

**Water Resources Commission Meeting
Hermiston, Oregon
May 5, 2006**

Testimony of Greg D. Corbin, Stoel Rives LLP

Good Morning Chair Thorndike and members of the Commission. My name is Greg Corbin. I am an attorney with Stoel Rives LLP in Portland, and I represent Miami Corporation in this matter. With me today is Allan Foutch, Manager of Miami's Oregon Tree Farm.

Miami has previously provided comments on Lincoln City's request that this Commission initiate a formal rulemaking to reserve certain waters of this state for multi-purpose storage. Miami's comments focus on Treat River because Miami owns the majority of the Treat River watershed, and because Miami opposes the City's plans to develop a municipal storage reservoir on Treat River, which under the current plan would inundate more than 40 acres of Miami's property and likely affect many more acres through added regulation. Miami opposes the request, but I want to underscore that Miami's comments and participation are driven by its desire to protect its property and business, not a desire to impede the City's municipal water planning efforts.

As you know from Miami's comments, Miami and the City have been involved in an unresolved water rights contested case for over a decade. The subject of that contested case is the City's applications to store water in a reservoir it proposes to construct on Miami's property. The contested case has been delayed and ignored for years by the City as it sought to secure other water for its municipal needs. Currently the status of that case is in question, but it remains unresolved. Miami is participating in this matter to preserve its rights in the unresolved contested case, and to preserve any errors on appeal from this matter, especially as they related to the contested case. It is Miami's position that the contested case, which touches on many of the issues raised by the City's request, should be resolved before this Commission entertains the request. Indeed, we believe there are significant legal and policy questions about whether the Department and the Commission should be acting on the request in light of the unresolved contested case. I also want to be clear that Miami does not waive any rights or arguments it has in that contested case by participating in this matter.

Miami also is participating in this matter because the settlement that lead to the City's request makes deals that affect Miami without involving Miami in the settlement process. Miami is particularly troubled by the willingness of the Department and the parties to agree to pursue a reservation of water that sets the stage for a government taking of Miami's property. The decision not to involve Miami in those discussions is unfortunate, because it has only hardened Miami's resolve to protect its property through this and other proceedings. What is more, Miami is uncomfortable with the role the Department has played here. While I understand that the Department is authorized to facilitate the settlement of contested cases, in the settlement that brings us here today the Department appears to have crossed the line from facilitator to advocate. You have already heard the Staff Report recommending that you initiate a rulemaking on the request. That recommendation cannot be a surprise given that the Department is required to make that recommendation under the terms of the settlement. As a result, I believe what is missing from the Staff Report is a careful analysis of Miami's comments, or even a full presentation of those comments to this Commission. I therefore will quickly outline three major topics in Miami's comments.

Miami's comments asks this Commission to consider carefully the criteria that the Commission should apply in evaluating a request for a water reservation, the propriety of a reservation request that touches on issues in an unresolved contested case, and the role of a reservation request post-House Bill 3038.

Miami asks this Commission to consider which criteria it will apply in evaluating the City's reservation request. As Miami discusses in its comments, this Commission has specific water policy rules that address when water should be reserved for storage through a rulemaking. In short, the reservation should be for "high priority" storage. The Commission's rules also provide specific criteria for evaluating whether a storage project is "high priority." Miami discusses the City's request in terms of those rules and criteria in its comments and argues that the request is inadequate to allow this Commission to fully evaluate the request. In its response to Miami's comments, the City dismisses the applicability of the Commission's water storage policies out of hand. The Department, in its Staff Report, similarly dismisses those rules as inapplicable at this stage. However, neither the City nor the Department provide any reasoning for dismissing those rules, and no reason why the Commission would be precluded from evaluating the reservation request under those rules. The City is asking this Commission to begin a public rulemaking process that will require time and resources of the Commission, the Department, and the public. Miami fails to see how it would not be efficient and fiscally prudent for this Commission to require the City to make a threshold showing that its request can satisfy the criteria set out in this Commission's state water policy rules.

Particularly focused on this case is whether the Commission should entertain the City's reservation request when the contested case between the City and Miami remains unresolved. Miami believes that doing so conflicts the adjudicative role of the Department with the Commission's policymaking role. On the one hand, the Department is responsible for conducting and seeing to completion the contested case. On the other, this Commission must decide as a policy matter whether the reservation request is warranted. Here the two roles collide because common facts are likely to be addressed in both proceedings. The danger is that facts critical to one proceeding could be determined in the other proceeding under different standards and using different evidence. The risks of inconsistency and prejudice the parties in the contested case are real. Miami requests that the Commission decline to consider the reservation request until the prior contested case is resolved. Doing so would not violate the settlement between the City, the Department and the other protestants because the settlement does not require that the reservation request be completed under any particular timeframe. Miami simply asks that the reservation request wait its turn until the prior contested case is resolved.

Finally, Miami asks this Commission to consider the role of a reservation request post-House Bill 3038. Before HB 3038 a reservation was the only way to lock in a priority date for a use more than 5 years in the future. After HB 3038 municipalities have added flexibility to plan for and develop municipal water sources. The twenty years, plus extensions, allowed under HB 3038 significantly reduced the need for and utility of a reservation.

Thank you.