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DEPARTMENT OF JUSTICE
TRIAL DIVISION

August 10, 2007

Case Processing
Clackamas County Courts
807 Main Street, Room 104
Oregon City, OR 97045

Re: *Oldenstadt et al v. State et al*
Clackamas County Circuit Court Case No. CV06110875

Dear Circuit Court Clerk:

Enclosed for filing please find the State of Oregon's Reply to Plaintiff's Opposition to Its Motion to Dismiss in the referenced matter.

A postcard is enclosed for your use in notifying me of the action taken.

Sincerely,

Stacy C. Posegate
Assistant Attorney General

TRIS6031 DOC/SCP/trl
Enclosures

cc: John W. Shonkwiler
Client

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

DENNIS L. OLDENSTADT; JACQUELINE
B. OLDENSTADT; DONNA L. SMITH;
ALLEN SMITH; and OLDENSTADT
LIMITED LIABILITY COMPANY, L.L.C.,
an Oregon limited liability company,

Plaintiffs,

v.

STATE OF OREGON; DEPARTMENT OF
LAND CONSERVATION AND
DEVELOPMENT OF STATE OF OREGON;
LAND CONSERVATION AND
DEVELOPMENT COMMISSION OF
STATE OF OREGON; and DEPARTMENT
OF ADMINISTRATIVE SERVICES OF
STATE OF OREGON,,

Defendants.

Case No. CV06110875

STATE OF OREGON'S REPLY TO
PLAINTIFFS' OPPOSITION TO ITS MOTION
TO DISMISS

(Oral argument requested – 30 minutes)

I. The Court of Appeals has determined that review of a Final Order in a Measure 37 claim where a claim is denied is an other than contested case proceeding under the Administrative Procedures Act.

In the recent Oregon Court of Appeals decision of *Emmel, et. al. v. Department of Land Conservation and Development, et al.*, 213 Or App 681 (July 5, 2007), the Court determined that the procedure whereby a State agency issues a Final Order denying relief under Measure 37 is an other than contested case hearing. Therefore, under ORS 183.484 of the Administrative Procedures Act (“APA”) jurisdiction over judicial review of the state agency’s decision is in a circuit court, not the Court of Appeals. (Judicial review of orders in other than contested case hearings is conferred on the Marion County Circuit Court or the Circuit Court where the

1 petitioner resides or has a principal place of business.) The appeal was dismissed for lack of
2 jurisdiction.

3 *Emmel* applies to the analysis of jurisdiction in the instant case because Plaintiffs seek a
4 review of the State's decisions in Final Order Nos. M130413 and M121599, both of which
5 denied the claimants relief under Measure 37. Therefore, under *Emmel*, the APA requires
6 Plaintiffs to follow the procedures established for review of Final Orders issued in other than
7 contested case hearings. ORS 183.484. These procedures mandate that a claimant seeking
8 review of a final order file such review within 60 days of the issuance of the final order. ORS
9 183.484(2). Failure to do so is a jurisdictional defect. As Plaintiffs have yet to file a petition for
10 review on either Final Order, their First Amended Complaint ("FAC") is defective and dismissal
11 is appropriate.

12 **II. Other circuit courts have ruled that subsection 6 of Measure 37 does not provide**
13 **an independent cause of action.**

14 The Circuit Courts of Jefferson, Josephine and Clatsop Counties have agreed with the
15 State that where an agency has issued a timely Measure 37 waiver, there is no separate cause of
16 action under Subsection (6). In the cases of *Pondelick v. County of Josephine, et al*, Case No.
17 06-CV-0622 and *Perrott v. Josephine County*, Case No. 06-CV-0677, the court granted the
18 State's Motion to Strike the plaintiffs' causes of action for compensation under Subsection (6)
19 and ruled that the plaintiffs' right to relief was limited to review of the State's order under the
20 APA.¹ Similarly, in the matter of *Hal Pruitt v. Jefferson County*, Jefferson County Circuit Court
21 Case No. 06CV0029, Judge Thompson granted the county's summary judgment motion/motion
22 to dismiss on the plaintiff's separate cause of action for compensation under Subsection (6)
23 because, in part, the court found that the county had issued a waiver and the only means to
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25 ¹ Judge Baker's letter opinions in *Pondelick v. County of Josephine, et al*, Case No. 06-CV-0622
26 and *Perrott v. Josephine County*, Case no. 06-CV-0677 are attached hereto respectively as
Exhibits "1" and "2".

1 challenge that waiver was by a writ of review.² Finally, in the matter of *Estate of Beelar et al v.*
2 *Clatsop County et al*, Case No. 06-2178, Clatsop County Circuit Court (Judge Cindee S. Matyas)
3 ruled that the APA is the exclusive procedure for review of timely Measure 37 state agency final
4 orders.³

5 As these circuit courts agree, the APA provides the exclusive remedy to review the Final
6 Order in this matter because an order has issued. Therefore, Plaintiffs do not have a separate
7 cause of action under Measure 37, thus their FAC should be dismissed in its entirety.

8 **III. Plaintiff misconstrues the jurisdictional argument.**

9 The State does not contend, as Plaintiffs suggest, that the circuit court lacks jurisdiction
10 to decide a legitimate Measure 37 cause of action under the Administrative Procedures Act
11 (“APA”) simply because the State issued a Final Order. The requirement that a person
12 dissatisfied with the State’s action seek review under the APA applies only when that
13 dissatisfaction arises from a *final order* that is subject to APA review. Consequently, if the State
14 took no action with respect to a Measure 37 demand, the property owner would have a
15 subsection 6 cause of action for compensation once 180 days had passed. However, because the
16 State did issue Final Orders and Plaintiffs’ claim for compensation depends on a finding that the
17 orders are invalid, the APA and its exclusionary principles apply.

18 **IV. Jurisdiction over Plaintiffs’ claims is exclusively within the APA because the**
19 **State is required to issue a written expression of its findings in the form of a**
20 **Final Order.**

21 Plaintiffs’ argument that the State’s sole role in reviewing a Measure 37 claim is “only in
22 receiving a written demand for compensation” (Response 7:6-7) contradicts the express language
23 of Measure 37, the APA and is counterintuitive. Clearly, the agency is required to act, and under
24 Oregon law, that action is in the form of a quasi-judicial hearing that necessarily results in the

25 ² Judge Thompson’s letter opinion in *Pruitt v. Jefferson County*, Jefferson County Case No.
26 06CV0029 is attached hereto as Exhibit “5”.

27 ³ Judge Matyas issued her opinion from the bench on July 5, 2007, without a written opinion.
Judgment has not yet been entered.

1 issuance of a Final Order. ORS 183.310 (6) (b) (A “‘final order’ means final agency action
2 expressed in writing.”).

3 A quasi judicial function is required when a State agency must reach a decision that
4 would require it to “apply preexisting criteria to concrete facts,” which result will be “directed at
5 a closely circumscribed factual situation or a relatively small number of persons.” *Don't Waste
6 Or. Comm. v. Energy Facility Siting Council*, 320 Or 132, 148-149 (1994); *Strawberry Hill 4
7 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-03 (1979). Measure 37 specifically
8 requires a state agency to perform a quasi judicial function and, ultimately, issue a final order
9 because it must apply the criteria set forth in Measure 37 to a claimant’s written demand for
10 compensation and, ultimately, reach a decision that directly affects the claimant. *Ibid* The
11 written expression of the agency’s findings on its quasi judicial hearing is defined as a Final
12 Order under the APA. ORS 183.310 (6) (b). (“‘Final Order’ means final agency action
13 expressed in writing.”) As the APA governs review of all Final Orders issued by a State agency,
14 if a claimant is dissatisfied with the effect of the final order, his or her exclusive remedy is to file
15 a petition for judicial review of the final order within 60 days of its issuance pursuant to the
16 APA.

17 Plaintiffs argument that the agency is only required to respond to a written demand with a
18 “yes” or a “no” and that its review is only a “self-actuated administrative decision” does not
19 defeat the exclusivity of the APA. (Response 6:2-7). Even a Final Order that merely results in a
20 “yes” or “no” is reviewable only under the APA.

21 **V. Measure 37 does not supersede the APA because, under Subsection 12, Measure**
22 **37 is not intended to replace or modify any other remedy in Oregon Law and**
23 **Measure 37 does not conflict with the APA.**

24 The remedies permitted by Measure 37 are “in addition to any other remedy under
25 Oregon or United States Constitution and are not intended to modify or replace any other
26 remedy.” ORS 197.352 (12). Subsection 12 of Measure 37 contradicts Plaintiffs’ entire
argument that Measure 37 somehow supersedes the APA because it is a specific statute, whereas

1 the APA is a general statute. In addition to the qualification in Subsection 12, Plaintiffs are
2 incorrect because the APA is the default position where a statute obviously requires action by a
3 state agency. To override the APA's exclusive provisions, a statute must expressly state that
4 review is not under the APA. *See Fairbanks v. Bureau of Labor and Industries*, 323 Or 88, 93-
5 94 (1996) (declining to insert into a statute a provision exempting it from the APA). That there
6 is no mention of the APA in Measure 37 does not, by omission, take Measure 37 out of the APA.
7 The APA must be expressly identified in the statute along with a definitive statement that it is
8 superseded. *Fairbanks*.

9 Without an express reference to the APA, Plaintiffs must demonstrate that there is an
10 actual conflict between Measure 37 and the APA in order to succeed at the specific versus
11 general argument. *See Palmquist v. Flir Systems, Inc.*, 207 Or App 365, 371 (2006) (“The rule
12 that a general statute gives way to a more specific statute applies only when there is an
13 irreconcilable conflict between the statutes.”); *see also Olsen v. Deschutes County*, 204 Or App
14 7, 13, *rev denied*, 341 Or 80 (2006) (In upholding APA exclusivity the Court of Appeals held
15 that the “later and more specific maxim applies should apply “*only when a conflict actually*
16 *exists and cannot be avoided.*”) (emphasis added). As in *Palmquist*, plaintiffs have neglected to
17 “identify any conflict at all, much less an irreconcilable one” between the APA and Measure 37.
18 *Id.* at 371. Whereas, interpreting Measure 37 in context, gives effect to both the APA and
19 subsection 6 and avoids any conflict.

20 Plaintiffs attempt to argue that there is conflict between the statutes because subsection 7
21 allows an agency to adopt procedures to process claims, but specifically disallows such
22 procedures from acting “as a prerequisite to the filing of a compensation claim under subsection
23 (6).” ORS 197.352 (7). While DAS has adopted such procedures at OAR 125-145-0010 to 125-
24 145-0105, none of these rules purport to be a prerequisite to filing a subsection 6 claim.
25 Moreover, subsection 7 does not contradict the APA because the APA is not a procedural
26 requirement created by the State to process Measure 37 claims. Indeed, nothing in Measure 37

1 states that the procedural prerequisites set forth in the APA, e.g. the filing of a Petition for
2 Judicial review within 60 days of the issuance of agency order, do not have to be followed prior
3 to filing a suit in a circuit court. Accordingly, they must be followed.

4 Finally, Plaintiffs argue that Measure 37 conflicts with the APA because subsection 6
5 permits jurisdiction to be in the county where the property is located. This does not contradict
6 the APA for, at least, two reasons. First, a petition for judicial review is not limited to review in
7 Marion County, as suggested by Plaintiffs. Rather it may also be held in the county where a
8 petitioner resides or in the county where their principal place of business is located. ORS
9 183.484. (Jurisdiction for judicial review of orders other than contested cases is conferred upon
10 the Circuit Court for Marion County and upon the circuit court for the county in which the
11 petitioner resides or has a principal business office.) Second, the relief provided in subsection 6
12 only arises if the agency has not acted. Therefore, there is no petition for judicial review and the
13 venue requirements under the APA for petitions for judicial review are irrelevant.

14 **VI. There is no concurrent jurisdiction over review of the agency's decision because**
15 **there is no independent cause of action under subsection 6.**

16 Plaintiffs argue that the APA does not provide exclusive review over their cause of action
17 because 1) they are not challenging the validity of the State's order, only the damages that flow
18 from the order; and 2) other Court of Appeal cases have held that the APA is not the exclusive
19 basis for review. Notwithstanding Plaintiffs' erroneous application of the authorities cited in
20 their Response, there is an immediate fallacy in their argument that the State's denial of their
21 claim creates a cause of action for just compensation. The just compensation that Plaintiffs
22 argue they are entitled to does not flow from the State's decision. It flows, if at all, from the
23 initial enactment of the land use regulations that are the basis of their Measure 37 claim. The
24 State's subsequent decision to deny the claim and continue to enforce certain land use
25 regulations already in effect when the present owner acquired the property did not cause
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1 Plaintiffs to suffer any additional loss of use or property value. Plaintiffs do not have an
2 independent cause of action for damages that permits them to avoid the APA.

3 **A. Plaintiffs do not have an independent cause of action because the agency acted.**

4 Subsection 6 of Measure 37, which creates a cause of action for compensation, does state
5 that the cause of action exists when “a land use regulation continues to apply to the subject
6 property more than 180 days after the present owner of the property has made written demand
7 for compensation.” ORS 197.352(6). Plaintiffs read that language literally – and out of context
8 – to mean that a landowner is entitled to monetary compensation *whenever* the State continues to
9 apply a land use regulation to his or her property, not only in those cases in which the State
10 incorrectly has denied a Measure 37 claim or granted too narrow a waiver.

11 That argument contradicts both the language of the statute and its purpose. Subsection 6
12 of Measure 37 gives the government “180 days after the present owner of the property has made
13 written demand for compensation *under this section*” to assess claims and to decide whether to
14 waive land use regulations or to grant compensation. ORS 197.352(6) (emphasis added). A
15 demand for compensation “under this section” is a demand for compensation under subsections 1
16 and 2 of the statute, which link the amount of monetary compensation due to the government’s
17 continued application of certain land use regulations to property. And subsections 8 and 10 then
18 provide that the government may elect to issue a waiver “in lieu of” granting *that* compensation.
19 Thus, read in context, subsection 6 creates a cause of action for compensation only when the
20 government has not responded to the written demand within the given time period.

21 **B. Oregon law does not provide concurrent jurisdiction over review of a State**
22 **agency decision.**

23 Plaintiffs’ misunderstanding of the law is evident in their citation to *Boise Cascade Corp*
24 *v. Board of Forestry*, 131 Or App. 538 (1994); *Dunn v. City of Redmond*, 303 Or 201 (1987) and
25 *State of Oregon v. Oregon Health and Sciences University*, 205 Or App 64 (2006) for the
26 proposition that the APA does not have exclusive jurisdiction in the instant case.

1 Plaintiffs are correct that *Boise Cascade Corp.* and *Dunn* permitted circuit court review
2 outside of the APA, but not for the reasons stated in Plaintiffs' Response. Both *Boise Cascade*
3 *Corp.* and *Dunn* involved a question of whether a governmental act resulted in a taking of private
4 property. The governmental act in *Boise Cascade Corp.* and *Dunn* was the issuance of an order
5 by a state agency that the plaintiffs argued resulted in a governmental taking. In *Boise Cascade*
6 *Corp.*, the Board of Forestry issued an order denying the plaintiff's application to log because a
7 spotted owl nesting site was located on the relevant property. *Id.* at 540-543. *Dunn* involved a
8 challenge of a final order issued by the Land Use Board of Appeals ("LUBA") that ordinances
9 enacted by the City of Redmond were valid and did not amount to a governmental taking. *Id.* at
10 203. In both cases the plaintiffs argued that the order in question caused a taking because it
11 deprived them of all the economic value of their respective properties.

12 Both Courts determined that the circuit court had jurisdiction over the takings claim
13 because Article I, § 8 of the Oregon Constitution specifically granted jurisdiction to the circuit
14 courts. These courts did not decide that the circuit courts had concurrent jurisdiction to review
15 the validity of the agency's orders. Rather, each court held that in cases where a plaintiff seeks
16 compensation because the state agency's order is in and of itself a taking, validity of the order is
17 not in question, thus the circuit court need not review the order under the APA. *Boise* at 546-547
18 (The Court agreed with the plaintiff that APA review was not required because "right or wrong,
19 the orders impose a regulation that results in a taking.").

20 This is not the situation here where the compensation that Plaintiffs allege they are
21 entitled to is not caused by the State's decision. Rather, compensation, if due, flows from the
22 initial enactment of the land use regulations, which enactment was the basis of Plaintiffs' written
23 demand to the state. Plaintiffs have already sought a remedy for diminishment in value caused
24 by these land use regulations. Subsection 6 does not give them a second bite at the proverbial
25 apple. Moreover, an action under Measure 37 is not a takings action under Art I, Section 18 of
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1 the Oregon Constitution or Amendment V of the U.S. Constitution. Neither *Boise Cascade*
2 *Corp.* nor *Dunn* support Plaintiffs' arguments.

3 *State of Oregon v. Oregon Health and Sciences University* is similarly inapposite because
4 the court did not decide that it had concurrent jurisdiction to review a decision by a state agency.
5 *State of Oregon v. OHSU*, 205 Or App 64 (2006). The Court of Appeals agreed with the plaintiff
6 that the APA governed its petition under ORS 183.490 to compel the state Public Employee
7 Benefits Board (PEBB) to act.⁴ *Id.* at 74-75. The Court of Appeals further determined,
8 however, that the APA did not govern the plaintiffs tort and breach of contract claims because
9 ORS 183.490 did not provide a remedy for tortious or unlawful agency action. *State of Oregon*,
10 at 76. Instead these were actions based on the agency's "affirmative misconduct – not for
11 inaction or a refusal to act." *Id.* This case has no application here, where Plaintiffs' claim is
12 based only on the validity of a state agency's final order – not an act of affirmative misconduct.

13 Contrary to Plaintiffs' argument, the appellate decisions that are relevant to the instant
14 case uniformly hold that the APA is the exclusive procedure for challenging state agency orders.
15 These cases present the same question raised by the FAC here: were the state agencies right or
16 wrong. In addition to the cases cited in the State's motion, *Muller v. Dept. of Agriculture*, 164
17 Or App 11 (1999) illustrates the flaw in Plaintiffs' argument that the State's Final Order is
18 irrelevant to their claims. In *Muller*, the trial court denied the agency's motion to dismiss tort
19 claims that were premised on denial of a field burning permit. The Court of Appeals reversed,
20 holding that the APA provides exclusive jurisdiction where the plaintiff's "entitlement to
21 damages depends on the validity of the denial." 164 Or App at 16.

22 Here, Plaintiffs' "entitlement" to just compensation depends entirely on the validity of
23 the Final Order because if the Final Order is valid, Plaintiffs have received the relief to which
24 they are entitled under Measure 37. Plaintiffs' argument that they are seeking relief that is not

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26 ⁴ "The court may upon petition as described in ORS 183.484, compel an agency to act where it
has unlawfully refused to act..." ORS 183.490.

1 addressed by the Final Order is analogous to Mr. Muller’s argument that the APA does not
2 apply because he was seeking relief—tort damages—not available under the APA. The Court of
3 Appeals rejected that argument, saying that it “amounts to mere question begging, however.
4 If he [Muller] is entitled to a remedy, then he must establish the invalidity of the agency action in
5 the first place.” 164 Or App at 16-17. The same is true here.

6 **VII. Plaintiffs’ have not stated a viable claim for relief under subsection 6 because**
7 **they are not entitled to any relief under Measure 37.**

8 Plaintiffs have not stated a claim for relief for compensation because, by the express
9 language of Measure 37, the State has the option to issue a Measure 37 waiver, if it finds the
10 claim to be valid. It is apparent on the face of the FAC that Plaintiffs’ claim is not valid because
11 none of them qualify for compensation or a waiver under Measure 37.

12 Measure 37 relieves present owners of real property whose use of their real property has
13 been restricted by a land use regulation that also diminishes the market value. 197.352(1)(11).⁵
14 The land use regulation(s) are described as “new” in the Subsection (1), meaning that they must
15 have been enacted or enforced after the present owner or a family member acquired the subject
16 property. ORS 197.352 (1) & (3)(E)⁶. Plaintiffs admit in paragraphs 3A, 3B and 3C of the FAC
17 that the present owner of the property is the Oldenstadt Limited Liability Company (“LLC”) and
18 that the LLC acquired at least one of the tax lots on April 19, 1999. However, Plaintiffs do not
19 allege that the State has enacted any land use regulations that were enacted *after* the LLC
20 acquired the property that restrict the use and diminish the market value of the property. Instead,
21 in paragraphs 6A, B and C, Plaintiffs allege that they are entitled to relief because the State has

22 ⁵ (1) If a public entity enacts or enforces a new land use regulation or enforces a land use
23 regulation enacted prior to December 2, 2004, that restricts the use of private real property or any
24 interest therein and has the effect of reducing the fair market value of the property, or any
25 interest therein, then the owner of the property shall be paid just compensation.

26 (11) Definitions - for purposes of this section: ... (C) "Owner" is the present owner of the
property, or any interest therein.

⁶ (3) Subsection (1) of this section shall not apply to land use regulations: ... (E) Enacted prior to
the date of acquisition of the property by the owner or a family member of the owner who owned
the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

1 enacted or enforced land use regulations that were enacted “prior to the effective date of ORS
2 197.352 (December 2, 2004)”. The land use regulations Plaintiffs are referring to are described
3 in paragraphs 5(C) and (D) as those enacted or adopted pursuant to Goal 3, particularly ORS
4 215.263, 215.284, 215.780 and OAR 660 division 33, all of which were enacted prior to the
5 LLC’s acquisition of the property. In other words, the property was already restricted by the
6 land use regulations described in the FAC when the LLC acquired the property. Accordingly,
7 the LLC is not entitled to relief under Measure 37 as a matter of law.

8 Plaintiffs do allege that property was owned by the individuals or their family member
9 before the LLC ultimately acquired ownership. However, these allegations, even if admitted as
10 true, are insignificant because the LLC, not the members of the LLC, is now the present owner.
11 ORS 63.239 (The nature of a membership interest in an LLC is “personal property”. “A member
12 is not a co-owner of and has no interest in specific limited liability company property.”); ORS
13 63.077(2)(b)(The LLC, not individual members in it, owns the company’s assets.). Moreover,
14 the LLC, as a legal entity, cannot have a “family member” as those terms are expressly defined
15 in Subsection (11)(A) of Measure 37.⁷ Therefore, the date the individual plaintiffs or their
16 family members acquired the property is irrelevant. Accordingly, Plaintiffs have failed to state a
17 claim for relief under Measure 37 because they are not entitled to compensation, or a waiver, as
18 none of them are present owners of the property whose use of the property has been restricted by
19 a new land use regulation that also diminishes the market value.⁸

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⁷ (A) “Family member” shall include the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, step-child, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family members or the owner of the property.

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⁸ Judge Marci W. Adkisson of the Klamath County Circuit Court has confirmed the State’s position that members of an LLC own only a personal property interest in the LLC, not a real property interest and that an LLC cannot have a “family member” under Measure 37. A copy of Judge Adkisson’s letter opinion in *Gavnus Rajnus LLC v State*, Case No. 0603137CV is attached hereto as Exhibit “1”.

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1 **CONCLUSION**

2 For the reasons stated in the State's Motion to Dismiss and in this reply, the State
3 respectfully requests that the Court grant its motion to dismiss on the grounds that this Court
4 does not have jurisdiction under the APA and for Plaintiffs' failure to state a claim for relief
5 under Measure 37.

6 DATED this 11th day of August, 2007.

7 Respectfully submitted,

8 HARDY MYERS
9 Attorney General

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11 _____
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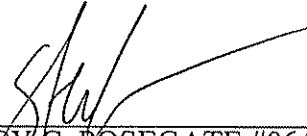
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CERTIFICATE OF SERVICE

I certify that on August 10, 2007, I served the foregoing State of Oregon's Reply to Plaintiff's Opposition to Its Motion to Dismiss upon the parties hereto by the method indicated below, and addressed to the following:

John W. Shonkwiler
Attorney at Law
13425 SW 72nd Avenue
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Attorney for Plaintiffs

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