

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

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER
COMPENSATION UNDER ORS 197.352) CLAIM NO. M124808
(BALLOT MEASURE 37) OF)
John O'Connor, CLAIMANT)

Claimant: John O'Connor (the Claimant)

Property: Township 40S, Range 10E, section 31, Tax lot 3903 (the Property)

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

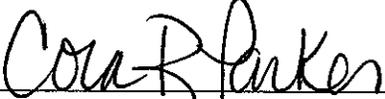
Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein,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

ORDER

The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

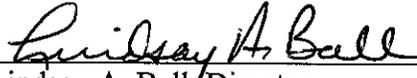
This Order is entered by the Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Director of the DAS as a final order of DAS under ORS 197.352, OAR chapter 125,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

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


Cora R. Parker, Deputy Director
DLCD

Dated this 29th day of September, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Lindsay A. Ball, Director
DAS

Dated this 29th day of September, 2006.

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)

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

IN THE MATTER OF THE CLAIM FOR)	FINAL ORDER
COMPENSATION UNDER ORS 197.352)	CLAIM NO. M124808
(BALLOT MEASURE 37) OF)	
John O'Connor, CLAIMANT)	

Claimant: John O'Connor (the Claimant)

Property: Township 41S, Range 10E, sections 5 and 6, Tax lot 504
Klamath 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) attached to and by this reference incorporated into this order.

ORDER

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 John O'Connor's development of a dwelling on tax lot 504: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after January 12, 1989. These laws will not apply to the claimant only to the extent necessary to allow him to use tax lot 504 for the use described in this report, and only to the extent that use was permitted when he acquired tax lot 504 on January 12, 1989.
2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lot 504 for the use described in this report, subject to the standards in effect on January 12, 1989. On that date, the property was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Klamath County's acknowledged EFU zone, and the applicable provisions ORS 215 then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lot 504 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 tax lot 504 imposed by private parties.

4. Any use of tax lot 504 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 tax lot 504, 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 tax lot 504 by the claimant.

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 Director of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:

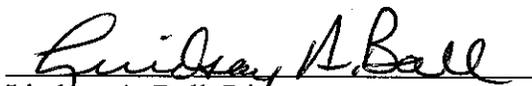
Lane Shetterly, Director



Cora R. Parker, Deputy Director
DLCD

Dated this 29th day of September, 2006.

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Lindsay A. Ball, Director
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2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352, the present owner of

the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

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

FOR INFORMATION ONLY

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

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

September 29, 2006

STATE CLAIM NUMBER: M124808

NAME OF CLAIMANT: John O'Connor

MAILING ADDRESS: 20100 Cheyne Road
Klamath Falls, Oregon 97603

PROPERTY IDENTIFICATION: Township 41S, Range 10E, sections 5 and 6
Tax lot 504

Township 40S, Range 10E, section 31
Tax lot 3903

Klamath County

OTHER CONTACT INFORMATION: Tru-Line Surveying
2333 Summers Lane
Klamath Falls, Oregon 97603

DATE RECEIVED BY DAS: April 6, 2006

180-DAY DEADLINE: October 3, 2006

I. SUMMARY OF CLAIM

The claimant, John O'Connor, seeks compensation in the amount of \$532,650 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 a dwelling on each of the two tax lots that composes the subject property.¹ The subject property is located at the geographic coordinates listed above, near Merrill, in Klamath 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 in part. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced

¹ The claim identifies two tax lots. Based on the information in the department's record for this claim, Tax lot 504 consists of 96.67 acres, and tax lot 3903 consists of 80.73 acres. The acreage for tax lot 3903 appears to be incorrect, was affected by a property line adjustment, and the county's records for tax lot 3903 are conflicting.

by the Land Conservation and Development Commission (the Commission) or the department not apply to John O'Connor's development of a dwelling on tax lot 504:² applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33, enacted or adopted after January 12, 1989. These laws will not apply to the claimant only to the extent necessary to allow him to use tax lot 504 for the use described in this report, and only to the extent that use was permitted when he acquired tax lot 504 on January 12, 1989.

The department has further determined that the claim for tax lot 3903 is not valid as to John O'Connor because he is not an owner of this tax lot. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 26, 2006, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no written comments were received.

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.

² After notification was provided pursuant to OAR 125-145-0080 on September 12, 2006, the claimant's agent submitted a letter, dated September 22, 2006, stating that the intent of the claim is to "obtain a waiver of existing zoning laws thus establishing the subject property without the current or past zoning restrictions." Under OAR 660-002-0010(8) and ORS 197.352(8), the state only may "not apply" land use regulations to allow the present owner a use permitted when the owner acquired the property. The state is not authorized to remove current or past zoning from the property—only to authorize the owner to carry out a particular use.

Findings of Fact

This claim was submitted to DAS on April 6, 2006, for processing under OAR 125, division 145. The claim identifies the property's Exclusive Farm Use (EFU) zoning as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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, John O'Connor, acquired the subject property (tax lots 504 and 3903) on January 12, 1989, as reflected by a bargain and sale deed included with the claim. John O'Connor subsequently transferred all of his interest in tax lot 3903 to Matt O'Connor on April 25, 2005, as reflected by a quitclaim deed provided by the Klamath County's Planning Department, which also is referenced in the title report provided with the claim. Daniel O'Connor, a family member of John O'Connor, acquired the subject property on January 22, 1954, as evidenced by a warranty deed included with the claim. The Klamath County Assessor's Office confirms John O'Connor's current ownership of tax lot 504.

Conclusions

The claimant, John O'Connor, is an "owner" of tax lot 504, as that term is defined by ORS 197.352(11)(C), as of January 12, 1989. Daniel O'Connor is a "family member" of John O'Connor, as that term is defined by ORS 197.352(11)(A), and acquired tax lot 504 on January 22, 1954. John O'Connor is not an "owner" of tax lot 3903 as the term is defined by ORS 197.352(11)(C).

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 develop a dwelling on each of the tax lots that composes the subject property and that the current zoning prohibits the desired use.

The claim is based generally on the applicable provisions of state law that require mixed farm-forest zoning and restrict uses on land zoned mixed farm-forest. The claimant's property is zoned by Klamath County as Forestry/Range (FR), which is a mixed agricultural and forest land zone, as required by Goal 4 and the implementing provisions of OAR 660-006-0050 (effective on February 5, 1990), subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Goals 3 and 4 are allowed in mixed agriculture and forest zones except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993.³ Depending on the predominant use on that date, the property is subject to either the requirements for dwellings applicable under exclusive farm use zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6.

The claimant's family first acquired the subject property in 1954, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established under Goal 4 for lands zoned for mixed farm-forest use and the statutory and rule restrictions under applicable provisions of ORS 215 and OAR 660, divisions 6, and 33, were enacted or adopted after the claimant's family acquired the subject property in 1954, and do not allow the desired development of the property. However, as explained in Section V.(1), John O'Connor is not an "owner" of tax lot 3903 as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Commission or the department restrict John O'Connor's use of that tax lot.

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 \$532,650 as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the subject property. This amount is based on a market analysis submitted by the claimant.

³ No information was provided to the department regarding the predominant use of the property on January 1, 1993.

Conclusions

As explained in Section V.(1) of this report, the claimant is John O'Connor whose family acquired the subject property in 1954, a portion of which the claimant presently owns. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of tax lot 504 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's family acquired the subject property restrict the claimant's desired use of tax lot 504. The claimant estimates that the effect of the regulations on the fair market value of the subject property is a reduction of \$532,650.

Without an appraisal or other documentation, and without verification the extent to which the alleged reduction in value relates to tax lot 504, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of that portion of the subject property that the claimant presently owns. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of tax lot 504 has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since the claimant's family acquired the property.

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 relative to the uses permitted when the claimant's family acquired the property, including applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Klamath County has implemented through its current FR zone. All of these land use regulations were enacted or adopted after the claimant's family acquired the subject property.

As explained in Section V.(1) of this report, John O'Connor is not a present "owner" of tax lot 3903 as that term is defined by ORS 197.352(11)(C). Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant to tax lot 3903.

Conclusions

It appears that none of the general statutory, goal and rule restrictions on residential development of the subject property were in effect when the claimant's family acquired the subject property on January 22, 1954. As a result, these laws are not exempt under ORS 197.352(3)(E). Because the claimant is not a present owner of tax lot 3903, the issue of whether any laws are exempt from ORS 197.352 is not relevant to this tax lot. Laws in effect when the claimant's family acquired tax lot 504 are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

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 tax lot 504. 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 \$532,650. 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 tax lot 504, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimant's desired use of tax lot 504 was allowed under the standards in effect when the claimant's family acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of tax lot 504 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 John O'Connor to use tax lot 504 for a use permitted at the time he acquired it on January 12, 1989.

At the time the claimant acquired tax lot 504, it was subject to Klamath County's acknowledged EFU zone.⁴ When the claimant acquired tax lot 504, the claimant's desired use of tax lot 504 would have been governed by the county's acknowledged EFU zone and the applicable provisions of ORS 215 then in effect.⁵ In 1989, ORS 215.263 (1987 edition) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan. ORS 215.283(1)(f) (1987 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously

⁴ Klamath County's EFU zone was acknowledged by the Commission for compliance with Goal 3 on August 6, 1984.

⁵ After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

with accepted farm practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

The claim does not establish whether or the extent to which the claimant's desired use of tax lot 504 was permitted under the laws in effect when he acquired the property on January 12, 1989.

In addition to the applicable provisions of Goal 3, ORS 215 and OAR 660 in effect on January 12, 1989, when the claimant acquired tax lot 504, there may be other laws that apply to the claimant's use of tax lot 504 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 tax lot 504 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, and depending on when they were enacted or adopted, may continue to apply to the claimant's property. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to tax lot 504 on that basis.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to tax lot 504 based on the use 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 his claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his use of tax lot 504.

Conclusions

Based on the record, before the department, the claimant, John O'Connor, has not established that he is entitled to relief under ORS 197.352(1) for tax lot 3903 as a result of land use regulations enforced by the Commission or the department because he is not a present owner of this tax lot. Therefore, the department recommends the claim be denied for tax lot 3903.

Based on the record, the department further recommends that the claim be approved for tax lot 504, 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 John O'Connor's development of a dwelling on tax lot 504: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after January 12, 1989. These laws will not apply to the claimant only to the extent necessary to allow him to use tax lot 504 for the use described in this report, and only to the extent that use was permitted when he acquired tax lot 504 on January 12, 1989.
2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lot 504 for the use described in this report, subject to the standards in effect on January 12, 1989. On that date, the property was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Klamath County's acknowledged EFU zone, and the applicable provisions ORS 215 then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lot 504 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 tax lot 504 imposed by private parties.

4. Any use of tax lot 504 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 tax lot 504, 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 tax lot 504 by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on September 12, 2006. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.