BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

In the Matter of the Application of John A. Petersen for Renewal of a Limited Exemption Certificate for the Tide Creek Rock Surface Mine	AMENDED ORDER NO. 44-2000 (Decision on Reconsideration)

WHEREAS, in June 1997, John A. Petersen ("Applicant") submitted an application for renewal of a Limited Exemption Certificate for the Tide Creek Rock surface mine , alleging that 160 acres qualified for limited exempt status; and

WHEREAS, during the 1997 proceedings Bruce Hugo and others were not allowed to present evidence and argument in opposition to the application; and

WHEREAS, on January 21, 1998, the Board adopted Order No. 04-98 granting limited exempt status to 80 acres of the Tide Creek Rock surface mine; and

WHEREAS, Bruce Hugo ("Hugo") appealed Order No. 04-98 to the Land Use Board of Appeals ("LUBA") which issued a decision on June 19, 1998, in favor of Hugo and remanded the decision to the Board of County Commissioners for failure to allow input from opposing parties and for failure to support their decision with appropriate findings; and

WHEREAS, the Applicant appealed LUBA's decision to the Oregon Court of Appeals which affirmed the LUBA decision on November 4, 1998, at 157 Or.App. 1, 967 P.2d 895; and

WHEREAS, in response to the remand and pursuant to notice the Board of County Commissioners held an evidentiary hearing on September 22, 1999, attended by the Applicant, represented by counsel Agnes M. Petersen, and by Hugo, represented by counsel Michael F. Sheehan, and where evidence was presented by the Department of Land Development Services ("LDS") staff, the Applicant, and by Hugo, and where presentations were made by counsel for the parties; and

WHEREAS, the hearing was closed on September 22, 1999, but the record remained open for seven days at the request of the Applicant; the record was closed on September 29, but was re-opened until October 6, 1999, to allow responses to new evidence or testimony received between September 22 and 29; after October 6, additional submissions in the form of argument by the Applicant, and additional materials submitted by County and LDS staff were received by the County; and

WHEREAS, a list of exhibits offered, received, and rejected by the County is attached hereto, labeled Attachment 1 and incorporated herein by this reference; and

NOW THEREFORE, IT IS HEREBY ORDERED as follows:

A. The Board of County Commissioners adopts the Findings of Fact and Conclusions of Law which are attached hereto, labeled Attachment 2 and incorporated herein by this reference.

B. The Board of County Commissioners denies the application of John A. Petersen for a Limited Exemption Certificate for the Tide Creek Rock surface mine in the amount of 160 acres.

C. The Board grants, and directs the Surface Mining Administrator to issue, a Limited Exemption Certificate to the Applicant for approximately ten acres (five acres as an existing mine, and five acres as expansion area subject to the area and quantity specifications of Section 4.6 of the Surface Mining Ordinance) for a surface mine and surface mining site in that portion of Tax Lot No. 6236-000-00500 ("TL 500") zoned Surface Mining (SM). The surface mine and surface mining site which is entitled to a Limited Exemption Certificate is shown approximately as the area outlined within TL 500 on the Surface Mining Administrator's Map (which is attached hereto, labeled Attachment 3, and incorporated herein by this reference) and on the 1994 Aerial Photograph (which is attached hereto, labeled Attachment 4, and incorporated herein by this reference). The approximately five acres which is approved as an existing mine is shown in yellow on Attachment 4; the approximately five acres of expansion area is shown in white on Attachment 4 and is entirely within TL 500. The Limited Exemption Certificate shall be issued upon the submission by Applicant, and approval by the Surface Mining Administrator, of a survey identifying this surface mine and surface mining site with specificity within 60 days of the issuance of this order. Prior to issuance of the Limited Exemption Certificate, the Applicant shall also have the area of approximately five acres entitled to limited exempt status as an existing use mine, and the additional area of approximately five acres entitled to limited exempt status as expansion area, staked by the surveyor in a manner acceptable to the Surface Mining Administrator. These areas shall be staked separately so that they can be identified by the Surface Mining Administrator to her satisfaction. The Limited Exemption Certificate shall be subject to the Findings and Conclusions stated in Attachment 2.

D. Within 120 days of this order Applicant shall cease and desist from any mining operations on TL 500 outside of the area set forth in the Limited Exemption Certificate described in

Paragraph C above until such time that Applicant has applied for an Operating Permit pursuant to Article V of the Columbia County Surface Mining Ordinance (SMO) for those additional lands.

E. Within 120 days of the date of this Order Applicant shall either comply with the provisions of subparagraph 1 below, or comply with the provisions of both subparagraphs 2 and 3 below:

1. Cease and desist from conducting surface mining operations on Tax Lot Nos. 6236-040-00100 ("TL 100"), 6236-000-00600 ("TL 600"), 6236-000-00900 ("TL 900"), and 6236-000-01000 ("TL 1000"), or

2. Apply for either:

   a. Zone changes and/or conditional use permits to bring Applicant's surface mining operations on TL 100, TL 600, TL 900 and TL 1000 into conformance with the Columbia County Zoning Ordinance on each such tax lot; or

   b. Nonconforming use approvals for mining operations on TL 100, TL 600, TL 900 and TL 1000 pursuant to the requirements of the Columbia County Zoning Ordinance; and

3. Apply for a surface mining operating permit to bring Applicant's surface mining operations on TL 100, TL 600, TL 900 and TL 1000 into conformance with the Columbia County Surface Mining Ordinance on each such tax lot.

DATED this 4th day of October, 2000.

BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

By: _____
Chair

By: _____
Commissioner

By: _____
Commissioner

Attachment 1
EXHIBIT LIST

SEPTEMBER 22, 1999, HEARING:

1. Board Communication dated September 22, 1999, from Todd Dugdale to the Board of County Commissioners, including Attachments (1) Staff Report dated September 15, 1999, and (2) Surface Mining Advisory Committee Meeting Minutes of June 12, 1997.

2. Record submitted to LUBA in the Hugo v. Columbia County matter, LUBA Case No. 98-035.

3. Map submitted by Carla Cudmore, Surface Mining Administrator.

4. 1997 Tide Creek Rock Surface Mining Application Exemption Certificate. (Application includes 25 Exhibits.)

5. Tape of July 23, 1997, Board of Commissioners meeting, submitted by Agnes Petersen.

6. Two tapes of December 10, 1997, Board of Commissioners meeting, submitted by Agnes Petersen.

7. 11-page packet of documents, first page of which is the Limited Exemption Certificate for John A. Petersen dated January 17, 1996, submitted by Agnes Petersen.

8. Packet of eight sets of stapled documents, first page which states "Comments and Exhibits Submitted by Bruce Hugo" submitted by Mike Sheehan.

9. Three maps submitted by Mike Sheehan:

   9A. Marked "Hugo 101 Map 1"
   Titled: "SECTION 36, T.6N., R.2.W., W.M."
   COLUMBIA COUNTY Current Revision Date 8/31/90.

   9B. Marked "Hugo 101 Map 2"
   Titled: "SECTION 36, T.6N., R.2.W., W.M."
   COLUMBIA COUNTY Current Revision Date 8/31/90.

   9C. Marked "Hugo 101 Map 3"
   Titled: "SE 1/4, SEC.36, T.6N., R.2.W., W.M."
   COLUMBIA COUNTY Current Revision Date 9/25/87.

[Only 9 Exhibits were received prior to or at the hearing. The hearing was closed on 9/22/99, but the record was held open for 7 days for additional written testimony and evidence.]

ADDITIONAL WRITTEN TESTIMONY/EVIDENCE RECEIVED FROM SEPTEMBER 22 THROUGH SEPTEMBER 29, 1999, PURSUANT TO ORS 197.763(6)(c):

10. Letter dated September 22, 1999, from Oregon Department of Fish & Wildlife to Carla Cudmore, faxed to county at 5:02 p.m. September 22, 1999.

11. Letter dated September 25, 1999, from Tammy Maygra to Tony Hyde, received on September 27, 1999.

12. Letter dated September 25, 1999, from Jamie Maygra to Board of Commissioners, received on September 27, 1999.

13. Statement (23 pages) from Bruce Hugo, dated September 22, 1999, received September 28, 1999.

14. Post-Hearing Comments and Exhibits submitted by Bruce Hugo, dated September 28, 1999, received September 29, 1999.

RESPONSES TO NEW EVIDENCE RECEIVED DURING THE PERIOD THE RECORD WAS LEFT OPEN (SEPTEMBER 22 THROUGH SEPTEMBER 29) RECEIVED SEPTEMBER 30 THROUGH OCTOBER 6, 1999, ALSO PURSUANT TO ORS 197.763(6)(c):

15. Fishing in Oregon, Sheehan and Casali, (8th Edition; 1995), along with one page of typed comments, submitted by Ms. Petersen October 6, 1999.

16. Oregon Sport Fishing Regulations, ODF&W (1999), submitted by Ms. Petersen October 6, 1999.

17. Affidavit of John A. Petersen dated October 6, 1999, and affidavit of John H. Petersen dated October 6, 1999, submitted by Ms. Petersen October 6, 1999.

18. Map titled "Survey of Proposed 40 Acre Tract of Limited Exemption" dated May 13, 1999, submitted by Ms. Petersen October 6, 1999.

19. Report titled "Fish Evaluation of Tide Creek," prepared by PBS Environmental for Tide Creek Rock Products, submitted by Ms. Petersen October 6, 1999.

FINAL WRITTEN ARGUMENTS SUBMITTED BY APPLICANT PURSUANT TO ORS 192.763(6)(e):

20. Applicant's Final Argument, submitted by Ms. Petersen October 13, 1999.

21. Applicant's Response to Draft Supplemental Staff Report November 22, 1999.

22. March 26, 1994, WAC aerial photograph in LDS files, submitted by staff.

23. Summary of the difference between a LEC and Operating Permit, submitted by staff.

24. Tape I, BOC November 2, 1994, meeting, submitted by staff.

25. BOC January 17, 1996, minutes, submitted by staff.

26. June 13, 1986, WAC aerial photo, submitted by staff.

27. May 17, 1973, aerial photo, submitted by staff.

EXHIBITS REJECTED:

1. Waivers of Remonstrance and Deed from Ross and Margaret Clark, submitted by Ms. Petersen October 6, 1999.

   [Rejected pursuant to ORS 197.763 (6)(c): Record was open from September 30 to October 6, 1999, only for response to new evidence submitted during the period the record was left open (September 23 - September 29). No new evidence was submitted by or regarding the Clarks during that period.]

2. Two documents titled "Excerpts of Hearing Tapes" for Board of Commissioners' meeting dates July 23, 1997, and December 10, 1997, submitted by Ms. Petersen October 6, 1999.

   [Rejected pursuant to ORS 197.763 (6)(c): Record was open from September 30 to October 6, 1999, only for response to new evidence submitted during the period the record was left open (September 23 - September 29). There is no indication which, if any, portions of these transcripts are intended to directly respond to new evidence submitted from September 23 to September 29, 1999.]

3. Portions of Applicant's Final Argument, submitted by Ms. Petersen October 13, 1999.

Attachment 2
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant John A. Peterson has applied for renewal of a Limited Exemption Certificate for the Tide Creek Rock surface mine. He has asked that the certificate apply to 160 acres of land. Although the application is labeled as a renewal, the Applicant's most recent prior certificate, dated January 17, 1996, was for an area of land not to exceed 40 acres.

FINDINGS OF FACT

Existing Mine

1. As of July 1, 1972 the Applicant's mine and mine site included no more than five or six acres, all in that portion of what is now TL 500 that is zoned surface mining (SM). Exhibit 8 (Hugo 103: DOGAMI Report, 1978), Exhibit 9a (Map); Exhibit 3 (Surface Mining Administrator Map). The only area permitted under the original ordinance was the SW 1/4 of the NE 1/4 of Section 36, Township 6 North, Range 2 West, Willamette Meridian, which roughly approximates, but isn't identical to, the portion of TL 500 which lies east of the line which divides the eastern and western halves of Section 36. Exhibit 4 (Map).

Vesting

2. The value and utility of the Applicant's investments in plant and equipment (for example, a crusher and earth moving machinery) do not depend on whether the Applicant operates under an Article IV limited exemption certificate or an Article V operating permit.

3. The bulk of the 160 acres at issue in this application was not owned by John A Petersen or Tide Creek Rock in 1972, having been purchased from the Estate of William O. Seffert in 1987. Exhibit 8 (Hugo 106: Deed Records).

4. The Applicant presented oral evidence that an agreement permitting the Applicant to mine the Seffert property existed between the Applicant and the owner of the bulk of the 160 acres, but did not provide any written agreement or memorandum supporting his assertion.

5. The Applicant's own evidence shows that the Applicant was working only three to six acres in 1972. Exhibit 2 (R.152, R.153: "Affidavits" by Robert Howard [5.56 acres] and Don Nelson [3 acres], submitted by Applicant).

6. The Applicant's original October 2, 1972 application shows "five acres" in the box titled "Estimated Total Acres to be Surface

Mined." Exhibit 8 (Hugo 102: Bates No. 019).

Expansion Acres

7. There has been an expansion of the original mine and mine site both inside and outside the SM-zoned portion of Tax Lot 500. Exhibit 3 (Surface Mining Administrator Map).

8. There has been expansion since 1972 to the date of the March 1994 aerial photo (Exhibit 22), which shows approximately 10 acres of disturbance, in the SM zoned portion of Tax Lot 500 of approximately four to five acres. It is not clear how much of that expansion occurred prior to July 1, 1990, the effective date of the amended ordinance, and how much afterward, or whether the expansion remained within the quantity and acreage specifications of Section 4.6.

Zoning

9. The portion of TL 500 zoned Surface Mining is approximately 40 acres. Exhibit 3 (Surface Mining Administrator Map).

10. Based on the 1994 aerial photo (Exhibit 22), even as late as 1994 no more than 10 acres had been disturbed by Applicant's mining operations in the SM zoned portion of TL 500. Exhibit 3 (Surface Mining Administrator Map).

11. The total acreage disturbed by mining both in the SM-zoned portion of TL 500 and adjoining tax lots not zoned SM as of 1994 is approximately 17 acres. Exhibit 3 (Surface Mining Administrator Map).

12. Other than the 40 acres of TL 500 zoned for surface mining, none of the other tax lots owned by Applicant and subject to this application are zoned surface mining. Exhibit 1 (Staff Report).

13. Based on Exhibit 22 (1994 aerial photo), Exhibit 3 (Surface Mining Administrator Map), and Exhibit 8 (Hugo 105, 1984 CC Comprehensive Plan p.217) applicant is conducting mining operations on adjacent tax lots not zoned for surface mining, without either the necessary conditional use permits, or a showing that these mining operations were valid non-conforming uses.

CRITERIA

1. Statutes. Columbia County has the authority to regulate surface mining and the reclamation of surface mined lands pursuant to ORS 517.780(1) which provides:

"The provisions of ORS 517.702 to 517.989 and the rules and regulations adopted thereunder shall not supersede any zoning laws or ordinances in effect on July 1, 1972 * * *."

ORS 41.580(1), the "Statute of Frauds", provides in relevant part:

"In the following cases the agreement is void unless it, or some note or memorandum thereof, expressing the consideration, is in writing and subscribed by the party to be charged, or by the lawfully authorized agent of the party; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents in the cases prescribed by law:

"(a) An agreement that by its terms is not to be performed within a year from the making.

"* * * * *

"(e) An agreement for the leasing for a longer period than one year, or for the sale of real property, or of any interest therein."

2. Surface Mining Land Reclamation Ordinance. Columbia County adopted its "Surface Mining Land Reclamation Ordinance" (the "original ordinance" or the "ordinance") on June 28, 1972. Article III of the original ordinance prescribed the process for obtaining permits under the ordinance; Article IV allowed the Board to require performance bonds to secure performance of reclamation plans; Article V prescribed site improvement standards during and after mining operations; Article VI provided operating standards, Article VII listed certain exemptions to the ordinance, and Article VIII prescribed the ordinance was to be administered.

The original ordinance did not distinguish between total exemptions, limited exemptions, and operating permits, as the ordinance does currently. All surface mining operations were required to obtain permits, although certain surface mining operations were exempt from portions of the ordinance. Other operations were excluded from the definition of surface mining, as discussed below.

Section 1.030(d) of the original ordinance provided:

"Surface Mining" includes all or any part of the process of mining materials by the removal of overburden and the extraction of natural mineral deposits thereby exposed by any method by which more than 10,000 cubic yards of minerals are extracted or by which at least two acres of land are affected within a period of 12 consecutive calendar months, including

open-pit mining operations, auger mining operations, production of surface ming refuse, the construction of adjacent or off-site borrow pits (except those constructed for use as access roads), and prospecting and exploration activities coming within the quantity or area specifications set forth herein; but excluding excavations of sand, gravel, clay, rock or other similar materials conducted by the landowner or tenant for the primary purpose of construction, reconstruction or maintenance of access roads and excavation or grading operations conducted in the process of farming, on-site road construction; and also excluding rock, gravel, sand, silt or other similar substances removed from the beds or banks of any waters of this county pursuant to permit issued under ORS 541.605 to 541.660; and excepting any work on a parcel of contiguous land owned or controlled by the operator and commenced before the date of this act."

Section 3.010 of the original ordinance provided: "No surface mining operations may be started without first obtaining a permit from the Board, which permit shall be granted upon compliance with the requirements of this ordinance."

Section 7.010(a) of the original ordinance provided: "Nothing in Article IV, V, or VI of this ordinance shall apply to the reclamation of lands that have been surface mined prior to July 1, 1972; dredging operations conducted pursuant to ORS 517.611 to 517.700; or to a land owner or operator who on July 1, 1972 is a party to a valid contract in existence on January 1, 1971, or before, to surface mine but this last exemption does not apply after January 1, 1981; nor to any operation on any contiguous parcel of land which is owned or controlled by the operator as of June 1, 1972, and on which operations have been commenced by said date."

Interpretation. The Board interprets Section 1.030(d) as including and excluding certain operations from the definition of "surface mining" as not being substantial. Under the definition, operations which are "within [i.e., below] the quantity or area specifications" set forth and "any work on a parcel of contiguous land owned or controlled by the operator and commenced before the date of this act", i.e., July 1, 1972, are not considered "surface mining" and therefore not substantial.

Interpretation. The Board interprets Section 7.010(a) of the original ordinance exempting certain surface mining operations from certain provisions as a legislative recognition of such operations as a form of nonconforming use. Under the exemptions, "any operation on any contiguous parcel of land which is owned or controlled by the operator as of June 1, 1972, and on which operations have been commenced by said date" is exempt from Articles IV, V, or VI of the original ordinance.

Interpretation. Article VII of the original ordinance did not exempt any surface mining operations from the provisions of Article III of the ordinance. The Board interprets the original ordinance to have required permits of all surface mining operations pursuant to Section 3.010, even those operations which were entitled to exemptions from the Articles IV, V and VI of the original ordinance pursuant to Article VII.

Interpretation. The original ordinance did not clearly address the issue of expansion within the boundaries of a permitted site. The Board interprets the original ordinance as allowing expansion within the boundaries of the permitted site, unless limited by the terms of the permit itself. However, the exemption from Articles IV, V and VI of the original ordinance only applies to "lands that have been surface mined prior to July 1, 1972" [emphasis added], unless the lands fit within another exempt category under Section 7.010(a) of the original ordinance. Therefore, lands which don't fit within another exemption category, were subject to Articles IV, V and VI of the original ordinance.

3. Surface Mining Ordinance.

Columbia County amended the original ordinance effective July 1, 1990, and renamed it the "Columbia County Surface Mining Ordinance" (the "amended ordinance" or the "SMO"). In order to engage in surface mining in Columbia County the operator must now comply with the SMO.

SMO Section 1.1 provides:

> "The provisions of this ordinance are in addition to the Columbia County Zoning Ordinance and any other laws, ordinances, rules and regulations that apply to the use of, or other development of land."

SMO Section 1.3(3) provides that the purpose of the SMO is:

> "(3) To provide for local regulation of surface mining and the reclamation of surface-mined lands in a manner that is consistent with, but more comprehensive and responsive than, the procedures provided by state law."

The SMO provides for two types of permits, Article IV limited exemption certificates and Article V operating permits. (A total exemption certificate is also available under Article III of the amended ordinance, but, by definition, a total exemption is only available for operations which do not fall under the definition of "surface mining".) The Applicant has applied for renewal of a limited exemption certificate under Article IV of the SMO.

The criteria for a Limited Exemption Certificate are set forth

in SMO Sections 4.1 and 4.3. Section 4.1 provides:

> "Except as otherwise provided in this ordinance, nothing in this ordinance requires the reclamation of lands within the surfaces and contours of surface mines in existence on July 1, 1972, or to vertical extensions of those surfaces and contours. The surfaces and contours of such exempt surface mines shall not include those areas over which the landowner or operator merely leveled terrain or cleared vegetative cover. The surfaces and contours of such exempt surface mines shall not include those areas for which there may have been an intent, a goal or proposal to surface mine on July 1, 1972, but on which no actual surface mining had taken place on that date, unless it is established as provided in Section 4.3 below that the landowner or operator had made such an investment in time, money and/or labor as to establish a vested right to surface mine such property."

Section 4.3 provides:

> "Those surface mines which qualify according to the provisions of Section 4.1, which have not been abandoned, and for which a Limited Exemption Certificate is obtained from the Board will be granted limited exempt status. Such limited exempt status shall also extend to the entire surface mining site, as it existed on July 1, 1972, associated with any such exempt surface mines. Surface mining is prohibited at such surface mining sites unless the landowner or operator has a valid, current Limited Exemption Certificate. Surface mining is prohibited at such surface mining sites outside the surfaces and contours of the surface mine granted limited exempt status, or vertical exemptions of such surfaces and contours, unless the landowner or operator has a valid current operating permit for such surface mining. A separate certificate is required for each separate surface mining site. Landowners and operators of surface mines and surface mining sites granted limited exempt status must pay the annual certificate fee, but are exempt from the reclamation, financial security and operating requirements of this ordinance until the surface mining is abandoned or completed at such surface mining site. The limited exemption applies only to surface mining and surface mining activity at a scale and intensity equivalent to that in existence on July 1, 1972. Surface mining and surface mining activity at a scale and intensity substantially disproportionate, as determined by the Board, to that in existence, or vested proposed mining and surface mining activity, on July 1, 1972 is not allowed by this article and an operating permit is required for such surface mining and surface mining activity."

> "A landowner or operator applying for a Limited Exemption

Certificate must submit evidence in the form of copies of aerial photographs, and/or any other information necessary to establish the exemption, and the operational and geographical extent of the exemption, and must pay the fees established under Section 5.2 of this ordinance. Except for Section 5.2, surface mines entitled to limited exempt status are exempt from Articles V, VI, VII and VIII of this ordinance. Except for Section 5.2, surface mines entitled to limited exempt status are exempt from Articles V, VI, VII and VIII of this ordinance. [sic] However, nothing in this Article is intended to exempt the surface mining activity involved from the requirements of any other statute, administrative rule or regulation, or County ordinance which would otherwise apply."

In order to be entitled to a Limited Exemption Certificate under Sections 4.1 and 4.3, the Applicant must show either: (1) the application is for a surface mine and surface mining site in existence as of July 1, 1972 or, alternatively, (2) must demonstrate that "the landowner or operator had made such an investment in time, money and/or labor as to establish a vested right to surface mine such property." SMO Section 4.1. For purposes of the discussion that follows, mines and mine sites, and/or portions thereof, determined to be eligible for a Limited Exemption Certificate under (1) above will be referred to as "existing use mines". Mines and mine sites determined to be eligible for a Limited Exemption Certificate under (2) above will be referred to as "vested rights mines".

Interpretation. The Board interprets Sections 4.1 and 4.3 of the amended ordinance which entitle certain mines and mine sites to Limited Exemption Certificates as a legislative recognition of such mines and mine sites as nonconforming uses.

Interpretation. The Board interprets the provisions of Sections 4.1 and 4.3 which recognize a limited exemption for surface mines and surface mining sites in existence on July 1, 1972, as excluding recognition for operations which would not have been considered surface mining under the definition in effect on July 1, 1972. The Board also interprets the provisions recognizing the possibility of vested surface mining operations as excluding contemplated operations which would not, when conducted, be defined as surface mining under the definition in effect on July 1, 1972.

Section 4.6, "Expansion", provides as follows:

"Expansion of surface mining under limited exempt status into previously unmined land which exceeds 2,500 cubic yards of material excavated, disturbed or sold or which affects more than one acre in any fiscal year is prohibited unless the landowner or operator applies for and receives an operating permit. An operating permit must be obtained before the

expansion occurs. Expansion of a site before the operating permit is issued constitutes surface mining without a permit is prohibited by Section 5.1 of this ordinance."

Interpretation. This section reflects the exclusion from the definition of "surface mining", in Section 1.4(30)(a)(1) of the SMO, of operations in which 2,500 cubic yards or less are excavated or disturbed, and in which one acre of land or less is affected, within one fiscal year. Similarly, expansion operations which stay within those limits, while still within the definition of "surface mining", don't trigger the same reclamation and operational concerns as expansion operations in excess of those limits. (That may be questionable as a matter of policy, but it would require a legislative amendment to change the policy.) Such expansion operations are also entitled to be included within the scope of a limited exemption certificate, but may not exceed those limits without obtaining an operating permit.

Section 6.2, "Existing Mines", of the SMO provides:

"Nothing in this article is intended to require new reclamation plans for existing surface mines with approved reclamation permits under the original ordinance unless the Board finds there is a demonstrated need for a new reclamation plan under this amended ordinance to achieve the purposes of this amended ordinance."

Similar provisions are found at Section 7.7, relating to financial security, and Section 8.10, relating to operating requirements.

Interpretation. The term "existing mine" in Sections 6.2, 7.7 and 8.10 does not have the same meaning as the term "existing use mines" which is used herein to describe one of the types of surface mines entitled to a limited exemption certificate. An "existing mine" for purposes of these sections means any mine (subject to some exceptions) permitted under the original ordinance, regardless of whether it was exempted from Articles IV, V and VI of the original ordinance. For example, a mine permitted in 1989 under the original ordinance would not have been exempt under those articles, but would be entitled to the benefits of the "existing mine" provisions of the amended ordinance.

Interpretation. The Board finds that these provisions were included in the SMO to recognize that existing mines with compliant operations did not need to comply with the new reclamation, financial security, and operating requirements of the amended ordinance, unless there was a demonstrated need for the new requirements. However, these provisions do not apply to operations which were either not permitted under the original ordinance, or were not considered to be "surface mining" operations under the

original ordinance. Nor do they apply to expansions beyond the 1990 boundaries of such existing mines.

Interpretation. With respect to permits issued under the original ordinance, the Board finds that those lands within the permit boundaries that were not exempted from Articles IV, V and VI of the original ordinance because they were not "lands that have been surface mined prior to July 1, 1972", regardless whether some lands within the permit boundaries were so exempted, are not entitled to a limited exemption certificate under the amended ordinance as "existing mines", but may still be entitled to the benefits of Sections 6.2, 7.7 and 8.10 of the amended ordinance.

4. "Nonconforming Uses".

a. ORS 215.130. The statutory provision for nonconforming uses is in ORS 215.130. Subsection (5) of that statute provides in relevant part:

> "The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. * * *"

While the section doesn't actually use the term "nonconforming use", the term is used in subsection (9) of the statute as follows:

> "As used in this section, "alteration" of a nonconforming use includes:
>
> "(a) A change in the use of no greater adverse impact to the neighborhood; and
>
> "(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood."

b. "Existing Uses". The Oregon Supreme Court discussed ORS 215.130 and the nature of nonconforming uses as they apply to rock quarries in Polk County v. Martin, 292 Or 69, 636 P2d 952 (1981), with the following general history:

> "Early in the history of zoning it became apparent that the attainment of tidy, homogeneous zones, however sound in theory, would be difficult of achievement because of existing usages of land which did not conform to the master plan and the unwillingness of the owners of such land to sacrifice their incompatible uses to the 'greater good.' The result was the decision by many legislative bodies to allow the continuation of existing uses as permitted nonconforming uses. The pattern of such legislation has been to protect existing uses, but such permitted uses are usually defined only in a

general way, such as an 'existing use' or 'lawful use,' leaving to the courts the responsibility to define the meaning of 'existing use' on a case-by-case basis.

"The result of such legislation and court decisions has been the development of a body of law which permitted nonconforming uses, if the right had 'vested' prior to the enactment of the zoning legislation. The terms 'vested right' and 'existing use' were sometimes used interchangeably, but in either case the right to continue the nonconforming use turned upon such factors as (1) whether the use was actual and existing at the time the zoning restriction became effective, and (2) whether it was a substantial use. Once the landowner established the existence of a nonconforming use, it was often held that a 'vested right' existed to continue such nonconforming use." (Citations omitted.) 292 Or at 74-75.

In determining whether the property owner had the right to continue a rock quarry as a nonconforming use the Court in Polk County stated:

"The resolution of this case largely turns upon the application of what is now ORS 215.130(5) * * *:

"Although both parties express the issue in terms of whether the defendant had a right to continue to use the property as a permitted nonconforming use, the term 'nonconforming use' does not appear in ORS 215.130(5), and although it is referred to in ORS 215.130(9), the term is nowhere defined in ORS chapter 215. The outcome therefore turns on whether the defendant's land, at the time the zoning ordinance was enacted, was then being lawfully used for the production of rock." 292 Or at 75.

(Although the Polk County v. Martin court viewed the term "vested right" as interchangeable with "existing use", for purposes of these findings and conclusions, and for reasons which will be apparent, the term "vested rights" will be used only for the situation described in Clackamas County v. Holmes discussed below.)

Interpretation. The Board interprets Section 7.010(a) of the original ordinance granting certain exemptions to certain surface mining operations, and Sections 4.1 and 4.3 of the amended ordinance allowing Limited Exemption Certificates for existing use mines, consistent with the criteria in Polk County v. Martin, *supra*.: (1) the operation or existing use mine must have been actual and existing at the time the original ordinance and/or the amended ordinance became effective; (2) the use must have been substantial; and (3) the use must have been lawful. Further, the Board interprets the word "substantial" to mean the mining activity in question must have actually met the definition of "surface

mining" in the applicable ordinance.

c. "Vested Rights". The leading case on vested rights in Oregon, Clackamas County v. Holmes, 265 Or 193, 508 P.2d 190 (1973), described vested rights as one form of nonconforming use. The Court stated: "A nonconforming use is one which lawfully existed prior to the enactment of a zoning ordinance and which may be maintained after the effective date of the ordinance although it does not comply with use restrictions applicable to the area. * * * The allowance of nonconforming uses applies not only to those actually in existence but also to uses which are in various stages of development when the zoning ordinance is enacted." 265 Or at 196-197. (The latter form of nonconforming use, i.e., the right to continue development of a nonconforming use, is referred to herein as "vested rights".)

The Court continued: "The courts and the text writers are agreed that in order for a landowner to have acquired a vested right to proceed with the [proposed] construction, the commencement of the construction must have been substantial, or substantial costs toward completion of the job must have been incurred." In determining whether expenditures have been "substantial", the court considered the use of the "ratio test", i.e., an "assessment of the proportion which the expenditure bears to the total expenditure which would be required to complete the proposed improvement." 265 Or at 197-198.

The Court concluded, however, that:

> "The test of whether a landowner has developed his land to the extent that he has acquired a vested right to continue the development should not be based solely on the ratio of expenditures incurred to the total cost of the project. We believe the ratio test should be only one of the factors to be considered. Other factors which should be taken into consideration are the good faith of the landowner, whether or not he had notice of any proposed zoning or amendatory zoning before starting his improvements, the type of expenditures, i.e., whether the expenditures have any relation to the completed project or could apply to various other uses of the land, the kind of project, the location and ultimate cost. Also, the acts of the landowner should rise beyond mere contemplated use or preparation, such as leveling of land, boring test holes, or preliminary negotiations with contractors or architects." 265 Or at 198-199.

In Clackamas County v. Webber, 42 Or App 151, 600 P2d 448 (1979), the Court of Appeals reversed an approval of a nonconforming use based on claimed vested rights, using the criteria set out in Holmes, *supra.*, because the plaintiffs had not established that their expenditures in a water system constituted

a major portion of the total cost of the project, and because they failed to establish that there was no economically reasonable alternative use of the improvement.

Interpretation. The Board interprets the provisions of the original ordinance granting exemptions, and the provisions of the amended ordinance allowing Limited Exemption Certificates, as requiring landowners or operators who are claiming "vested rights" to meet the requirements for nonconforming uses in general, i.e., the use under development must have been substantial, i.e., "surface mining" as defined, and lawful. In addition, the landowners or operators must have made substantial investments in time, money and/or labor, based on the ratio test; those expenditures must have been made in good faith considering whatever notice he or she may have had of the requirements of the proposed ordinance or ordinance amendments; and the actions of the landowner or operator must have gone beyond mere contemplated use or preparation. Finally, the investments must have no economically reasonable alternative use, but for exempt (or limited exempt) surface mining, as discussed in Clackamas County v. Webber, *supra*.

5. Zoning Ordinance.

In order to conduct surface mining operations within Columbia County the Columbia County Zoning Ordinance ("CCZO") requires one of the following:

(1) The property on which the mining is to occur must be zoned Surface Mining (SM); or,

(2) The Applicant must have a conditional use permit to conduct mining on property not zoned Surface Mining; or

(3) The mining must be determined to be a prior non-conforming use on property not zoned Surface Mining.

6. Level of Use Allowed Under a Nonconforming Use.

Section 4.3 of the Surface Mining Ordinance provides in relevant part:

> "The limited exemption applies only to surface mining and surface mining activity at a scale and intensity equivalent to that in existence on July 1, 1972. Surface mining and surface mining activity at a scale and intensity substantially disproportionate, as determined by the Board, to that in existence, or vested proposed mining and surface mining activity, on July 1, 1972 is not allowed by this article and an operating permit is required for such surface mining and surface mining activity."

In Bither v. Baker Rock Crushing Co., 249 Or 640, 438 P2d 988, 440 P2d 368 (1968), the Oregon Supreme Court upheld an injunction "to prohibit any rock quarrying or crushing activities which constitute an increase over the volume or level that existed at the time of the adoption of the interim zoning ordinance." 249 Or at 654.

Interpretation. The Board interprets the provisions of the original surface mining ordinance and the amended ordinance, which permit nonconforming surface mining operations to continue, consistent with the court in Bither, either as an existing use or as a vested right, as limited to volume or level of rock crushing or quarrying operations that existed (or were projected, in the case of vested rights) at the time of adoption of the applicable ordinance.

DISCUSSION OF THE EVIDENCE

Applicant has applied for a Limited Exemption Certificate to mine 160 acres without an operating permit. Such a right must be established as an "existing use" as of July 1, 1972, or as a "vested right". The analysis of these issues is different for TL 500, for several reasons, from that for TL 100, TL 600, TL 900 and TL 1000.

1. Existing Use.

Applicant presented generalized anecdotal evidence by several witnesses that he had worked the property for many years, back to and including 1972, and before. This evidence was largely non-specific as to the time and location of mining activity on the 160 acres. Moreover, much of Applicant's evidence was contradicted by the written statements of other witnesses presented by the Applicant that, as of 1972, he had been engaged in mining only 3 to 6 acres, and indeed only acquired the bulk of the 160 acres in 1987, 25 years after the July 1, 1972, date at issue. Applicant claimed that he had an interest in the land going back to 1972, but did not produce a contract, deed, or written memorandum, as required by ORS 41.580(1), supporting his claim; nor did he show by means of aerial photos or other similar hard evidence, as required by SMO Section 4.3, that he had conducted mining activities on the bulk of the 160 acres, or made a substantial investment in the bulk of the 160 acres, beyond the maximum of five or six acres shown in the 1973 aerial photos produced by the LDS staff.

The evidence presented by the LDS staff and Hugo is composed largely of official documents and aerial photographs. Aerial photographs from 1973, 1986 and 1994 show a maximum of five or six acres disturbed in 1973, nine acres in 1986, and 17 in 1994, with at least seven of the 17 acres being outside the area zoned surface mining (SM), on lands for which Applicant has never applied for or

received conditional use permits for his mining operations as required by the CCZO. That leaves a maximum of approximately ten acres of disturbed acreage as of the 1994 aerial photo within the area zoned Surface Mining, i.e., within TL 500.

a. TL 500. (1) There is substantial evidence in the record to find that the Applicant's surface mining operations on TL 500 was actual and existing at the time the original ordinance became effective, July 1, 1972, in the amount of 5 to 6 acres, and at the time the amended ordinance became effective, July 1, 1990, in the amount of approximately 10 acres; (2) the existing use on TL 500 on July 1, 1972, and on July 1, 1990, was substantial; and (3) that the use was lawful. These conclusions are based on proof established by aerial photos, deeds showing Applicant's ownership of the parcel, Applicant's application for a permit to conduct surface mining operations, and the permits which were issued consistently over the years approving surface mining operations within the permit boundaries on that parcel.

b. TL 100, TL 600, TL 900 and TL 1000. There is not substantial evidence in the record to find that the Applicant's surface mining operations, if any, were actual and existing on TL 100, TL 600, TL 900 and TL 1000 on July 1, 1972; that the operations, if any, were substantial; and that the operations were lawful.

There isn't substantial evidence in the record that there were any surface mining operations on these parcels on July 1, 1972.

If there were any such operations, to be substantial, the operations on these parcels would have to meet the definition of "surface mining", including the area and quantity specifications, as set forth in Section 1.030(d) of the original ordinance. There isn't substantial evidence in the record that these operations, if any, met those specifications.

If the operations were actual and existing and met the area and quantity specifications, there isn't substantial evidence in the record, sufficient to meet the requirements of ORS 41.580(1), that the Applicant owned or controlled these contiguous parcels as of June 1 or July 1, 1972, sufficient to be excluded from the definition of "surface mining", or exempted from Articles IV, V and VI of the original ordinance.

Therefore, if the operations were actual and existing and met the area and quantity specifications, the Applicant would have been required to comply with Article III's permit requirements, and with the requirements of Articles IV, V and VI, to be lawful. Any surface mining which might have occurred on those parcels after July 1, 1972, up to and after July 1, 1990, was outside the area described in the permit which was issued to Applicant and would not

have been lawful. In addition, any surface mining operations which began on those parcels after August 1984 were not consistent with the zoning of those parcels and not within the scope of any conditional use permit issued for those parcels, and would not have been lawful.

In the alternative, even if Applicant owned or controlled these contiguous parcels, notwithstanding ORS 41.580(1), the operations would not have been considered "surface mining" and therefore not "actual and existing" and not "substantial". Under the alternative theory, which is expressly not adopted by the Board, the operations would have been lawful non-surface mining operations up until July 1, 1990, the effective date of the amended ordinance, but after that date would have to qualify as either pursuant to a total exemption, a limited exemption, or an operating permit. Applicant has not applied for a total exemption certificate or operating permit for these parcels and no analysis is made here of those issues.

Under the alternative theory, even if the Board found that there were operations on these contiguous parcels, and the Board does not, they could not qualify as "actual and existing" or "substantial" since they would not have been considered "surface mining" under the original ordinance. Therefore, they would not meet the first test under Section 4.1 of the SMO, i.e., "that the application is for a mine and mine site in existence as of July 1, 1972", i.e., an "existing use mine".

2. Vested Rights.

Applicant presented general evidence with regard to his investments in time, money and/or labor on the Tide Creek surface mine. Most of the evidence related to time and labor was unspecific as to location and date, but was convincing that the applicant had spent many years of his life, from sunrise to sunset, weekdays and weekends, working on the mine. The evidence related to monetary investments was limited, but included significant purchases of equipment in the early 1970s. On the other hand, the investments made by Applicant in plant and equipment-crusher, earth moving equipment, etc., were not site specific and, in any event, were just as useful in the operation whether the mine was operated under a limited exemption certificate or an operating permit. Therefore, these investments would not satisfy the test in Clackamas County v. Webber, that there be no economically reasonable alternative use for this equipment except for a limited exempt surface mine. And while Applicant cannot be said to have been unaware of the plans to adopt the original ordinance (his wife was one of the drafters) or the amended ordinance, the Board does not doubt his good faith in believing his operations were exempt from Articles IV, V and VI of the original ordinance.

a. TL 500. There is substantial evidence in the record to find that the Applicant's investments of time, money and/or labor to conduct surface mining operations within the permit boundaries on TL 500 were substantial and that they were made in a good faith belief that these operations were allowed by the permit granted under the original ordinance. However, that is not sufficient to establish a vested right to conduct surface mining operations on the additional five acres of disturbed land on TL 500, as shown on the 1994 aerial photo. Because the Applicant's investments would still have economic value if his mining were done pursuant to an operating permit, rather than a limited exemption certificate, Applicant has not satisfied the requirements of Clackamas County v. Webber. However, the Applicant's operations on the additional five acres of disturbed land within the permit boundaries on TL 500 may qualify as expansion acreage under Section 4.6 of the SMO.

b. TL 100, TL 600, TL 900 and TL 1000. There is not substantial evidence in the record to find that the Applicant's investments of time, money and/or labor to conduct operations on TL 100, TL 600, TL 900 and TL 1000 were "substantial", in the sense that they were for "surface mining", given the area and quantity specifications in the original ordinance; nor to find that they were "substantial" based on the ratio test, as of July 1, 1972, nor for many years after 1972. The Board finds that any such investments may have been made in a good faith belief that these operations were allowed under the original ordinance, either under the belief that the operations were not "surface mining" as defined, as operations "controlled" by the operator on a contiguous parcel, or exempt from Articles IV, V and VI of the original ordinance, even though not covered under the permit issued under the original ordinance. The Board finds that such operations would not have been lawful, however, given the requirements of ORS 41.580(1). The Board finds further that: "the acts of the landowner [did not] rise beyond mere contemplated use or preparation, such as leveling of land, boring test holes, or preliminary negotiations with contractors or architects", sufficient to meet the requirements of Clackamas County v. Holmes, *supra*. Finally, regardless of whether the investments were substantial, in good faith, and lawful, because the Applicant's investments would still have economic value if his mining were done pursuant to an operating permit, rather than a limited exemption certificate, Applicant has not satisfied the requirements of Clackamas County v. Webber. The evidence is therefore not sufficient to establish a vested right to conduct surface mining operations on those parcels under the original ordinance or the amended ordinance. The Board, in reaching this determination, considered the lack of a required surface mining permit issued for these parcels under the original ordinance, the lack of approved zoning or conditional use permits, and the fact that the Applicant did not even own those parcels until 1987.

Based on this record, and the findings set forth below, the Board finds that Applicant has established a right to a Limited Exemption Certificate for a surface mine and surface mining site on a maximum of approximately ten acres located in the portion of TL 500 zoned Surface Mining. However, any mining pursuant to a Limited Exemption Certificate issued for this parcel is limited to the volume or level of rock crushing or quarrying operations that existed at the time of adoption of the original ordinance.

As to mining operations on adjacent tax lots, TL 100, TL 600, TL 900 and TL 1000, Hugo presented substantial uncontradicted evidence that: (1) None of these tax lots have been or are currently zoned surface mining (SM); and (2) the Applicant has never obtained the necessary conditional use permits to engage in mining on these properties.

3. Expansion.

The additional acreage mined within the permit boundaries of TL 500 after July 1, 1972, were covered by a permit issued under the original ordinance and were, therefore lawful under the original ordinance, although subject to Articles IV, V and VI, according to the Board's interpretations above. Any expansion within the original permit boundaries after 1990 may or may not be entitled to coverage under a limited exemption certificate, as provided by Section 4.6 of the amended ordinance, depending on whether it remained within the area and quantity specifications of Section 4.6. The Board finds, based on all of the evidence provided, that the Applicant is entitled to the benefit of the doubt. For the purposes of this application, the additional four to five acres mined within the permit boundaries on TL 500 after 1972 shall be treated as expansion acreage to be included under the limited exemption certificate granted by this order, subject to the area and quantity specifications of Section 4.6. However, should the Applicant choose to apply for an operating permit for that acreage, subject to all of the other requirements of the amended ordinance which apply to the issuance of an operating permit, the Board agrees to consider whether those same four to five acres are entitled to be treated as existing mines under Sections 6.2, 7.7 and 8.10 of the amended ordinance.

CONCLUSIONS OF LAW

1. The SMO is a land use ordinance.

2. Pursuant to the CCZO, surface mining is not allowed on TLs 100, 600, 900, 1000 and that portion of TL 500 not zoned SM without either a conditional use permit or a showing that mining constitutes a prior non-conforming use.

3. All surface mining not permitted pursuant to Article IV of the

SMO is required to have an Operating Permit issued pursuant to Article V of the SMO (with certain exceptions not relevant here).

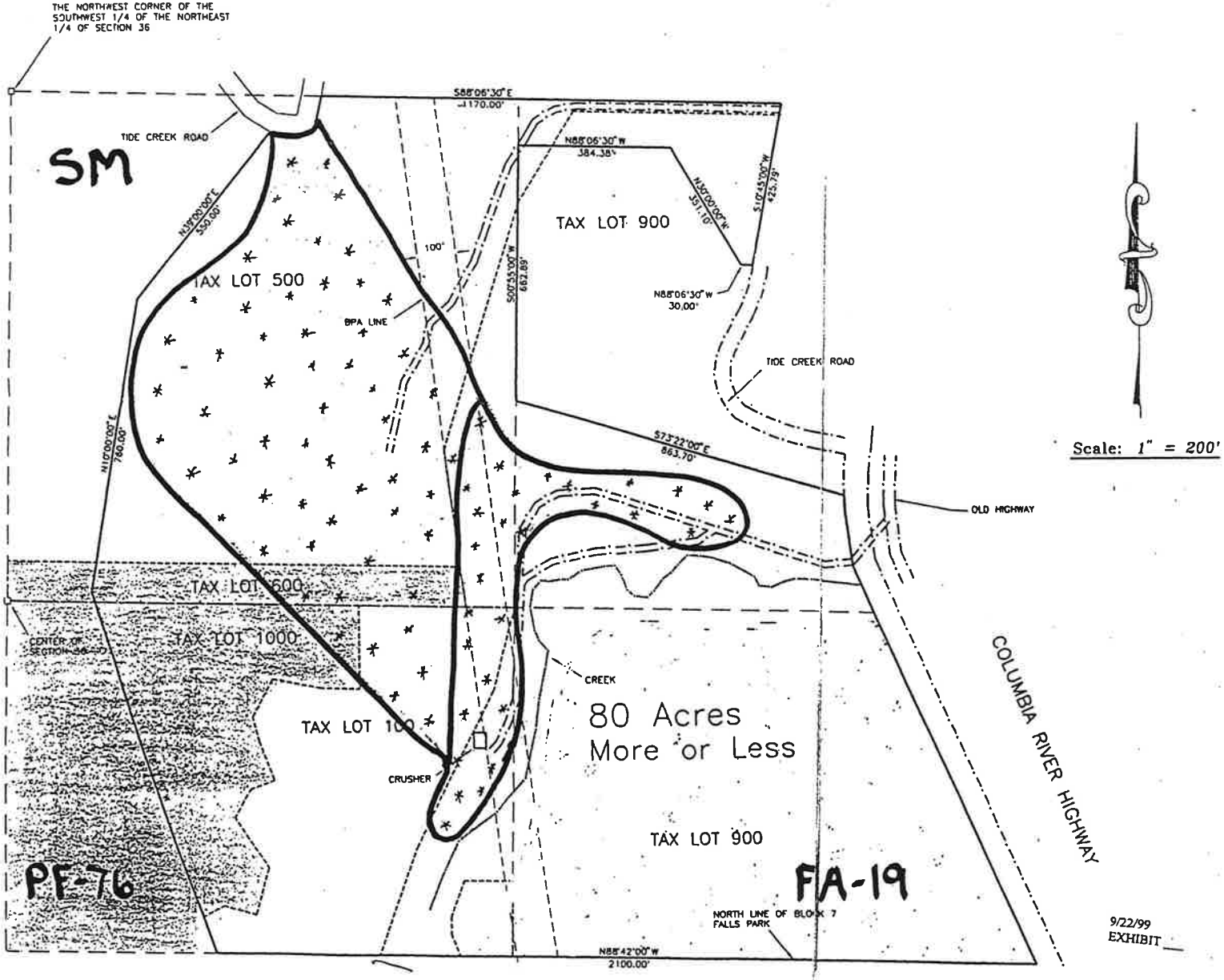
4. An agreement establishing an interest in real property for a period longer than one year has to be in writing. ORS 41.580(1).

5. The Board interprets the vesting provisions of Sections 4.1 and 4.3 of the SMO in the light of the Oregon Supreme Court's decision in Clackamas County v. Holmes and Clackamas County v. Webber, and the factors set forth there.

TIDE CREEK ROCK
SURFACE MINE
AGGREGATE EXTRACTION AREA
IN SECTION 36, TOWNSHIP 6 NORTH, RANGE 2 WEST
WILLAMETTE MERIDIAN, COLUMBIA COUNTY OREGON
SEPTEMBER 29, 1997

OLYMPIC SURVEYORS
Land & Construction Surveying
257 S. First Street office (503) 367-4113
St. Helens, OR 97051 fax (503) 367-6171
email olysurvyr@columbia-coast.org

Drawing Name: TCR e 36 B



Scale: 1" = 200'

LEGEND:
- ROAD LINES
- BOUNDARY LINES
- 16TH LINES
- BPA EASEMENT LINES
- TAX LOT LINES
- CREEK LINE

9/22/99
EXHIBIT

ATTACHMENT 3

Approximate 1973 Affected Area

ATTACHMENT 4

3-26-94