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 COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF James R. Miller, CLAIMANT	))))	FINAL ORDER CLAIM NO. M129449

Claimants: James R. Miller (the Claimants)

Property: Township 21S, Range 13E, Section 30, Tax lot 101;aka lots 3, 4, 5, 7, 9 and the W1/2 of the SE 1/4 of the SW 1/4 all of section 30, T21S, R13E, W.M.
Deschutes County (the Property)

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

Claimants 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 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 Administrator for the State Services Division 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
DLCD
Dated this 28th ay of November, 2006.

FOR THE DEPARTMENT OF ADMINISTRATIVE SERVICES:

David Hartwig, Administrator
DAS, State Services Division
Dated this 28th day of November, 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)

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

November 28, 2006

STATE CLAIM NUMBER:	M129449
NAME OF CLAIMANT:	James R. Miller
MAILING ADDRESS:	12918 SW 63rd Place Portland, Oregon 97219
PROPERTY IDENTIFICATION:	Township 21S, Range 13E, Section 30 Tax lot 101; aka lots 3, 4, 5, 7, 9 and the W1/2 of the SE 1/4 of the SW 1/4 all of section 30, T21S, R13E, W.M.[1] Deschutes County
DATE RECEIVED BY DAS:	June 2, 2006
180-DAY DEADLINE:	November 29, 2006

I. SUMMARY OF CLAIM

The claimant, James Miller, seeks compensation in the amount of $203,491,831 for the reduction in fair market value as a result of land use regulations that are alleged to restrict his right to use certain private real property. The claimant desires compensation or the right to divide the subject property into a maximum of 100 parcels with a common road access to the Paulina-East Lake Road, and to develop a dwelling on each parcel. The claimant also desires the right to develop facilities for commercial geothermal power production, and the right to mine pumice on the property. The subject property is located north of Paulina-East Lake Road, near La Pine, in Deschutes 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 this claim is not valid for several reasons. First, the claimant does not own the private real property that is the subject of this claim. At most, the claimant has a personal property right in a limited partnership that in turn is the owner of the real property. Second, the Department finds that the preponderance of evidence in the record for this claim shows that there is not a legal right of access to the property to carry out the

[1] The subject property borders on East Lake. By this report, the State of Oregon makes no determination concerning the rights of the claimant, the state or the public to lands below the ordinary high water level of East Lake.

uses that the claimant alleges have been restricted by state land use regulations. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 25, 2006, pursuant to Oregon Administrative Rule (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, two written comments were received in response to the 10-day notice.

The comments are relevant to whether the claimant owns an interest in the property that has been restricted by a state land use regulation; whether the claimant owns an interest in the real property; whether state law restricts the claimant's use of the subject property; whether the restriction of the claimant's use of the subject property reduces the fair market value of the property; and whether the management of the Newberry Crater National Volcanic Monument precludes the use of the subject property as desired by the claimant. The comments were considered by the department in preparing this report. (See the comment letters 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 criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on June 2, 2006, for processing under OAR 125, division 145. The claim identifies ORS 197 and 215; and OAR 660, divisions 6, and 33, 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, James Miller, asserts that he acquired the subject property on May 7, 1969, and now has an interest in the property as a general partner in a limited partnership. However, according to the information provided in the claim, the claimant does not own a present interest in private *real property*. At most, he owns a *personal property interest* in a limited partnership that owns the private real property in question. Documentation submitted with the claim, collected by the department and submitted in comments on the claim indicate that in 1969 the property was owned by the United States of America as part of the Deschutes National Forest, subject to an unpatented mining claim of a Clare Williamson. In 1969, La Pine Pumice Company (an Oregon corporation) leased Clare Williamson's rights under the unpatented mining claim.[2] On November 6, 1973, the lease agreement was amended to include an option to purchase Ms. Williamson's interest in certain "Pumice Claims." The option's term was through November 30, 1979. On April 27, 1979, Ms. Williamson and La Pine Pumice Company entered into "Amendment No. 2 to Lease and Option." Under that amendment, the lease and option were extended for an additional period of 10 years.

On July 3, 1980, by Patent No. 36-80-006, Ms. Williamson acquired the property.[3] On October 31, 1980, Ms. Williamson deeded the property to La Pine Pumice Company. On December 22, 1988, La Pine Pumice Company conveyed (by special warranty deed, Recorder's No. 88-29758) its interest in the property to LPP Resources Limited Partnership, an Oregon limited partnership formed on December 16, 1988, under ORS chapter 70. The claimant, James Miller, was a shareholder in La Pine Pumice Company and is a general partner in LPP Resources Limited Partnership.

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[2] A copy of the lease was provided by the claimant's attorney in response to the draft staff report..

[3] A preliminary title report issued to the claimant on May 18, 2006, contains the following pertinent exceptions:

12. Notwithstanding Paragraph 4 of the insuring clauses of the policy or policies to be issued, the policy or policies will not insure against any loss arising by reason of any lack of a right of access to and from the land.

13. Rights of the public and governmental bodies in and to that portion of said premises now or at any time lying below the ordinary high water line of the East Lake, including any ownership rights which may be claimed by the State of Oregon to any portion now or at any time lying below the ordinary high water line.

Such rights and easements for navigation and fishing as may exist over that portion of the property, now or at any time lying below the ordinary high water line.

The Deschutes County Assessor's Office confirms that LPP Resources Limited Partnership is the current owner of the subject property. LPP Resources Limited Partnership acquired the property by special warranty deed subject only to "encumbrances, easement and restrictions of record to date." The claimant, James Miller, appears to own an interest in LPP Resources Limited Partnership, as a general partner, but the private real property that is the subject of this claim is owned by the limited partnership and not Mr. Miller. ORS 67.060 ("Property acquired by a partnership is property of the partnership and not of the partners individually"); ORS 67.065(1) ("Property is partnership property if acquired in the name of . . . [t]he partnership . . ."). In this case, the property was acquired in the name of the partnership, as shown by the special warranty deed from La Pine Pumice Company to LPP Resources Limited Partnership dated December 1988, and recorded in the Deschutes County deed records as Recorder's No. 88-29758.

The department also notes that even as to LPP Resources Limited Partnership and its predecessor La Pine Pumice Company, neither entity appears to have a right of access to the subject private real property to carry out the desired uses. As noted in footnote 3, the preliminary title report issued to the claimant contains a special exception due to the lack of right of access. Further, according to an appraisal of the property conducted as of October 13, 1982, there was no authorization from the United States Forest Service for road access to or from the subject property as of that date.

The claimant's attorneys, in response to the draft staff report, have challenged the evidence noted above, and have submitted an undated map that appears to show that Paulina Lake Road abuts the southern boundary of the subject property. The map also shows two other roads, one of which is asserted to be a "mining claim access road constructed by the owners of the claim in the 1950's pursuant to their rights as owner of the claim and used continuously since then for the mining operation at the 'upper mine.'" The other road is asserted to have been used continuously by the owners of the claim for access to their 'lower' mine.

Other evidence in the department's record, however, contradicts the evidence submitted by the claimant. First, the official assessor's plat map for the area surrounding the property, and the Deschutes County Land Information System map for the same area both show that Paulina Lake Road does not abut the subject property. Second, the deed records submitted by the claimant include the initial bargain and sale deed from Claire Williamson to La Pine Pumice Company on October 31, 1980. That deed, in addition to the normal conveyancing language, includes the following additional language: "[t]ogether with all rights, privileges and franchises incident, appendant, and appurtenant thereto, together with all rights of egress therefrom and ingress thereto that the Owner *may posses*, and personal property thereon." Deschutes County Deed Records, Vol. 32, Page 960 (emphasis added). This special conveyancing language is additional evidence that the title may *not* have included a right to ingress and egress. When taken together with the contemporaneous information from the U.S. Forest Service appraisal, the Department finds that there is a preponderance of evidence in the record for this claim that La Pine Pumice Company did not have a legal right to access the property. No evidence has been provided that there is a legal right of access for the residential or geothermal uses that claimant desires to carry out. Some evidence has been provided that there was actual use of ingress and egress for mining purposes, but this evidence does not establish that there was a legal right for this use. As a result, based on the evidence before the department for this claim, the claimant has not established that there was any right to use the property for any of the claimant's desired uses when the property was acquired by La Pine Pumice Company from Clare Williamson in 1980.

Conclusions

The claimant, James Miller, is not an "owner" of the subject "private real property" as these terms are used in ORS 197.352. The claimant also has failed to establish that La Pine Pumice Company, or LPP Resources Limited Partnership, had the right to carry out the desired uses of the subject property when they acquired it and that claimant now asserts are restricted by state land use regulations.

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.

As explained in Section V.(1), the claimant, James Miller, is not an "owner" of the subject private real property as these terms are used in ORS 197.352. In addition, the claimant has failed to demonstrate that La Pine Pumice Company, or LPP Resources Limited Partnership, had the right to carry out the desired uses of the subject property when they acquired it and that claimant now asserts are restricted by state land use regulations. Therefore, no laws enforced by the Commission or the department restrict the claimant's use of the private real property.

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."

As explained in Section V.(1) of this report, the claimant, James Miller, is not an "owner" of the subject property as that term is defined in ORS 197.352(11)(C). In addition, the claimant has failed to demonstrate that La Pine Pumice Company, or LPP Resources Limited Partnership, had the right to carry out the desired uses of the subject property when they acquired it and that claimant now asserts are restricted by state land use regulations. Therefore, no state land use regulations restrict his rights to use the subject private real property, and no state land use regulations can have the effect of reducing the fair market value of the subject private real 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.

As explained in Section V.(1) of this report, the claimant, James Miller, is not an "owner" of the subject private real property as these terms are used in ORS 197.352. As a result, the department has not evaluated the application of the exemptions in ORS 197.352(3) for this claim.

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 record for this claim and the preceding findings of fact in this report, the department finds that the claim is not valid because the claimant has not established that he owns an interest in private real property that has been restricted by a state land use regulation that has had the effect of reducing the fair market value of the subject private real property.

Conclusions

Based on the record before the department, the claimant, James Miller, has not established that he is entitled to relief under ORS 197.352. Therefore, the department recommends that this claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on November 3, 2006. Under OAR 125-145-0100(3), the department 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 were received from the claimant and the U.S. Forest Service. As noted above, these comments have been considered by the department in preparing this final report.