ORCA: Oregon Coast Alliance
P.O.Box 5464, Charleston OR 97420
(503) 391-0210 http://www.oregoncoastalliance.org

Protecting the Oregon Coast

April 22, 2010

M49 Supplemental Claim Review
Dept. of Land Conservation and Development
635 Capitol St. NE, Suite 150
Salem, OR 97301

Re: Sea Lion Caves Claims E132637A, E132637B, E132637C

To Whom It May Concern,

Oregon Coast Alliance submits the following letter concerning the Preliminary Evaluations by the Department of Land Conservation and Development in the matter of the three claims submitted by Sea Lion Caves (SLC) referenced above.

I. There is only one "property" for M49 purposes

It is critical that DLCD treat all of the SLC property as contiguous under M49 in order to limit the number of home site approvals. SLC claims that Highway 101 somehow makes its properties non-contiguous, and therefore eligible for separate home site approvals

For purposes of M37/M49 Oregon law defines "property" as:

. . . the private real property described in a claim and contiguous private real property that is owned by the same owner, whether or not the contiguous property is described in another claim, and that is not property owned by the federal government, an Indian tribe or a public body, as defined in ORS 192.410.

ORS 195.300(20).

DLCD has adopted rules governing the evaluation of Measure 37 contiguous property. *See* OAR 660-041-0120. This rule states:

> (1) For purposes of the Supplemental Review of a Claim, ownership of contiguous property will be determined and evaluated as of the date the Claimant Elected relief under section 6 or section 7 of Measure 49.

> (2) In determining the relief to which a Claimant is entitled under section 6 or section 7 of Measure 49, the number of home site approvals a Claimant is entitled to will be reduced by the number of existing lots, parcels and dwellings contained within the entire property, which includes both the Measure 37 Claim Property and any contiguous property in the same ownership.

OAR 660-041-0120. When a single M37 claim is divided as SLC has done, DLCD rules state:

> . . . DLCD will combine multiple Claims into one claim if the Measure 37 Claim Property contains multiple contiguous lots or parcels that are in the same ownership.

OAR 660-041-0150. Therefore, because the underlying M37 claim is for SLC's full 119 acres, all properties should be considered contiguous.

The deeds do not provide any evidence that SLC has divided or partitioned its land. *See* Bargain & Sale Deed #53381, July 2, 1971 covering tax lots 200, 300, 500 and 600; and Warranty Deed #8302278, January 16, 1978 for tax lot 400. In order for SLC to have four non-contiguous parcels, they must have partitioned the land prior to filing the M49 claim. *See* ORS 92.012 ("No land may be subdivided or partitioned except in accordance with ORS 92.010 to 92.192."). To lawfully establish a unit of land, ORS 92.010 (3) provides:

(a)"Lawfully established unit of land" means:
(A) A lot or parcel created pursuant to ORS 92.010 to 92.192; or
(B) Another unit of land created:
(i) In compliance with all applicable planning, zoning and subdivision or partition ordinances and regulations; or
(ii) By deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations.
(b) "Lawfully established unit of land" does not mean a unit of land created solely to establish a separate tax account.

Therefore, since the property was acquired in 1971 and 1978, SLC must have lawfully established partitions pursuant to applicable laws, which they did not.

Lastly, nothing in the statute, regulations or case law indicates that roads, highways or waterways automatically partition property as SLC argues. Instead, a lawful unit of land must be created through one of the processes described above. Neither SLC nor the Oregon Department of Transportation has lawfully established a unit of land that supports SLC assertion regarding the effect of Highway 101.

II. A Road Does not Interrupt the Contiguity of a Tract

ORS 195.305 Sec. 6 refers to "the property," defined in ORS 195.300 as cited above.

Template dwellings are limited to one per "tract". ORS 215.750(4) and OAR 660-006-0027(1)(i) and (4) provide that a template dwelling may be allowed only if no other dwellings exist on a tract, and if no other dwellings are allowed on other lots or parcels making up a tract and deed restrictions so providing are established.

ORS 215.750(6)(b) and OAR 660-006-0027(3)(b) address the situation where a road crosses a tract, and require that at least one of the three required dwellings be on the same side of the road as the proposed dwelling.

The definition of tract found in OAR 660-006-0027(5)(a) and the language of OAR 660-006-0027(3)(a) clearly contemplate that a road may cross a tract. The road thus cannot interrupt the tract or divide one tract into two.

Applicable provisions of statute, administrative rule and Lane Code clearly contemplate that a road may cross a tract and does not necessarily form the boundary of a tract, as in this case with Sea Lion Caves under their Measure 49 claims.

III. Establishment of the Lot, Parcel or Dwelling Is Prohibited by a Land Use Regulation Described in ORS 195.305(3)

ORS 195.305(3) exempts certain land use regulations from claims under Measure 49. The following three categories of exemptions apply to the subject parcel:

(a) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law.
(b) Restricting or prohibiting activities for the protection of public health and safety.
(c) To the extent the land use regulation is required to comply with federal law.

A. Protection of Public Health and Safety

The SLC property is primarily coastal headland with very steep and eroding slopes. Hone site approvals and additional developments on the property has the potential to create dangerous flooding and possibly landslides. This hazard is one of the primary reasons for current restrictive zoning on the property. Given the proximity to Highway 101, a landslide on the SLC property could have catastrophic implications. ORS 195.300(21) provides:

"Protection of public health and safety" means a law, rule, ordinance, order, policy, permit or other governmental authorization that restricts a use of property in order to reduce the risk or consequence of fire, earthquake, landslide, flood, storm, pollution, disease, crime or other natural or human disaster or threat to persons or property

including, but not limited to, building and fire codes, health and sanitation regulations, solid or hazardous waste regulations and pollution control regulations.

Therefore current land use restrictions limiting developments on SLC property should be characterized by DLCD as "protection of the public health and safety."

B. Compliance with Federal Law

Granting new home site approvals for SLC's property may negatively affect federally protected species, including coho salmon, marbled murrelet and Stellar sea lion. In addition, additional home site approvals will result in developments that may foul clean water and negatively impact Oregon's coastal zone. When taken in the aggregate with other M49 claims, DLCD approvals threaten violations of federal laws protecting species threatened with extinction, clean water and the coastal zone.

1. Protected Species

Three species listed under the federal Endangered Species Act ("ESA"), 16 U.S.C. 1531 *et seq*., may be negatively affected by DLCD's approval of home sites on SLC property. Coho salmon are listed as threatened and inhabit the Pacific Ocean adjacent to SLC property. Marbled murrelet are listed as threatened and inhabit the Pacific Ocean and forests adjacent to SLC property. Stellar sea lion are listed as threatened and inhabit both the Pacific Ocean, rocks and beaches adjacent to SLC property as well as SLC property itself. SLC is a commercial operation that charges tourists to view Stellar sea lions in the sea cave under SLC property. According to SLC and the state and federal wildlife agencies, SLC does not posses a valid permit to "take" Stellar sea lions under the ESA.

DLCD home site approval will clear the way for road building, land clearing and other ground disturbing activities on the subject parcel that may result in changes to site hydrology, increased runoff or potential flooding and landslides. These activities are potentially detrimental to the federally protected wildlife on the SLC property and adjacent to it.

DLCD's home site approvals at the SLC property along with home site approvals in nearby watersheds and coastal areas that provide habitat for federally protected species may violate Section 9 of the ESA. Without an incidental take permit under Section 10 of the ESA, DLCD is liable for any "take" to federally protected species. Since SLC has made no showing that they possess a take permit for federally listed species, and DLCD possesses no take permit, then DLCD cannot authorize the additional home sites without risking a violation of the federal ESA.

Thank you for the opportunity to comment on this matter.

Sincerely,

Cameron La Follette

Land Use Director
Oregon Coast Alliance
P.O. Box 5464
Charleston, OR 97420
www.oregoncoastalliance.org
(503) 391-0210