

**BEFORE THE LIQUOR CONTROL COMMISSION  
OF THE STATE OF OREGON**

<b>In the Matter of the Full On-Premises</b>	)	<b>FINAL FINDINGS OF FACT</b>
<b>Sales License Held by:</b>	)	<b>CONCLUSIONS OF LAW</b>
	)	<b>AND ORDER</b>
	)	
<b>U-N-Me, Inc.</b>	)	<b>OLCC-11-V-014</b>
<b>Theresa Brown, Pres/Sec/Treas/Dir/ Stockholder</b>	)	<b>OLCC-11-V-014A</b>
<b>dba FOSTER WATERHOLE</b>	)	
<b>6099 Highway 20</b>	)	
<b>Foster, OR 97345</b>	)	

**HISTORY OF THE CASE**

On March 15, 2011, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Cancellation to U-N-Me, Inc., Theresa Brown, President/Secretary/Treasurer/Director/Stockholder (collectively Licensee), dba Foster Waterhole, located at 6099 Highway 20, Foster, Oregon. The Notice charged Licensee with violations of OAR 845-005-0355, alleging that: (1) Laune Brown had been on the premises on multiple occasions in violation of a license restriction prohibiting him from the premises at all times; and (2) that Laune Brown participated in the operation or management of the business in violation of a license restriction prohibiting him from taking part in the operation or management of the business.<sup>1</sup> Licensee timely requested a hearing.

The Commission referred Licensee’s hearing request to the Office of Administrative Hearings on March 31, 2011.

A contested case hearing was held in this matter in Albany, Oregon, on September 19, 2011 before Senior Administrative Law Judge Alison Greene Webster. Licensee was represented by Michael Mills, Attorney at Law. Kelly Routt presented the case for the OLCC.

OLCC Inspectors Christine Gittins and Christopher Nolte and Sweet Home Police Chief Robert Burford and Sweet Home Police Sergeant Jason VanEck testified on the Commission’s behalf. Corporate principal Theresa Brown, and witnesses Mike Hall, Debra Jewell, Shaunna Sharp, Nanette Kenyon, Ricky Autry and Laune Brown testified on Licensee’s behalf. The record remained open for receipt of Licensee’s offer of proof and written closing briefs. Staff’s Closing Argument was received September 30, 2011 and Licensee’s Closing Argument was received on October 14, 2011. The record closed on October 25, 2011, upon receipt of Staff’s Rebuttal Argument.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed November 2, 2011.

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<sup>1</sup> At hearing, Commission Staff withdrew violation number two, which alleged that Laune Brown had participated in the operation and management of the business.

Licensee filed Exceptions to the Proposed Order on November 17, 2011. Staff filed Comments on the Proposed Order on November 17, 2011. The Administrative Law Judge responded to Licensee's Exceptions and Staff's Comments on December 1, 2011.

On April 5, 2012, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Licensee's Exceptions to the Proposed Order, Staff's Comments on the Proposed Order and the Administrative Law Judge's Response to Licensee's Exceptions, Staff's Comments, and the Commission's official notice of facts. Based on this review and the preponderance of the evidence, the Commission enters the following:<sup>2</sup>

### **EVIDENTIARY RULINGS**

Prior to the hearing, Licensee subpoenaed OLCC Liquor License Investigator Lionel Salgado and OLCC License Process Technician Dan Croy to appear at the hearing. OLCC moved to quash the subpoenas asserting that neither OLCC employee had a connection with the proceeding and could not offer relevant testimony. During an August 29, 2011 telephone conference, the ALJ granted the OLCC's motion and quashed the subpoenas.

OLCC Exhibits A1 through A7 and Licensee's Exhibits P1 and P2, P3, P5, P11, P12, P13, P14, P15, P17, P22 and P25 (page 1) were admitted at hearing.<sup>3</sup> Licensee withdrew Exhibits P4, P6 through P10, P16, P18 through P21 and P23 and P24 at hearing. Licensee's Offers of Proof were received September 20, 2011.<sup>4</sup>

### **ISSUES**

1. Whether, by allowing Laune Brown on the licensed premises, Licensee violated a restriction on the license that prohibits Laune Brown from being on the premises at all times. OAR 845-005-0355(5).

2. If so, what is the appropriate sanction for this violation?

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<sup>2</sup> Licensee's status changed between the Proposed Order in this matter and the Final Order herein. The Commission took official notice of facts reflecting the sale of this business and, on April 3, 2012, the issuance of a temporary license to a new entity. Due to this change in status, the recommended penalty of license cancellation has been converted to a Letter of Reprimand. *See* footnotes 8 and 9, *infra*, and the Penalty section of this Order.

<sup>3</sup> In their Comments on the Proposed Order, staff requested correction to the agency exhibits listed as being admitted to the record. In her Response to Licensee's Exceptions and Agency Comments, the ALJ agreed that the listed exhibits should be corrected to reflect that OLCC Exhibits A6 and A7 were also admitted.

<sup>4</sup> In response to the ALJ's ruling to quash the subpoenas served on Mr. Salgado and Mr. Croy, Licensee asked to make offers of proof as to what these OLCC employees would have testified, had they been called and sworn as witnesses. Although the ALJ determined that the proffered evidence was not relevant to the charges at issue, Licensee's offers of proof were accepted pursuant to OAR 137-003-0610(5).

## FINDINGS OF FACT

1. On August 12, 2010, the Commission issued U-N-Me, Inc. and Theresa Brown, the corporation's president, secretary, treasurer, director and sole stockholder, dba Foster Waterhole, located at 6099 Highway 20, Foster, Oregon, a temporary license to operate. That temporary license contained restrictions, one of which prohibited Ms. Brown's husband, Laune Brown, from being on the licensed premises during business hours. (Test. of Gittins.)

2. On September 3, 2010, OLCC Inspectors Gittins and Nolte met with Licensee at the premises. Among other things, they discussed the restrictions on the temporary license. At that time, Inspector Gittins understood that the restriction prohibited Mr. Brown from being on the premises at all times (as opposed to just during business hours). She explained to Licensee that the licensed premises meant the entire area within the building, including the bar, lounge area, kitchen, storage rooms, bathrooms and any other areas not open to the public. Licensee acknowledged this definition of licensed premises, but mentioned that the restriction was onerous because Mr. Brown was the handyman, and the premises and building often needed maintenance or repair. (Test. of Gittins; Ex. A2.)

3. On November 2, 2010, the Commission granted Licensee authority to operate, both a Full On-Premises Sales license and an Off-Premises Sales license, with the following two restrictions:

1. Licensee shall prohibit Laune Brown from being on the licensed premises at all times.
2. Licensee shall prohibit Laune Brown from taking part in the operation or management of the business.

(Ex. A7.) The Commission placed these restrictions on the license based on a determination that, due to his May 2010 conviction for unlawful possession of marijuana, a Class B Felony, Mr. Brown was an unlicensable person who had a financial interest in the licensed business. (Ex. P17.)

3. Licensee timely filed a hearing request to challenge the restrictions. A hearing was held in April 2011 before ALJ Han. In a Final Order issued August 19, 2011, the Commission upheld the license restrictions. *Foster Waterhole* (OLCC Final Order, 10-L-012, August 2011). (Ex. P17.)

4. Meanwhile, on December 29, 2010, Inspector Gittins visited the premises and met with Licensee for a "first call visit."<sup>5</sup> During that visit, Inspector Gittins provided Licensee with a packet of information regarding compliance with the liquor laws. They also discussed the restrictions, and Inspector Gittins reminded Licensee that Mr. Brown was prohibited from the licensed premises at all times. (Test. of Gittins.)

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<sup>5</sup> The Commissioners corrected a scrivener's error in the date of the "first call visit" to reflect that the visit occurred on December 29, 2010, not December 29, 2011. See Exhibit P-24, p.1.

5. On January 26, 2011, Inspector Gittins received an email from Sweet Home Police Chief Bob Burford with the following information:

Multiple sources tell us Laune is there most every day especially on Friday nights. One call received Monday was from the owner of the RV park next door. Officers have observed the vehicle he alone drives but have done no walk-throughs I am aware of.

(Ex. A5 at 1.)

6. On Sunday, February 6, 2011, at about 1:00 p.m., Sweet Home Police Sergeant VanEck drove by the licensed premises and saw Mr. Brown's vehicle, a black Chevrolet truck, parked in the parking lot near the premises' back door. Sgt. VanEck did not stop and walk through the premises to determine whether Mr. Brown was, in fact, there. (Test. of VanEck; Ex. A5 at 2.)

7. On Saturday, February 12, 2011, Inspectors Gittins and Nolte visited the premises in search of Mr. Brown, to determine if he had been there in violation of the license restriction. Before their arrival, the inspectors stopped off at the Sweet Home Police Department and verified Mr. Brown's DMV photograph with Sgt. Lynn. They also confirmed the registration plate number to Mr. Brown's black Chevrolet pickup. They arrived at the premises at about 4:20 p.m. and parked in the RV parking area next door. They saw Mr. Brown's black Chevrolet pickup parked at the rear of the premises. (Test. of Gittins; test. of Nolte; Exs. A2 and A3.)

8. About five minutes later, at 4:25 p.m., the inspectors saw Licensee Theresa Brown and a male, later identified as Laune Brown, exit the premises and walk to the rear, where Mr. Brown's truck was parked.<sup>6</sup> After identifying Mr. Brown (from the DMV photograph in their possession), the inspectors contacted the Sweet Home Police Department to assist them in making contact with him. The inspectors also drove about a quarter mile down the road, to The Pointe restaurant parking lot at the corner of Riggs Hill Road and Highway 20, to await arrival of the police. While there, at approximately 4:35 p.m., the inspectors saw Mr. Brown and Licensee drive by on Riggs Hill Road in Mr. Brown's truck. (Test. of Gittins; test. of Nolte; Exs. A2 and A3.)

9. At about 4:40 p.m., the inspectors returned to the licensed premises and contacted the bartender on duty, Permittee Nanette Kenyon. Inspector Gittins asked Kenyon if Mr. Brown had been at the premises. Kenyon initially said that the male the inspectors saw leaving the premises was not Mr. Brown but rather Licensee's brother, Rick. When pressed, however, Kenyon admitted to the inspectors that Mr. Brown had been inside the premises about 20 minutes earlier. She explained that he had consumed a Coke Zero in the bar area while there. She added that both Licensee and Mr. Brown had left the premises, but she did not know if they were still outside or had left for the day. In response to further questioning, Kenyon also acknowledged

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<sup>6</sup> In their Comments on the Proposed Order, staff requested correction of this Finding of Fact to reflect that it was Licensee Brown and Mr. Brown who were observed leaving the premises. Licensee made a similar request in her Exceptions. In her Response to Licensee's Exceptions and Agency Comments, the ALJ agreed that the Finding should be corrected.

that Mr. Brown had been inside the premises on previous occasions, including every other Sunday to unload groceries.<sup>7</sup> (Test. of Gittins; test. of Nolte; Exs. A2, A3 and A4.)

10. In the inspectors' opinion, Kenyon was not forthcoming with information and seemed reluctant to discuss Mr. Brown's presence at the premises. Kenyon acknowledged that she was aware of the restriction prohibiting him from being there. (Test. of Gittins; test. of Nolte; Ex. A2 and A3.)

11. After speaking with Kenyon, Inspector Gittins called Licensee's cell phone. Licensee answered, and the inspector explained that she was conducting an investigation. She then asked what Mr. Brown had been doing inside the bar about 30 minutes earlier. Licensee acknowledged he was there, and explained that he was "fixing an ice machine." She added that he had only been there for a few minutes fixing the ice machine in the back. When the inspector confronted her with Kenyon's statement (that Mr. Brown had been in the bar area), Licensee admitted that Mr. Brown had also been in the bar and consumed a Coke. She explained that she had Mr. Brown come to the premises because her brother, Rick, had been unable to help her fix the ice machine that day. During this conversation, Licensee acknowledged she was aware of the restriction prohibiting Mr. Brown from being on the premises. She admitted that she knew he could not be there for any reason, including for handyman work. (Test. of Gittins; Exs. A2 and A4.)

12. On February 14, 2011, Inspector Gittins received the following voice mail message from Licensee:

Christine, this is Theresa Brown calling. \* \* \* I just want to check in with you and see where we are at, how bad I screwed up. Um, just wanted to get your input, um, with what's happening in the thing with Laune stepping into that back room last, on Saturday and checking the ice machine. So if you could call me, I would appreciate it.

(Ex. A6; test. of Gittins.)

13. At some point in the late spring or early summer of 2011, on a Friday or Saturday evening, Sgt. VanEck saw Mr. Brown inside the licensed premises. The sergeant was off-duty, at the licensed premises as patron with his wife. He and his wife stopped in on Theresa Brown's

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<sup>7</sup> At hearing, Kenyon testified that she did not recall telling Inspector Gittins that Mr. Brown came to the premises every other Sunday to unload groceries. She testified that she had never seen Mr. Brown there on a Sunday, that grocery day was generally Tuesday, and that Mr. Brown did not ever enter the premises or unload them. The Commission gives little weight to Kenyon's testimony in this regard. Her testimony at hearing was evasive and at times non-responsive. She had very little recall of her discussion with the inspectors. Conversely, Inspector Gittins's notebook notes, which she wrote during or immediately after her interview of Kenyon, indicate she was told that "every other Sunday he [Mr. Brown] unloads groceries." (Ex. P12 at 3.) Consequently, after weighing the conflicting testimony, the Commission gives more weight to Inspector Gittins's testimony and written notes in finding above that, in responding to Inspector Gittins' questions on the afternoon of February 12, 2011, Kenyon admitted that Mr. Brown had been inside the premises on previous occasions.

invitation, after having dinner out at The Pointe Restaurant just down the road. The sergeant and his wife spoke with Licensee and Mr. Brown at the licensed premises and remained there for approximately an hour. During this time, Licensee and Mr. Brown gave Sgt. VanEck and his wife a tour of the premises, showing them changes and upgrades they had made to the building. (Test. of VanEck; test. of T. Brown.)

14. On April 3, 2012, a F-COM/OPS 90 day Authority to Operate was issued to Autry Boys Inc. dba FOSTER WATERHOLE for the premises located at 6099 Highway 20, Foster, Oregon 97345. (Official Notice)<sup>8</sup>

15. As of April 4, 2012, Licensees U-N-Me, Inc. and Theresa Brown no longer possess a liquor license for the premises located at 6099 Highway 20, Foster, Oregon 97345. (Official Notice)

## CONCLUSIONS

1. Licensee violated a restriction on the license by allowing Laune Brown on the licensed premises. OAR 845-005-0355(5).
2. The appropriate sanction for this violation is a Letter of Reprimand in lieu of cancellation.

## OPINION

### 1. Violation

The Commission asserts that Licensee violated OAR 845-005-0355(5) by permitting Laune Brown on licensed premises. As the proponent of this contention, the Commission bears the burden of proof. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position).

OAR 845-005-0355(5) provides as follows:

A licensee or permittee who has a restricted license or permit must exercise license or permit privileges only in compliance with the restriction(s). Failure to comply with the restriction(s) is a Category I violation.

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<sup>8</sup> Pursuant to OAR 137-003-0615(4)(a), on April 4, 2012, the Commission gave notice to (former) Licensee (U-N-Me, Inc. and Theresa Brown) that it would take official notice from its licensing records of facts 14 -15. In its notice, the Commission recited Licensee's right under OAR 137-003-0615(4)(b) to object to and/or rebut the facts officially noticed. Licensee did not object or request the opportunity to rebut within 10 calendar days of the date of the notice. No response was received. On April 16, 2012, the Commission took official notice of the general facts within its specialized knowledge that are set forth in Findings of Fact 14-15.

Licensee acknowledges the restriction prohibiting Mr. Brown “from being on the licensed premises at all times.”<sup>9</sup> Licensee admits that Mr. Brown was on the licensed premises on February 12, 2011, where he consumed a soft drink in the bar area. Licensee also admits that Mr. Brown was with her at the licensed premises that evening when she spoke with Sgt. VanEck and his wife. The evidence establishes that Licensee violated OAR 845-005-0355(5) by permitting Mr. Brown on the premises in contravention of the restriction prohibiting him from being there.

## 2. Penalty

As set out above, the violation of a restriction on the license is a Category I violation. A Category I violation is one that makes the licensee ineligible for a license. OAR 845-006-0500(7)(a)(A). Under the Commission’s guidelines, the standard penalty for a first Category I violation is cancellation of the license. OAR 845-006-0500(7), Exhibit 1.

In restriction violation cases, the Commission considers the factors described in *Oceanside Restaurant & Lounge* (OLCC Final Order, 88-V-123, August 1989) in determining whether the restriction violation was substantial and therefore warrants cancellation. As the Commission noted in *Betty Ford’s* (OLCC Final Order, 06-V-021/06-L-006, August 2007), the *Oceanside* factors are “not required elements but are examined as factors weighing in favor of or against a determination that a restriction violation is substantial enough to warrant the presumed penalty of cancellation.” Final Order at 13, n. 5. The *Oceanside* factors are as follows:

- (a) the timing of the violation, with breaches early in the contract considered more likely to be substantial;
- (b) whether the violation was willful;
- (c) the number of violations;
- (d) whether the hardship on the licensee outweighs the importance of the conditions in ensuring compliance with the license condition.

In *Oceanside*, the Commission found that the restriction violation was substantial and merited cancellation where all four factors weighed against the licensee. There, the licensee’s principal violated the restriction (requiring that she abstain from psychoactive substances during the duration of the license) three times during the first six weeks of licensure; and her consumption of alcoholic beverages in contravention of the restriction was willful, repeated and struck at the very heart of the condition placed on the license. Final Order at 12-13. In *Lotsa Luck* (OLCC Final Order, 08-V-054, April 2009), another case in which the licensee’s principal violated a restriction prohibiting him from consuming alcoholic beverages on the premises, the Commission found the violation was substantial and merited cancellation because it was willful,

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<sup>9</sup> At hearing, Licensee asserted that the restriction was onerous because she needed Mr. Brown on the premises to perform routine building maintenance and equipment repairs. She added that because of the building’s age and condition, maintenance and repairs were often necessary. But, Licensee’s collateral attack on the validity or fairness of the restriction is misplaced in this proceeding. The validity of license restrictions was previously adjudicated. The Commission upheld the restriction in *Foster Waterhole* (OLCC Final Order, 10-L-012, August 2011).

it occurred six months after the restriction was imposed, and the hardship on the licensee did not outweigh the importance of the restriction.

Applying the *Oceanside Restaurant & Lounge* factors in this case similarly demonstrates that the restriction violation was substantial:

(a) *Timing of the Violation*: A violation occurred on February 12, 2011, three months after Licensee received the letter granting the licenses with restrictions in November 2010. Another violation occurred in the late spring or early summer, within seven months of the restriction letter. This factor therefore weighs against Licensee. See *Lotsa Luck*, Final Order at 6 (timing factor weighed against the licensee where violation occurred approximately six months after the restriction was placed on the license).

(b) *Willfulness*: The Commission has held that where a licensee or employee is aware of restrictions on the license and voluntarily acts in a manner contrary to the restriction, the violation was committed willfully. See e.g., *C.S. Convenient Services* (OLCC Final Order 09-V-059, June 2010); *Lotsa Luck* (OLCC Final Order, 08-V-054, April 2009); see also *Dad's Restaurant & Lounge* (OLCC Final Order, 06-V-029, December 2007) (noting that “willful” means voluntary and intentional, but not necessarily malicious).

In this case, Licensee was well aware of the restriction prohibiting Mr. Brown from being on the licensed premises when, on February 12, 2011, she had him come to the premises purportedly to fix the leaking ice machine. She was also aware of the restriction a few months later, when Mr. Brown joined her at the premises to socialize with Sgt. VanEck and his wife. Licensee asserts that on February 12, 2011, she needed Mr. Brown there to fix the ice machine because her regular maintenance person was not available. But, Licensee's need for an ice machine repairman does not counter a finding that the violation was willful. Licensee also argues that she forgot about the restriction when Mr. Brown joined her during the VanEcks' visit to the premises. Not only is this assertion somewhat suspect, but also, even if true, Licensee's spotty memory does not militate against a finding that the violation was willful. She knew before that evening that Mr. Brown was prohibited from the premises, yet she allowed him to join her there as she gave the VanEcks a tour. Her actions were voluntary and intentional. This factor weighs against Licensee as well.

(c) *Number of Violations*: As discussed above, the evidence establishes that the violation was repeated, because on at least two occasions, February 12, 2011 and that evening in the late spring or early summer of 2011, Mr. Brown was on the licensed premises in violation of the license restriction. This factor weighs also against Licensee.

(d) *Hardship on the Licensee vs. the Importance of the Conditions*: The fourth *Oceanside* factor counts against a licensee where “the breach strikes at the very heart of the restriction or condition placed on the licensee, as the licensee would not be a good risk for compliance with alcoholic beverage laws without the restriction.” *Dad's*, Final Order at 15, citing to *La Macarena* (OLCC Final Order, 00-V-116, August 2002).

In this case, the Commission placed the restrictions prohibiting Mr. Brown from being on the licensed premises and prohibiting him from participating in the operation or management of the business because of Mr. Brown's status as an unlicensable person. As the Commission noted in *Foster Waterhole* (OLCC Final Order, 10-L-012, August 2011), the restrictions imposed on Mr. Brown were the standard restrictions used when an unlicensable person has a financial interest in the licensed business. Final Order at 7, n.6. As Theresa Brown's spouse, Mr. Brown has a financial interest in the licensed business. Mr. Brown was, and is, unlicensable because of his May 2010 felony conviction for unlawful possession of marijuana. It is well established Commission precedent that a person who engages in illegal acts involving a controlled substance is considered a poor risk for complying with the liquor laws. *Foster Waterhole* Final Order at 5; *see also Loretta Clayton* (OLCC, Final Order, 88-SP-002, September 1988). Licensee would not have been granted the licenses at issue without the restrictions in place.

As noted above, Licensee argued that the restriction prohibiting Mr. Brown from the premises is onerous because it is more costly to the business to have someone other than Mr. Brown perform the necessary handyman work. Licensee also argued that the restriction is onerous because there may be situations, as was the case on February 12, 2011 when the ice machine was leaking, that Mr. Brown is the only one available to perform emergency repairs. As Commission Staff notes, however, building maintenance and equipment repair are standard costs of doing business. Thus, the hardship on Licensee in having to rely on persons other than Mr. Brown to perform handyman work does not outweigh the importance of the conditions placed on the license. Accordingly, this final factor also weighs against Licensee.

With all four *Oceanside* factors weighing against Licensee in this instance, it is evident that this restriction violation is substantial and warrants the presumed penalty of cancellation. That penalty would have been imposed but for the fact that, effective April 3, 2012, Licensee no longer has a liquor license at the premises located at 6099 Highway 20, Foster, Oregon 97345. The Commission has no jurisdiction to impose a fine or suspension or other penalty on a former licensee when the license is no longer in existence. However, the Commission retains jurisdiction to issue a Letter of Reprimand to a former licensee in order to establish the licensee's record of compliance. *Rod's Old Town* (OLCC Final Order, 92-V-073, February 1993); *300 Liberty Place* (OLCC Final Order 97-V-023, March 1998).

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## FINAL ORDER

The Commission orders that former Licensee(s) U-N-Me, Inc. and Theresa Brown, President/Secretary/Treasurer/Director/Stockholder, dba FOSTER WATERHOLE, located at 6099 Highway 20, Foster, Oregon, be issued a LETTER OF REPRIMAND for the violation proved above.

It is further ordered that notice of this action, including the reasons for it, be given.

Dated this 25th day of April 2012.

/s/ Steve Pharo  
Stephen A. Pharo  
Executive Director  
OREGON LIQUOR CONTROL COMMISSION

Mailed this 25th day of April 2012.

THIS ORDER IS EFFECTIVE ON THE DATE MAILED.

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