

Oregon Water Resources Department
Water Rights Division

Water Rights Application
Number G-15818

Final Order Incorporating Settlement Agreement

Appeal Rights

This is a Final Order in other than contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review must be filed within the 60 day time period specified by ORS 183.484(2). Pursuant to ORS 536.075 and OAR 137-004-0080 you may either petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, the petition shall be deemed denied.

This statement of judicial review rights does not create a right to judicial review of this order, if judicial review is otherwise precluded by law. Where no changes have been made to a Proposed Final Order on a water right application and no protests have been filed during the protest period, the Final Order is not subject to judicial review.

Application History

On August 12, 2002, Colony Nursery INC. submitted an application to the Department for a water use permit.

The Department issued a Proposed Final Order on May 13, 2003, recommending the application be denied because the proposed use of ground water had the potential for substantial interference with an over-appropriated surface water source.

The applicant filed a timely protest on June 27, 2003.

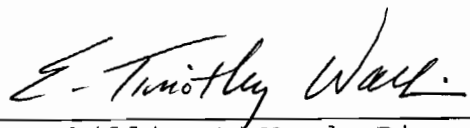
A Settlement Agreement was signed by all parties as of September 23, 2004. The Settlement Agreement is incorporated into this Final Order and is attached hereto.

With the modifications described above, the proposed use would not impair or be detrimental to the public interest.

Order

Application G-15818 therefore is approved as proposed by the Proposed Final Order further modified by the attached Settlement Agreement, and Permit G-16389 is issued as limited by the conditions proposed by the Proposed Final Order and Settlement Agreement.

DATED January 29, 2009



for Phillip C. Ward, Director
Water Resources Department

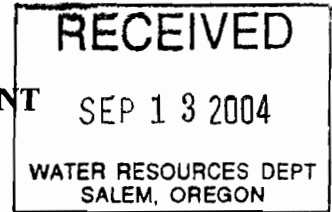
This document was prepared by Joel Plahn. If you have any questions about any of the statements contained in this document I am most likely the best person to answer your questions. You can reach me at 503-986-0815.

If you have previously filed a protest and want to know its status, please contact Patricia McCarty at 503-986-0820.

If you have other questions about the Department or any of its programs please contact our Customer Service Group at 503-986-0801.

Address all other correspondence to: Water Rights Section, Oregon Water Resources Department, 725 Summer St NE Ste A, Salem OR 97301-1266, Fax: 503-986-0901.

BEFORE THE OREGON WATER RESOURCES DEPARTMENT



In the Matter of Water Right Application)
G 15818 in the Name of Colony Nursery,)
Inc.)
Applicant and Protestant)

**SETTLEMENT AGREEMENT
APPLICATION G 15818**

The Oregon Water Resources Department (“OWRD” or “Department”) and Colony Nursery, Inc. (“Applicant”) do hereby stipulate and agree as follows:

Background

- I. On August 12, 2002, Applicant filed an application (G 15818) with the OWRD for a combined rate of 0.891 cubic foot per second (“cfs”) of water from three wells for nursery use on 37.0 acres in Clackamas County.
- II. The three wells identified on application G 15818, were as follows:
CLAC 12582: T 4S R 1E Section 28 1620’N and 850’E from SW corner of S 28;
CLAC 12637: T 4S R 1E Section 29 400’N and 600’W from SE corner of S 29;
CLAC 20074: T 4S R 1E Section 29 1930’N and 1930’W from SE corner of S 29.
- III. In reviewing ground water applications, the OWRD shall presume that a proposed use will ensure the preservation of the public welfare, safety and health as described in ORS 537.525 if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12), if water is available, if the proposed use will not injure other water rights and if the proposed use complies with rules of the Water Resources Commission. ORS 537.621(2).

Rules of the Water Resources Commission

Division 09

- IV. Pursuant to OAR 690-040-0040(4)(c), all wells that produce water from an aquifer that is determined to be hydraulically connected to a surface water source shall be assumed to have the potential to cause substantial interference with the surface water source if the the proposed rate of appropriation is greater than one percent of the discharge that is equaled or exceeded 80 percent of the time as determined or estimated by the OWRD, and the point of appropriation is a horizontal distance less than one mile from the surface water source.
- V. The OWRD found that all three wells had the potential to cause substantial interference with a surface water source, namely the Pudding River above Mill Creek because the wells are within a horizontal distance of less than one mile from Bear Creek, tributary to the Pudding River and because the combined rate of

0.891 is greater than one percent of the discharge of the Pudding River at an 80 percent exceedence level.

Division 033

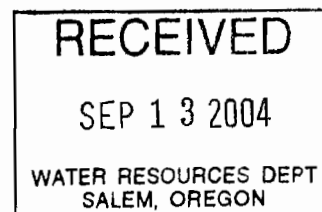
- VI. Because the proposed use had the potential to cause substantial interference with a surface water source containing threatened, sensitive or endangered fish species, an interagency review team reviewed the proposed use for potential adverse impacts on sensitive, threatened or endangered fish populations. OAR 690-033-0330. The team consisted of representatives from the Oregon Department of Environmental Quality ("DEQ"), the Oregon Department of Fish and Wildlife ("ODFW") and the Oregon Department of Agriculture.
- VII. DEQ and ODFW both recommended denial of the proposed use because the proposed use had the potential to interfere with surface waters and reduced flows would have an impact on native fish species.

Basin Program Rules

- VIII. OAR 690-502-0120(5) provides that the tributaries of the Pudding River are classified for agricultural uses only from November 1 through April 30 of each year. The OWRD applied this rule to application G 15818 because it found the potential for substantial interference with tributaries of the Pudding River. Accordingly, the Department found that the use was not allowed May 1 through October 31 of each year.
- IX. The Department has determined that for the purposes of the Willamette Basin Program, water uses described by the term "nursery use" are fully included in irrigation and agricultural uses, both of which are classified under the program. Therefore nursery use is a classified use under the Willamette Basin Program.

Well Construction Rules

- X. The term "commingling of aquifers" as it is used in this Agreement is defined at OAR 690-210-0080 which provides that "[i]n no case shall a well be constructed to allow commingling or leakage of groundwater within an individual well by gravity flow or artesian pressure from one aquifer to another."
- XI. The OWRD found that the three wells did not comply with well construction standards because the wells had mechanical seals and the OWRD does not recognize mechanical seals as complying with current well construction standards. The OWRD found that three wells listed in the application were commingling aquifers.



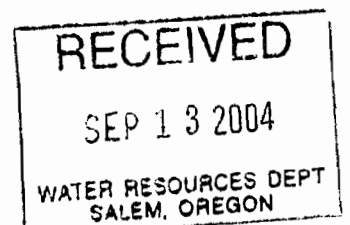
The Proposed Final Order

- XII. Because the proposed combined rate for the proposed use exceeded one percent the eighty (80) percent exceedence level in the Pudding River, the Department found that no water was available for the proposed use. Further, the proposed use did not comply with the rules of the Water Resources Commission as discussed above. Accordingly, the OWRD recommended denial of application G 15818 on May 13, 2003.
- XIII. On June 27, 2003, Applicant timely filed a protest to the PFO for application G 15818.
- XIV. The OWRD and Applicant agree that the concerns raised applicant's protest are resolved solely on the terms of this Settlement Agreement.

Settlement Agreement

1. The parties of this Settlement Agreement waive the opportunity to file exceptions, or requests for reconsideration to this Final Order and any right to judicial review of this Settlement Agreement and Final Order.
2. Each party to this Settlement Agreement represents, warrants and agrees that the person who executes this Settlement Agreement on its behalf has the full right and authority to enter into this Settlement Agreement on behalf of that party and bind that party to the terms of this Settlement Agreement.
3. In signing this Settlement Agreement, Applicant withdraws with prejudice its protest and request for a contested case hearing.
4. In signing this Settlement Agreement, Applicant amends application G 15818 such that CLAC 20074 is withdrawn from the application to be replaced by a new well to be constructed at the following location: T 4S R 1E Section 29 600'N and 200'W from the Southeast corner of Section 29.
5. In signing this Settlement Agreement, Applicant amends application G 15818 such that CLAC 12637 is withdrawn from the application.
6. In signing this Agreement, the OWRD agrees that the well as described in paragraph four (4) above does not have the potential for substantial interference with any surface water sources.
7. Before a permit is issued to Applicant, Applicant shall reconstruct the following well so that the well complies with OWRD's well construction standards. The well shall be cased and sealed to the following depth below land surface ("bls"):

- (A) CLAC 12582 shall be sealed to a depth of sixty-three (63) bls



8. Upon receipt of the well log for the well described in paragraph seven (7) above, the OWRD's Enforcement Section will determine whether the well meets minimum well construction standards as described in OAR chapter 690 division 210. A permit for the well shall be issued only upon determination by the Enforcement Section that the wells meet OWRD's well construction standards.
9. In signing this Settlement Agreement, Applicant amends the total combined rate for the two wells described in paragraphs four (4) and seven (7) above as follows:

COMBINED RATE SHALL BE LIMITED AS FOLLOWS: October through July: 0.891 cfs; August: 0.71 cfs; September 0.67 cfs.

10. In signing this Settlement Agreement, Applicant agrees to the following permit conditions as well as to the Standard Permit Conditions contained in the attached draft permit which is incorporated by reference herein:

To monitor the effect of water use from the well(s) authorized under this permit, the Department requires the water user to make and report annual static water level measurements. The static water level shall be measured in the month of March. Reports shall be submitted to the Department within 30 days of measurement.

Measurements must be made according to the following schedule:

Before Use of Water Takes Place

Initial and Annual Measurements

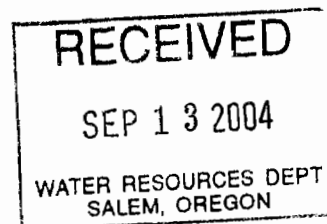
The Department requires the permittee to submit an initial water level measurement in the month specified above once well construction is complete and annually thereafter until use of water begins; and

After Use of Water has Begun

Seven Consecutive Annual Measurements

Following the first year of water use, the user shall submit seven consecutive annual reports of static water level measurements. The first of these seven annual measurements will establish the reference level against which future annual measurements will be compared. Based on an analysis of the data collected, the Director may require that the user obtain and report additional annual static water level measurements beyond the seven year minimum reporting period. The additional measurements may be required in a different month. If the measurement requirement is stopped, the Director may restart it at any time.

All measurements shall be made by a certified water rights examiner, registered professional geologist, registered professional engineer, licensed well constructor or pump installer licensed by the Construction



Contractors Board and be submitted to the Department on forms provided by the Department. The Department requires the individual performing the measurement to:

- (A) Identify each well with its associated measurement; and
- (B) Measure and report water levels to the nearest tenth of a foot as depth-to-water below ground surface; and
- (C) Specify the method used to obtain each well measurement; and
- (D) Certify the accuracy of all measurements and calculations submitted to the Department.

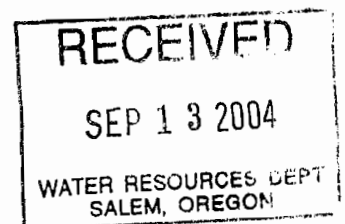
The water user shall discontinue use of, or reduce the rate or volume of withdrawal from, the well(s) if annual water level measurements reveal any of the following events:

- (A) An average water level decline of three or more feet per year for five consecutive years; or
- (B) A water level decline of 15 or more feet in fewer than five consecutive years; or
- (C) A water level decline of 25 or more feet; or
- (D) Hydraulic interference leading to a decline of 25 or more feet in any neighboring well with senior priority.

The period of non or restricted use shall continue until the annual water level rises above the decline level which triggered the action or until the Department determines, based on the permittee's and/or the Department's data and analysis, that no action is necessary because the aquifer in question can sustain the observed declines without adversely impacting the resource or senior water rights. The water user shall in no instance allow excessive decline, as defined in Commission rules, to occur within the aquifer as a result of use under this permit. If more than one well is involved, the water user may submit an alternative measurement and reporting plan for review and approval by the Department.

If the number, location, or construction of any well deviates from that proposed in the permit application or permit conditions, the conclusions of the Final Order under which this permit was granted may be revised, conditions may be appropriately revised, or this permit may not be valid.

11. In signing this Agreement the OWRD stipulates and agrees that the proposed use as conditioned in the draft permit does not have the potential to cause substantial interference with surface water sources and will not injure existing water uses. Because the use does not have the potential to cause substantial interference with surface water sources, the proposed use will not affect the habitat of sensitive, threatened, or endangered fish species.



12. In signing this Agreement the OWRD agrees that OAR 690-502-0120(5) is inapplicable in this instance as to the period of use and that the season of the proposed use may be allowed as follows:

PURPOSE OF USE: NURSERY USE ON 37.0 ACRES

PERIOD OF USE: YEAR ROUND

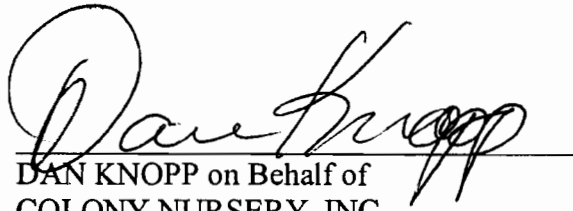
13. The parties agree to entry of the Final Order Incorporating Settlement Agreement and issuance of a permit consistent with the attached draft permit.



DWIGHT FRENCH
Manager, Water Rights Division
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301-1271
(503) 986-0819
FAX (503) 986-0901

8-31-04

DATE



DAN KNOPP on Behalf of
COLONY NURSERY, INC.
28889 S. Needy Rd.
Canby, OR 97013
(503) 651-2348
FAX (503) 651-2524

9/9/04
DATE

RECEIVED
SEP 13 2004
WATER RESOURCES DEPT
SALEM, OREGON

DRAFT

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

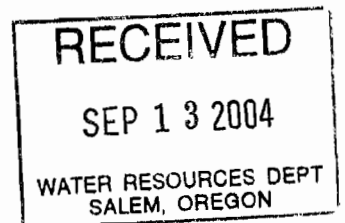
In the Matter of Water Right Application)	FINAL ORDER
G 15818 in the Name of Colony Nursery,)	INCORPORATING
Inc.)	SETTLEMENT AGREEMENT
<i>Applicant and Protestant</i>)	

Based on the attached Settlement Agreement, which is incorporated herein and which includes the draft permit attached thereto, I find that the proposed use will protect the public welfare, safety and health.

Therefore, it is ORDERED that, pursuant to ORS 537.625, Application G 15818 is approved and a permit shall issue.

DATED this __ day of XXXX, 2004

Phillip C. Ward, Acting Director
Oregon Water Resources Department



STATE OF OREGON

COUNTY OF CLACKAMAS

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS **DRAFT** PERMIT IS HEREBY ISSUED TO

COLONY NURSERY INC.
28889 S NEEDY RD
CANBY, OREGON 97013

The specific limits and conditions of the use are listed below.

APPLICATION FILE NUMBER: G-15818

SOURCE OF WATER: TWO WELLS IN BEAR CREEK BASIN

PURPOSE OR USE: NURSERY USE ON 37.0 ACRES

MAXIMUM RATE: 0.891 CUBIC FOOT PER SECOND (CFS); 0.891 CFS OCTOBER 1 THROUGH JULY 31 AND SEPTEMBER 1; 0.71 CFS AUGUST 1 THROUGH AUGUST 31; AND 0.67 CFS SEPTEMBER 1 THROUGH SEPTEMBER 30

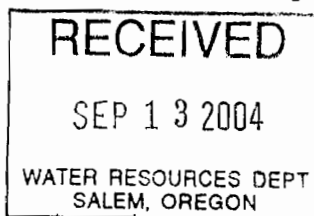
PERIOD OF USE: YEAR ROUND

DATE OF PRIORITY: AUGUST 12, 2002

WELL LOCATIONS:

WELL 1 (CLAC 12582): NW $\frac{1}{4}$ SW $\frac{1}{4}$, SECTION 28, T4S, R1E, W.M.; 1620 FEET NORTH & 850 FEET EAST FROM SW CORNER, SECTION 28
WELL 3: SE $\frac{1}{4}$ SE $\frac{1}{4}$, SECTION 29, T4S, R1E, W.M.; 600 FEET NORTH & 200 FEET WEST FROM SE CORNER, SECTION 29

The amount of water used for nursery use is limited to a maximum of 5.0 acre feet per acre and a diversion of 0.15 cubic foot per second per acre. For irrigation of containerized nursery plants, the amount of water diverted is limited to one fortieth of one cubic foot per second and 5.0 acre feet per acre per year. For irrigation of in-ground nursery plants the amount of water diverted is limited to one eightieth of one cubic foot per second and 2.5 acre feet per acre per year. The use of water for nursery use may be made at any time, during the period of allowed use specified above, that the use is beneficial. For irrigation of any other crop, the amount of water diverted is limited to one eightieth of one cubic foot per second and 2.5 acre feet per acre during the irrigation season of each year.



THE PLACE OF USE IS LOCATED AS FOLLOWS:

SE ¼ SW ¼ 0.85 ACRE
NE ¼ SE ¼ 1.00 ACRE
SW ¼ SE ¼ 17.65 ACRES
SE ¼ SE ¼ 17.50 ACRES

SECTION 29

TOWNSHIP 4 SOUTH, RANGE 1 EAST, W.M.

Measurement, recording and reporting conditions:

- A. Before water use may begin under this permit, the permittee shall install a meter or other suitable measuring device as approved by the Director. The permittee shall maintain the meter or measuring device in good working order, shall keep a complete record of the amount of water used each month and shall submit a report which includes the recorded water use measurements to the Department annually or more frequently as may be required by the Director. Further, the Director may require the permittee to report general water use information, including the place and nature of use of water under the permit.
- B. The permittee shall allow the watermaster access to the meter or measuring device; provided however, where the meter or measuring device is located within a private structure, the watermaster shall request access upon reasonable notice.

CLAC 12582 well shall be cased and sealed to a depth of 63 feet below land surface.

To monitor the effect of water use from the well(s) authorized under this permit, the Department requires the water user to make and report annual static water level measurements. The static water level shall be measured in the month of March. Reports shall be submitted to the Department within 30 days of measurement.

Measurements must be made according to the following schedule:

Before Use of Water Takes Place

Initial and Annual Measurements

The Department requires the permittee to submit an initial water level measurement in the month specified above once well construction is complete and annually thereafter until use of water begins; and

After Use of Water has BegunSeven Consecutive Annual Measurements

Following the first year of water use, the user shall submit seven consecutive annual reports of static water level measurements. The first of these seven annual measurements will establish the reference level against which future annual measurements will be compared. Based on an analysis of the data collected, the Director may require that the user obtain and report additional annual static water level measurements beyond the seven year minimum reporting period. The additional measurements may be required in a different month. If the measurement requirement is stopped, the Director may restart it at any time.

All measurements shall be made by a certified water rights examiner, registered professional geologist, registered professional engineer, licensed well constructor or pump installer licensed by the Construction Contractors Board and be submitted to the Department on forms provided by the Department. The Department requires the individual performing the measurement to:

- (A) Identify each well with its associated measurement; and
- (B) Measure and report water levels to the nearest tenth of a foot as depth-to-water below ground surface; and
- (C) Specify the method used to obtain each well measurement; and
- (D) Certify the accuracy of all measurements and calculations submitted to the Department.

The water user shall discontinue use of, or reduce the rate or volume of withdrawal from, the well(s) if annual water level measurements reveal any of the following events:

- (A) An average water level decline of three or more feet per year for five consecutive years; or
- (B) A water level decline of 15 or more feet in fewer than five consecutive years; or
- (C) A water level decline of 25 or more feet; or
- (D) Hydraulic interference leading to a decline of 25 or more feet in any neighboring well with senior priority.

The period of non or restricted use shall continue until the annual water level rises above the decline level which triggered the action or until the Department determines, based on the permittee's and/or the Department's data and analysis, that no action is necessary because the aquifer in question can sustain the observed declines without adversely impacting the resource or senior water rights. The water user shall in no instance allow excessive decline, as defined in Commission rules, to occur within the aquifer as a result of use under this permit. If more than one well is involved, the water user may submit an alternative measurement and reporting plan for review and approval by the Department.

STANDARD CONDITIONS

If the number, location, or construction of any well deviates from that proposed in the permit application or permit conditions, the conclusions of the Proposed Final Order and Final Order under which this permit was granted may be revised, conditions may be appropriately revised, or this permit may not be valid.

If substantial interference with a senior water right occurs due to withdrawal of water from any well listed on this permit, then use of water from the well(s) shall be discontinued or reduced and/or the schedule of withdrawal shall be regulated until or unless the Department approves or implements an alternative administrative action to mitigate the interference. The Department encourages junior and senior appropriators to jointly develop plans to mitigate interferences.

The wells shall be constructed in accordance with the General Standards for the Construction and Maintenance of Water Wells in Oregon. The works shall be equipped with a usable access port, and may also include an air line and pressure gauge adequate to determine water level elevation in the well at all times.

Where two or more water users agree among themselves as to the manner of rotation in the use of water and such agreement is placed in writing and filed by such water users with the watermaster, and such rotation system does not infringe upon such prior rights of any water user not a party to such rotation plan, the watermaster shall distribute the water according to such agreement.

Prior to receiving a certificate of water right, the permit holder shall submit the results of a pump test meeting the department's standards, to the Water Resources Department. The Director may require water level or pump test results every ten years thereafter.

Failure to comply with any of the provisions of this permit may result in action including, but not limited to, restrictions on the use, civil penalties, or cancellation of the permit.

This permit is for the beneficial use of water without waste. The water user is advised that new regulations may require the use of best practical technologies or conservation practices to achieve this end.

By law, the land use associated with this water use must be in compliance with statewide land-use goals and any local acknowledged land-use plan.

The use of water shall be limited when it interferes with any prior surface or ground water rights.

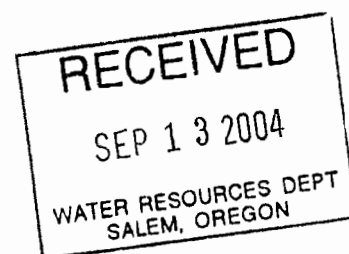
Complete application of the water to the use shall be made on or before October 1, 2008. If the water is not completely applied before this date, and the permittee wishes to continue development under the permit, the permittee must submit an application for extension of time, which may be approved based upon the merit of the application.

Within one year after complete application of water to the proposed use, the permittee shall submit a claim of beneficial use, which includes a map and report, prepared by a Certified Water Rights Examiner (CWRE).

Issued _____, 2004

--D R A F T --

Phillip C. Ward, Acting Director
Water Resources Department



ASSIGNMENT OF PERMIT: Pursuant to ORS 537.220, this permit may be assigned to a party other than the permittee named hereon, if the land the permit is associated with changes ownership, or if the permittee is an organization whose name changes as a result of sale or merger. Request for Assignment forms are available from the Oregon Water Resources Department web site at <http://www.wrd.state.or.us/>, or may be requested from the Department at 503-986-0801 or Water Right Application Section, Oregon Water Resources Department, 725 Summer St NE Ste A, Salem OR 97301-1271.

MAILING ADDRESS CHANGES: If the mailing address of the permittee named hereon changes, it is important that the Oregon Water Resources Department be informed of the change. Address changes must be submitted in writing with the permittee's signature to Water Right Application Section, Oregon Water Resources Department, 725 Summer St NE Ste A, Salem OR 97301-1271.

REAL ESTATE TRANSACTIONS: Pursuant to ORS 537.330, in any transaction for the conveyance of real estate that includes any portion of the lands described in this permit, the seller of the real estate shall, upon accepting an offer to purchase that real estate, also inform the purchaser in writing whether any permit, transfer approval order, or certificate evidencing the water right is available and that the seller will deliver any permit, transfer approval order or certificate to the purchaser at closing, if the permit, transfer approval order or certificate is available.

CULTURAL RESOURCES PROTECTION LAWS: Permittees involved in ground-disturbing activities should be aware of federal and state cultural resources protection laws. ORS 358.920 prohibits the excavation, injury, destruction or alteration of an archeological site or object, or removal of archeological objects from public and private lands without an archeological permit issued by the State Historic Preservation Office. 16 USC 470, Section 106, National Historic Preservation Act of 1966 requires a federal agency, prior to any undertaking to take into account the effect of the undertaking that is included on or eligible for inclusion in the National Register. For further information, contact the State Historic Preservation Office at 503-378-4168, extension 232.