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Coos County Board of Commissioners
Fred Messerle, Board Chair
Commissioner Cam Parry
Commissioner Bob Main
Coos County Courthouse
250 N. Baxter St.
Coquille, OR 97423

Re: comments on Coos County-ORC lease for access and use of property for mining

Oregon Coast Alliance (ORCA) hereby submits these comments on the proposed Surface Use Lease between Coos County and Oregon Resources Corporation (ORC). ORCA is currently involved in litigation with several federal agencies and ORC over the possible violation of federal environmental laws.

ORCA is concerned about the continuing viability of ORC given the effects of the recession on the company. On October 5, 2012, ORC's parent company, IDM International Limited, was suspended from official quotation before the Australian Securities Exchange: "The securities of IDM International Limited (the 'Company') will be suspended from quotation immediately, at the request of the Company, pending the release of an announcement regarding the Company's future funding and production options." ORC requested this suspension, and "discussions in respect to future funding and production options are still ongoing,...." *See* Exhibit A. In the IDM International Limited Annual Report, the Independent audit report states:

"there is significant uncertainty whether the consolidated entity will continue as a going concern and therefore whether it will be able to pay its debts as and when they fall due and realize its assets and extinguish its liabilities in the normal course of business and at the amounts stated in the financial report."

Exhibit B; *see also* South Coast Dev. Council Newsletter Vol. 2, Issue 3, p. 3 (“Due to the prolonged recession, today’s market for foundry sands – like so many commodities – has softened. As a result, ORC has not achieved the levels of market penetration it had planned. Additional financing is needed, both to improve the mining process, and to sustain the company through the current recessionary times.”).

I. Assignment

ORCA encourages the County to reconsider its assignability clause in the lease. Specifically, ORCA requests that the county restrict the lease by removing the assignability because of the possibility that including the assignability clause could increase the risk to the County and the potential that the assignability clause may be against public policy. However, if the County does not remove the assignability clause, ORCA requests that the County impose a specific term after which assignment would be prohibited.

A. Material increase in burden of risk

Occasionally the assignment of a contract right causes a material increase in the obligor’s burden or risk, even though it does not result in a material change in the obligor’s duty. Because ORC is currently involved in litigation related to chromite mining in Coos County, the County may experience an increase in its burden of risk as a result of impacts from mining, pollution from chromite, and other related risks as eventually determined by the outcome of the lawsuit.

B. Assignments against public policy

The rule that contract rights are freely assignable is not without exception. A court may hold that a purported assignment is not effective on grounds of public policy, just as it may hold that a purported contract is not enforceable on such grounds. *See Eldridge v. Johnston*, 195 Or 379, 405-06, 245 P2d 239 (1952) (quoting *Swigert & Howard v. Tilden*, 121 Iowa 650, 656 (1903)) (“In view of the ever-changing conditions of trade, commerce, the mechanic arts, etc., the diversity of interests which obtain in the various states and countries, it must be manifest that there can be no single standard respecting public policy”). Here, the public has a significant interest in the quality and integrity of its natural environment, especially as reclamation may not be completed due to the possible financial uncertainty of ORC. For example, the surface lease appears to include drainage to 7 Mile Creek, which contains federally listed Coho salmon, and 2 Mile Creek, whose confluence with the Pacific is a State Park. *See TVA v. Hill*, 437 US 153, 175 (1978) (“Declaring the preservation of endangered species a national policy, the 1966 Act directed all federal agencies both to protect these species and ‘insofar as is practicable and consistent with the[ir] primary purposes...preserve the habitats of such threatened species on lands under their jurisdiction.”).

C. Term prohibiting assignment

Absent a statute to the contrary, the County is free to prohibit assignment. ORCA encourages the County to consider a term prohibiting assignment. After a stated period, the County should include a non-assignment term in the proposed lease. This would allow the County to reconsider its contractual rights at a future date and preserve its options.

D. Reasonable Concerns

Given ORC's financial uncertainty, a transfer of ownership is possible. The County has no information on the company that will step into ORC's shoes in the event of a transfer of ownership. The assignability clause subjects the County to be contractually bound by an unknown company. Since ORC may very likely propose to assign its rights under the lease to another company, ORCA strongly encourages the County to withhold assignment based on reasonable concerns that the County may have, including reclamation, pollution, and other environmental considerations. The County is entitled to withhold the lease under paragraph 10.3, which states that the "Lessee may transfer, assign or sublease any or all of its interest in this Lease only upon the County's prior written consent, which shall not be unreasonably withheld or delayed." and prohibit ORCA encourages the County to retain as much control over its land as is possible, and further encourages the County to consider environmental and public policy concerns in the event ORC proposes to transfer its lease. *See Kendall v. Ernest Pestana, Inc.*, 709 P2d 837 (Cal 1985) (consent withhold only for reasonable objections).

II. Lease Terms

ORCA encourages the County to limit the terms of the lease, including the length of the lease, acreage included, and the scope of the work, in order to retain as much control over the lease as possible.

A. Lease Period

Given the aforementioned uncertainties with ORC, ORCA encourages the County to limit the lease to one or two years with the option to renew *after* all environmental assurances have been satisfied. This would provide the County with greater control over the lease, and ensure environmental concerns are given adequate consideration.

B. Acreage

Given the environmental concerns (including fish-bearing streams containing listed species), the County should limit access to the lease to the smallest number of acres

required. For example, the County could specify a maximum number of acres permitted for access, or specify the core areas to which the lease would apply, citing the approximate number of acres necessary to provide access. By doing so, the County could ensure maximum environmental safeguards and minimum disturbance. Given that the lands proposed for access are public lands, such a restriction would be a prudent move to help safeguard public assets.

C. Scope

The County should also limit the access lease to exploration only. At this time, it is not clear that the company has performed exploration on these leased lands, or has even applied for the requisite permits to do so. ORC does *not* have permits from Coos County, the Oregon Department of Geology and Mineral Industries (DOGAMI) or federal agencies, including the U.S. Army Corps of Engineers, to develop any mines on the lands accessed by the proposed lease. Limiting access to “exploration only” allows the County to retain control and ensure environmental safeguards are fully considered.

III Conclusion

In conclusion, ORCA encourages the County to retain as many rights as possible to ensure that all environmental and public policy concerns are fully considered. In light of ORC’s financial uncertainties and the potential for increased environmental impacts due to future mining, the County does not want to foreclose future options. It is much more responsible public policy for the County to craft a non-assignable, limited lease that impacts as few public resources as possible, and gives the County maximum oversight opportunities on ORC’s activities on these new lease-lands.

Sincerely,

A handwritten signature in blue ink that reads "Sean T. Malone". The signature is written in a cursive style with a large initial 'S'.

Sean T. Malone
Counsel for ORCA