

AFTER RECORDING, RETURN TO:

Board of County Commissioners
Columbia County Courthouse
230 Strand, Room 331
St. Helens, OR 97051

**BEFORE THE COLUMBIA COUNTY
LAND DEVELOPMENT SERVICES DEPARTMENT**

In the Matter of Claim No. 07-125 Submitted)
by Jack Fazio for Compensation Under) Order No. 103-2007
Measure 37)

WHEREAS, on December 4, 2006, Columbia County received a claim for compensation under Measure 37 and Order No. 34-2007 from Jack Fazio (the "Claimant"), related to a parcel of property located on Sauvie Island Road on Sauvie Island, Oregon, having tax account numbers 3120-000-00301 and 3120-000-0302; and

WHEREAS, according to the information presented with the Claim, the Claimant acquired an interest in the property in 1953; and

WHEREAS, the County zoned the subject property as Primary Agriculture (PA-38) in 1984, after the acquisition by the Claimant; and

WHEREAS, pursuant to Columbia County Zoning Ordinance (CCZO), Section 304.1, the minimum lot or parcel size for new land divisions in the PA-38 Zone is 38 acres; and

WHEREAS, pursuant to CCZO Section 303.13(D), non-resource dwellings may not be placed on land that is generally suitable for farm use; and

WHEREAS, the Claimant claims that CCZO 304.1 and 303.13(D) have restricted the use of the property and have reduced the value of the property by \$4,798,364.55; and

WHEREAS, the Claimant desires to subdivide the property into twelve parcels, 11 having a 5 acre minimum lot size; and

WHEREAS, pursuant to Measure 37, in lieu of compensation the Board may opt to not apply (hereinafter referred to as "waive" or "waiver") any land use regulation that restricts the use of the property and reduces the fair market value of the property to allow a use which was allowed at the time the Claimant acquired the property; and

WHEREAS, in 1953, the Claimant could have divided the property into eleven 5 acre

minimum lot size parcels;

NOW, THEREFORE, it is hereby ordered as follows:

1. The County adopts the findings of fact set forth in the Staff Report for Claim Number CL 07-125, dated April 25, 2007, which is attached hereto as Attachment 1, and is incorporated herein by this reference.
2. The County approves CL 07-125. In lieu of compensation, the County waives CCZO Sections 304.1 and 303.13(D) to the extent necessary to allow the Claimant to subdivide the property into eleven 5 acre minimum lot size parcels, and one approximately 393 acre parcel.
3. This waiver is subject to the following limitations:
 - A. This waiver does not affect any land use regulations of the State of Oregon. If the use allowed herein remains prohibited by a State of Oregon land use regulation, the County will not approve an application for land division, other required land use permits or building permits for development of the property until the State has modified, amended or agreed not to apply any prohibitive regulation, or the prohibitive regulations are otherwise deemed not to apply pursuant to the provisions of Measure 37.
 - B. In approving this waiver, the County is relying on the accuracy, veracity, and completeness of information provided by the Claimant. If it is later determined that Claimant is not entitled to relief under Measure 37 due to the presentation of inaccurate information, or the omission of relevant information, the County may revoke this waiver.
 - C. Except as expressly waived herein, Claimant is required to meet all local laws, rules and regulations, including but not limited to laws, rules and regulations related to subdivision and partitioning, dwellings in the forest zone, and the building code.
 - D. This waiver is personal to the Claimant, Jack Fazio, as an individual, does not run with the land, and is not transferable except as may otherwise be required by law.
 - E. By developing the parcel in reliance on this waiver, Claimant does so at his own risk and expense. The County makes no representations about the legal effect of this waiver on the sale of lots resulting from any land division, on the rights of future land owners, or on any other person or property of any sort.

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4. This Order shall be recorded in the Columbia County Deed Records, referencing the legal description which is attached hereto as Attachment 2, and is incorporated herein by this reference, without cost.

Dated this 2nd day of May, 2007.

BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

Approved as to form

By: Todd Dugdale

Todd Dugdale, Director
Land Development Services

By: Sarah Hanson
Assistant County Counsel

ATTACHMENT 1

COLUMBIA COUNTY LAND DEVELOPMENT SERVICES
MEASURE 37 CLAIM
STAFF REPORT

DATE: April 25, 2007

FILE NUMBER(s): CL 07-125

CLAIMANT: Jack Frank Fazio; 29244 N.W. Sauvie Island Road; Portland, OR 97231

CLAIMANT'S REPRESENTATIVE: Stark Ackerman; Black Helterline LLP; 1900 Fox Tower; 505 S.W. Broadway; Portland, OR 97205

PROPERTY LOCATION: same

TAX ACCOUNT NUMBERS: 3120-000-00301
3120-000-00302

ZONING: Primary Agriculture - 38 (PA-38)

SIZE: Tax Lot 301: Approximately 2.36 acres
Tax Lot 302: Approximately 101.71 acres

Total: Approximately 104.07 acres in Columbia County

REQUEST: To create a new 5-acre parcel for the Claimant's existing dwelling (located in Multnomah County), and to create a new 5-acre parcel for each of the Claimant's ten children and grandchildren. The twelfth parcel would remain in farm use. The Claimant wishes to create these parcels within the existing 448-acre property, which includes property in both Multnomah and Columbia Counties.

CLAIM RECEIVED: December 4, 2006

REVISED 180 DAY DEADLINE: May 30, 2007

RECEIPT OF CLAIM NOTICE: Claim notices were mailed on March 22, 2007. The comment period ended on April 5, 2007.

The Claimant initially requested a hearing, but revoked the request on April 16, 2007. No comments were received.

I. BACKGROUND:

The subject property is a large farm developed with the Claimant's residence and accessory buildings located on Sauvie Island, and includes property in both Columbia and Multnomah Counties. Access is provided by Sauvie Island Road. The property was partitioned in September of 2004 as shown on Partition Plat No. 2005-11. Claimant appears to have acquired an interest in the property in May of 1953.

Whether or not a property is a legally platted lot or parcel created by a Subdivision or Land Partition, respectively, or a legal lot-of-record is not included in the review for a Measure 37 Claim. If the property reviewed by this Claim is neither of these, this could impact any subsequent development under this Claim.

II. APPLICABLE CRITERIA & STAFF FINDINGS:

Measure 37

(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.

(2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this act.

A. PROPERTY OWNER & OWNERSHIP INTERESTS

1. **Current ownership:** Based on the information provided, a Lot Book Report prepared by Columbia County Title & Escrow Services dated November 30, 2006, it appears the subject property is owned by the Claimant as a co-owner. The Claimant and his wife, Maria Fazio, each own a one-third interest as tenants in common. Each of their four children owns a one-twelfth interest in fee simple. Jack Fazio has filed this Measure 37 claim only on his own behalf.
2. **Date of Acquisition:** The subject property was originally acquired by the Claimant's parents through a series of conveyances which took place between 1942 and 1949. The Claimant acquired an ownership interest on May 20, 1953, the date that his father, Tony Fazio, died. The Claimant and two of his siblings were named as residuary beneficiaries of their father's real and personal property under his will, which was admitted to probate on June 3, 1953. The property was held in trust by U.S. National Bank of Oregon for the benefit of the will beneficiaries. The Bank deeded a 19% interest in the property to the three Fazio children on July 12, 1989. The bank later distributed the remaining 81% interest in the property to the Fazio children under their mother's will on January 14, 1991. For the purpose of this claim, the Claimant's acquisition date is May 20, 1953.

B. LAND USE REGULATION(s) IN EFFECT AT THE TIME OF ACQUISITION

The County did not have a Zoning Ordinance which applied to the subject property until August 1, 1984. The property was not subject to County zoning regulations when it was acquired by Claimant in June of 1953.

C. LAND USE REGULATION(s) APPLICABLE TO THE SUBJECT PROPERTY ALLEGED TO HAVE REDUCED FAIR MARKET VALUE / EFFECTIVE DATES / ELIGIBILITY

The Claimant cites the following regulations as restricting his use of the property:

Columbia County Zoning Ordinance(CCZO)

The Claimant cites Section 300 of the CCZO, specifically noting minimum lot size restrictions(Section 304.1) and Sections 302 and 303, which limit permitted and conditional uses to farm related dwellings and non-farm dwellings which meet certain criteria. The Claimant also cites Section 600 (Rural Residential) zoning regulations. The Claimant acknowledges that this regulation does not currently apply to the property, but stated that potential application of these regulations would limit the lot size and uses of the property, thereby restricting the Claimant's use.

LAND USE CRITERION	DESCRIPTION
CCZO 300	Section heading
CCZO 302	Uses permitted outright in the PA-38 zone.
CCZO 303.13 (D)	Restricts non-resource related dwellings to land generally unsuitable for farm use
CCZO Remainder of 303	Conditional Uses and Standards for review for non-farm uses in PA-38 zone.
CCZO 304.1	Establishes a minimum lot size in the PA-38 zone of 38 acres.
CCZO Remainder of 304, 305, & 309	Standards for PA-38 uses; Standards for partitions; Standards for land divisions for farm parcels.
CCZO Section 600	Rural Residential(RR-5) regulations not currently applicable to the subject property.

Columbia County Subdivision and Partition Ordinance,

The Claimant cites CCSP0 Article IX, subdivision and partition requirements to the extent that any of these regulations restrict the use of the property, including but not limited to restricting his ability to subdivide it into individual homesites. "These provisions include, but are not limited to Section 1003, requiring conformity and harmony with the Comprehensive Plan and CCZO."

Columbia County Comprehensive Plan

The Claimant cites Part IV(Forest Lands); Part V(Agriculture) and Part XIV(Public Facilities) of the Comprehensive Plan in his claim.

D. **CLAIMANT'S ELIGIBILITY FOR FURTHER REVIEW**

The Claimant acquired an interest in the property before the Columbia County Comprehensive Plan, Zoning Ordinance and Subdivision and Partitioning Ordinances were enacted. Therefore, the Claimant may be eligible for compensation and/or waiver of cited regulations which restrict use and reduce fair market value.

E. **STATEMENT AS TO HOW THE REGULATIONS RESTRICT USE**

The Claimant cites provisions of the Columbia County Zoning Ordinance, Columbia County Comprehensive Plan, and Columbia County Subdivision and Partitioning Ordinance as noted above. These regulations are addressed below.

Columbia County Zoning Ordinance(CCZO)

The Claimant cites Section 300(Primary Agriculture-PA-38) and Section 600(Rural Residential-RR-5) regulations as restricting his proposed use.

Section 300 sets forth the zoning regulations for PA-38 zoned property. However, with the exception of Section 304.1 imposing the 38 acre minimum lot size and Section 303.13D limiting non-farm dwellings

to land unsuitable for agriculture, the regulations don't restrict the use of the property for non-farm resource residential development.

Section 301 describes the general purpose of the PA-38 zone and does not restrict or prohibit the use of the property.

Sections 302 and 303 describe the permitted and conditional uses in the PA-38 zone. With the exception of Section 303.13D limiting placement of a non-resource dwelling to land which is generally unsuitable for crops and livestock(Class VI and above soils), these provisions do not restrict or prohibit the proposed subdivision for single family dwellings because non-resource dwellings are allowed in the PA-38 zone as conditional uses and other types of dwellings are allowed as permitted uses. Section 303.13D, a criterion applied to non-resource dwelling review, restricts use in this case because the soils on the property are within agricultural capability Classes II and III which the County Comprehensive Plan describes as soils suitable for agriculture and therefore this criterion could not be met on the property. Staff finds that this section restricts and prohibits use of the property. Otherwise, CCZO Sections 303, 304 and 305 do not restrict or prohibit the proposed subdivision for development of single family dwellings because single family dwellings are allowed as conditional uses. During the hearing process on the proposed conditional use dwellings, conditions may be imposed that may restrict or prohibit the use. Some of those conditions may be exempt from waiver under Measure 37. However, the County cannot determine whether conditions will qualify for waiver under Measure 37 until the County knows what they are. CCZO Section 304.1 prohibits a division of land in the PA-38 zone below 38 acres. Staff finds that this minimum lot size regulation restricts and prohibits the use of the property. However, the County does not have any information that the remaining standards set forth in Section 304, 305 and 309 cannot be met and thereby restrict the use of the property

Staff finds that the property cannot be divided and developed due to the 38-acre minimum lot size established in CCZO Section 304.1. Further, the conditional use permit criterion that non-resource dwellings may only be sited on land generally unsuitable for farm use cannot be met for the intended use of the property because the soils on both of the subject tax parcels are predominately agricultural soils (Class I - IV soils). Staff notes that Tax Lot 301 has Sauvie Silt loam (Class II); Tax Lot 302 has predominately Sauvie silt loam and some Rafton silt loam (Class III). Both parcels are considered "prime farmland" according to the U.S. Department of Agriculture. Staff finds that CCZO 303.13 (D) & 304.1 can be read and applied to "restrict" the use of Claimant's property within the meaning of Measure 37.

Section 600 sets forth zoning regulations for the Rural Residential(RR-5) zoning district. The subject property is zoned PA-38 and therefore these regulations do not restrict use. A Measure 37 claim can only be evaluated based on regulations currently applicable to the subject property.

Columbia County Subdivision and Partition Ordinance

The stated purpose of the Subdivision Ordinance regulations in Section 102 of the CCSPO is "to assure adequate width of streets,...to avoid undue congestion of population,...and to protect in other ways the public health, safety and welfare." Staff finds the CCSPO regulations address health and safety related requirements for newly created lots, blocks, streets and public improvements and are therefore generally exempt from the Measure 37.

The Subdivision and Partitioning Ordinance does not restrict the use of the property, once the minimum lot size provision in the CCZO has been waived. The Ordinance merely sets forth the process to partition or subdivide the property. Standards will be imposed during the process. The County has no information to suggest that the Claimant cannot meet the subdivision standards or that they otherwise restrict use and

reduce value. The Commission may impose reasonable conditions to approval of a partition or subdivision. However, without knowing what the conditions will be the County cannot make a determination that they restrict the use of the property, reduce the value of the property and are not exempt. Other than Section 1003, the Claimant has not provided any information about what specific provisions he believes are subject to waiver under the Measure. Moreover, the Claimant fails to address how a properly subdivided property could possibly be worth less than property that does not go through a recognized subdivision process. Staff doubts that any financing would be available for such a development due to the uncertainty surrounding it. Furthermore, staff presumes that a potential buyer would pay more for a lot that can be shown to have been legally created than for a lot that cannot be shown to have been legally created.

Columbia County Comprehensive Plan(CCCP),

The portions of the CCCP cited by the Claimant are addressed below:

Part IV (Forest Lands) - The Claimant notes that the property is not currently zoned or protected for forest uses, but concludes that application of these provisions would restrict the use of the property. The Claimant asks that the County make a determination as to whether Part IV applies to the property, and if it is determined that the provisions apply, the County should pay just compensation. Staff finds that the subject property is zoned PA-38(Primary Agriculture) and these provisions of the Comprehensive Plan are not applicable to this Claim.

Part V (Agriculture) - The Claimant states that these provisions place restrictions on agricultural lands by "limiting the uses to agriculture, limiting lot sizes and land divisions, and generally prohibiting non farm-related residential development."

Part [XVI] (Public Facilities and Services) - The Claimant states that the regulations regarding provision of public services, including sewer and water, restrict his use of the property. The Claimant points to Policy 2 (without excluding others), which sets County policy regarding water, sewer and street systems, and fire protection for residential, commercial, and industrial areas.

With respect to all cited provisions of the Comprehensive Plan, Staff finds that the Comprehensive Plan is implemented through the Zoning Ordinance and is not generally applicable in and of itself to an application for a dwelling on farmland. Moreover, even if they were applicable, provisions related to health and safety such as for water, sewer/septic, and roads, are exempt from Measure 37. Specific implementing regulations cited by the Claimant in the CCZO and CCSP0 are addressed above.

Based on the Claim, it appears that the County regulations that clearly prevent the Claimant from developing the property as desired are:

CCZO 303.13(D) Restricts non-resource related dwellings to land generally unsuitable for farm use. All of the soils on the subject property are predominately agricultural soils (Class I - IV soils) and therefore this conditional use permit criterion cannot be met for the intended use of the property.

CCZO 304.1 Establishing the 38-acre minimum lot/parcel size in the PA-38 zone.

F. EVIDENCE OF REDUCED FAIR MARKET VALUE

1. **Value of property as regulated:** The Claimant submitted a report stating that the approximate market value of the entire 448-acre property is \$857,010, with a value of \$1,910.27 per acre. This would indicate a value of \$198,801.80 for the 104.07 acres situated in Columbia County. The Claimant obtained these values from the website niteowlplus.net, which is not an official source.

Staff notes that based on County Assessor data the real market value for the land itself is \$642,800 (\$572,200 for Tax Lot 302 and \$70,600 for Tax Lot 301) .

2. **Value of property not subject to cited regulations:** The Claimant submitted a report analyzing comparable homesites. The report indicated that the fifty-five acres which Claimant desires to divide into eleven 5-acre homesites would be worth approximately \$4,903,429.38 if it were not subject to the cited regulations. Staff notes that this value accounts for all of the proposed parcels, as the Claimant did not specify how the proposed parcels would be allocated between Columbia and Multnomah Counties. However, the Claimant indicated that at least one of the proposed parcels, the site of the Claimant's residence, would be located in Multnomah County.
3. **Loss of value as indicated in the submitted documents:** The Claimant alleges a total reduction in value of \$4,798,364.55. As stated above, this figure accounts for all of the proposed residential parcels, regardless of whether they would be located in Columbia or Multnomah County.

Staff does not agree that the information provided by the Claimant is adequate to fully establish the current value of the property or the value of the property if it was not subject to the cited regulation(s). Staff finds, however, that it is more likely than not that the property would have a higher value if it could be divided for residential development as proposed.

G. COMPENSATION DEMANDED

As noted on page 1 of the Measure 37 Claim Form: \$4,798,364.55.

(3) Subsection (1) of this act shall not apply to land use regulations:

(A) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this act;

(B) Restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;

(C) To the extent the land use regulation is required to comply with federal law;

(D) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions; or

(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.

CCZO 303.13(D) and 304.1 do not qualify for any exclusions listed.

Staff notes that other standards including but not limited to fire suppression/protection, access, adequacy of domestic water, subsurface sewage, erosion control and stormwater requirements continue to apply as they are exempt from compensation or waiver under Subsection 3(B), above.

Staff also notes that the property may be subject to federal and/or state fish and wildlife regulations. Federal regulations would continue to apply as they are exempt from compensation or waiver under Subsection 3(C) above. To the extent that state regulations apply to the subject property, Claimant must check with state authorities regarding compliance and/or waiver of applicable regulations. To the extent that Multnomah County regulations apply to the Claimant's property, Claimant must check with Multnomah County authorities regarding compliance and/or waiver of the applicable regulations.

(4) Just compensation under subsection (1) of this act shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.

Should the Board determine that the Claimant has demonstrated a reduction in fair market value of the property due to the cited regulations, the Board may pay compensation in the amount of the reduction in fair market value caused by said regulations or in lieu of compensation, modify, remove, or not apply CCZO Sections 303.13(D) and 304.1.

(5) For claims arising from land use regulations enacted prior to the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the effective date of this act, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims arising from land use regulations enacted after the effective date of this act, written demand for compensation under subsection (4) shall be made 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.

The subject claim arises from the minimum lot/parcel size and non-resource dwelling siting restrictions of the PA-38 zone which was enacted prior to the effective date of Measure 37 on December 2, 2004. The subject claim was filed on December 4, 2006, which is within two years of the effective date of Measure 37. (Since the filing deadline fell on a weekend, Columbia County extended the deadline to the following business day, Monday, December 4.)

(8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this act, in lieu of payment of just compensation under this act, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

Should the Board determine that the Claimant has demonstrated a reduction in fair market value of the property due to the cited regulations, the Board may pay compensation in the amount of the reduction in fair market value caused by said regulations or in lieu of compensation, modify, remove, or not apply said regulations.

III. STAFF RECOMMENDATION:

The following table summarizes Staff findings concerning the land use regulations cited by the Claimant as a basis for the Claim. In order to meet the requirements of Measure 37 for a valid claim, the cited land use regulations must be found to restrict use, reduce fair market value, and not be one of the land use regulations exempted from Measure 37. The regulations identified in this table have been found to apply to this Measure 37 claim.

LAND USE CRITERION	DESCRIPTION	RESTRICTS USE?	REDUCES VALUE?	EXEMPT?
CCZO 300	Section heading	No	No	No
CCZO 302	Uses permitted outright in the PA-38 zone	No	No	No
CCZO 303.13 (D)	Restricts non-resource related dwellings to land generally unsuitable for farm use.	Yes	Yes	No
CCZO Remainder of 303	Conditional Uses and Standards for review for non-farm uses in PA-38 zone.	No	No	No
CCZO 304.1	Establishes a minimum lot size in the PA-38 zone of 38 acres.	Yes	Yes	No
CCZO Remainder of 304, 305, & 309	Standards for PA-38 uses; Standards for partitions; Standards for land divisions for farm parcels.	No	No	No
Comp. Plan Sections IV, V, XVI	Comprehensive Plan	No	No	N/A
CCS&PO	Land Division Procedures and Standards	No	No	Yes

Staff recommends the Board of County Commissioners take action to determine the amount, if any, by which the cited regulations reduced the value of the Claimant's property, and act accordingly to pay just compensation in that amount, or, in the alternative, to not apply CCZO Section(s) 303.13(D) and 304.1 in order to allow the Claimant to divide and develop the property with no more than eleven 5-acre homesites.

ATTACHMENT 2

November 30, 2006

Order No: 06/01322

Your No: .

Owner Name: FAZIO ANTHONY

Customer Name: BLACK/HELTERLINE LLP

TO: BLACK/HELTERLINE LLP
ATTN: ANNE WATERS
1900 FOX TOWER
805 SW BROADWAY
PORTLAND, OREGON 97205-3359

<u>TYPE OF POLICY:</u>	<u>AMOUNT\$</u>	<u>CODE</u>	<u>PREMIUM\$</u>
Lot Book Report	\$N/A		\$150.00

Effective Date: November 21, 2006

We have searched our Tract Indices as to the following described real property:

PARCEL 1 of PARTITION PLAT NO. 2005-011, as recorded April 27, 2005 under Instrument No. 2005-005561, Records of Columbia County, Oregon.

And as of November 22, 2006 at 8:00 A.M., we find the grantee(s) in the last deed filed for record is (are):

JOHN PETER FAZIO, to an undivided 1/12 interest;
DIANE MARIE DELEGATO, as to an undivided 1/12 interest;
DAVID ANTHONY FAZIO, as to an undivided 1/12 interest;
MARY THERESA FAZIO RIGERT, as to an undivided 1/12 interest;
JACK FRANK FAZIO, as to an undivided 1/3 interest;
MARIA N. FAZIO, as to an undivided 1/3 interest;
as tenants in common

We also find the following apparent encumbrances filed within ten years prior to the effective date hereof:

1. Rights of the public and of governmental bodies in and to that portion of the premises herein described lying below the high water mark of Mud Lake (now drained) and the ownership of the State of Oregon in and to the Lake Bed.