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January 16, 2006

VIA FACSIMILE (503) 986-0903 AND E-MAIL

Mr. Bill Fuji
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271

Re: Comments of Miami Corporation in Response to City of Lincoln City's Request That The Commission Reserve Water of Treat River For Multi-purpose Storage

Dear Mr. Fuji:

Miami Corporation ("Miami") submits these comments in response to a public notice (the "Notice") issued by the Water Resources Department (the "Department"). The public notice seeks comments concerning the City of Lincoln City's (the "City") request that the Water Resources Commission (the "Commission") initiate a rulemaking to reserve for multi-purpose storage for future economic development the waters of three water sources (the "Request"). According to the Notice, written comments via mail, facsimile, or e-mail must be received by 5:00 PM January 16, 2006. These comments are timely submitted.

I. MIAMI'S INTEREST IN THE REQUEST

Treat River, which runs through private property owned and actively managed by Miami as part of its commercial timberland operations, is one of the water sources the City seeks to have the Commission reserve. The Request mentions that the City has previously filed two water right applications (S-73409 and R-73407) affecting Treat River (the "Treat River Applications"). However, the Request does not acknowledge that for over a decade the City and Miami have been parties to an unresolved contested case proceeding concerning the Treat River Applications, which, if approved, would give the City water rights necessary to construct an earthen dam and reservoir on Miami's property (the "Treat River Contested Case"). The City's decision not to inform the Commission of this important background and context is emblematic of the City's approach throughout its attempt to develop a municipal storage project on Treat River (the "Treat River Project").

EXHIBIT D
PAGE 1 OF 20

Miami's experience protesting the Treat River Applications is the foundation for its interest in the Request. The Treat River Project would likely inundate 45 acres of Miami's timberlands, and directly affect at least another 30 acres of Miami's timberlands through additional regulation under the Oregon Forest Practices Act (the "FPA") that would become applicable upon construction of a drinking water reservoir.[1] *See* OAR 629-620-0400 (FPA water protections rules for chemical applications). The construction of a reservoir to store water for human consumption also is likely to affect Miami's ability to actively manage the approximately 1,000 acre watershed of adjacent timberlands due to perceived concerns, founded or not, over water quality impacts to drinking water from timberland management operations.[2] (*See* map attached as Exhibit A). Equally important is that Miami has a limited land base on which to conduct an economically viable forest products business, with few to no options for replacing property lost to a reservoir. The impact of the Treat River Project on Miami as a contributor to the local economy may well stretch beyond the direct loss of acreage to a drinking water reservoir. Finally, Miami also believes the Treat River Project (located near a fault line, and on a sensitive stream system) would create an unacceptable risk to human life and cause unnecessary environmental damage. For these reasons, described in more detail below, Miami continues to oppose the City's plan to construct a dam and reservoir on its property.

The following sections of these comments provide the Commission background and context not provided by the City in its Request, and argues that whatever action the Commission may take in response to the Request, the Commission must restrain or condition its actions so as

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[1] The City's reservoir application (R-73407) stated that it intended to construct a 116-foot earthen dam on Treat River that would inundate 33 acres and have a maximum depth of 102 feet. The City did not provide plans and specification to support those statements, and Miami believes that the actual dam height would be closer to 120 feet and inundate approximately 45 acres, of which 43 acres are on Miami's property. (*See* Exhibit A).

[2] The impacts of timberland management on water quality are complex and often uncertain. The same cannot be said for the regulatory impact of having a drinking water source near timberlands. The Oregon Forest Practices Act (the "FPA") and its regulations are most stringent when it comes to the types of management allowed near such water bodies, and public concerns over the issue of water quality often extend to activities beyond the already significant and protective buffers and setbacks required by the FPA. Exhibit A demonstrates the effect of applying a 100-foot buffer around a drinking water source, OAR 629-620-0400(6), and the boundaries of the watershed likely affected.

not to prejudice Miami's position in the Treat River Contested Case, or any subsequent proceedings concerning Treat River.

II. THE TREAT RIVER CONTESTED CASE

As noted above, the Request does not acknowledge that the Treat River Applications are the subject of the unresolved Treat River Contested Case. Miami believes that the Commission should be fully informed of the issues and status of the Treat River Contested Case as it considers the Request, and, accordingly, provides this summary.

On May 19, 1993, the City filed the Treat River Applications proposing to appropriate and store water for municipal use. The City's surface water right application sought to appropriate 9.0 cubic feet per second (cfs) from the Salmon River for storage in an upstream reservoir on Treat River that would impound 1,250 acre-feet per year behind a 116-foot earthen dam. The Treat River Project would be constructed on lands owned by Miami and Mrs. Dorothy Northrup; however, neither party had granted the City permission to use their property.

On September 15, 1994, Miami filed comments opposing the reservoir application, stating that it would not allow the City to inundate its property and noting the City's failure to submit dam plans and specifications required by OAR chapter 690, division 11. On December 5, 1995, the Department issued Proposed Final Orders ("PFOs") proposing to approve the Treat River Applications pending satisfaction of certain conditions, including the submission of plans and specifications for construction of the dam and an agreement with the Oregon Department of Fish and Wildlife ("ODFW") regarding fish screening and by-pass devices.

In January 1996 the City and Miami each filed protests to the PFOs. The City protested both PFOs' conditions of approval related to the submission of plans and specifications and related to ODFW's mandated approval of fish screening and by-pass devices. Miami protested the reservoir PFO on a number of grounds, including, (1) the City's failure to obtain additional permits required to build the proposed reservoir and dam, (2) its failure to provide substantial evidence of available water for storage, and (3) its failure to obtain an easement or other permission to use Miami's property. In addition, Miami explained that it owns the land to be submerged by the reservoir as well as the surrounding timberlands, which it holds and manages as a sustained yield commercial tree farm and on which it conducts timber harvest operations. Approval of the City's proposed reservoir would inundate prime commercial timberlands that are critical to Miami's business operations. The proposed reservoir also had the potential to affect Miami's ability to manage as much as 1,000 acres of its remaining timberlands, because water

quality concerns could be invoked to restrict or prohibit Miami's timber management and harvesting operations on the watershed surrounding the reservoir.

Mrs. Northrup also filed a protest of the reservoir PFO.[3] The City had proposed to construct the dam on her property just above her home. Mrs. Northrup expressed particular concern that the dam site lies along a fault line and, if constructed, would pose an unacceptable risk to her home and life. (*See* map attached as Exhibit B). As noted, the Treat River Applications did not include plans and specifications for the dam, much less an appropriate geological study to address Mrs. Northrup's concerns.

On March 19, 1996, ALJ Weisha Mize issued a Notice of Contested Case Hearing, scheduling a hearing on the parties' protests for September 12, 1996. Since March 1996, the contested case hearing has been postponed or rescheduled no fewer than eight times, frequently, and most recently, at the City's request. After the City's first request for a continuance on August 16, 1996, on the basis of a potential settlement with the protestants, many of the subsequent requests were premised on the City's claim that it was pursuing an alternative reservoir site on Rocky Creek in conjunction with the City of Newport. The City argued that a hearing on the Treat River Applications would be premature and a waste of judicial resources because the alternative site would eliminate any need to pursue the Treat River Applications. The ALJ granted each request for a continuance, and Miami agreed to the continuances because the City, through its attorney at the time, repeatedly represented that it would withdraw the Treat River Applications if it succeeded in securing the alternative site. (*See* example letter attached as Exhibit C).

In 1999, while the contested case hearing was pending after the seventh continuance, the Oregon legislature passed House Bill 2525, establishing a Hearing Officer Panel as a pilot project to hear contested cases from all but certain enumerated state agencies. Or Laws 1999, ch 849. The 1999 act required the Department to use hearing officers assigned from the Hearing Officer Panel to conduct contested case hearings. Or Laws 1999, ch 849, § 9(1). The Department was also required to transfer to the Hearing Officer Panel "the permanent employees

[3] Although Mrs. Northrup was not timely notified of the City's applications or the PFOs, upon learning of the contemplated reservoir and dam, Mrs. Northrup filed a protest of the reservoir PFO in March 1997. Her protest identified as errors and deficiencies in the PFO and PFO process the City's failure to notify Mrs. Northrup of the proposed project, the City's failure to submit final plans and specifications for the proposed project, the possible conflict with existing water rights, and other issues.

EXHIBIT D
PAGE 4 OF 20

in the regular service of the [Department] whose job duties involve the conducting of contested case proceedings." *Id.* § 17(1). In addition, on the operative date of the act, the chief hearing officer for the Hearing Officer Panel was to assign hearing officers "to continue the conduct of and conclude proceedings pending on the operative date" of the act. *Id.* § 18.

In 2003, the legislature eliminated the sunset provision of the 1999 act, changed the name of the panel to the Office of Administrative Hearings (the "OAH"), and required all state agencies, except those now listed in ORS 183.635, to delegate responsibility for the conduct of a contested case hearing to an ALJ assigned from the OAH. HB 2526, Or Laws 2003, ch 75, § 6. HB 2526 became effective on May 22, 2003. The Department is one of the agencies required to use ALJs from the OAH.

Since the legislature created the OAH, the City has not caused the Treat River Contested Case to be heard. The City has made no effort to prosecute the case since the last continuance it requested expired on December 27, 2002. This inattention to the case raises additional procedural issues and may ultimately require dismissal of the Treat River Contested Case and denial of the Treat River Applications. In addition, it is unclear from Miami's records or the Department's records whether the Treat River Contested Case was ever properly assigned to the OAH. Nothing in those records demonstrate that the Department ever requested that the OAH hear the case, and according to the Department the OAH has no record of the Treat River Contested Case. Nevertheless, the most recent continuance in the record, setting the hearing date for December 27, 2002, is captioned as being from the OAH, and is signed by ALJ Mize.

To date, the Department has been unable to determine the procedural status of the case. ALJ Mize has retired, making resolving questions concerning the status of the case more difficult. Notwithstanding the procedural uncertainties surrounding the status of the Treat River Contested Case, the underlying substantive issues remain. Miami's protest of the proposed reservoir and dam is unresolved and presents more than one valid basis for rejecting the Treat River Applications.

III. THE SETTLEMENT

In August of 2005, the Department and the City, among others, entered into a Supplemental Settlement Agreement (the "Settlement") that resolved protests concerning municipal use of Drift Creek (the "Drift Creek Applications"). While much of the Settlement is devoted to resolving specific issues raised in the protests to the Drift Creek Applications, the Settlement also includes an agreement that the City will study ways to make its water use more

efficient, anticipates the creation of a Municipal Water Management and Conservation Plan by the City, and includes an agreement by the City "to construct and put into operation an additional two million gallons of water storage by December 31, 2020." (Settlement, ¶¶ 19, 20, and 22 at 10-11). The two million gallons of water storage is in addition to another two million gallons of storage that the City agreed to construct in the Settlement Agreement that the Settlement supplements. Thus the City has agreed to construct four million gallons of storage in an as yet unspecified location.

Miami is not a party to the Settlement,[4] and the Settlement does not resolve the Treat River Contested Case. However, as part of the Settlement, the parties agreed that the City would request that the Commission reserve for multi-purpose storage for future economic development unappropriated water of three water sources; Rock Creek, Side Creek, and Treat River. (Settlement, ¶¶ 25 and 27 at 12-13). The City further agrees that if the Commission establishes the reservation as requested, then the City will withdraw the Treat River Applications. (Settlement, ¶ 25 at 12.) The Protestants agree to support the reservation request for Treat River, and the Department agrees to recommend that the Commission initiate a rulemaking and approve the reservation as requested by the City. (Settlement, ¶ 30 at 13). The form and substance of the Request ultimately sent to the Department and the Commission was agreed to as part of the Settlement. (Settlement, Exhibit J).

Miami is troubled by the agreements made in the Settlement about an area in which none of the parties own or appear to have any interest in the property affected. The parties agree, without consulting any affected landowner, to support the Request. This is most troubling with respect to the Department agreeing to recommend to the Commission that it initiate a rulemaking and approve the Request. The result is that the Department has tied its hands and cannot analyze the Request as additional information becomes available through these comments and through the public process required in the rulemaking. It also precludes itself from participating in the public interest review of the Request required by ORS 537.358(1). The upshot is that in any rulemaking in response the Request, the Commission will be left without its expert staff to

[4] The parties to the Settlement are the City and Kernville-Gleneden Beach Water District (the "District") (collectively the "Applicants"), Water Watch of Oregon, Oregon Council of Trout Unlimited, Northwest Environmental Defense Center, Salmon Drift Creek Watershed Council, Confederated Tribes of the Siletz Indians of Oregon, MidCoast Watersheds Council, and three individuals; Paul Katen, Wayne Hoffman, and Diane Henkels (collectively the "Protestants"). Signatories to the Settlement are the Applicants, the Protestants, the Department, and the Oregon Department of Fish and Wildlife.

EXHIBIT D
PAGE 6 OF 20

analyze the Request and to evaluate whether the Request is in the public interest. That leaves only non-parties to the Settlement, such as Miami, to inform the Commission of any concerns or disagreements about the Request. This feature of the Settlement alone should give the Commission pause to consider whether the Settlement is valid as a matter of law, or wise as a matter of public policy.

IV. THE REQUEST

The Request continues a pattern of obfuscation and incomplete analysis endemic to the City's approach to developing the Treat River Project. In the Treat River Applications, the City attempted to gloss over significant risks posed by the Treat River Project. In the Request, the City completely passes over the existence of, and the issues raised in, the Treat River Contested Case. Nearly every section of the Request ignores important information. The Request's thin treatment of important issues is particularly troubling given the scope of the Request. The City is understandably concerned about securing an adequate water supply to meet projected growth in and around the City. Yet the City's need to plan for the future is not in itself a justification for reserving water, and the Request is inadequate to justify the action the City seeks from the Commission.

The Commission should consider carefully the information provided in the Request, in Miami's comments, and in any other comments submitted, all in the context of the Commission's policies for water management and development.[5] In particular, the Commission

[5] The Request is organized around the information requirements of OAR chapter 690, division 79. *See* OAR 690-079-0060. Division 79 is titled "Reservations of Water for Future Economic Development." These rules, which were last amended in 1993, were drafted to implement the reservation statute then in effect, *former* ORS 537.356, and do not recognize the ability of a local government such as the City to make a reservation request. OAR 690-079-0010(1)(division 79 rules establish "the procedure for *state agencies* to request reservations of water for future economic development") (emphasis added). In 1997, the Oregon legislature amended ORS 537.356 to allow local governments to request reservations. Oregon Laws 1997, ch 445, § 1. The division 79 rules, which contemplate a contested case process for reservations of water, are now out of date and do not apply to the City's Request. Miami understands from conversations with Department staff that the Commission now uses its rules for amending basin plans, OAR chapter 690, division 500, to reserve water for particular uses. This process is governed largely by the rulemaking provisions of the Oregon Administrative Procedures Act (the

should not entertain a reservation request that is not consistent with its own state water policies. *See* OAR 690-400-0000(1)(c) (Commission shall adopt rules compatible with State Water Resources Policy in Divisions 400 and 410). The Commission's water storage policies are particularly instructive here. OAR 690-410-0080. It is the Commission's policy that the state will reserve unappropriated water for future economic development for "high priority" storage projects. OAR 690-410-0080(1)(c). To be "high priority" a project must "protect and enhance the public health, safety and welfare, and the state's natural resources." OAR 690-410-0080(1)(d). Moreover, in reviewing the Request, the Commission should look to its own criteria for evaluating storage projects, which include the following factors:

(A) Purpose (e.g., type, location and extent of use, benefits);

(B) Legal (e.g., state, federal and local legal requirements);

(C) Social (e.g., recreational, public support, cultural, historic);

(D) Technical (e.g., siting issues, public safety and structural integrity);

(E) Financial (e.g., project financing including site costs, cost sharing and repayment, and operating, maintenance and rehabilitation costs);

(F) Economic (e.g., project benefit/cost analysis);

(G) Land use (e.g., ownership, comprehensive plans, coordination);

(H) Environmental (e.g., impacts on streamflows, fisheries, wildlife, wetlands, habitat, biological diversity, water quality and opportunities for mitigation);

(I) Other (e.g., direct and indirect impacts).

OAR 690-410-0080(2)(g). Miami believes that the Request, compared against the Commission's policies and criteria, fails to make the case for a reservation. The following subsections highlight some areas in which Miami believes the Request fails. These comments

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"APA"), ORS 183.325-.355. See ORS 536.027(1) (Commission to adopt rules in accordance with the APA).

are by no means exhaustive, however, and Miami urges the Commission to be probing with the City as it considers the Request.

A. The Request Fails to Adequately Inform the Commission of The Need For or Purpose of a Treat River Reservation.

As a threshold matter, the Commission should consider whether the City's Request to reserve water for its future municipal needs is consistent with current legislative policy on municipal water development. In particular, the Commission should consider the Request in light of the legislature passing House Bill ("HB") 3038, which extends from 5 to 20 years the time a municipality has to develop a municipal water right permit. As the Commission well knows, municipalities tend to plan their water needs on horizons of 20 years or more, and often desire to establish priority to water that they cannot develop within 5 years. After HB 3038, if the City were to apply for and obtain a municipal water right permit, it would establish its priority to the water and have 20 years in which to develop the works necessary to perfect the water right. Even if 20 years were not enough, the City could extend the permit. Thus under current law the City could apply for a water right permit and have 20 years or more to implement its water development plans. In light of this change in the law and legislature's policy decision to grant municipalities the breathing space they need within the water right permit process, it is questionable whether the Request provides any benefit to the City. On the other hand, not pursuing the Request has the distinct benefit of relieving the Commission, the Department, and the public of the need to expend considerable resources in a public rulemaking for what is essentially a private request.

Legislative policy considerations aside, the Request is inadequate on it face to demonstrate a sufficient need or purpose for the Treat River reservation. The Request does nothing more than paraphrase the purpose of the reservation statute, ORS 537.356; that is, to provide anyone, including the City, the ability to apply for a water right at some future date for multi-purpose storage. The City's benign statement of purpose obscures what arguably is its true purpose—to lay the foundation for the City to develop a single-purpose municipal storage project on Miami's property. *See* OAR 690-410-0080(1)(h) (multi-purpose storage is preferred over single-purpose storage). Indeed, it stretches the imagination too far to think that the City would expend resources to reserve water it does not see as important, if not critical, to its development plans.

The Commission should require the City to justify the need and purpose for the Treat River reservation. Specifically, the City should provide the Commission with an analysis of how

the Treat River reservation fits with its projected municipal water needs and larger municipal water development plans. The Settlement makes clear that the City is pursuing many other development options, and the City has committed to studying ways to increase water efficiency and to developing a Municipal Water Management and Conservation Plan. Yet the Request provides no information on how the Treat River reservation fits with these plans in terms of the benefits it will provide, when the City might need the reservoir contemplated by the Request, and to what extent Treat River is necessary to the meet the City's projected water requirements. The City must provide that information for the Commission, and the public in a rulemaking, to evaluate the whether the Request is consistent with the Commission's policies and in the public interest.

B. The Request Fails to Inform the Commission of Significant Legal Issues.

The Request is completely silent when it comes to legal issues facing development of a storage project on Treat River. As Miami's comments demonstrate, the City, or any other applicant, will face significant legal issues in attempting to develop a storage project on Treat River. For example, the Treat River Contested Case will need to be resolved, and Miami will oppose any application filed to develop a similar project. Also significant is that those who own the property on which the Treat River Project would mostly likely be sited will not grant rights to the land. That means the City will need to condemn the property. Moreover, the City must obtain a variety of permits and approvals to site and construct a reservoir, including water rights, ODFW and Department of Environmental Quality approvals, Army Corps permits, county land use approvals, and possibly federal Endangered Species Act permits. Other approvals may also be required. Miami, and possibly other landowners and public interest groups, will oppose these permits and approvals. Thus it is clear that the City, or any applicant, will face significant legal hurdles to take advantage of a reservation of Treat River water. The Commission should consider whether it is in the state's interest to reserve water where such opposition and clear legal hurdles exist.

C. The Request Fails to Inform the Commission of Public Support and Other Cultural Issues.

The Request is silent on whether a multi-purpose storage project on Treat River has public support or must address other cultural issues. For example, the Request provides no information about how the Request is viewed by landowners and residents affected by the Request. With respect to Treat River, in addition to Miami's and Mrs. Northrup's opposition, it is likely that the dozens of residential landowners and businesses downstream on the Treat River

and Salmon River would have pointed views about the City's Request and the possibility of a dam built on a fault line upstream of their homes and property. The Commission does not have the benefit of those views, however, because the City has not informed those interested parties of the Request or attempted to gauge public support for the Request. The Commission should require the City to develop and provide this information to the Commission before making a decision on the Request.

D. The Request Fails to Inform the Commission of Significant Technical Issues.

As mentioned above, the location the City identifies for a Treat River reservation and storage project is the same location it identified in the Treat River Applications. Also as mentioned above, that location lies near a fault line that poses a significant technical issue with respect to dam construction.[6] (*See* Exhibit B). What is more, the Request does not provide the Commission with enough information to evaluate the technical challenges of the Treat River Project. Where, for example, would the City divert water for the reservoir? The Treat River Applications identified a point of diversion downstream on Salmon River. In addition, how does the City propose to deliver the water to its municipal system miles away? Will it need to construct a pipeline? If so, what would be the size, route, and technical challenges, not to mention the legal and economic feasibility, of doing so? These are just some of the technical issues the City did not address in the Treat River Applications, has not addressed in the Treat River Contested Case, and now fails to even recognize in the Request. The Commission should require the City to provide appropriate documentation of plans and other technical specification, including geological studies and engineering opinions, that a dam, reservoir, and water delivery system can be safely and feasibly constructed in the location identified in the Request.

[6] Notably, there is evidence that the Oregon coast is particularly prone to earthquakes and associated tsunamis. In 1993, around the time the City filed the Treat River Applications, the Cascadia Subduction Zone was discovered, and western Oregon was upgraded from Seismic Zone 2B to Seismic Zone 3, indicating a potential of earthquakes up to magnitude 9 on the Richter Scale occurring, on average, every 500 years. The most recent such earthquake occurred more than 300 years ago. *See* The Oregon Department of Geology and Mineral Industries, Geologic Hazards on the Oregon Coast, *at* www.oregongeology.com/earthquakes/Coastal/CoastalHazardsMain.htm. Many of the environmental studies commissioned by the City for the Treat River Project predate the recognition of seismic vulnerability on the Oregon coast.

E. The Request Fails to Establish That the Treat River Reservation is Financially Feasible or Will Provide Economic Benefits.

The Request is also troubling in its failure to justify the Treat River reservation with respect to financial feasibility and economic benefits. To fully appreciate this failure, it is important to understand the significant costs and hurdles the City would face in developing a water storage project on Treat River. Of course, any public project of such magnitude would be expensive and include the cost of designing, constructing, and maintaining a reservoir. The cost of the Treat River Project, however, is likely to far exceed these normal costs due to opposition and technical challenges.

The cost of a storage project on Treat River will be higher than normal because it is certain that such a project will be opposed at every step. As Miami's and Mrs. Northrup's protests of the Treat River Applications demonstrate, any such application will be opposed and the City will be required to address serious concerns, including whether the Treat River Project is in the public interest, is protective of the environment and fish, and does not pose an unacceptable risk to human health and safety. Moreover, because Miami and Mrs. Northrup oppose a storage project on their land, the only way the City can obtain the land rights necessary to develop such a project is to condemn the land. This would require condemning not only the specific dam site and lands to be inundated by the reservoir (45 acres), but also buffers required by the FPA (30 acres at 100 feet), possibly other surrounding lands to secure and maintain the reservoir site, additional lands to ensure appropriate water quality for a drinking water source (1,000 or more acres of the watershed), and possibly lands downstream of the dam and reservoir on Treat River and Salmon River in response to dam safety concerns. (*See* Exhibit A). The value of such lands, given that they are either residential properties with homes, local businesses, or highly productive commercial timberlands, will represent a significant project cost. The project will be made more expensive by the certain contentious nature of judicial condemnation proceedings. Additional costs will be incurred at each stage of permitting a storage project in the location identified in the Request. For example, constructing a dam near a fault line that ensures public safety may be prohibitively expensive. The Request provides no information on these costs for the Commission to evaluate.

Even assuming the City could absorb the cost of constructing such a storage project, the Request provides no information on whether doing so is economic when compared to other water development options available to the City. As an example, in 1994, CH2M HILL completed an environmental feasibility analysis on four water supply options for the City (the "EFA"). Memorandum from Dan Heagerty & Bob Fuller, CH2M HILL, to John McKevitt, Lincoln City

EXHIBIT D
PAGE 12 OF 20

Public Works Department (Feb. 2, 1994). The EFA concluded that, of the available storage sites, Side Creek was most feasible, and that the Treat River reservoir "[s]hould not be advanced at this time." *Id.* at 6. The EFA reveals that, because of the distant location of the Treat River reservoir, the City could lose up to 25 percent of its water in transmission alone. Similar losses would not occur at the Side Creek reservoir. The EFA also indicates that the Treat River reservoir would "present relatively high costs for water treatment and delivery." *Id.* at 3. A cost/benefit analysis of developing storage on Treat River would be highly valuable to the Commission and the public, and the Commission should require the City to provide such an analysis before considering the Request.

F. The Request Fails to Inform The Commission of Significant Environmental Issues.

The Request is also silent concerning environmental impacts of a storage project on Treat River and Salmon River. Miami and ODFW have raised environmental concern over the Treat River Applications, and nothing in the Request suggests that similar concerns would not exist in any subsequent application. In particular, the impact of a storage project on resident and anadromous fish populations in Treat River and downstream in Salmon River must be considered. Clearly the potential environmental damage from dam failure must be addressed. Their also may be significant terrestrial environmental concerns associated with inundating forestlands to create a reservoir. The Commission should require the City to provide an analysis of environmental impacts before the Commission considers the Request.

G. Granting the Request May Waste Scarce Resources.

Finally, in the "other" category of factors the Commission should consider, it is important to recognize that acting on the Request may waste resources of the Commission and the Department better spent on other important water resource matters. That is so because the Request, with respect to Treat River, is little more than an attempt to sidestep the Treat River Contested Case and enlist the Commission in the City's plan to secure by rule what it has not secured through the Treat River Applications and Treat River Contested Case. This is evident in the Request itself. For example, the City requests that the Commission set aside the exact amount of water (1,250 acre-feet) that it seeks in the Treat River Applications.[7] (Request at 2).

[7] Section 1 of the Request sets forth certain "Terms and Conditions of the Requested Reservations," including: "A reservation of 1,250 acre-feet of unappropriated water from Treat River, a tributary to Salmon River, for multipurpose storage for future economic development."

EXHIBIT D
PAGE 13 OF 20

The Request also identifies the potential location of any application the City would file after a reservation as the same location identified in the Treat River Applications. (Request at 4). Most telling, however, is that the Request, and the Commission acting in accordance with the Request, is directly tied to the City's agreement in the Settlement to withdraw the Treat River Applications. No leap of logic is required to understand that the City is looking to have the Commission establish by rule a placeholder for the Treat River Project.

Setting aside for a moment the propriety of the Request, the result of the Commission agreeing to initiate a rulemaking will be to duplicate much of the effort involved in the Treat River Contested Case. What is more, it is not at all certain that granting the Request would lead to a withdrawal of the Treat River Applications and dismissal of the Treat River Contested Case. As is discussed above, the City agrees in the Settlement to withdraw the Treat River Applications if a rule is established reserving the exact amount of water, in the exact location, requested. If the Commission, after a full public process in the rulemaking, and after conducting the public interest review required by ORS 537.358(1), concludes that less than the full amount requested should be reserved, then the City is under no obligation to withdraw the Treat River Applications. Thus it is not unlikely that the Department's, the Commission's, and the public's time and effort in such a rulemaking would not serve to settle the issues on Treat River, and the Treat River Contested Case would proceed nonetheless. Finally, even if the Commission were to adopt a rule as the City requests, it is certain that Miami, and possibly others, would contest any subsequent application to construct a reservoir in the location identified in the Request. The result is that no matter how the Commission responds to the Request, it is likely the ultimate decision over development on Treat River will be made in a contested case, and much of the analysis and expenditure of resources required for the Commission to act on the Request will duplicate the expenditure of resources in a contested case hearing.

V. EFFECT OF REQUEST ON TREAT RIVER CONTESTED CASE

Miami respectfully cautions the Commission not to act on the Request in a way that prejudices Miami's position in the Treat River Contested Case, or prejudges any issues that might be raised in a challenge to any application filed after a reservation. Miami's concern stems from the parallels between the issues raised in the Treat River Contested Case and those the Commission must consider in evaluating the Request or in any rulemaking to reserve the water of Treat River. For example, Miami has raised significant technical, health and safety,

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(Request at 1-2). Application R-73407 to construct a reservoir on Miami's property seeks to impound 1,250 acre-feet of water.

EXHIBIT D
PAGE 14 OF 20

environmental, and public interest issues in the Treat River Contested Case. The Commission necessarily must consider those same issues to evaluate the Request. However, it is important to note that in the Treat River Contested Case those issues are focused on the specific applications and proposal at issue. While Miami believes the City is seeking to have the Commission reserve the water of Treat River to allow the City to develop the same Treat River Project at issue in the Treat River Contested Case, the Commission must consider the Request as it relates to all possible development options within the location on Treat River identified in the Request. It is important that in evaluating the Request and conducting a rulemaking, if any, the Commission not make findings of fact, conclusions or other statements that speak to unresolved issues in the Treat River Contested Case or that would prejudge issues that might be raised in a subsequent proceeding concerning multi-purpose storage on Treat River.

VI. CONCLUSION

In light of the foregoing, Miami respectfully requests that the Commission deny the Request and not initiate a rulemaking to reserve the water of Treat River. Miami urges the Commission to require the City to provide a complete analysis of any reservation request in terms of the Commission's state water management polices, as discussed above, before entertaining a request to reserve the water of Treat River.[8] Doing so is necessary to fully inform the Commission and the public of the pros and cons of a reservation request. If the City opts to provide a new, complete and adequate request, then the Commission should provide the public notice of the request and seek comment from all interested parties, including affected landowners.

Finally, Miami respectfully urges the Commission to consider carefully the relationship between the Request and the Treat River Contested Case. In the event that the Commission decides, now or in the future, to address a reservation request for Treat River before resolution of the Treat River Contested Case, the Commission should condition its action to make clear that its findings, statements, and conclusions concerning a reservation of water on Treat River are not binding on or otherwise to be used in any other proceeding concerning development of a storage project on Treat River. Failing to do so could improperly impinge on the contested case process and prejudice Miami and other parties to the Treat River Contested Case. Miami submits that the Commission, like all citizen policymaking bodies, should draw clear lines between its policy role and the adjudicative role of the Department and OAH. The Request asks the Commission to

[8] While Miami has confined its comments to the Request as it relates to Treat River, the policies discussed in these comments apply equally to the other water bodies in the Request, and the Commission should consider the entire Request in the context of those policies.

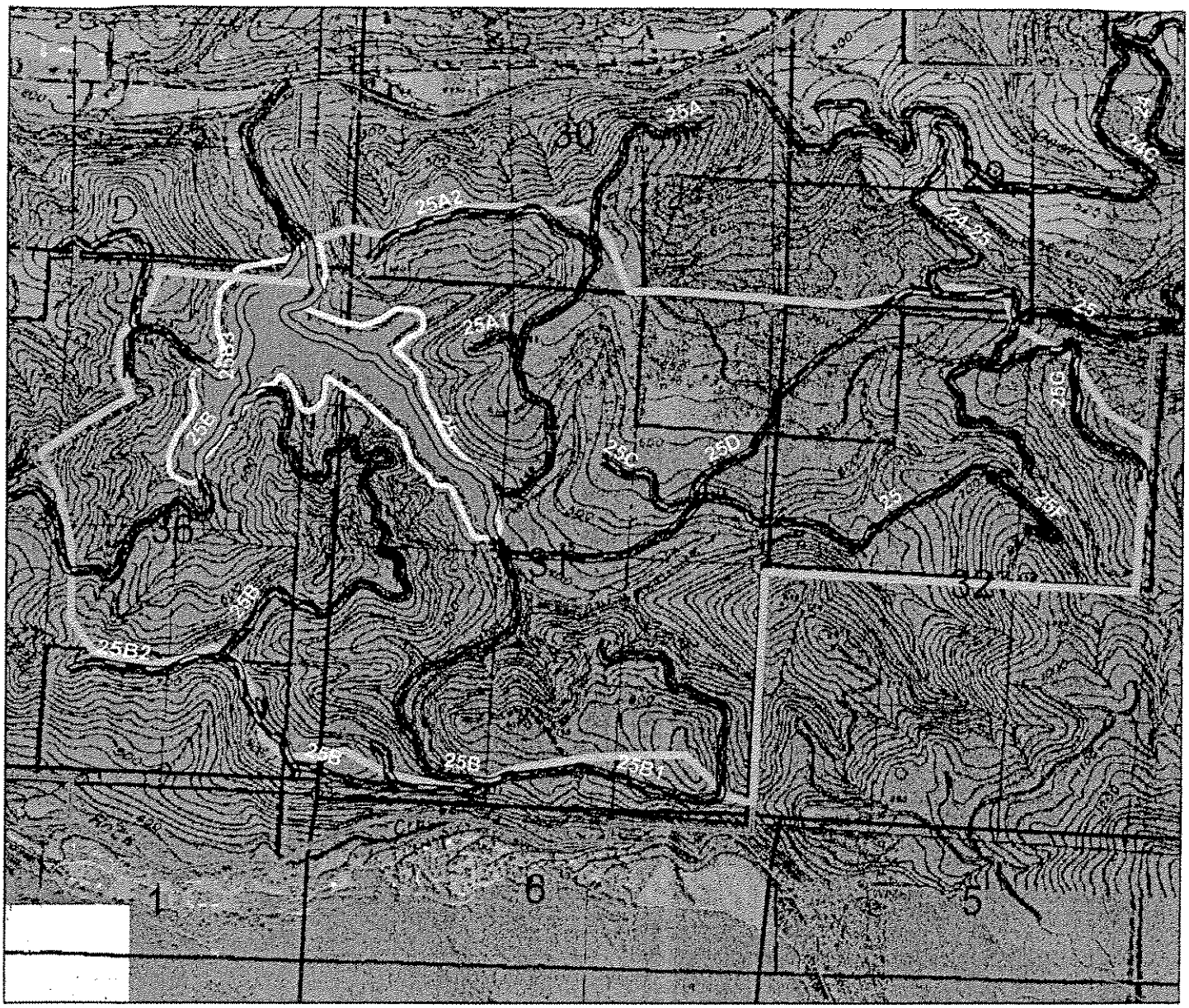
act in its policymaking role, and Miami requests that the Commission confine any action it may take to the policy arena.

Respectfully submitted,

Greg D. Corbin
Of Attorneys for Miami Corporation

cc: Mr. Allan Foutch, Manager (Miami Corporation)
Mr. John Rau, President (Miami Corporation)
Ms. Chris Long, Executive Vice President (Miami Corporation)
Mr. William H. Holmes (Stoel Rives LLP)
Mr. John McKevitt, Water Superintendent (Lincoln City)
Mr. Jeff Ring (Preston Gates & Ellis LLP)
Mrs. Dorothy Northrup
Mr. David Shannon

Miami Corporation
Treat River Proposed Dam



Legend

- Gravel Road
- ELE — Power Line
- Stream
- Property Line
- Section
- **Proposed Dam**
- Lake
- 100' Buffer
- Watershed
- Affected Roads

0 1,000 2,000 4,000 Feet

N

Lake Area

Total:
Lake = 45 Acres
Buffer = 30 Acres

Miami:
Lake = 43 Acres
Buffer = 26 Acres
Watershed = 1,006 Acres

EXHIBIT A

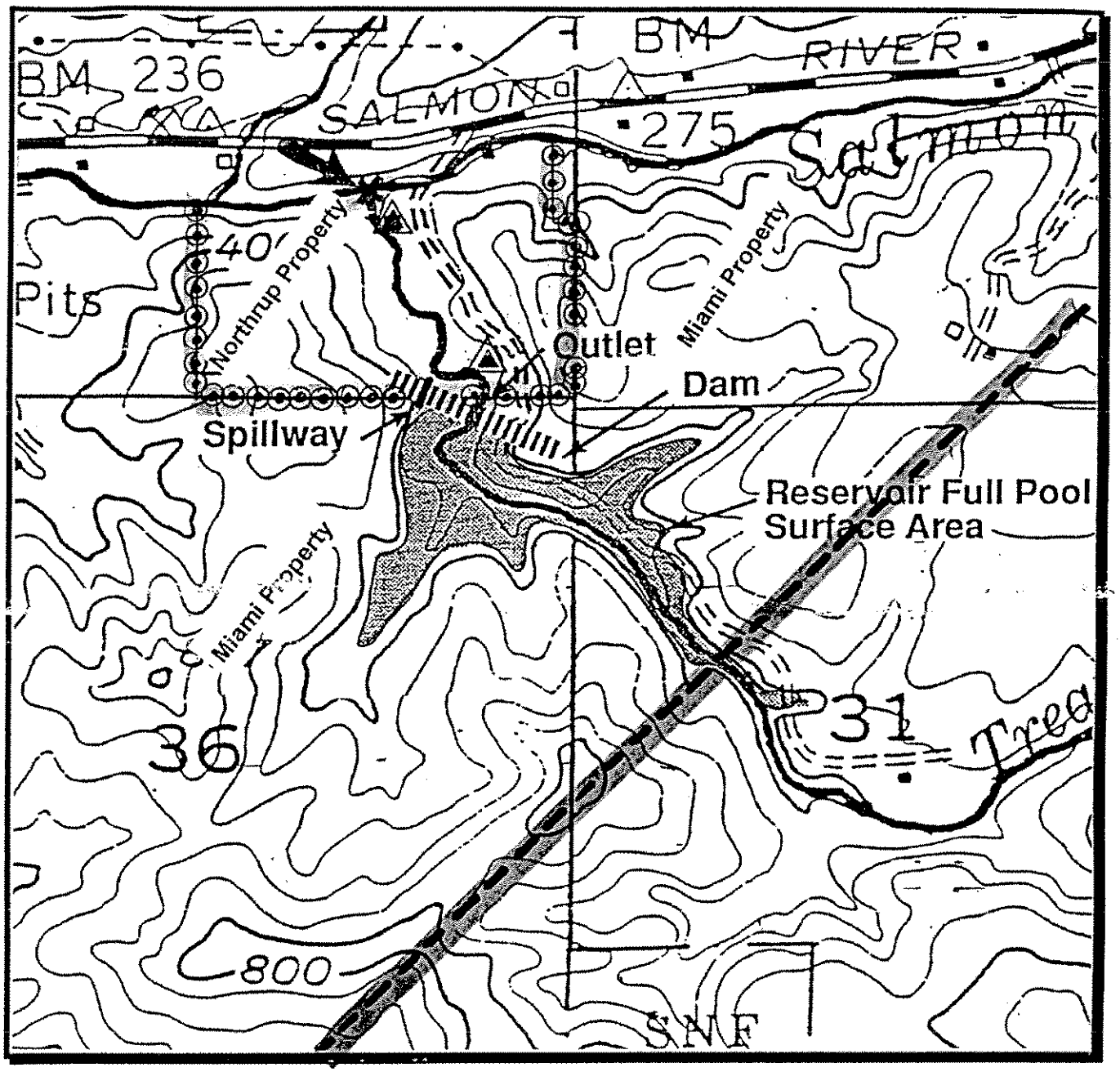
Created By: PWB
10/24/05

EXHIBIT D
PAGE 17 OF 20

MIAMI CORPORATION

Oregon Tree Farm at Grand Ronde

Treat River Map



-- Residences

-- Private Roadway

-- Property Line

-- Treat River Falls

-- Fault Line

EXHIBIT B

EXHIBIT D
PAGE 1 OF 20

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June 14, 2000

Weisha Mize, ALJ
Water Resources Department
158 12th Street NE
Salem, OR 97310

Re: In the Matter of Water Right Applications R-73407 and S-73409 in the name of the City of Lincoln City

Dear Ms. Mize:

In your Order dated December 7, 1999, you continued the contested case hearing in the referenced matter by 180 days. We are writing to request an additional 180-day continuance.

My letter to you of November 22, 1999 reported that the Cities of Newport and Lincoln City were recruiting other coastal communities to join an intergovernmental organization to develop the Rocky Creek project. Rocky Creek is intended as a regional water supply project, capable of serving all the coastal communities in Lincoln County. If successfully completed, Rocky Creek would replace the Treat River project as a long-term water source for Lincoln City. Thus, we have been asking your indulgence to defer a contested case hearing on the Treat River in order to allow Rocky Creek to develop. By doing so, we avoid needlessly using resources of the Department and the protestants.

Substantial progress has been made advancing the Rocky Creek Project. In addition to Newport and Lincoln City, three Lincoln County communities, the Cities of Yachats, Depoe Bay and Seal Rock, have adopted resolutions supporting formation of an intergovernmental entity under ORS Chapter 190. The purpose of the entity would be to develop, construct and operate the Rocky Creek Project. Three additional community water utilities are expected to consider similar resolutions within the next two weeks—the City of Toledo, the Kernville, Gleneden Beach and Lincoln Beach Water District, and the South Lincoln Water District.

During the next 180 days, we expect to achieve an executed intergovernmental agreement, form the new entity and resume the administrative process for securing water rights for Rocky Creek. We will also be meeting with state and federal resource agencies, as well as interested citizens, to identify and resolve issues

I have spoken with Renee Moulun, Bill Holmes and David Shannon, and none object to continuing the contested case hearing. For the reasons stated above, we respectfully request continuing the hearing for an additional 180 days. Thank you for your consideration.

Very truly yours,

Davis Wright Tremaine LLP

Richard M. Glick

RMG:jb

Cc Renee Moulun
Sharyl Kammerzell
Bill Holmes
David Shannon
David Hawker
Bob Fuller

EXHIBIT C

EXHIBIT D
PAGE 20 OF 20