

The Wasco Inn does not open until 3:00 p.m. each day and Jack's Fine Foods closes at 10:00 p.m. each day. The Branding Iron is open from 10:00 a.m. until 1:00 a.m. A preference for license issuance is therefore shown under OAR 845-05-040(2)(a).

c. The Branding Iron will offer social gambling if Moro finally adopts its proposed social gambling ordinance. The three existing Sherman County DA outlets do not offer social gambling. Thus social gambling at the Branding Iron would constitute a greater investment in entertainment in comparison to the three existing Sherman County DA outlets and would show a preference for license issuance under OAR 845-05-040(2)(a). This potential preference remained prospective as of the November 16, 1982 hearing because Moro had not yet adopted a social gambling ordinance.

4. Preference for issuance of a dispenser license will be given to applicants who provide dining service or atmosphere which is unique or substantially different in quality, quantity or type from that offered by other licensees within a 20-mile radius as indicated by menu, decor and amenities, entertainment or other characteristics. OAR 845-05-040(2)(b).

The Branding Iron's dining service is unique in comparison to the other dispenser outlets within a 20-mile radius in that the Branding Iron offers five Mexican dishes in addition to its standard menu. The number of Mexican items is small. Nevertheless some preference for licensure is indicated under OAR 845-05-040(2)(b) because of the Mexican food.

5. Preference in licensing may be given to Dispenser Class A and C applicants where an applicant's premises are located in a rural

unincorporated area or in an incorporated area with a population of less than 25,000, or where an applicant's premises are located in such an area and have seating for 100 or fewer persons. OAR 845-05-040(2)(d) and (e).

The preferences shown under OAR 845-05-040(2)(d) do not apply to Seasonal Dispenser licenses. Rather, these preferences apply only to DA and DC license applications. OAR 845-05-040(2)(f).

#### ULTIMATE CONCLUSIONS OF LAW

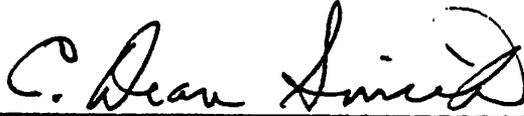
The Applicant's Seasonal Dispenser's license application is demanded by the public interest and convenience, as indicated by the lack of sufficient dispenser's outlets in the Applicant's community, by the Branding Iron's comparatively high likely gross sales in comparison to two of the three dispenser's outlets in Sherman County, by the Applicant's relatively extensive operating hours, and to a lesser degree by the Applicant's Mexican food offerings, which are not available at existing dispenser's outlets within 20 miles. The Applicant has been shown to qualify for a Seasonal Dispenser's license under ORS 472.205(5) and OAR 845-04-040 because of evidence establishing the required degree of seasonality. The application should therefore be granted under ORS 472.160(1).

#### FINAL ORDER

It is hereby ordered that the application by Donna Melzer for a Seasonal Dispenser (Seas. D) license at the Branding Iron, Route 1, Box 42, Moro, Oregon, be GRANTED.

It is further ordered that due notice of such action, stating the reasons therefore, be given as provided by law.

Dated this 28th day of February, 1983.



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C. Dean Smith  
Administrator  
OREGON LIQUOR CONTROL COMMISSION

NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a Petition for Review within 60 days from the service of this Order. Judicial Review is pursuant to the Provisions of ORS Chapter 183.