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

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| IN THE MATTER OF THE CLAIM FOR<br>COMPENSATION UNDER ORS 197.352<br>(BALLOT MEASURE 37) OF<br>James and Susan Coulter, CLAIMANTS | )<br>)<br>)<br>) | FINAL ORDER<br>CLAIM NO. M124344 |

Claimants: James and Susan Coulter (the Claimants)

Property: Township 9S, Range 2W, Section 15, Tax lots 200 and 301

Township 9S, Range 2W, Sections 15 and 16, Tax lot 300

Township 9S, Range 2W, Sections 15 and 22, Tax lot 302

Township 9S, Range 2W, Sections 21 and 22, Tax lot 500, Marion 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 Reports and Recommendation of DLCD (the DLCD Report), and the OregonWater Resources Department (the OWRD Report), attached to and by this reference incorporated into this order.

## ORDER

The Claim is denied as to laws administered by the Oregon Water Resources Department for the reasons set forth in the OWRD Report.

The Claim is denied as to the claimants' desired operation of a water extraction and bottling facility on a five-acre portion of the subject property for reasons set forth in the DLCD report.

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to James and Susan Coulter's division of approximately 545 acres of the subject property into two- to five-acre residential parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33 that took effect after June 7, 1982. These land use regulations will not apply to the claimants only to the extent necessary to

allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on June 7, 1982.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to James and Susan Coulter's operation of an aggregate mining facility on a 75-acre portion of the subject property: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33 that took effect after June 7, 1982. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use a 75-acre portion of the subject property for an aggregate mining facility, and only to the extent that use was permitted when they acquired the property on June 7, 1982.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for division and residential use and aggregate extraction as described in this report, subject to the standards in effect on June 7, 1982. On that date, the property was subject to compliance with Marion County's acknowledged EFU zone, and the applicable provisions of Goals 3 and 5, ORS 215 and OAR 660, divisions 5, and 16, then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit; a land use decision; a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies; and restrictions on the use of the subject property imposed by private parties.

4. Any use of the property by the claimants 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 claimants to use the subject property, it may be necessary for them 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 claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

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 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

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

FOR DLCD AND THE LAND CONSERVATION AND DEVELOPMENT COMMISSION:

Lane Shetterly, Director
DLCD
Dated this 7th day of September, 2006.

FOR THE DEPARTMENT OF ADMINISTRATIVE SERVICES:

David Hartwig, Administrator
DAS, State Services Division
Dated this 7th day of September, 2006.

FOR THE FOR DEPARTMENT OF WATER RESOURCES:

Phillip C. Ward, Director
OWRD
Dated this 7th 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)

**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 7, 2006

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| **STATE CLAIM NUMBER:** | M124344 |
| **NAMES OF CLAIMANTS:** | James and Susan Coulter |
| **MAILING ADDRESS:** | 11631 Marion Road Southeast<br>Turner, Oregon 97392 |
| **PROPERTY IDENTIFICATION:** | Township 9S, Range 2W, Section 15<br>Tax lots 200 and 301;<br>Township 9S, Range 2W, Sections 15 & 16<br>Tax lot 300;<br>Township 9S, Range 2W, Sections 15 & 22<br>Tax lot 302;<br>Township 9S, Range 2W, Sections 21 & 22<br>Tax lot 500<br>Marion County |
| **OTHER CONTACT INFORMATION:** | Christopher Koback<br>Davis Wright Tremaine, LLP<br>1300 SW 5th Avenue, Suite 2300<br>Portland, OR 97201 |
| **OTHER INTEREST IN PROPERTY:** | Coulter Farms, Inc.<br>11631 Marion Road SE<br>Turner, OR 97392<br><br>GE Capitol Mortgage<br>c/o Navy Federal Credit Union<br>PO Box 3300<br>Merrifield, VA 22116<br><br>USDA Farm Service Agency<br>3867 Wolverine St. NE, Suite F1<br>Salem, OR 97305 |
| **DATE RECEIVED BY DAS:** | March 14, 2006 |
| **180-DAY DEADLINE:** | September 10, 2006 |

## I. SUMMARY OF CLAIM

The claimants, James and Susan Coulter, seek compensation in the amount of $42,009,000 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 claimants desire compensation or the right to operate an aggregate extraction facility on a 75-acre portion of the property; to divide approximately 545 acres of the approximately 550-acre property[1] into two- to five-acre parcels and develop a dwelling on each parcel; and to establish a water extraction and bottling facility on the remaining five acres. The subject property includes the tax lots listed above and is located at 11631 Marion Road SE, near Turner, in Marion 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 and not valid in part. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to James and Susan Coulter's division of approximately 545 acres of the subject property into two- to five-acre residential parcels, or to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33 that took effect after June 7, 1982. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on June 7, 1982.

Department staff also recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Commission or the department not apply to James and Susan Coulter's operation of an aggregate mining facility on a 75-acre portion of the subject property: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, that took effect after June 7, 1982. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use a 75-acre portion of the subject property for an aggregate mining facility and only to the extent that use was permitted when they acquired the property on June 7, 1982. (See the complete recommendation in Section VI of this report.)

Department staff also recommends that, the claim be denied as to the claimants' desired operation of a water extraction and bottling facility on a five-acre portion of the subject property because this use was not permitted when the claimants acquired the property.

[1] The acreage of the subject property is approximate. The claim contains conflicting information concerning the overall acreage of the property. In section 4 of the claim, the overall acreage is listed as 550 acres, while acreage figures are also given for each of the five tax lots. The total of the acreage of each of the five tax lots is 532 acres. The department is unable to reconcile the discrepancy based on the existing record, and is using the 550 acre figure as the total acreage, based on the claimants' comments on the draft staff report.

## III. COMMENTS ON THE CLAIM

**Comments Received**

On July 17, 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, five written comments were received in response to the 10-day notice.

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

**Findings of Fact**

This claim was submitted to DAS on March 14, 2006, for processing under OAR 125, division 145. The claim identifies Goal 3 and ORS 197 and 215 as the basis for the claim.[2] Only laws that were enacted or adopted prior to December 2, 2004, are the bases 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.

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[2] The claim also lists ORS 537.505 to 537.796 and OAR 690 as state laws that restrict the claimants' desired use of the subject property. These laws are not administered by the department and will be addressed in a separate report issued by the Oregon Water Resources Department (OWRD).

## 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 claimants, James and Susan Coulter, are present owners of the subject property, as shown by title reports filed by the claimants. Susan Coulter's father, Edwin Keech, acquired parts of the subject property in 1941 and parts of it in 1942, as evidenced by deeds included with the claim. Based on additional evidence provided by the claimants in response to the draft staff report, James and Susan Coulter acquired an interest in the subject property on June 7, 1982 on the death of Edwin Keech by operation of his Will and ORS 114.215(1)(b).

### Conclusions

The claimants, James and Susan Coulter, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C), as of June 7, 1982. Susan Coulter's father, Edwin Keech, is a "family member" as defined by ORS 197.352(11)(A) and acquired the subject property in 1941 and 1942.

### 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 claimants' 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 claimants or a family member acquired the property.

### Findings of Fact

The claim provides that the claimants would like to operate an aggregate mining facility on a 75-acre portion of the subject property; to divide 527 acres of the property into two- to five-acre parcels and to develop a dwelling on each parcel; and to establish a water extraction and bottling facility on five acres of the property. The claimants identify Goal 3, ORS 197 and 215 and OAR 660 and 690, as state laws administered by the department, that restrict their desired use of the subject property.[3]

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[3] At the end of a narrative statement included with the claim, the claimants also cite ORS 195, 196 and 268. The subject property is not within a metropolitan service district (ORS 268), and as a result the statutes codified in that chapter do not apply to the claimants' desired use of the subject property. In their response to the draft staff report, the claimants do not address ORS chapter 195, but do provide a brief statement to the effect that the statutes in ORS chapter 196 relating to removal and fill of material from wetlands may restrict development of a portion of the property. Based on the record for this claim, the claimants have not provided sufficient information that any statute in ORS chapters 195 or 196 do, in fact, restrict the claimants' desired use of the property. There is no information in the record concerning where the claimant's wish to place the specific use they desire, or where wetland areas (if

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The claimants' property is zoned EFU by Marion County, as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.[4] Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.) Most state laws concerning zoning were not in effect in 1940-41. On June 7, 1982, ORS 215.213 (1981) authorized farm dwellings in conjunction with farm use, and non-farm dwellings under ORS 215.213(3)(1981), which contained a number of statutory standards. Goal 3 (1975) also contained standards for dwellings on that date.

ORS 215.283(2)(v) and OAR 660-033-0120 (Table 1) currently permit "operations for extraction and bottling of water" in EFU zones, subject to county approval based on criteria in ORS 215.296 and OAR 660-033-0130(5) (the same criteria appear in both the statute and rule). This use was added as a use permitted in EFU zones in 1997 (Chapter 363, Oregon Laws 1997). In comments on the draft staff report, the claimants indicate that while this use may be allowed under state law, Marion County ordinances restrict the use. The department makes no finding concerning the county's ordinances. Most state laws concerning zoning were not in effect in 1940-41. On June 7, 1982, ORS 215.213 (1981) did not authorize water extraction and bottling facilities on land zoned EFU.

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any) may be located. If claimants have specific information that one or more state laws relating to wetlands restricts their desired use of the property, they may file another claim.

[4] The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I–IV soils.

ORS 215.283(2)(b)(B) allows operations conducted for mining, crushing and stockpiling of aggregate as a use that may be established in an area zoned EFU subject to criteria in ORS 215.296 and 215.298.[5] All of these statutes were enacted in 1989.

ORS 215.298 includes provisions concerning aggregate operations authorized under ORS 215.283(2)(b)(B) in EFU zones. For purposes of ORS 215.283(2)(b)(B), a land use permit is required for mining more than 1,000 cubic yards of material or excavation preparatory to mining of a surface area of more than one acre. ORS 215.298(2) provides that a permit for mining of aggregate shall be issued only for a site included on an inventory in an acknowledged comprehensive plan. In comments on the draft staff report, claimants state that the area including the subject property was included on the county's inventory of aggregate sites. If that were the case, then the claimants' desired aggregate use would be allowed under ORS 215.283 and 215.298(2), and there would be no basis for the department to provide relief as to these statutes. However, the department finds that the preliminary documents and maps that the claimants refer to are not the county's official acknowledged inventory of aggregate sites, see ***Beaver State Sand & Gravel v. Douglas County*, 187 Or App 241 (2003).** As a result, these statutes do not authorize claimants' desired aggregate use, and restrict that use, as they were not in effect in 1941-42. In 1982, ORS 215.213(b) (1981) authorized counties to allow the mining of aggregate on land zoned for exclusive farm use. Goal 3 (1975) required that non-farm uses (including aggregate) be minimized to allow for maximum agricultural productivity.

The claim also includes a general listing of OAR 660, which is all of the Commission's rules. This report addresses only those statutes, goals and rules that the department can determine apply to and restrict the claimants' desired use. One other goal that the claimants do not list, but that the department considered, is Goal 5, adopted in 1975. Goal 5 establishes procedures and criteria for inventorying and evaluating Goal 5 resources and for developing land use programs to conserve and protect significant Goal 5 resources. Aggregate and mineral resources are subject to the provisions of Goal 5 and the Goal 5 administrative rule (OAR 660-023-0180). In 1981, the Commission adopted OAR 660, division 16, establishing the process for applying Goal 5 to significant aggregate sites (OAR 660-016-0030). In 1996, the Commission adopted OAR 660, division 23, replacing OAR 660, division 16, with a new process for inventorying, evaluating and designating significant aggregate sites under Goal 5. The rule was later amended in 2004. The intent of Goal 5 and the implementing regulations is to identify and protect significant resources, including mineral and aggregate resources, to allow their use. The rule also protects significant resources (including aggregate sites) from conflicting uses associated with uses on neighboring properties. As the aggregate resource within the subject property was not and has not been inventoried in an acknowledged Goal 5 inventory by Marion County, Goal 5 (and its implementing rules) does not apply to or restrict the claimants' desired aggregate use of a portion of the property.

[5] In addition to these statutes, administrative rules apply. OAR 660-033-0120 (Table 1) lists aggregate mining as a use subject to review and approval. OAR 660-033-0130(5) requires review and approval of the use under ORS 215.296.

**Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goals 3, ORS 215 and OAR 660, division 33, all took effect after Edwin Keech acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimants' family member acquired the 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."

**Findings of Fact**

The claim includes an estimate of $42,009,000 as the reduction in the subject property's fair market value due to the regulation(s) that restrict the claimants' desired use of the property. This amount is based on: property owner market research for the value of residential development; gravel industry expert advice for the aggregate extraction proposal; and other industrial property values for the water extraction and bottling operation. No appraisal is included with the claim, and the estimate appears to be overstated for a variety of reasons, including that it assumes the desired uses would be carried out simultaneously when, in fact, residential development would have to follow any aggregate operation on that part of the property. Nevertheless, the claim includes relevant evidence that state land use regulations have had the effect of reducing the fair market value of the subject property to some extent.

**Conclusions**

As explained in Section V.(1) of this report, the claimants are James and Susan Coulter whose family member acquired the subject property in 1941 and 1942. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants' family member acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulation(s) on the fair market value of the subject property is a reduction of $42,009,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since the claimants' 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 claimants' family acquired the property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Marion County has implemented through its current EFU zone. All of these land use regulations were enacted or adopted after the claimants' family acquired the subject property.

#### Conclusions

It appears that none of the general statutory, goal and rule restrictions on division and development of the subject property were in effect when the claimants' family acquired the property in 1941 and 1942. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants' family acquired the subject property 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 claimants' desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by $42,009,000. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of the compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when their family member 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 the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow James and Susan Coulter to use the subject property for a use permitted at the time they acquired the property on June 7, 1982.

At the time the claimants acquired the subject property on June 7, 1982, their use of it was subject to ORS 215.213 and 215.263 (1981) as well as other applicable statutes in ORS chapter 215, along with Goal 3 (1975). In 1982, ORS 215.263 (1981 edition) required that divisions of land in EFU zones be "in conformity with the legislative intent set forth in ORS 215.243". ORS 215.213(1)(f) (1981 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.213(3) (1981) if they were determined to be compatible with farm use, not interfere seriously 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 to what extent the claimants' desired division and residential development of the subject property was allowed under the standards in effect when they acquired the property on June 7, 1982.

ORS 215.283(2)(v) and OAR 660-033-0120 (Table 1) currently permit "operations for extraction and bottling of water," as explained in Section V.(2) of this report. The statute and goal did not permit this use when the claimants acquired the property in 1982. As a result, the department is not authorized to "not apply" ORS 215.283 or Goal 3 with respect to this use, as these laws did not permit the use when the claimants acquired the property.

ORS 215.213(2)(b) and Goal 3 (1981 and 1975, respectively) provisions relating to mineral and aggregate resources allowed mining of aggregate as a conditional use on land zoned EFU, with the state requirement under Goal 3 that the use be minimized to allow for maximum agricultural productivity. The claimants have not shown that the desired aggregate use would comply with these standards

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have 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 claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

**Conclusions**

Based on the foregoing findings and conclusions, the department recommends that the claim be denied as to the desired water extraction and bottling use, and approved as to the desired residential development and aggregate uses, 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 James and Susan Coulter's division of approximately 545 acres of the subject property into two- to five-acre residential parcels or to their development of a dwelling on each parcel:

applicable provisions of Goal 3, ORS 215 and OAR 660, division 33 that took effect after June 7, 1982. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on June 7, 1982.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to James and Susan Coulter's operation of an aggregate mining facility on a 75-acre portion of the subject property: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33 that took effect after June 7, 1982. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use a 75-acre portion of the subject property for an aggregate mining facility, and only to the extent that use was permitted when they acquired the property on June 7, 1982.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for division and residential use and aggregate extraction as described in this report, subject to the standards in effect on June 7, 1982. On that date, the property was subject to compliance with Marion County's acknowledged EFU zone, and the applicable provisions of Goals 3 and 5, ORS 215 and OAR 660, divisions 5, and 16, then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit; a land use decision; a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies; and restrictions on the use of the subject property imposed by private parties.

4. Any use of the property by the claimants 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 claimants to use the subject property, it may be necessary for them 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 claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

## VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 21, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.

## ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

## OREGON DEPARTMENT OF WATER RESOURCES
**Final Staff Report and Recommendation**

September 7, 2006

| | |
|---|---|
| **STATE CLAIM NUMBER:** | M124344 |
| **NAMES OF CLAIMANTS:** | James and Susan Coulter |
| **MAILING ADDRESS:** | 11631 Marion Road SE<br>Turner, OR 97392 |
| **PROPERTY IDENTIFICATION:** | Township 9S, Range 2W, Section 15<br>Tax lots 200 and 301;<br>Township 9S, Range 2W, Sections 15 & 16<br>Tax lot 300;<br>Township 9S, Range 2W, Sections 15 & 22<br>Tax lot 302;<br>Township 9S, Range 2W, Sections 21 & 22<br>Tax lot 500<br>Marion County |
| **OTHER CONTACT INFORMATION:** | Christopher Koback<br>Davis Wright Tremaine LLP<br>1300 SW 5th Avenue, Suite 2300<br>Portland, OR 97201 |
| **OTHER INTEREST IN PROPERTY:** | Coulter Farms, Inc.<br>11631 Marion Road SE<br>Turner, OR 97392<br><br>GE Capitol Mortgage<br>c/o Navy Federal Credit Union<br>P.O. Box 3300<br>Merrifield, VA 22116<br><br>USDA Farm Service Agency<br>3867 Wolverine St. NE, Suite F1<br>Salem, OR 97305 |
| **DATE RECEIVED BY DAS:** | March 14, 2006 |
| **180-DAY DEADLINE:** | September 10, 2006 |

## I. SUMMARY OF CLAIM

The claimants, James and Susan Coulter, seek compensation in the amount of $42,009,000 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 claimants desire compensation or the right to operate an aggregate extraction facility on a 75-acre portion of the property; to divide approximately 545 acres of the approximately 550-acre property[1] into two- to five-acre parcels and develop a dwelling on each parcel; and to establish a water extraction and bottling facility on the remaining five acres. The subject property includes the tax lots listed above and is located at 11631 Marion Road SE, near Turner, in Marion County. (See claim.)

## II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Water Resources Department (OWRD) has determined that the claim is not valid as to state laws administered by OWRD. OWRD staff recommends that the claim be denied as to laws administered by OWRD. (See the complete recommendation in Section VI of this report.)

## III. COMMENTS ON THE CLAIM

**Comments Received**

OWRD incorporates by reference section III of the DLCD final report on this claim.

## IV. TIMELINESS OF CLAIM

OWRD incorporates by reference the findings and conclusions of DLCD concerning the timeliness of the claim.

## V. ANALYSIS OF CLAIM

**1. Ownership**

OWRD incorporates by reference the findings and conclusions of DLCD concerning the present owners of the property, and when they and any family member acquired an interest in the subject real property.

**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 claimants' use of private real property in a manner that reduces the fair market value of the

[1] The acreage of the subject property is approximate. The claim contains conflicting information concerning the overall acreage of the property. In section 4 of the claim, the overall acreage is listed as 550 acres, while acreage figures are also given for each of the five tax lots. The total of the acreage of each of the five tax lots is 532 acres. The department is unable to reconcile the discrepancy based on the existing record, and is using the 550 acre figure as the total acreage, based on the claimants' comments on the draft staff report.

property relative to how the property could have been used at the time the claimants or a family member acquired the property.

**Findings of Fact**

The claim provides that the claimants would like to operate an aggregate mining facility on a 75-acre portion of the subject property; to divide 527 acres of the property into two- to five-acre parcels and to develop a dwelling on each parcel; and to establish a water extraction and bottling facility on five acres of the property. The claimants identify ORS 537.505 - 796, and OAR chapter 690 as state laws administered by OWRD that restrict their desired use of the property. The claim does not establish that these laws apply to or restrict the claimants' desired operation of an aggregate extraction facility, or the division of the property and development of residences. It appears that the claimants identified these laws as restrictions on their desired use of a small (five-acre) portion of the property as a water extraction and bottling facility. The claim asserts that there were no state laws restricting this use when the claimants' family member acquired the property in 1941 and 1942, and that the claimants' family member owned "all of the groundwater without limitation of use or volume" (as part of the rights acquired by deed).

In comments on the draft staff report, the claimants repeat their argument that ownership of land includes a vested property right to the use of groundwater, and state that a family member of the claimants acquired a perfected water right to groundwater with a claimed priority date of 1944 under Certificate of Registration 4152, groundwater registration number GR-3689.[2] The state disagrees with the claimants' legal arguments. The legal authority the claimants' attorneys identify relates to springs that arise on land and do not flow off of the land, not to groundwater. Simply because the state had not elected to place limits on the use of groundwater as of a particular date does not mean that a land owner had a vested right to use that water. In this case, the claimants' family member claimed the right to use water from a well for 0.0446 cfs for primary irrigation of 10 acres. The 10 acres appear to be located in T9S R2W sec. 15, tax lots 301 and 302. The desired use of water that claimants' seek to carry out is to use water for bottling for human consumption. Based on the record for this claim, neither the claimants nor their family member have held a vested property right to use water for the purpose that they now wish to carry out.

The claimants' assertion regarding the ownership of water, including groundwater, is wrong as a matter of law. The State of Oregon has owned all the waters of the state, including groundwater, since statehood. With the exception of the water right claim represented by certificate of registration 4152, GR-3689, the claimants' father did not have any right to the use of groundwater underlying the subject property. ***California Oregon Power Co. v. Portland Beaver Cement***, 295 U.S. 142 (1935); ***Hough v. Porter***, 51 Or 318; supp. op. 51 Or 382 (1909); see also, ***Kinross Copper Corp. v. State***, 160 Or App. 513, 522-523 (1999) (mining company had no property right to use water in the absence of a certificate or other vested right). In addition to the ground water registration, the claimants' father held, and the claimants appear to continue to hold, an interest in a certificated right under a decree in the name of the Santiam Water Control District for irrigation on most of the subject property and for wildlife on tax lot 200 (T9S R2W

[2] A groundwater registration is not a final determination of a perfected water right to groundwater. A certificate of registration entitles the registrant to appropriate groundwater as provided therein, but remains an unadjudicated claim to the use of groundwater.

sec. 15). Neither the water right nor the groundwater registration involve the use of water for a use described in the claim under ORS 197.352, and nothing in the claim establishes that these rights to use water are restricted or that OWRD has enforced any of the listed laws with respect to these rights. As a result, the department determines that there is no property right that has been restricted by a state land use regulation administered by OWRD. Claimants have no right to use water for any of the uses set forth in their claim without obtaining a transfer of their existing right or some other form of authorization or permit from OWRD.

In addition, OWRD has not enforced any state land use regulation that it administers in a manner that has restricted the claimants' desired use of real property that they own. Claimants have not applied for any water right for bottling or for any use described in their claim.

Finally, the rules in OAR chapter 690 are not state "land use regulations" under ORS 197.352. Only rules of LCDC, and rules regulating farm and forest practices, are "land use regulations" as defined in ORS 197.352.

The claimants' family first acquired the subject property in 1941 and 1942. Neither the claimants' family, nor the claimants have any property right to use surface or groundwater for the uses described in the claim. Claimants have not applied to OWRD for a surface or groundwater right, and as a result OWRD has not enforced a state land use regulation that it administers with regard to claimants' desired use of their property. The state rules in OAR chapter 690 are not "land use regulations," as that term is defined under ORS 197.352.

**Conclusions**

For all of the foregoing reasons, OWRD has not enforced a state land use regulation that restricts a property right held by the claimants. As a result, OWRD recommends that this claim be denied as to laws administered by OWRD.

**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 $42,009,000 as the reduction in the subject property's fair market value due to the regulation(s). This amount is based on: property owner market research for the value of residential development; gravel industry expert advice for the aggregate extraction proposal; and other industrial property values for the water extraction and bottling operation. The amount estimated for laws restricting the use of the property as a water bottling facility is $1,171,500. However, this estimate presumes that the claimants have the right to use waters of the state for bottling. As explained above, the claimants do not hold that right. As a result, the claimants estimate is not relevant to determining whether laws administered by OWRD have had the effect of reducing the fair market value of real property owned by the claimants.

**Conclusions**

As explained in Section V.(1) of this report, the claimants are James and Susan Coulter whose family members acquired the subject property in 1941 and 1942. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the property and have the effect of reducing the fair market value of real property rights held by the claimants. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants' family acquired the subject property do not restrict the claimants' real property rights. As a result, the claimants have not demonstrated that these laws have had any effect on real property rights held by claimants.

**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 and Conclusions**

The claim is based on state land use regulations that are alleged to restrict the use of the subject property relative to the rights held by the claimants' family when it acquired the property. The claimants have not established that they hold property rights that have been restricted by state land use regulations administered by OWRD.

Some of the laws administered by OWRD may be exempt under particular exemptions of ORS 197.352(3). Because claimants have not established that they have a right to compensation, OWRD makes no determination concerning these exemptions at this time.

## 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 current owner acquired the property.

**Findings of Fact**

Based on the findings and conclusions set forth in this report, laws enforced by OWRD do not restrict any real property interest held by claimants, and OWRD has not enforced any state "land use regulation" to restrict the claimants' desired use of their property. As a result, OWRD recommends that this claim be denied as to laws administered by OWRD.

## VII. COMMENTS ON THE DRAFT STAFF REPORT

OWRD's draft staff report on this claim was issued on August 21, 2006. Under OAR 125-145-0100(3), OWRD provided an opportunity for comments on the draft report to the claimants and

any third party who had earlier submitted comments on the claim. The attorney for the claimants submitted comments on the draft report that WRD has considered in this final report.