

March 14, 2006

VIA EMAIL AND REGULAR MAIL

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

Re: City of Lincoln City's Responses to Comments Submitted by Miami Corporation
on Lincoln City's Request to Reserve Water of the Treat River

Dear Mr. Fujii:

I am writing on behalf of our client, The City of Lincoln City ("City"), to submit the City's responses to the comments made by Miami Corporation ("Miami") on the City's request that the Water Resources Commission ("WRC") reserve unappropriated water in the Treat River, Rock Creek and Side Creek for multi-purpose storage for future economic development. As we read their comments, Miami's comments relate solely to the proposed reservation on the Treat River.

The City submitted the reservation request as required by Conditions 25 and 27 of the Drift Creek Supplemental Settlement Agreement. The City agreed that should the requested reservations be granted, it would withdraw its pending water rights applications on those streams. In accordance with the Supplemental Settlement Agreement, the City's reservation request was accompanied by a letter of support from the various original protestors to the Drift Creek water rights.

As is required by ORS 537.356(2), the Oregon Water Resources Department ("OWRD") sent notice of the City's request to local governments and watershed councils within the geographic area or basin affected by the proposed reservations. The deadline for comments under this notice was January 16, 2006. None of the local governments or watershed councils submitted comments. Comments in opposition to the proposed rulemaking were received, however, by Miami, a commercial timber operation that owns property within the Treat River watershed.

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RESPONSES TO MIAMI'S COMMENTS

I. Miami's Comments on the Construction and Operation of a Treat River Reservoir are Inappropriate for the Reservation Proceeding.

Several years ago, Miami protested OWRD's proposed final orders that would have conditionally approved the City's applications for a storage reservoir on the Treat River. Miami's protest alleged that the City did not have the required permits, had not demonstrated sufficient available water for the proposed reservoir and had not obtained the required easements or permission to use Miami's land. Miami claimed that the proposed reservoir would inundate prime commercial timberlands that were critical to its business operations.

Miami's comments on the proposed Treat River reservation, for the most part, mirror the issues raised by Miami in the Treat River contested case. In particular, Miami's comments claim that the WRC cannot grant the reservation because the City's application does not address the WRC's criteria for evaluating specific storage projects. Miami alleges that the reservation request improperly fails to provide specific information regarding the purpose of a Treat River reservoir and the legal, social, technical, financial, economic, land use and environmental issues presented by a Treat River reservoir.

Miami's comments on the proposed reservation reflect an apparent misunderstanding of the reservation request process. With the reservation requests, the City is not seeking authorization to construct a storage project on Miami's land and divert water from the Treat River. Rather, the City is seeking, as it plainly states in its application, to reserve unappropriated water in the various streams for multi-purpose storage for future economic development.

If the WRC grants the City's reservation requests all that will be set will be the priority date, water availability and type of use. The City will still be required, prior to construction of any storage project, to obtain water rights from OWRD. It is in response to such subsequent water rights application, if filed, that Miami should raise the majority of issues it raises in its comments, not in the reservation request proceedings. In particular, the comments made in Sections IV.B through IV.G of Miami's letter are inappropriate for the reservation request proceeding and, if they should be raised at all, should be raised in subsequent water rights applications before OWRD.

II. The City's Purpose in Seeking the Reservation is as it Said in the Request.

While the majority of Miami's comments are simply not applicable to this proceeding, a few of their comments merit specific response from the City. Miami claims, in Section IV.A of its letter, that the City has failed to inform the Commission of the purpose or need for the reservation. It states, "[t]he 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

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project on Miami's property...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 City's purpose in requesting the reservations is what the City said it is – to reserve water for multi-purpose storage for future economic development. The City is currently evaluating all available options for a long term water supply to meet the ever increasing demand it faces from growth. These options include a possible regional water supply as well as the sources for which it seeks reservations. The ever-changing political, economic and regulatory climate on the Oregon Coast require that the City remain as flexible as possible when analyzing long-term supply sources. The City's purpose in requesting these reservations is, in accordance with prudent municipal water supply planning, to ensure that it leaves all of its long-term supply options open. To ascribe an ulterior motive to the City's request, as Miami did in its letter, is wholly unfounded.

III. The City will Comply with the Terms and Conditions of the Drift Creek Supplemental Settlement Agreement.

Additionally, Miami insinuates, in Section IV.G of its comments, that the City will take an absolutist view of its obligation to withdraw its Treat River applications. It states that "it is not at all certain that granting the Request would lead to a withdrawal of the Treat River Applications" because the City would be under no obligation to withdraw its applications if there were minor changes in the amount of water available or the exact location of the reservation. The City intends to fully comply with all of the terms and conditions of the Drift Creek Supplemental Settlement Agreement and has no intention of taking the absolutist view envisioned by Miami. Moreover, Miami has no basis in fact or experience for making this inappropriate allegation.

IV. Miami's Threats of Subsequent Contested Cases Should Not Intimidate the Water Resources Commission.

Miami also threatens, in the same section, that it will contest a subsequent application by the City to put the reserved water to use. It states "it is certain that Miami, and possibly others, would contest any subsequent application to construct a reservoir in the location identified in the Request." According to Miami, this threat to contest an as-yet filed water rights application should caution the WRC against granting the reservation because the analyses Miami incorrectly claims the WRC must perform in the reservation process will have to be duplicated in a contested case over a subsequent water rights application.

The City believes that such threats by Miami should not influence the reservation process. First, the analyses that Miami alleges the WRC must undertake are, as described above, inappropriate for the reservation process. Second, the decision of the WRC to grant or deny the

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City's reservation request should not be influenced by threats of contested cases on applications that have not yet and may not ever be filed. Miami has no way of knowing what the nature and extent of any project proposed by the City would be, yet it boldly threatens to contest a future application and tie up resources in an attempt to intimidate the WRC.

V. Miami's Comments on the Propriety of OWRD's Actions in Signing the Drift Creek Supplemental Settlement Agreement are Unfounded.

Finally, Miami has raised concerns about the role of OWRD in the proposed reservation rulemaking process. Miami claims, in Section III of its letter, that because OWRD has agreed, in Condition 30 of the Supplemental Settlement Agreement, to recommend that the reservation request be granted it "has tied its hands" and will be unable to critically analyze any additional information provided during the rulemaking process. It further alleges that OWRD will be unable to use its expert staff to participate in any public interest review necessary for the reservation request. Miami goes so far as to state that OWRD's agreement to support the reservation request 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."

Miami makes these feckless allegations ignorant of the careful and considered multi-year effort that the OWRD engaged in through the Drift Creek Settlement process and the fact that it is the WRC, and not OWRD, that will have the final say in whether the reservations are granted. OWRD's decision to support the reservation request does not equate to a grant of the request because the WRC must still approve the reservation following a formal rulemaking process. The City has no doubt that OWRD entered into the Drift Creek Supplemental Settlement Agreement after a searching review and with full knowledge of the implications of its signature.

OWRD is authorized under the Administrative Procedures Act to participate in the collaborative settlement negotiations that took place in this case.¹ The City is confident that, in exercising this authority, OWRD carefully reviewed each and every one of its obligations under the agreement before signing. Further, the City fully believes that OWRD's decision to recommend to the WRC that it grant the reservation requests resulted from a searching technical review of the requests including a detailed water availability analysis. Miami's comments are nothing more than an uninformed accusation that OWRD has failed to do its job. These comments are out of place and should simply be dismissed.

¹ ORS 183.502(1) grants state administrative agencies, such as OWRD, the express authority to engage in alternate means of dispute resolution as an alternative to contested cases including "arbitration, mediation or any other collaborative problem-solving process designed to encourage parties to work together to develop mutually agreeable solutions to disputes."

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CONCLUSION

The City provides these responses to Miami's comments to reiterate its commitment to the reservations it sought in its request. As discussed above, most of Miami's comments are inappropriate at this point and, should the City choose to file water rights applications to use the reserved water in the Treat River, the technical and legal issues Miami raises, although probably without any merit, could be raised at that time. The City appreciates the continued support of OWRD in this process and looks forward to working with you and the WRC in the upcoming rulemaking process.

If you have any questions please do not hesitate to call me at (206) 370-6585 or Jeff Ring at (503) 228-3200.

Very truly yours,

PRESTON GATES & ELLIS LLP



By
Kenneth J. Gish, Jr.

KJG:kjg

cc: David Hawker, City Manager, City of Lincoln City
John McKeivitt, Water Superintendent, City of Lincoln City
Mike Reynolds, Protest Coordinator, Oregon Department of Water Resources ✓
J.W. Ring, Preston Gates Ellis, LLP

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