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BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

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FRANK M. PLASS, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
BOARD OF COMMISSIONERS OF )  
KLAMATH COUNTY, )  
Respondent, )  
 )  
OREGON BROADCASTING COMPANY, )  
 )  
Respondent- )  
Applicant, )

LUBA No. 84-007  
FINAL OPINION  
AND ORDER OF DISMISSAL

Appeal from Klamath County.

Michael L. Brant, Klamath Falls, filed the Petition for Review and argued the cause on behalf of Petitioner.

Carl M. Brophy, Medford, filed the response brief and argued the cause on behalf of Respondent-Applicant Oregon Broadcasting Company. With him on the brief were Brophy, Wilson and Duhaime.

No appearance by Klamath County.

KRESSEL, Referee; BAGG, Chief Referee; DuBAY, Referee; participated in this decision.

DISMISSED 05/21/84

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1983, ch 827.

1 Opinion by Kressel.

2 NATURE OF THE DECISION

3 Petitioner seeks review of an order of the Klamath County  
4 Board of Commissioners granting a conditional use permit to the  
5 Oregon Broadcasting Company. The permit enables the company to  
6 place a television transmitting tower on land owned by the  
7 federal government and managed by the Bureau of Land Management  
8 (BLM).

9 The county has zoned this property F-I, a forest use zone.  
10 Under the county's zoning code, a communication structure is  
11 considered a non-forest use in this zone but permissible under  
12 a conditional use permit. See §51.020(D) of the Klamath County  
13 Land Development Code.

14 In August and September of 1983, the applicant's permit  
15 request was heard by the Klamath County hearings officer. The  
16 hearings officer issued an order granting the conditional use  
17 permit on October 3, 1983. The decision was appealed to the  
18 Klamath County Board of Commissioners. The Board considered  
19 the appeal and issued an order granting the permit on January  
20 4, 1984. This appeal followed.

21 JURISDICTION

22 Respondent argues LUBA should dismiss this proceeding  
23 because

24 "[f]ederal lands are generally exempt from state  
25 regulation because of the property and supremacy  
26 clause of the United States Constitution...." Brief  
of Respondent-Applicant at 1.

1 Respondent points to the Federal Land Policy and Management Act  
2 of October 21, 1976, as specific authorization for a grant of  
3 right-of-way by the United States on federal lands for  
4 "systems for transmission or reception of radio,  
5 television, telephone, telegraph or other electronic  
6 signals and other means of communication." 43 USC  
7 1761(5).

8 Accordingly, the respondent asserts BLM has sole authority over  
9 the applicant's activities, and Klamath County had no authority  
10 to require a conditional use permit for activity on federal  
11 land. See Lane County v. Besset 46 Or App 319, 612 P2d 297  
12 (1980) and Elliott v. Oregon International Mining Company, 60  
13 Or App 474, 654 P2d 663 (1982). See also, 2 R Anderson,  
14 American Law of Zoning, §1207 (2ed, 1976).<sup>1</sup>

15 This argument assumes this Board is empowered to declare  
16 the challenged permit was not within Klamath County's authority  
17 to grant because of the pre-emptive role of federal law. The  
18 argument presents a threshold question, novel in our  
19 experience, of the scope of our authority under ORS 197.825.  
20 One subsection of that statute grants this Board exclusive  
21 jurisdiction to review "...any land use decision of a local  
22 government, special district, or a state agency in the manner  
23 provided in ORS 197.830 to 197.845." However, the statute also  
24 reserves to the circuit courts the power to grant declaratory,  
25 injunctive and mandamus relief in certain circumstances. ORS  
26 197.825(4).

We believe our power to review local government "land use

1 decisions" under ORS 197.835(1) necessarily implies the further  
2 power to determine, as a threshold matter, whether the local  
3 government or state agency action challenged in a given appeal  
4 falls within the definition of "land use decision" appearing in  
5 ORS 197.015(10).

6 The statutory definition of "land use decision" is as  
7 follows:

8 "(A) A final decision or determination made by a local  
9 government or special district that concerns the  
adoption, amendment or application of:

- 10 "(i) The goals;  
11 "(ii) A comprehensive plan provision;  
12 "(iii) A land use regulation; or  
13 "(iv) A new land use regulation...." ORS  
14 197.015(a) (A).

15 In our view, the decision at issue in this appeal does not  
16 come within the scope of the quoted definition. The county's  
17 decision does not concern the application of a statewide goal,  
18 plan provision or land use regulation because, as a matter of  
19 federal law, those state-mandated regulatory devices are not  
20 enforceable on federal land under these circumstances. Lane  
County v. Besset, supra; Elliott v. Oregon International Mining  
Co., supra.

21 Based on the above, we agree with respondent that "land use  
22 decision," as that term is defined in ORS 197.015(10), has not  
23 been presented for our review.

24 Dismissed.

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FOOTNOTE

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1 The respondent requested and received a permit from Klamath  
2 County. This act suggests the respondent concedes it is  
3 subject to county land use regulation. Arguably, its  
4 submission to county authority may preclude respondent's claim  
5 it is immune from county regulation and from our review of the  
6 county's exercise of its land authority. Anderson v. Peden, 30  
7 Or App 1063, 569 P2d 663 (1977) aff'd 284 Or 313, 587 P2d 59  
(1978).

8 However, we believe the statutory framework within which we  
9 operate, in contrast to the more restrictive writ of review  
10 statute involved in the Anderson v. Peden case, permits us to  
11 address the question of Klamath County's authority to issue the  
12 permit in the first instance.