

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

—◆—

VIEWCREST INVESTMENTS, LLC,  
an Oregon limited liability company,

*Petitioner,*

v.

STATE OF OREGON, by and through  
the Oregon Department of Transportation,

*Respondent.*

—◆—

**On Petition For Writ Of Certiorari To  
The Court Of Appeals Of The State Of Oregon**

—◆—

**PETITION FOR WRIT OF CERTIORARI**

—◆—

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## QUESTIONS PRESENTED

Has the Oregon judiciary violated Petitioner's federal constitutional right to compensation for a taking of real property by failing to provide any remedy when applying ORS 93.740(1) and ORS 205.470?

Do these statutes violate Petitioner's federal constitutional right to due process of law and just compensation for a taking of real property where:

- (1) The State is a party;
- (2) The State claimed no interest in Petitioner's real property at the time it recorded its *lis pendens*, and more than one year later claimed, at the very most, a possible contingent future interest if it lost a lawsuit;
- (3) The State had no legitimate reason to record its *lis pendens* notice;
- (4) Six and a half years after its recording, the State has no possible contingent future interest in the property because it ultimately prevailed on appeal;
- (5) Petitioner has been deprived of any meaningful use of its property without an exercise of the State's limited eminent domain powers, and without paying any compensation?

**RULE 14.1(b) STATEMENT**

Petitioner is Viewcrest Investments, LLC, an Oregon limited liability company. Respondent is the State of Oregon, by and through its Department of Transportation (“ODOT”). ODOT is a public body established pursuant to ORS 184.615, possessing eminent domain and condemnation power within the State of Oregon.

Other parties not participating in the appeal from which review is sought are: S. Fred Hall is an individual; Westek Properties, LLC, is an Oregon limited liability company.

**RULE 29.6 STATEMENT**

Petitioner has no parent corporations and no publicly held corporation owns 10% or more of their stock.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
RULE 14.1(b) STATEMENT.....	ii
RULE 29.6 STATEMENT .....	iii
TABLE OF AUTHORITIES .....	vii
INTRODUCTION .....	1
OPINIONS BELOW.....	1
JURISDICTION.....	3
CONSTITUTIONAL AND STATUTORY PROVISIONS.....	3
STATEMENT OF THE CASE.....	4
A. Statutory Framework.....	4
B. Fundamental Facts Essential to Resolution of Question Presented .....	5
Table 1: Summary of All Related Proceedings Below.....	8
C. Federal Question Preserved Below .....	10
REASONS FOR GRANTING THE WRIT .....	18
1. The State Never Had an Interest in the Property.....	18
2. A <i>Lis Pendens</i> Is an Encumbrance Under Oregon law.....	19
3. The State Took Petitioner’s Property Without Any Compensation.....	19

## TABLE OF CONTENTS – Continued

	Page
4. The State’s Judiciary Took Property by Allowing the State’s Encumbrance to Remain Without Affording Any Remedy or Compensation.....	20
5. Oregon Circumvented <i>Doehr</i> and Disre- garded the Constitution With the Subter- fuge of a <i>Lis Pendens</i> to Encumber Private Land.....	23
CONCLUSION.....	27

## APPENDIX

## Decisions of the Lower Courts

## OREGON COURT OF APPEALS, A151584

Order affirming limited judgment without  
opinion, May 7, 2014.....App. 1

Appellate Judgment, February 12, 2015 .....App. 3

## LINN COUNTY CIRCUIT COURT NO. 112338

Limited Judgment, October 19, 2012.....App. 5

Order Denying Reconsideration, October 19,  
2012 .....App. 7

October 18, 2012 Opinion Letter.....App. 9

Order on ODOT’s Motion to Dismiss, May 3,  
2012 .....App. 11

April 12, 2012 Opinion Letter .....App. 15

March 20, 2012 Opinion Letter .....App. 19

## OREGON SUPREME COURT, S062483

Order denying review, November 20, 2014 ....App. 34

## TABLE OF CONTENTS – Continued

	Page
United States Code	
28 U.S.C. §1257(a).....	App. 36
28 U.S.C. §2101(c).....	App. 36
Oregon Revised Statutes	
ORS 1.002(1)(a), (2)(f), (g), and (6) .....	App. 37
ORS 7.010 .....	App. 42
ORS 7.020 .....	App. 43
ORS 7.095 .....	App. 43
ORS 93.740(1).....	App. 44
ORS 205.450 .....	App. 47
ORS 205.470 .....	App. 49
Other Material Essential to Understand Peti- tion (Rule 14.1(i)(vi))	
Lis Pendens Notice (challenged below) .....	App. 50

## TABLE OF AUTHORITIES

## Page

## CASES

<i>Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation</i> , 402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971).....	15
<i>Connecticut v. Doeher</i> , 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991) .....	20, 23, 24, 25
<i>Diaz v. Paterson</i> , 547 F.3d 88 (2d Cir. 2008).....	25
<i>Doughty v. Birkholtz</i> , 156 Or. App. 89, 964 P.2d 1108 (1998). ....	18
<i>Horne et al. v. U.S. Dept. of Agriculture</i> , No. 14-275 (grant of cert.).....	1
<i>Hoyt v. American Traders, Inc.</i> , 301 Or. 599, 725 P.2d 336 (1986) .....	18
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) .....	24
<i>Mitchell v. W.T. Grant Co.</i> , 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974).....	24
<i>Stevens v. Cannon Beach</i> , 510 U.S. 1207, 114 S. Ct. 1332, 127 L. Ed. 2d 679 (1994).....	17
<i>Stop the Beach Renourishment, Inc. v. Florida Dept. of Environ. Prot.</i> , 530 U.S. ___, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010) .....	1, 12, 16, 21, 22
<i>Tri-State Development, Ltd. v. Johnston</i> , 160 F.3d 528 (9th Cir. 1998) .....	20, 24, 25

## TABLE OF AUTHORITIES – Continued

## Page

<i>Vukanovich v. Kine</i> , 251 Or. App. 807, 285 P.3d 733 (2012), <i>rev. den.</i> , 353 Or. 203, 296 P.3d 1275 (2013).....	5, 10, 18, 19, 23
<i>Webb’s Fabulous Pharmacies, Inc. v. Beckwith</i> , 449 U.S. 155, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980).....	21

## CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V .....	3, 20
U.S. Const. amend. XIV .....	4, 20, 23

## STATUTES

## United States Code (U.S.C.)

28 U.S.C. §1257(a) .....	3
28 U.S.C. §2101(c).....	3

## Oregon Revised Statutes (ORS)

ORS 1.002(1)(a), (2)(f), (g), and (6).....	2
ORS 7.010.....	2
ORS 7.020.....	2
ORS 7.095.....	2
ORS 93.740(1) .....	4, 8, 19
ORS 205.450.....	4, 19
ORS 205.470.....	4, 5, 12, 19, 23

## INTRODUCTION

This case presents the federal question of state judicial taking of private real property in violation of the Takings and Due Process clause to the Fifth and Fourteenth Amendments, as described in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environ. Prot.*, 530 U.S. \_\_\_, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010) (Part II, four justices). This petition follows closely on the heels of this Court's recent grant of certiorari in *Horne et al. v. U.S. Dept. of Agriculture*, No. 14-275 in the context of a personal property taking. The real property taking below arises out of the Oregon judiciary's abject failure to follow state law requiring that a person encumbering real property with a notice of *lis pendens* have a recorded interest in the real property in question, and requiring that statutory damages be awarded against the recording party if the encumbrance be invalid. Petitioner urges that the Oregon courts' failure to grant any remedy, and their failure to reach the federal issues presented below, have resulted in an uncompensated taking and a denial of procedural due process.



## OPINIONS BELOW

All Oregon appellate decisions in this action are reported only as line entries in the official Oregon Reports; that is, neither the Oregon Court of Appeals nor the Oregon Supreme Court issued a reported

opinion. The Oregon Court of Appeals' affirmance without opinion is listed at 262 Or. App. 666 (May 7, 2014). A copy of the order is set forth at App.-1 to -2. The order of the Oregon Supreme Court's denying discretionary review is set forth at App.-34 to -35.

The denial of review by the Oregon Supreme Court appears in the Oregon Judicial Information Network (OJIN) at S-OJIN 1. OJIN, the official State of Oregon register of all state court proceedings, is authorized and established by ORS 7.010, ORS 7.020, and ORS 7.095; *see also*, ORS 1.002(1)(a), (2)(f), (g), and (6).<sup>1</sup>

The Oregon Supreme Court Order Denying Review issued on November 20, 2014. The Limited Judgment of the Linn County Circuit Court was entered on October 19, 2012, and appears at App.-5 to -4. All relevant Oregon state court documents appear in the Appendix to this Petition (App.-1 to -35, and App.-50 to -58). There have been no orders for rehearing, nor any order granting an extension to file this petition.




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<sup>1</sup> Since OJIN separately records trial and appellate case filings, Petitioners will designate Circuit Court OJIN references as "C-OJIN," appellate court OJIN references as "A-OJIN," and Supreme Court OJIN references as "S-OJIN."

## JURISDICTION

Petitioner's Petition for Writ of Certiorari is timely because it is filed within 90 days of the date the Oregon Supreme Court denied discretionary review. 28 U.S.C. §2101(c).

This Court has jurisdiction to review the judgment of the Oregon Supreme Court on Writ of Certiorari pursuant to 28 U.S.C. §1257(a).



## CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States of America,  
Amendment V:

**When prosecution to be by presentment  
or indictment; double jeopardy; self-  
incrimination; due process; compensa-  
tion for property taken for public use.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property

be taken for public use, without just compensation.

Constitution of the United States of America,  
Amendment XIV, Section 1:

**Citizenship; privileges and immunities; due process; equal protection.** Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ORS 93.740(1), ORS 205.450, and ORS 205.470 are lengthy, and are reproduced in the Appendix.



## STATEMENT OF THE CASE

### A. Statutory Framework

Oregon Revised Statutes (ORS) 93.740(1) permits “any party” to any suit “in which the title to or any interest in or lien upon real property is involved, affected or brought into question” “at any time during the pendency” of the suit to record “a notice of the pendency of the action” (*lis pendens*). Oregon law further requires any party recording a *lis pendens*

to possess or have a recorded interest in the subject property, apart from the *lis pendens* itself. *Vukanovich v. Kine*, 251 Or. App. 807, 285 P.3d 733 (2012), *rev. den.*, 353 Or. 203, 296 P.3d 1275 (2013). Otherwise, the *lis pendens* is an invalid encumbrance. *Id.* ORS 205.470 requires actual money damages be awarded against a party recording an invalid encumbrance, or \$5,000.00, whichever is greater, in addition to attorney fees. Oregon statutes do not require a pre-deprivation hearing or exigent circumstances before recording a *lis pendens*.

## **B. Fundamental Facts Essential to Resolution of Question Presented**

Petitioner owns 25 acres of undeveloped, industrial real property adjacent to Interstate 5 (I-5). I-5 is a part of the Oregon state highway system.

Since approximately the year 2003, ODOT systematically and repeatedly published oral and written public statements that it was eliminating Petitioner's sole access to the state highway system, that Petitioner's existing access was hazardous, and that the property would be landlocked, leaving the clear impression that ODOT would condemn the property at some later date if anyone purchased and attempted to develop it. ODOT specifically made these representations to potential investors, developers, and purchasers who possessed a definite interest in the acquisition and development of Petitioner's

property, thereby chilling any hope Petitioner had of sale, development or refinancing.

As a consequence of these repeated ODOT representations and insinuations, on April 13, 2008, Petitioner filed a state court action at law, seeking money damages only, against ODOT for inversely condemning its land by blighting it and thereby depriving it of any beneficial use of its property (Linn Circuit No. 081164). This action never placed title to Petitioner's property in question. ODOT filed an Answer to Petitioner's lawsuit; it did not claim any interest of any kind in Petitioner's property (081164 C-OJIN 7). On June 6, 2008, ODOT filed its *lis pendens* (App.-50 to -58), apparently designed to coerce Petitioner into dropping Linn Circuit No. 081164 since no pending or existing action questioned Petitioner's title to its land. When ODOT refused to withdraw its *lis pendens*, Petitioner filed Linn Circuit No. 082279. More than one year later, during which time Petitioner challenged the *lis pendens*, in part because no title question existed, the Circuit Court (over Petitioner's strenuous objection) allowed ODOT to file an Amended Answer in Linn County No. 081164, alleging for the first time that it had a *contingent future interest* in Petitioner's property.

ODOT has never claimed any present legal or equitable interest in Petitioner's land. Petitioner endeavored, repeatedly, for more than six years, to secure removal of ODOT's *lis pendens* in order to arrange financing of the unpaid balance it owes on the property's purchase price. ODOT obdurately

refuses to remove its *lis pendens*. ODOT has never claimed any unusual circumstance that would justify its continued refusal; it never pled or claimed any present interest in the land; it never provided any notice and opportunity for Petitioner to be heard before recording its *lis pendens*; it never sought a pre-deprivation hearing of any nature; it never identified any exigent circumstance justifying its untoward action (and none exist); it never posted a bond; and it has never contested the extraordinary burden its *lis pendens* placed on Petitioner.

In March 2010, as a direct result of the *lis pendens*, Petitioner filed for Chapter 11 under the Bankruptcy Code.<sup>2</sup> The State's recording this improper *lis pendens* prevented Petitioner from paying its existing creditor as the debt came due, and further prevented conventional refinancing. Petitioner saved some of its interest in the encumbered property by non-conventional financing at an above-market rate, coupled with the loss of a significant interest in the land.

Petitioner has exhausted all available state court remedies in three proceedings, all without success, and the offending *lis pendens* continues to deprive Petitioner of its private property without due process.

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<sup>2</sup> Petitioner voluntarily dismissed its bankruptcy petition in July, 2010. Petitioner has also been required to defend foreclosure proceedings as a consequence of not qualifying for conventional secured financing due to the recording of the *lis pendens*.

ODOT recorded its ORS 93.740(1) *lis pendens* against Petitioner's property without possessing or having any recorded interest in the property. Table 1 summarizes all related proceedings below.

Table 1

Case Progression →			
Linn County Circuit Court	Oregon Court of Appeals	Oregon Supreme Court	U.S. Supreme Court
Case No. 081164. Filed April 14, 2008. Judgment date: July 7, 2010.	CA146386 Reversed. October 3, 2012.	S060879 Reversed and re-manded October 12, 2013. Reconsideration denied November 20, 2014.	No petition for certiorari filed. Decision based exclusively on state law, <i>lis pendens</i> not at issue. <i>Lis pendens</i> challenged and exhausted exclusively in S059176 and S06243 below.
<i>Lis pendens</i> recorded in Linn County on June 6, 2008.	June 6, 2008 <i>lis pendens</i> challenged this column below.	June 6, 2008 <i>lis pendens</i> challenged this column below.	June 6, 2008 <i>lis pendens</i> challenged this column below.

Case No. 082279. Filed July 24, 2008. Judgment date: August 18, 2009.	CA143349 Affirmed without opinion December 1, 2010. Peti- tion for reconsidera- tion denied January 6, 2011.	S059176 Petition for review denied May 5, 2011. Petition for reconsidera- tion denied July 28, 2011.	U.S. No. 11- 537 Certiorari denied Dec. 12, 2011.
Case No. 112338 Filed Sept. 20, 2011 Judgment date: October 19, 2012. App.-5 to -6	CA151584 Affirmed without opin- ion May 7, 2014. App.-1 to -2.	S062483 Petition for review denied November 20, 2014. App.-34 to -35	<b>This peti- tion for certiorari.</b>

After the *lis pendens* was recorded, Petitioner sued to have it removed, but the circuit court in Linn 082279 dismissed the matter without prejudice, and Petitioner was denied all relief in the Oregon state courts on appeal, and this court denied *certiorari*. See Table 1 above.

Next, the Linn Circuit Court gave judgment to Petitioner on a jury's verdict in Linn 081164, and found that ODOT had no interest in Petitioner's land. About a year after such judgment, Petitioner sued ODOT again to have the *lis pendens* removed, Linn

112338 (this case). Petitioner relied on controlling precedent from the Oregon Court of Appeals, *Vukanovich v. Kine*, when urging that the encumbrance was invalid and required payment of compensation in the form of damages and attorney fees. Notwithstanding its earlier judgment in Linn Circuit No. 081164, the circuit court dismissed Petitioner's claims with prejudice by limited judgment, finding that its much earlier judgment in Linn 082279 precluded all of Petitioner's claims to remove the errant *lis pendens*. On appeal, Petitioner urged that it could not be precluded by the Linn 082279 judgment of dismissal without prejudice, because that same court had subsequently issued judgment on the merits in Linn 081164. That judgment determined that ODOT had no interest in Petitioner's property, yet the State's *lis pendens* remained to encumber Petitioner's property. In sum, Petitioner urged that it could not be claim or issue precluded by a legal predicate. The Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied discretionary review. Petitioner now prays for writ of certiorari.

ODOT has refused to remove the encumbrance for more than six and a half years, thereby preventing Petitioner from selling, or developing, or refinancing the purchase of its property.

### **C. Federal Question Preserved Below**

*Summary.* Petitioner was denied all relief on his federal question, first in the circuit court, and later in

the Oregon Court of Appeals. The Oregon Supreme Court then denied discretionary review.

*Detail.* Petitioner first raised the federal takings issue in the Linn County Circuit Court. Petitioner's complaint, filed September 20, 2011, alleged in its tenth claim for relief (paragraph 73, quoted here):

In the alternative, if ORS 93.740(1) has not been applied in violation of the Oregon Constitution, then defendant ODOT has applied ORS 93.740(1) in a manner which deprives plaintiffs of their right, title, interest, and equity in plaintiffs' real property described above in violation of the takings clause to the Fifth Amendment to the United States Constitution as applied to states under the Fourteenth Amendment to the United States Constitution.

Petitioner raised the federal issue again when opposing ODOT's motions to dismiss in the trial court (Nov. 29, 2011, pages 4 to 5, quoted here):

Similarly, plaintiffs' other claims – arising out of the *lis pendens* recording – ripened as a consequence of entry of judgment in Linn Circuit No. 081164. There, defendant ODOT was given an opportunity, by this court, to purchase plaintiffs' land for \$4 million dollars by tendering same prior to entry of judgment on July 7, 2011. After the judgment was entered, defendant ODOT appealed, but defendant ODOT has not released plaintiffs' title from its *lis pendens* unlawfully clouding plaintiffs' title. Among

plaintiffs' claims are to quash the *lis pendens*, so that plaintiffs can qualify for conventional financing for the balance of the purchase price. *Complaint*, claims under ORS 205.470, and for inverse condemnation, mandatory injunction, quiet title, declaratory judgment, and unconstitutionality. Or. Const. Art. I, section 10 and 18 guarantee plaintiffs a remedy where the state has deprived plaintiffs lawful title to their land.

If Oregon law is otherwise, it would simply mean that there is no state law remedy available to a private property owner who (a) has been awarded a judgment on a jury's verdict establishing that the state has no interest in such property and (b) desires to refinance the purchase price, but cannot, due to the state's obdurate refusal to release title in land to which it has no interest. In that case, whatever law defendant ODOT relies on for its proposition is demonstrably unconstitutional under the Case B<sup>3</sup> analysis set forth in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environ. Protect.*, \_\_\_ U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_, \_\_\_ L.Ed. \_\_\_ (No. 08-1151, June 17, 2010), *whether* it be for a judicial taking or procedural due process violations.

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<sup>3</sup> In a plurality opinion, the justices could not agree whether the applicable analysis should be for a judicial taking, for procedural due process violation, or because the challenged state law violated "substantive due process" well after the *Lochner* era.

In either case, whether plaintiffs are entitled to recover for a judicial taking or for a procedural due process violation, it should be apparent that the claim does not arise under the Case B analysis until after plaintiff's land has been taken as a consequence of Case A. More simply, the plurality acknowledges that a prior case is the predicate for, rather than a barrier to, a subsequent case seeking affirmative relief.

The circuit court dismissed Petitioner's claims by written order and opinion, but without reaching the federal question presented. The court held:

Plaintiffs' causes of action 3 through 10 are each, in some essential way, dependent upon the Notice being unlawful as to 081164. Consequently, they are barred by claim preclusion. As case 081164 is still on appeal, each of the causes of action are also appropriately dismissed pursuant to ORCP21 (A)(3) as there continues to be another action pending for the same cause.

Defendant ODOT's Motion I and II are granted as to ODOT.

App.-27 to -28.

Next, Petitioner raised the issue again on reconsideration in circuit court. Quoting from Petitioner's *Memorandum and Motion for Reconsideration* August 29, 2014 at page 6 line 8:

[P]laintiffs should not be issue or claim precluded from advancing claims after the

circuit court determined that defendant ODOT was not entitled to receive any portion of plaintiff's land after ODOT's failure to tender \$4 million prior to July 7, 2010 in lieu of seeking its limited remedies on appeal. Otherwise, plaintiffs have been offensively issue precluded following the jury's verdict and the court's judgment thereon in Linn 081164, which is a denial of due process under the Fifth and Fourteenth Amendments to the United States Constitution.

Petitioner's motion for reconsideration was denied by the circuit court without reaching the federal issue, and limited judgment was entered in favor of ODOT. App.-5 to -8.

Petitioner next raised the federal question in the Oregon Court of Appeals. The relevant portions of Petitioner's Opening brief are quoted here.

[page 3]

**Question 8.** If the circuit court did not err in applying ORS 93.740(1) and ORS 205.450 *et seq.* when denying plaintiff any remedy under state law, has plaintiff demonstrated that the judiciary's application of state law has resulted in an uncompensated taking and denial of procedural due process forbidden by the Fifth and Fourteenth Amendments to the United States Constitution? [Yes].

\* \* \*

[page 22]

And by applying claim preclusion from a judgment of dismissal to deny plaintiff any remedy against ODOT in case 3, the circuit court denied plaintiff procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution.

Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.

Some litigants – those who never appeared in a prior action – may not be collaterally estopped [issue precluded] without litigating the issue. They have never had a chance to present their evidence and argument on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

*Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-33, 91 S.Ct. 1434, 1442-43, 28 L.Ed.2d 788, 799-800 (1971) (observing that offensive application of issue preclusion to a litigant is a denial of due process).

Plaintiff did not have a full and fair opportunity to present its evidence and argument on his claim in case 2 because the circuit court there dismissed without reaching the merits. Consequently, it was error for the circuit court to bar plaintiff [page 23] *res judicata* from a judgment of dismissal. The circuit court erroneously applied the judgment of dismissal in case 2 to prevent plaintiff from presenting evidence and argument on its claims against ODOT in case 3.

By comparison, the judgment on the jury's verdict in case 1 was given on the merits, after the circuit court had heard and weighed plaintiff's evidence and argument (Judge McCormick). Thus, the circuit court (Judge Novotny) erred by refusing to give effect to plaintiff's judgment entered against ODOT on the merits in case 1. Those errors denied plaintiff due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, and were briefed to the circuit court prior to its error. *Plaintiffs' Opposition to ODOT's Reply Memorandum on ODOT's ORCP 21 Motions*, page 4 line 18 to page 5 line 11, citing *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environ. Protect.*, 130 S.Ct. 2592, 560 U.S. \_\_\_, 177 L.Ed.2d 184 (2010).

The Takings Clause (unlike, for instance, the Ex Post Facto Clauses, see Art. I, § 9, cl. 3; § 10, cl. 1) is not addressed to the action of a specific branch or branches. It is concerned

simply with the act, and not with the governmental actor (“nor shall private property be taken” (emphasis added)). There is no textual justification for saying that the existence or the scope of a State’s power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. Nor does common sense recommend such a principle. *It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat. See Stevens v. Cannon Beach*, 510 U.S. 1207, 1211-1212, 114 S.Ct. 1332, 127 L.Ed.2d 679 (1994) (SCALIA, J., dissenting from denial of certiorari).

[page 24]

*Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary.*

*Id.*, 130 S. Ct. at 2601-02 (*emphasis added*) (part II of plurality, Scalia, J., for the court joined by J. Thomas, J. Alito, and C.J. Roberts).

In sum, the Oregon judiciary has effectuated a taking of Petitioner’s real property by failing and refusing to address the federal issue repetitively presented to the circuit court, and on appeal. The

Oregon Court of Appeals’ affirmance without opinion, and the Oregon Supreme Court’s denial of discretionary review, in addition to amounting to a taking, has resulted in a denial of procedural due process. This petition follows.



## REASONS FOR GRANTING THE WRIT

### 1. The State Never Had an Interest in the Property

Oregon law generally permits the recording of a *lis pendens* only if the litigant possesses a real and present interest in the real property. *Vukanovich v. Kine*, 251 Or. App. 807, 815, 285 P.3d 738 (2012), *rev. den.*, 353 Or. 203, 296 P.3d 1275 (2013); *Doughty v. Birkholtz*, 156 Or. App. 89, 95, 964 P.2d 1108 (1998) (“ . . . the subject of the suit must be an actual interest in real property, not merely a speculative future one.”). *See also*, *Hoyt v. American Traders, Inc.*, 301 Or. 599, 605, 725 P.2d 336 (1986). ODOT does not have, and never did possess, any interest in Petitioner’s private property. The most that ODOT could claim, long after recording its misbegotten *lis pendens*, was some possible future contingent interest if Petitioner prevailed. After a jury’s adjudication that it never had any such contingent future interest, ODOT obstinately refused to remove the errant *lis pendens*. And after the Oregon Supreme Court reversed Petitioner’s judgment from Linn 081164, and found that the jury should not have been permitted to hear the case, ODOT continues to deprive Petitioner

of essential private property rights without due process and without any, let alone just, compensation.

## **2. A *Lis Pendens* Is an Encumbrance Under Oregon law**

Oregon law provides statutory remedies to a Petitioner which suffers under an inappropriately recorded *lis pendens*. In *Vukanovich, supra*, a *lis pendens* was held an invalid encumbrance because at the time it was recorded, the person claiming under it had no recorded interest in the property, only a contingent future, speculative interest. ORS 205.450 *et seq.* provides statutory remedies to any party who suffers under such an invalid encumbrance. Petitioner below sought money damages and removal of the *lis pendens* under ORS 205.470 and under that precedent. Petitioner briefed the application of ORS 205.470 and *Vukanovich* to the circuit court and on appeal, but to no avail. Petitioner was denied all relief by the Oregon courts, which amounts to a taking and a denial of procedural due process.

## **3. The State Took Petitioner's Property Without Any Compensation**

The Oregon judiciary has taken Petitioner's property without compensation by refusing to afford Petitioner any remedy whatsoever. As applied by the Oregon state courts in this case, ORS 93.740(1) permits the state to record a *lis pendens* to encumber

Petitioner's property without any of the procedural safeguards required by this Court, and without just or any compensation as commanded by the Fifth and Fourteenth Amendments to the United States Constitution. This Court addressed the mandatory procedural safeguards in *Connecticut v. Doeher*, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991) (*Doeher*); the United States Court of Appeals for the Ninth Circuit followed this direction in *Tri-State Development, Ltd. v. Johnston*, 160 F.3d 528 (9th Cir. 1998) (*Tri-State*) (construing Washington law). Petitioner's exhaustion of its claims in the state courts in the present case has left it with loss of use of its private property and without a remedy for more than six years. Thus, Petitioner raises a seminal issue of federal law: does a state statute which allows the state to encumber title to private property, for which it can make no showing of any legitimate claim to title, violate a Petitioner's federal constitutional protections against an uncompensated taking of his property without due process of law?

#### **4. The State's Judiciary Took Property by Allowing the State's Encumbrance to Remain Without Affording Any Remedy or Compensation**

The Oregon court of last resort took Petitioner's property without just compensation in violation of the Takings clause of the Fifth Amendment, as applied against the States through the Fourteenth Amendment. It did so by declining to review the Court of

Appeals' order affirming, without opinion, the trial court's dismissal without prejudice in spite of Petitioner's takings and due process challenges.

This Court's plurality opinion in *Stop the Beach, supra*, concerned riparian rights under Florida law. Before reaching the merits of the parties' arguments there, four justices of the opinion outlined general principles of its takings jurisprudence, quoted above.

Part II of that opinion cites *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-65, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980) as precedent for the proposition that a State's judicial branch is not so entitled. There, the Florida court of last resort had concluded below that interest on private money paid into court was "public money," and this Court concluded that neither Florida's legislature nor its judiciary could re-characterize that property without effectuating a taking requiring compensation.

In sum, the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. But the particular state actor is irrelevant. If a legislature or a court declares

that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation. “[A] State, by ipse dixit, may not transform private property into public property without compensation.” Ibid.

*Stop the Beach*, 130 S. Ct. at 2602 (Part II.A.).

Generally, the remainder of Part II takes issue with the separate concurrences of Justice Brewer and Justice Kennedy. Most generally, there seemed to be significant disagreement on the Court about whether disposition of the case should lead the Court to pass on the question of whether a state court could, by its action, effectuate an uncompensated taking.

This case squarely presents the as yet unresolved issue in *Stop the Beach*: is the judicial branch of State government immune from the requirement imposed by the Takings clause that private property not be taken or encumbered without providing compensation or an adequate remedy? Petitioner seeks writ of certiorari to urge the application of Part II from that opinion. The failure of the Oregon judiciary to provide Petitioner with any remedy notwithstanding repeated citation to this Court’s jurisprudence begs review. Petitioner is the landowner, and there are no procedural obstacles to confound the substantive issue presented.

Since the State had no recorded interest in Petitioner's real property at the time it recorded its *lis pendens*, it was an invalid encumbrance entitling Petitioner to removal, money damages, and mandatory attorney fees, pursuant to ORS 205.470. *Vukanovich, supra*. The Oregon judiciary's failure to give Petitioner any remedy whatsoever, either in its court of general jurisdiction or on appeal, amounts to a taking of private property without just compensation forbidden by both the Takings clause and the Due Process clause contained in the Fifth Amendment as applied to the States by the Fourteenth Amendment.

### **5. Oregon Circumvented *Doehr* and Disregarded the Constitution With the Subterfuge of a *Lis Pendens* to Encumber Private Land**

*Doehr* provides the touchstone for consideration of the issues presented. *Doehr* held that the Connecticut statute under review violated the Due Process clause of the Fourteenth Amendment because it permitted *ex parte* attachment of real property without any prior notice or hearing, without any showing of extraordinary circumstances, and without requiring the claimant to post any type of security bond. The Court stated the overarching issue as "... what process must be afforded by a state statute enabling an individual to enlist the aid of the State to deprive another of his or her property by means of the prejudgment attachment or similar procedure..."

*Doehr*, 501 U.S. at 9. The Court analysis and decision invoked the tripartite inquiry set forth in *Mathews v. Eldridge*, 424 U.S. 319, 343-44, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (*Mathews*) and differentiated *Doehr* from *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 604 *et seq.*, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974) (*Mitchell*). Thus, reduced safeguards suffice in a case like *Mitchell*, where the claiming party has a real and present interest in the attached property (a current vendor's lien), whereas much greater safeguards are required in cases like *Doehr*, where the claimant possessed, at most, an ephemeral possible future interest in the owners' land (a possible future claim to satisfy a possible but uncertain future tort judgment).

The Ninth Circuit followed *Doehr* when it decided in *Tri-State* that a Washington state statute allowing pre-judgment attachment violated the Fourteenth Amendment Due Process clause. It applied the three-fold *Mathews'* inquiry and differentiated the case before it from *Mitchell* where the claimant possessed a present vendor's lien:

... Tri-State's situation is more similar to that in *Doehr* than that in *Mitchell*. In *Mitchell*, the party seeking sequestration had a vendor's lien on household goods sold on an installment contract to Mitchell, and there was no question of the vendor's interest in the property. Thus, unlike the instant case, the vendor clearly had an interest in the property. . . . 160 F.3d at 531.

The Second Circuit analysis and decision in the consolidated cases titled *Diaz v. Paterson*, 547 F.3d 88 (2d Cir. 2008) is consistent with *Doehr* and *Tri-State* (*lis pendens* notice by a party possessing a present and identifiable interest or claim to specific property at the time of recording does not violate the Fifth and Fourteenth Amendments; mortgagee entitled to file *lis pendens* to protect its secured interest).

The present case demonstrates the foresight of the four-Justice concurrence in *Doehr* that considers and expresses the real-world concern that property owners may suffer demonstrable and abiding harm even if state law provides for some pre-attachment protections, *i.e.*, a mere security bond may not afford adequate protection to the Petitioner. *Doehr*, 501 U.S. at 22-23.<sup>4</sup>

However, the present case moves far beyond *Doehr* and presents a most troubling and insidious problem, neither foreseen nor solved by the concurrence. An elemental precept of sovereignty recognizes that a state may constitutionally exercise eminent

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<sup>4</sup> “ . . . These amounts [of the security bond] bear no relation to the harm the defendant might suffer even assuming that money damages can make up for the foregoing disruptions.” *Doehr*, 501 U.S. at 23; “ . . . Reliance on a bond does not sufficiently account for the harms that flow from an erroneous attachment to excuse a State from reducing that risk by means of a timely hearing.” *Id.* “ . . . a wrongful attachment can inflict injury that will not fully be redressed by recovery on the bond after a prompt postattachment hearing determines that the attachment was invalid.” *Id.*

domain powers to acquire private property for public purposes by following fundamental rules of due process and upon payment of just compensation. Here, however, the State has circumvented the Oregon statutory condemnation protections and procedures, has paid no compensation let alone a “just” compensation, and has employed the *lis pendens* statute to circumvent the rule of law and deprive Petitioner of any real value in its land.

This subterfuge is compounded by the Oregon judiciary’s failure to afford Petitioner any remedy notwithstanding its own precedent in *Vukanovich* which stands exactly contrary to the proposition that the State’s *lis pendens* should remain and escape any meaningful state judicial review.

This state subterfuge has caused Petitioner serious financial harm. Not only has Viewcrest lost the effective use of its property, but it has been unable to sell the land or refinance its acquisition debts in a normal market fashion. Moreover, if this Court does not rectify this dangerous and devious evasion of the spirit if not the rule of Constitutional law, nothing will prevent states from a mass destruction of individual private property rights, for example, in the name of land use planning or the maintenance of undeveloped real estate limited only to public use. When a state’s judiciary denies a Petitioner any remedy under state and federal law for a prejudgment attachment free of any of the procedural safeguards mandated by the Due Process clause, it

accomplishes an uncompensated taking under the Takings clause.



## CONCLUSION

Oregon's judiciary seemingly implements the scales of justice based upon the identity of one of the parties – the State. The state's judiciary is demonstrably blind to the legislature's statutes, its own case precedent, and this Court's jurisprudence when an interest of the State is at stake. Petitioner prays this Court to grant its Petition in order to consider and settle the Constitutional limits on state use of *lis pendens* to silently but effectively condemn private property without compliance with statutory protections and procedures. Also, the writ is requested to settle the knotty question of whether a State's judiciary may take real property without compensation by refusing to afford a Petitioner any state or federal remedy whatsoever.

Respectfully submitted,

RUSSELL L. BALDWIN

*Counsel of Record*

*Attorney for Petitioner*

App. 1

IN THE COURT OF APPEALS  
OF THE STATE OF OREGON

S. FRED HALL,  
Plaintiff,

and

VIEWCREST INVESTMENTS, LLC  
an Oregon limited liability company,  
Plaintiff-Appellant,

v.

WESTEK PROPERTIES, LLC;  
ROBERT RIEMENSCHNEIDER; and  
BRYANT EMERSON & FITCH, LLP,  
Defendants,

and

STATE OF OREGON, acting by and  
through its Department of Transportation,  
Defendant-Respondent.

Linn County Circuit Court  
112338

A 151584

(Filed May 7, 2014)

DeAnn L. Novotny, Judge.

Argued and submitted on April 15, 2014.

Before DeVore, Presiding Judge, and Sercombe, Presiding Judge, and Garrett, Judge.

Attorney for Appellant: Russell L. Baldwin.

Attorney for Respondent: Patrick M. Ebbett.

**AFFIRMED WITHOUT OPINION**

---

**DESIGNATION OF PREVAILING  
PARTY AND AWARD OF COSTS**

Prevailing party: Respondent

☐ No costs allowed.

☒ Costs allowed, payable by Appellant.

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IN THE COURT OF APPEALS  
OF THE STATE OF OREGON

S. FRED HALL,  
Plaintiff,

and

VIEWCREST INVESTMENTS, LLC,  
an Oregon limited liability company,  
Plaintiff-Appellant,

v.

WESTEK PROPERTIES, LLC;  
ROBERT RIEMENSCHNEIDER; and  
BRYANT EMERSON & FITCH, LLP,  
Defendants,

and

STATE OF OREGON, acting by and  
through its Department of Transportation,  
Defendant-Respondent.

Linn County Circuit Court  
112338

A151584

**APPELLATE JUDGMENT and  
SUPPLEMENTAL JUDGMENT**

DeAnn L. Novotny, Judge.

Argued and submitted on April 15, 2014.

Before DeVore, Presiding Judge; Sercombe, Judge;  
and Garrett, Judge.

Attorney for Appellant: Russell L. Baldwin.

Attorney for Respondent: Patrick M. Ebbett.

**AFFIRMED WITHOUT OPINION**

---

**DESIGNATION OF PREVAILING  
PARTY AND AWARD OF COSTS**

Prevailing party:            ☒ Costs allowed, payable  
Respondent                        by Appellant.

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**MONEY AWARD**

Creditor: State of Oregon

Attorney: Patrick Ebbett, 1162 Court St NE, Salem  
OR 97301

Debtor: Viewcrest Investments, LLC

Attorney: Russell Baldwin

Costs:                        \$455.00

Total Amount: \$455.00

Interest: Simple, 9% per annum, from the date of this  
appellate judgment.

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Appellate Judgment                        COURT OF APPEALS  
Effective Date: February 12, 2015                        (seal)

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IN THE CIRCUIT COURT  
OF THE STATE OF OREGON  
FOR THE COUNTY OF LINN

S. FRED HALL	)	
and VIEWCREST	)	<b>Case No. 11-2338</b>
INVESTMENTS, LLC.,	)	<b>LIMITED JUDGMENT</b>
Plaintiffs,	)	<b>AGAINST PLAINTIFFS</b>
v.	)	<b>AND IN FAVOR OF</b>
	)	<b>ODOT ONLY</b>
WESTEK PROPERTIES,	)	
LLC, ROBERT	)	
RIEMENSCHNEIDER,	)	
BRYANT EMERSON &	)	
FITCH LLP, and STATE	)	
of OREGON by and	)	
through its Oregon	)	
Department of	)	
Transportation	)	
Defendants.	)	

Whereas on May 3, 2012 the Court previously issued its Order dismissing the claims brought against defendant Oregon Department of Transportation (ODOT), for reasons set forth therein and in the opinion letters attached thereto, and the Court having given Plaintiffs leave to amend Plaintiffs' second claim (wrongful initiation of civil proceedings), and Plaintiffs having filed a notice of voluntary dismissal as to Plaintiffs' second claim, and Plaintiffs' motions for reconsideration and stay of proceedings having been denied, and there being no just reason for delaying the entry of this judgment,

NOW THEREFORE, Limited Judgment is entered dismissing claims 3 through 10, with prejudice, as to Defendant ODOT only, and dismissing claim 2, without prejudice, as to ODOT only, and with recoverable costs, pursuant to ORCP 67B. Defendant ODOT may submit a statement of recoverable costs and disbursements within fourteen days from the date this Limited Judgment is entered and may seek a supplemental judgment, as provided by ORCP 68C(4) through (5).

Dated this 19th day of October, 2012.

/s/ DeAnn L. Novotny  
DeAnn L. Novotny  
Circuit Court Judge

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IN THE CIRCUIT COURT  
OF THE STATE OF OREGON  
FOR THE COUNTY OF LINN

S. FRED HALL	)	
and VIEWCREST	)	<b>Case No. 11-2338</b>
INVESTMENTS, LLC.,	)	<b>ORDER</b>
Plaintiffs,	)	<b>(Plaintiffs' Motions for</b>
v.	)	<b>Reconsideration and</b>
WESTEK PROPERTIES,	)	<b>Stay of Proceedings)</b>
LLC, ROBERT	)	
RIEMENSCHNEIDER,	)	
BRYANT EMERSON &	)	
FITCH LLP, and STATE	)	
of OREGON by and	)	
through its Oregon	)	
Department of	)	
Transportation	)	
Defendants.	)	

Whereas on October 15, 2012 this matter came before the Court for hearing regarding Plaintiffs' Motion for Reconsideration, Plaintiffs' Motion to Stay Proceedings as to ODOT and Plaintiffs' Supplemental Motion to Stay Proceedings as to all Defendants, and the Court having reviewed the documents filed by the parties in support of their positions, and the Court having heard the arguments of Counsel, and the Court having made findings of fact and conclusions of law as outlined in the Court's opinion letter dated October 18, 2012 (attached and incorporated by reference herein), NOW THEREFORE:

Plaintiffs' Motion for Reconsideration is DENIED.

Plaintiffs' Motion to Stay Proceedings as to ODOT is DENIED.

Plaintiffs' Supplemental Motion to Stay Proceedings as to ODOT and all other Defendants is DENIED.

IT IS SO ORDERED.

Dated this 19th day of October, 2012.

/s/ DeAnn L. Novotny  
DeAnn L. Novotny  
Circuit Court Judge

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[SEAL]

CIRCUIT COURT OF OREGON  
TWENTY-THIRD JUDICIAL DISTRICT

CAROL R. BISPHAM	P.O. BOX 1749
Judge	ALBANY, OREGON
JAMES C. EGAN	97321-0491
Judge	COURTS (541) 967-3848
THOMAS A. MCHILL	CRIMINAL RECORDS
Judge	(541) 967-3841
DANIEL R. MURPHY	CIVIL RECORDS
Judge	(541) 967-3845
DEANN L. NOVOTNY	
Judge	

October 18, 2012

Russell Baldwin  
Attorney at Law  
PO Box 1242  
Lincoln City OR 97367

David Kramer  
Department [sic] of Justice  
1162 Court Street NE  
Salem, OR 97301-4096

Kim Hoyt  
Attorney at Law  
P.O. Box 749  
Salem OR 97308

Re: Hall/Viewcrest v. Westek Properties, et al.  
Linn County Circuit Case No. 11-2338

Dear Counsel,

A hearing was held on October 15, 2012 to address all pending Motions (exclusive of Defendant Bryant Emerson & Fitch LLP's recently filed motion to dismiss). Plaintiffs Hall and Viewcrest were represented by Mr. Baldwin. Defendant ODOT was represented by Mr. Kramer. Defendants BEF, Westek, and Riemenschneider were represented by Ms. Hoyt. The Court had previously reviewed the documents filed by the parties in support of their positions. The Court heard oral argument regarding Plaintiffs' renewed Motion for Reconsideration, Plaintiffs' Motion for a Stay of Proceedings as to ODOT, and Plaintiffs' Supplemental Motion for a Stay of Proceedings as to ODOT and all other Defendants. The Court attaches and incorporates by reference herein, the opinion letters of the Court dated March 20, 2012 and April 12, 2012, necessarily including the findings of fact and conclusions of law contained therein.

Having considered the arguments of the parties, the pleadings of the parties, and the Court's previous findings of fact and conclusions of law, the Court declines to reconsider the Court's previous rulings. The Court also declines to stay the proceedings as to any Defendant. The Court allows Plaintiff's Motion to Dismiss Count 2 without prejudice.

Sincerely,

/s/ DeAnn L. Novotny  
DeAnn L. Novotny  
Linn County Circuit Judge

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IN THE CIRCUIT COURT  
OF THE STATE OF OREGON  
FOR THE COUNTY OF LINN

S. FRED HALL  
and VIEWCREST  
INVESTMENTS, LLC.,  
Plaintiffs,

v.

WESTEK PROPERTIES,  
LLC, ROBERT  
RIEMENSCHNEIDER,  
BRYANT EMERSON &  
FITCH LLP, and STATE  
OF OREGON by and  
through its Oregon  
Department of  
Transportation  
Defendants.

Case No. 11-2338

ORDER UPON  
DEFENDANT ODOT'S  
MOTIONS TO DISMISS  
[FOLLOWING  
LETTER OPINION  
OF APRIL 17, 2012]

(Filed May 3, 2012)

**ORS 20.140 – State fees  
deferred at filing**

This matter came before the Court upon the Motions to Dismiss filed by the State of Oregon, by and on behalf of the Oregon Department of Transportation (ODOT). The motions were heard on January 5, 2012. Senior Assistant David L. Kramer appeared on behalf of ODOT; Mr. Russell Baldwin appeared on behalf of Plaintiffs, and Mr. S. Fred Hall appeared personally; Ms. Kim Koyt [sic] appeared on behalf of defendants Bryant, Emerson & Fitch, LLF [sic]; and Mr. Zachary Dablow appeared on behalf of Defendants Westek Properties, LLC and Robert Riemenschneider. The Court considered the motions, memoranda, and

declarations submitted herein by the parties (through January 17, 2012) and the arguments of counsel. The Court also considered and takes judicial notice of the records and files of this Court in the related matters cited by the parties (Linn County Circuit Court case numbers 081164, 101755 and 102728). The Court thereafter issued its letter opinion of March 20, 2012, and its supplemental opinion of April 17, 2012, which are attached and incorporated by this reference as Exhibits A and B.

Accordingly, the Court hereby,

**ORDERS:**

1. Defendant ODOT's Motions to Dismiss I and II are granted as to ODOT. Plaintiffs' third through tenth Causes of Action are dismissed because of claim preclusion and because there is another action pending between the same parties for the same cause.
2. Defendant ODOT's Motion to Dismiss III is granted. Plaintiffs' Second Cause of Action is dismissed for failure to state ultimate facts sufficient to constitute a claim for Wrongful Use of a Civil Proceeding.
3. Defendant ODOT's Motion to Dismiss IV is granted. Plaintiffs' Third Cause of Action is dismissed for failure to state ultimate facts sufficient to constitute a claim pursuant to ORS 205.470.
4. Defendant ODOT's Motion to Dismiss V is granted. Plaintiffs' Fourth Cause of Action is

dismissed for failure to state ultimate facts sufficient to constitute a claim for inverse condemnation against ODOT.

5. Defendant ODOT's Motion to Dismiss VI is granted in part and denied in part. The Court finds that Plaintiff Viewcrest provided constructive tort claim notice to ODOT on May 25, 2010, as required by ORS 30.275, and thereby preserved its state tort claims which arose between November 26, 2009 and May 25, 2009. To that extent, and subject to the other rulings in this Order, the Motion to Dismiss is denied. The motion is granted as to Plaintiff Hall, who did not provide notice.
6. Defendant ODOT's Motion VII was withdrawn by ODOT.
7. Defendant ODOT's Motion VIII was made as an alternative the Motions I through VI. Given the foregoing rulings, the alternative motion is denied as moot.
8. Pursuant to the foregoing Orders, all claims against ODOT are dismissed. Claims 3 through 10 are dismissed with prejudice, because they are barred by the doctrine of claim preclusion. Claim 2 as against ODOT is dismissed without prejudice and with leave to amend as to ODOT.

IT IS SO ORDERED this 3rd day of May, 2012.

/s/ DeAnn L. Novotny  
Honorable DeAnn L. Novotny  
Circuit Court Judge

App. 14

Submitted by: David L. Kramer  
Senior Litigation Counsel  
Of Attorneys for State of Oregon (ODOT)

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[SEAL]

CIRCUIT COURT OF OREGON  
TWENTY-THIRD JUDICIAL DISTRICT

CAROL R. BISPHAM	P.O. BOX 1749
Judge	ALBANY, OREGON
JAMES C. EGAN	97321-0491
Judge	COURTS (541) 967-3848
THOMAS A. MCHILL	CRIMINAL RECORDS
Judge	(541) 967-3841
DANIEL R. MURPHY	CIVIL RECORDS
Judge	(541) 967-3845
DEANN L. NOVOTNY	
Judge	

April 122012 [sic]

Russell Baldwin	David Kramer
Attorney at Law	Department of Justice
PO Box 1242	1162 Court Street NE
Lincoln City OR 97367	Salem OR 97301-4096
Zachary Dablow	Kim Hoyt
Attorney at Law	Attorney at Law
495 State Street Suite 500	PO box 749
Salem OR 97301	Salem OR 97308

Re: Hall/Viewcrest v. Westek Properties, et al.  
Linn County Circuit Case No. 11-2338  
Supplemental Opinion to March 20, 2012  
opinion letter

Dear Counsel,

I am in receipt of several documents, including:

1. Plaintiff's Motion to Stay Proceedings as to ODOT;
2. Defendant ODOT's propose [sic] order regarding ODOT's Motions to Dismiss;
3. Defendant ODOT's proposed order regarding Discovery Motions;
4. Certificate of compliance (ODOT);
5. Plaintiff's letter regarding objections to the form of the proposed orders;
6. Defendant ODOT's letter regarding Plaintiff's letter regarding the proposed orders.

First, the Court writes to clarify the Court's intent as to whether or not dismissals granted by the Court were to be with prejudice or without. In this case, there were motions to dismiss filed against the various causes of actions, including alternative motions for several of the causes of action. The Court made decisions regarding these alternative motions in order to make a record. This led to some confusion. Certain motions to dismiss necessarily are granted with prejudice (i.e., dismissals ordered because claim preclusion bars the filing of a particular cause of action), while other motions to dismiss are appropriately granted without prejudice (i.e., dismissals based upon another action pending, or failure to state ultimate facts, or faulty tort claim notice). Here, causes of action 3 through 10 are barred by claim preclusion.

That ruling ends those causes of action. Alternative motions to dismiss regarding those causes of action are technically without prejudice, but do not change the fact that those causes of action are out of the case because they are barred by claim preclusion.

Second, the Court granted Plaintiff leave to amend only as to the 2nd cause of action as to ODOT.

Third, the Court did not order any particular limitation of the scope of discovery, but rather lifted the stay on the discovery process, allowed Plaintiff to make a revised discovery request if Plaintiff desired, and noted that the scope of permissible discovery as to ODOT would appear to be significantly reduced by the Court's decision that causes of action 3 through 10 are out of the case. Nothing prevents Defendant ODOT from challenging any revised discovery request that is too broad, or otherwise inappropriate.

Finally, the Court would like the March 20, 2012 opinion letter and this supplemental opinion letter to be attached and incorporated into the Order. Counsel for ODOT may submit a revised order reflecting the Court's rulings.

Also, the Court will consider Plaintiff's Motion to Stay Proceedings as to Defendant ODOT. However, the Court will allow Plaintiff to revise the Motion now that Plaintiff has clarification about which causes of action can be amended per the Court's leave.

/s/ DeAnn L. Novotny  
DeAnn L. Novotny  
Circuit Court Judge

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[SEAL]

CIRCUIT COURT OF OREGON  
TWENTY-THIRD JUDICIAL DISTRICT

CAROL R. BISPHAM	P.O. BOX 1749
Judge	ALBANY, OREGON
JAMES C. EGAN	97321-0491
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Judge	(541) 967-3841
DANIEL R. MURPHY	CIVIL RECORDS
Judge	(541) 967-3845
DEANN L. NOVOTNY	
Judge	

March 20, 2012

Russell Baldwin	David Kramer
Attorney at Law	Department of Justice
PO Box 1242	1162 Court Street NE
Lincoln City OR 97367	Salem OR 97301-4096
Zachary Dablow	Kim Hoyt
Attorney at Law	Attorney at Law
495 State Street Suite 500	PO box 749
Salem OR 97301	Salem OR 97308

Re: S. Fred Hall and Viewcrest Investments, LLC. v.  
Westek Properties, LLC, Robert Riemenschneider,  
Bryant Emerson & Fitch LLP, and  
State of Oregon by and through its  
Oregon Department of Transportation  
Linn County Circuit Court Case 11-2338

Dear Counsel,

This case is the latest in a series of related cases that involve several parcels of land located in Linn County, Oregon, hereinafter referred to as “the property.” The property is owned by Plaintiffs. Defendants here are the Oregon Department of Transportation (hereafter “ODOT”), Westek Properties, LLC (hereafter “Westek”), Robert Riemenschneider (hereafter “Riemenschneider”) and Bryant Emerson & Fitch LLP (hereafter “Bryant”). Westek is a former creditor of Viewcrest. Riemenschneider is a managing agent of Westek. Bryant is a law firm whose attorneys have represented Westek and Riemenschneider in prior cases.

The Court has reviewed all pleadings and submissions filed by the parties in this case (112338) through January 17, 2012. The Court has also reviewed the court files in Linn County Circuit Court cases 081164 (8 volumes), 082279 (3 volumes), 101755 (1 volume) and 102728 (1 volume). These cases are generally related and are referenced in certain of the submitted materials of the parties in this case. The Court takes judicial notice of the court files in the earlier listed cases. The Court has jurisdiction over the Parties and the subject matter.

A hearing was held on January 5, 2012. Mr. Baldwin appeared on behalf of the Plaintiffs, S. Fred Hall and Viewcrest Investments, LLC (hereafter Viewcrest). Mr. Hall also personally appeared. Assistant Attorney General Kramer appeared on behalf

of the State of Oregon by and through the Oregon Department of Transportation. Mr. Dablow appeared on behalf of Westek Properties, LLC and Robert Riemenschneider. Ms. Hoyt appeared on behalf of Bryant, Emerson & Fitch, LLP. At the end of the hearing, the Court took the following matters under advisement: 1) Defendant ODOT's Motion to Dismiss, 2) Defendant ODOT's Motion for a Protective Order for a Temporary Stay of Discovery, and 3) Plaintiffs' Cross-Motion to Compel Discovery by Defendant ODOT. The Court ordered the discovery process, including the taking of depositions, stayed pending this ruling.

In order to evaluate the motions at issue, the Court necessarily had to consider the voluminous and convoluted contents of the prior cases as well as the already extensive, redundant and convoluted pleadings filed in this case. As would be expected, the process has been very time consuming resulting in a significant delay in the rendering of this opinion. The Court is disappointed to note that that [sic] the lack of reasonableness apparent in some of the prior related cases is already evident in this case as well.

In this case Plaintiffs' Complaint alleges ten causes of action:

- 1st – Wrongful Use of Civil Proceedings (v. W/R/B);
- 2nd – Wrongful Use of Civil Proceedings (v. ODOT);
- 3rd – Statutory Claim under ORS 205.470 (v. ODOT);
- 4th – Inverse Condemnation (v. ODOT);

- 5th – Intentional interference w/ Prospective Advantage (v. ODOT/R/B);
- 6th – Negligence (v. ODOT);
- 7th – Mandatory Injunction Quashing Claim of Encumbrance (v. ODOT);
- 8th – Quiet Title (v. ODOT);
- 9th – Declaratory Judgment (v. ODOT);
- 10th – Unconstitutionality of ORS 93.740(1) as applied (v. ODOT).

Defendant ODOT moves to dismiss the causes of action against ODOT for reasons including claim preclusion, the pendency of another matter, failure to state facts sufficient to support a claim for relief, and failure to file a tort claim notice. Further, ODOT requests that the Court consider, as an alternative to denying Defendant ODOT's Motions to Dismiss, allowing Plaintiffs to amend their complaint.

The Court accepts the facts as alleged in the complaint for purposes of its ORCP Rule 21 rulings. The standard for review on a motion to dismiss is to assume the truth of all well pleaded allegations in the complaint, giving the Plaintiffs the benefit of all reasonable inferences which can be drawn from those allegations. Oregon code pleading requires ultimate facts to be alleged, which are general factual conclusions drawn from evidence, which the pleader reasonably believes will be adduced at hearing or trial. These ultimate facts must establish each of the elements of a prima facie case for a recognized claim for relief.

**Defendant ODOT's Motion I: Claim Preclusion;  
and Motion II: Another Action Pending**

Defendant moves against Plaintiffs' 3rd through 10th Causes of Action based upon claim preclusion, and because there is another action pending between the same parties for the same cause:

Defendant ODOT filed a Notice of Pendency of Action (hereafter "the Notice") on June 6, 2008. The Notice has been on file in Linn County ever since. The Notice was filed by ODOT pursuant to ORS 93.740(1)<sup>1</sup>. The Notice was the subject of prior litigation in Linn County Case No. 082279. In that case, Judge Bispham ruled that ODOT's filing of the Notice was lawful after analyzing ORS 93.740, reviewing

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<sup>1</sup> ORS 93.740 provides that, "[i]n all suits in which the title to or any interest in or lien upon real property is involved, affected or brought in question, any Party thereto at the commencement of the suit, or at any time during the pendency thereof, may have recorded by the county clerk or other recorder of deeds of every county in which any part of the premises lies a notice of the pendency of the action containing the names of the parties, the object of the suit, and the description of the real property in the county involved, affected, or brought in question, signed by the party or the attorney of the party. From the time of recording the notice, and from that time only, the pendency of the suit is notice, to purchasers and incumbrancers, of the rights and equities in the premises of the party filing the notice."

The language of the statute itself indicates a distinction between a notice and an encumbrance and a notice and a lien. Therefore, a notice of the pendency of an action is not an encumbrance or a lien. It is a notice meant to protect future purchasers or incumbrancers from potential issues that might arise as a result of pending litigation involving the property at issue.

existing authority, and applying *Cereghino et al v. State Highway Com.*, 230 Or 439 (1962). At that time, Linn County case 081164 had been filed and was the basis for ODOT's filing of the Notice. The Court also ruled that the filing of the Notice did not amount to a taking under the Oregon or Federal Constitutions under the facts at that time and that the statute allowing the Notice to be filed was not unconstitutional. A General Judgment of Dismissal was entered in 082279. Plaintiffs appealed the ruling, and the Court of Appeals affirmed the decision without opinion.

Subsequently, Linn County Case No. 081164 went to trial and a jury verdict was returned for the Plaintiffs regarding Plaintiffs' claim of inverse condemnation against ODOT. A General Judgment was entered reflecting the verdict. The case is currently pending in the Oregon Court of Appeals as a result of ODOT filing an appeal. Plaintiffs now allege, in Case 112338, another inverse condemnation cause of action based upon the same Notice. Plaintiffs disagreed with the Court's ruling in 082279 regarding the legality of the Notice. But beyond this disagreement, Plaintiffs seek to distinguish the circumstances of the Notice in case 082279 from the circumstances of the Notice in 112338. Plaintiffs assert that because 081164 concluded with a jury verdict in Plaintiffs' favor, and because ODOT did not remove the Notice, the Notice is essentially an invalid encumbrance on Plaintiffs' property and constitutes a new act of inverse condemnation (among other causes of action) by ODOT

since the time of the Judgment in 081164. ODOT argues that case 081164, the original and proper basis for the filing of the Notice, is still pending on appeal and therefore continues to be a proper basis for the Notice. ODOT further argues that because there is still a pending case, and because it is indeed the same case related to the rulings in case 082279, that Judge Bispham's rulings regarding the legality of the same Notice preclude Plaintiffs from having any valid new claims based on the illegality of the Notice. In other words, Judge Bispham has already ruled on the legality of the Notice as to 081164 and that decision should not be litigated again.

Plaintiffs, however, assert that the issue here is distinct from that litigated previously and is not barred by claim preclusion. In 082279, the Court considered the lawfulness of the Notice and whether the Notice amounted to a taking in the context of a case not yet decided (i.e., case 081164) where there was, arguably, a dispute over where title would end up due to an inverse condemnation claim. Plaintiffs suggest that this case is different because the underlying case of 081164 concluded with a jury verdict for Plaintiffs. Plaintiffs further assign great weight to the trial judge's opinion letter in 081164 regarding the effects of the jury finding of a partial taking versus a complete taking, and in particular, to the judge's disagreement with the State's position that the inverse condemnation finding by the jury resulted in title of the property fully passing to ODOT. The trial Judge said that he instructed on the market

value of the property, in part, because ODOT's position was always that ODOT would receive a portion of the title in an amount corresponding to the amount of damages. The jury found the market value of the property to be higher than the amount of damages it awarded to Plaintiffs, leading one to infer that only a partial taking had been found. The trial judge did not address whether a portion of the title would pass to ODOT based on a corresponding percentage of the damages in relation to the fair market value or rule whether or not there was any validity to that theory. Rather, the trial Judge did say that if ODOT elected to pay the full market value before the general judgment was signed, then ODOT could request that title [fully] pass to ODOT. ODOT declined to do that (opting instead to later pursue its remedies on appeal). As a result of ODOT declining to pay the full amount, the trial court assumed that the result of the trial "was a money judgment in favor of the Plaintiffs only." All of these facts lead Plaintiffs to argue that ODOT's failure to remove the Notice, following the dispositive verdict and opinion of the trial judge, gives rise to new claims of unlawfulness, inverse condemnation, etc., occurring since the time of the entry of judgment in 081164. Further, Plaintiff argues that since the new claims are predicated on the entry of the judgment in 081164, the claims could not have been previously litigated so therefore cannot be barred by claim preclusion. Plaintiffs also seem to imply that claim preclusion does not apply to Judge Bispham's rulings in case 082279 because case 082279 concluded

by a judgment of dismissal as opposed to a judgment on the merits.

ORCP 21A(3) requires dismissal if another matter is pending between the same parties for the same cause. Under *Bernard v. Gary J. Lekas, P.C.*, 120 Or App 607 (1993), a case is pending during the time it is on appeal because the merits remain in dispute at some judicial level. . . .” *Bernard at 607, citing Beetham v. Georgia-Pacific*, 87 Or App 592 (1987). Here, the merits of case 081164 remain in dispute at the appellate level as to several issues, including the issue of whether ODOT has any rights to the property following the jury finding of inverse condemnation. The same cause requirement encompasses “an aggregate of operative facts which comprise a single occasion for Judicial relief.” *Dean v. Exotic Veneers*, 271 Or 188 (1975). The causes here are based upon the same set of operative facts. The parties dispute whether or not ODOT has any interest in the property. That issue is absolutely intertwined with the legality of the Notice which is the basis for the 2nd through 10th causes of action against ODOT.

Despite Plaintiffs’ attempts to distinguish the circumstances of the Notice now as compared to when the Notice was previously ruled on, the basis for the Notice remains the same (a pending action in 081164). Consequently, the Court finds that the Plaintiffs are barred by claim preclusion from again litigating the legality of the Notice as to case 081164 because that issue was previously decided. Further, case 081164 is on appeal and therefore still pending. Plaintiffs’

causes of action 3 through 10 are each, in some essential way, dependent upon the Notice being unlawful as to 081164. Consequently, they are barred by claim preclusion. As case 081164 is still on appeal, each of the causes of action are also appropriately dismissed pursuant to ORCP21(A)(3) as there continues to be another action pending for the same cause.

Defendant ODOT'S Motion I and II are granted as to ODOT.

### **Defendant ODOT's Motion III: Failure to State Facts**

Defendant ODOT moves against Plaintiffs' 2nd Cause of Action for failure to state ultimate facts sufficient to constitute a claim.

The elements of Wrongful Use of a Civil Proceeding include: 1) The commencement and prosecution by the Defendant of a judicial proceeding against the Plaintiff, 2) the termination of the proceeding in the Plaintiff's favor, 3) The absence of probable cause to prosecute the action, 4) The existence of malice, or of a primary purpose other than that of securing an adjudication of the claim, and 5) damages. *Alvarez v. Retail Credit Ass'n*, 234 Or 255 (1963).

A claim for damages for wrongful use of a civil proceeding shall be brought in an original action after the proceeding which is the subject matter of the claim is concluded. ORS 31.230(3). [A] person shall

not be required to plead or prove special injury beyond the expense and other consequences normally associated with defending against unfounded legal claims. ORS 31.230(1).

Here, Plaintiffs allege conclusory facts rather than ultimate facts to establish the absence of probable cause and the existence of malice. Further, while case 102728 was terminated in Plaintiffs' favor, case 081164 is still pending in the Court of Appeals, and case 082279 was terminated, but not in favor of the Plaintiffs. Plaintiffs have crafted their complaint to include allegations directly or indirectly related to all three cases. The Court finds that Plaintiffs have failed to state sufficient facts to support their claim. The 2nd Cause of Action is therefore dismissed pursuant to ORCP21(A)(8).

Defendant ODOT's Motion III is granted as to Plaintiffs' 2nd Claim for Relief.

#### **Defendant ODOT's Motion IV: Failure to State Facts**

Defendant ODOT moves against Plaintiffs' 3rd Cause of Action for failure to state ultimate facts sufficient to constitute a claim.

Plaintiffs' 3rd Cause of Action is predicated upon the Notice filed by ODOT under ORS 93.740 being an invalid claim of encumbrance. ORS 205.470 provides that, "[a]ny person who knowingly files, or directs another to file, an invalid claim of encumbrance shall

be liable to the owner of the property bound by the claim of encumbrance for a sum of not less than \$5,000 or for actual damages caused by the filing of the claim of encumbrance, whichever is greater, together with costs and reasonable attorney fees at trial and on appeal. Any grantee or other person purportedly benefited by an invalid encumbrance that is filed who willfully refuses to release the invalid encumbrance upon request of the owner of the property affected shall be liable to the owner for the damages and costs and reasonable attorney fees at trial and on appeal provided in this section.” An encumbrance is defined as a “claim, lien, charge or liability attached to and binding a property.” ORS 205.450(1). Also, the language of ORS 93.740 itself indicates a distinction between a notice and an encumbrance and a notice and a lien. Applying rules of statutory construction, a notice of the pendency of an action is not an encumbrance or a lien. Rather, it is a notice meant to protect future purchasers or incumbrancers from potential issues that might arise as a result of pending litigation involving the property at issue.

This Cause of Action is barred by claim preclusion and dismissed because of another matter pending. Those findings render this motion moot, although the Court agrees that Plaintiffs have failed to state ultimate facts sufficient to constitute a claim as to this cause of action because the Notice is not an invalid claim of encumbrance.

**Defendant ODOT's Motion V: Failure to State Facts**

Defendant ODOT moves against Plaintiffs' 4th Cause of Action for failure to state ultimate facts sufficient to constitute a claim.

Plaintiffs' 4th Cause of Action is a claim of inverse condemnation against ODOT. The Cause of Action is predicated on the Notice being unlawful and therefore constituting inverse condemnation because the continued existence of the filed Notice represents a taking of Plaintiffs' private property.

This Cause of Action is barred by claim preclusion and dismissed because of another matter pending. Those findings render this motion moot.

**Defendant ODOT's Motion VI: Faulty Tort Claim Notice**

Defendant ODOT moves for dismissal of the tort causes of action (2nd, 3rd, 5th and 6th) based on an assertion of lack of proper tort claim notice. Particularly, ODOT asserts that Plaintiffs failed to serve the notice on ODOT.

ORS 30.275 provides that a notice of claim must be given within 180 days after an alleged loss or injury in order to sustain an action arising from any act or omission of a public body or an officer, employee or agent of a public body. There are formal requirements as set forth in ORS 30.275(4) and (5).

Robert Harris and Viewcrest Investments provided a written notice of tort claim to the Oregon Department of Justice and AAG J. Nicole DeFever on May 25, 2010. DeFever had represented ODOT through her employment at the Department of Justice. The Department of Justice was acting as counsel for ODOT, a state agency. The notice was copied to the director of DAS. Because of the 180 day requirement, the notice pertained to the period of time between November 26, 2009 and May 25, 2010.

The Court finds that ODOT constructively received a tort claim notice from Plaintiff Viewcrest, but not from Plaintiff Hall. Defendant ODOT's Motion VI is granted as to Plaintiff Hall. However, the Court notes that Plaintiffs' pleadings include allegations outside the 180 day time period and beyond the scope of conduct described in the tort claim notice. Whether or not these problems could be cured by Plaintiffs is not relevant in light of the dismissal the 3rd, 5th, and 6th causes of action due to claim preclusion and another matter pending, and the dismissal of the 2nd cause of action for failure to state ultimate facts sufficient to constitute a claim.

**Defendant ODOTs Motion VII – withdrawn**

**Defendant ODOT's Motion VIII – Alternative Motion.**

Based on the decisions above, the Court declines to consider this alternative motion.

**Defendant ODOT's Motion for a Protective Order for a Temporary Stay of Discovery**

The Court ordered a stay of the discovery process and scheduled depositions at the time of hearing on these motions. As to ODOT, it would now appear that the scope of permissible discovery has been significantly reduced. Plaintiffs may submit a revised request for production of documents in light of the Court's rulings if they so choose.

**Plaintiffs' Cross-Motion to Compel Discovery by Defendant ODOT**

The Court denies this motion. Plaintiffs may choose to submit a new request for production of documents in line with the Court's decisions.

Following the above rulings, only Plaintiffs' 1st Cause of Action, and Plaintiffs' 5th Cause of Action as to Defendants Riemenschneider and Bryant remain. The dismissals granted are without prejudice. Plaintiffs are granted leave to amend as to Plaintiffs' 2nd Cause of Action.

Counsel for ODOT may prepare the Order.

Sincerely,

/s/ DeAnn L. Novotny  
DeAnn L. Novotny  
Circuit Court Judge

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IN THE SUPREME COURT  
OF THE STATE OF OREGON

S. FRED HALL,  
Plaintiff,

and

VIEWCREST INVESTMENTS, LLC,  
an Oregon limited liability company,  
Plaintiff-Appellant,  
Petitioner on Review,

v.

WESTEK PROPERTIES, LLC;  
ROBERT RIEMENSCHNEIDER; and  
BRYANT EMERSON & FITCH, LLP,  
Defendants,

and

STATE OF OREGON, acting by and  
through its Department of Transportation,  
Defendant-Respondent,  
Respondent on Review.

Court of Appeals  
A151584

S062483

**ORDER DENYING REVIEW**

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

/s/ Thomas A. Balmer 11/20/2014  
9:38:36 AM

THOMAS A. BALMER CHIEF JUSTICE, SUPREME COURT
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c: Patrick M Ebbett  
Russell L Baldwin

kg

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**United States Code (“U.S.C.”)**

**28 U.S.C §1257(a) provides:**

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

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**28 U.S.C. § 2101(c) provides:**

The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

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**Oregon Revised Statutes (“ORS”).**

**ORS 1.002 provides:**

(1) The Supreme Court is the highest judicial tribunal of the judicial department of government in this state. The Chief Justice of the Supreme Court is the presiding judge of the court and the administrative head of the judicial department of government in this state. The Chief Justice shall exercise administrative authority and supervision over the courts of this state consistent with applicable provisions of law and the Oregon Rules of Civil Procedure. The Chief Justice, to facilitate exercise of that administrative authority and supervision, may:

(a) Make rules and issue orders appropriate to that exercise.

(b) Require appropriate reports from the judges, other officers and employees of the courts of this state and municipal courts.

(c) Pursuant to policies approved by the Judicial Conference of the State of Oregon, assign or reassign on a temporary basis all judges of the courts of this state to serve in designated locations within or without the county or judicial district for which the judge was elected.

(d) Set staffing levels for all courts of the state operating under the Judicial Department and for all operations in the Judicial Department.

(e) Establish time standards for disposition of cases.

- (f) Establish budgets for the Judicial Department and all courts operating under the Judicial Department.
  - (g) Assign or reassign all court staff of courts operating under the Judicial Department.
  - (h) Pursuant to policies approved by the Judicial Conference of the State of Oregon, establish personnel rules and policies for judges of courts operating under the Judicial Department.
  - (i) Establish procedures for closing courts in emergencies.
  - (j) Establish standards for determining when courts are closed for purposes of ORCP 10, ORS 174.120 and other rules and laws that refer to periods of time when courts are closed.
  - (k) Take any other action appropriate to the exercise of the powers specified in this section and other law, and appropriate to the exercise of administrative authority and supervision by the Chief Justice over the courts of this state.
- (2) The Chief Justice may make rules for the use of electronic applications in the courts, including but not limited to rules relating to any of the following:
- (a) Applications based on the use of the Internet and other similar technologies.
  - (b) The use of an electronic document, or use of an electronic image of a paper document in lieu of the original paper copy, for any record of the courts

maintained under ORS 7.095 and for any document, process or paper that is served, delivered, received, filed, entered or retained in any action or proceeding.

(c) The use of electronic signatures or another form of identification for any document, process or paper that is required by any law or rule to be signed and that is:

(A) Served, delivered, received, filed, entered or retained in any action or proceeding; or

(B) Maintained under ORS 7.095.

(d) The use of electronic transmission for:

(A) Serving documents in an action or proceeding, other than a summons or an initial complaint or petition;

(B) Filing documents with a court; and

(C) Providing certified electronic copies of court documents and other Judicial Department records to another person or public body.

(e) Payment of statutory or court-ordered monetary obligations through electronic media.

(f) Electronic storage of court documents.

(g) Use of electronic citations in lieu of the paper citation forms as allowed under ORS 153.770, including use of electronic citations for parking ordinance violations that are subject to ORS 221.333 or 810.425.

(h) Public access through electronic means to court documents that are required or authorized to be made available to the public by law.

(i) Transmission of open court proceedings through electronic media.

(j) Electronic transmission and electronic signature on documents relating to circuit court jurors under ORS 10.025.

(3) The Chief Justice may make rules relating to the data that state courts may require parties and other persons to submit for the purpose of distinguishing particular persons from other persons. If the rules require the submission of data that state or federal law does not require that the courts make public, the rules may also require courts to keep the data confidential and not release the data except pursuant to a court order issued for good cause shown. Data that is made confidential under the rules is not subject to disclosure under ORS 192.410 to 192.505.

(4) Rules adopted by the Chief Justice under subsection (2) of this section must be consistent with the laws governing courts and court procedures, but any person who serves, delivers, receives, files, enters or retains an electronic document, or an electronic image of a paper document in lieu of the original paper copy, in the manner provided by a rule of the Chief Justice under subsection (2) of this section shall be considered to have complied with any rule or law governing service, delivery, reception, filing, entry or retention of a paper document.

(5) Rules made and orders issued by the Chief Justice under this section shall permit as much variation and flexibility in the administration of the courts of this state as are appropriate to the most efficient manner of administering each court, considering the particular needs and circumstances of the court, and consistent with the sound and efficient administration of the judicial department of government in this state.

(6) The Chief Justice may establish fees for the use of the Oregon Judicial Information Network.

(7) The judges, other officers and employees of the courts of this state shall comply with rules made and orders issued by the Chief Justice. Rules and orders of a court of this state, or a judge thereof, relating to the conduct of the business of the court shall be consistent with applicable rules made and orders issued by the Chief Justice.

(8) The Chief Judge of the Court of Appeals and the presiding judge of each judicial district of this state are the administrative heads of their respective courts. They are responsible and accountable to the Chief Justice of the Supreme Court in the exercise of their administrative authority and supervision over their respective courts. Other judges of the Court of Appeals or court under a presiding judge are responsible and accountable to the Chief Judge or presiding judge, and to the Chief Justice, in respect to exercise by the Chief Justice, Chief Judge or presiding judge of administrative authority and supervision.

(9) The Chief Justice may delegate the exercise of any of the powers specified by this section to the presiding judge of a court, and may delegate the exercise of any of the administrative powers specified by this section to the State Court Administrator, as may be appropriate.

(10) This section applies to justices of the peace and the justice courts of this state solely for the purpose of disciplining of justices of the peace and for the purpose of continuing legal education of justices of the peace.

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**ORS 7.010 provides:**

(1) The records of the circuit courts include a register and jury register.

(2) The record of the Supreme Court and the Court of Appeals is a register.

(3) All references in this chapter to the clerk or court administrator relate to the office of the clerk or court administrator of the appropriate trial or appellate court.

(4) Minimum record retention schedules and standards for all records of the state courts and the administrative offices of the state courts may be prescribed by the State Court Administrator pursuant to ORS 8.125. The State Court Administrator shall ensure that the minimum record retention schedules and standards prescribed under ORS 8.125 conform with

policies and standards established by the State Archivist under ORS 192.105, 357.825 and 357.835(1) for public records valued for legal, administrative or research purposes.

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**ORS 7.020 provides:**

The register is a record wherein the clerk or court administrator shall enter, by its title, every action, suit or proceeding commenced in, or transferred or appealed to, the court, according to the date of its commencement, transfer or appeal. Thereafter, the clerk or court administrator shall note therein all the following:

- (1) The date of any filing of any document.
  - (2) The date of making, filing and entry of any order, judgment, ruling or other direction of the court in or concerning such action, suit or proceeding.
  - (3) Any other information required by statute, court order or rule.
- 

**ORS 7.095 provides:**

- (1) Where the application of electronic data processing techniques is determined to be feasible and expedient in maintaining records of the courts of this state, the Chief Justice of the Supreme Court may authorize records to be kept by use of electronic data

processing equipment. Court records maintained as provided by this section shall contain the information otherwise required by law for the records of courts in this state.

(2) The State Court Administrator may prescribe standards governing the use of such techniques, the preservation of the records so maintained, and controls to prevent unauthorized access to records maintained through the use of electronic data processing equipment.

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**ORS 93.740 provides:**

(1) In all suits in which the title to or any interest in or lien upon real property is involved, affected or brought in question, any party thereto at the commencement of the suit, or at any time during the pendency thereof, may have recorded by the county clerk or other recorder of deeds of every county in which any part of the premises lies a notice of the pendency of the action containing the names of the parties, the object of the suit, and the description of the real property in the county involved, affected, or brought in question, signed by the party or the attorney of the party. From the time of recording the notice, and from that time only, the pendency of the suit is notice, to purchasers and incumbrancers, of the rights and equities in the premises of the party filing the notice. The notice shall be recorded in the same book and in the same manner in which mortgages are

recorded, and may be discharged in like manner as mortgages are discharged, either by such party or the attorney signing the notice.

(2) Except as provided in subsection (3) of this section, a conveyance or encumbrance that is not recorded in the manner provided by law before the filing of a notice of pendency that affects all or part of the same real property is void as to the person recording the notice of pendency for all rights and equities in the real property that are adjudicated in the suit. The provisions of this subsection apply only to a conveyance or encumbrance that under the provisions of ORS 93.640 would be void as against a subsequent purchaser whose interest in the property is of record at the time the notice of pendency is recorded and who purchased the property in good faith and for valuable consideration.

(3) A conveyance or encumbrance is not void under subsection (2) of this section if:

(a) The person who records a notice of pendency under this section has notice of the conveyance or encumbrance at the time the notice of pendency is recorded or otherwise does not act in good faith in recording the notice of pendency; or

(b) Pursuant to ORCP 33, the court allows a person claiming an interest in real property under the conveyance or encumbrance to intervene in the suit for the purpose of seeking adjudication of the person's interest or priority in the property.

(4) Unless otherwise prescribed by law, a party recording a notice of pendency shall use substantially the following form:

\_\_\_\_\_

NOTICE OF PENDENCY  
OF AN ACTION

Pursuant to ORS 93.740, the undersigned states:

1. As plaintiff(s), \_\_\_\_\_, has filed an action in the \_\_\_\_\_ Court for \_\_\_\_\_ County, State of Oregon;

2. The defendant(s) is/are: \_\_\_\_\_  
\_\_\_\_\_;

3. The object of the action is: \_\_\_\_\_  
\_\_\_\_\_;

4. The description of the real property to be affected is: \_\_\_\_\_  
\_\_\_\_\_

Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.  
\_\_\_\_\_

Plaintiff or  
Plaintiff's attorney

Name: \_\_\_\_\_

Address: \_\_\_\_\_  
\_\_\_\_\_

Phone No.: \_\_\_\_\_

STATE OF OREGON )  
 ) ss.  
County of \_\_\_\_\_ )

The foregoing instrument was acknowledged before  
me this \_\_\_\_ day of \_\_\_\_\_, 2\_\_ by \_\_\_\_\_.

\_\_\_\_\_  
Notary Public for Oregon  
My commission expires: \_\_\_\_\_

STATE OF OREGON )  
 ) ss.  
County of \_\_\_\_\_ )

The foregoing instrument was acknowledged before  
me this \_\_\_\_ day of \_\_\_\_\_, 2\_\_ by \_\_\_\_\_ of  
\_\_\_\_\_, a corporation, on behalf of the corpora-  
tion.

\_\_\_\_\_  
Notary Public for Oregon  
My commission expires: \_\_\_\_\_

**ORS 205.450 provides:**

As used in ORS 205.450 to 205.470:

- (1) “Encumbrance” means a claim, lien, charge or liability attached to and binding property.
- (2) “Encumbrance claimant” means a person who purportedly benefits from the filing of an encumbrance.

(3) “Federal official or employee” has the meaning given the term “employee of the government” in the Federal Tort Claims Act (28 U.S.C. 2671).

(4) “Filing” includes filing or recording.

(5) “Invalid claim of encumbrance” means a claim of encumbrance that is not a valid claim of encumbrance.

(6) “Property” includes, but is not limited to, real and personal property.

(7) “State or local official or employee” means an appointed or elected official, employee or agent of:

(a) A branch of government of this state or a state agency, board, commission or department of a branch of government of this state;

(b) A public university listed in ORS 352.002;

(c) A community college or local school district in this state;

(d) A city, county or other political subdivision in this state; or

(e) A public corporation in this state.

(8) “Valid claim of encumbrance” is an encumbrance that:

(a) Is an encumbrance authorized by statute;

(b) Is a consensual encumbrance recognized under the laws of this state; or

(c) Is an equitable, constructive or other encumbrance imposed by a court of competent jurisdiction.

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**ORS 205.470 provides:**

Any person who knowingly files, or directs another to file, an invalid claim of encumbrance shall be liable to the owner of the property bound by the claim of encumbrance for a sum of not less than \$5,000 or for actual damages caused by the filing of the claim of encumbrance, whichever is greater, together with costs and reasonable attorney fees at trial and on appeal. Any grantee or other person purportedly benefited by an invalid encumbrance that is filed who willfully refuses to release the invalid encumbrance upon request of the owner of the property affected shall be liable to the owner for the damages and costs and reasonable attorney fees at trial and on appeal provided in this section.

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NOTICE OF PENDENCY  
OF AN ACTION

Pursuant to ORS 93.740, the undersigned states:

1. As plaintiffs', S. Fred Hall and Viewcrest Investments, LLC. have filed an action in the Circuit Court for Linn County, State of Oregon;
2. The defendant is: State of Oregon, by and through its Department of Transportation;
3. The object of the action is: inverse condemnation, among other things, to put the property described bellow [sic], to the defendant and obtain just compensation therefore;
4. The description of the real property to be affected is as set out in the Exhibit A attached hereto and by this reference made a part hereof;

DATED this 5 day of June, 2008.

/s/ Albert C. Depenbrock  
Albert C. Depenbrock  
Senior Assistant Attorney General

Name: STATE OF OREGON, by and through  
its DEPARTMENT OF TRANSPOR-  
TATION, by

Albert C. Depenbrock  
Senior Assistant Attorney General

Address: 1162 Court Street NE  
Salem OR 97301-4096

Phone No.: (503) 947-4700

STATE OF OREGON, County of Marion

The foregoing instrument was acknowledged before me this 5th day of June, 2008, by Albert C. Depenbrock.

LINN COUNTY, OREGON	2008-11438
CC-NPA	06/06/2008 11:47:36 AM
Cnt=1 Stn=7 M. FISHER	
\$20.00 \$11.00	\$31.00

[Bar Code Omitted In Printing]

I, Steve Druckenmiller, County Clerk for Linn County, Oregon, certify that the instrument identified herein was recorded in the Clerk records.

Steve Druckenmiller – County Clerk [Linn County  
Oregon Seal]

<p>[SEAL] OFFICIAL SEAL <b>TAMMY R RUSSELL</b> NOTARY PUBLIC-OREGON COMMISSION NO. 382329 MY COMMISSION EXPIRES JUNE 30, 2008</p>	<p>/s/ <u>Tammy R. Russell</u> Notary Public for Oregon My Commission Expires <u>6/30/08</u></p>
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After Recording Return To:  
Albert C. Depenbrock  
Oregon Department of Justice  
1162 Court Street NE  
Salem OR 97301

**Exhibit "A"**

Real property in the City of Millersburg, County of Linn, State of Oregon, described as follows:

Parcel I:

PART OF JOHN MEEKER DONATION LAND CLAIM NO. 60 IN TOWNSHIP 10 SOUTH, RANGE 3 WEST OF THE WILLAMETTE MERIDIAN, COUNTY OF LINN AND STATE OF OREGON, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING ON THE EASTERLY RIGHT-OF-WAY LINE OF THE SOUTHERN PACIFIC COMPANY AT A POINT 840.18 FEET SOUTH  $0^{\circ}13'30''$  WEST AND 1278.97 FEET SOUTH  $89^{\circ}46'30''$  EAST FROM THE NORTHEAST CORNER OF THE SARAH FARLOW LAND CLAIM NO. 59; THENCE SOUTH  $89^{\circ}46'30''$  EAST 483.67 FEET TO THE WESTERLY RIGHT-OF-WAY LINE OF THE PACIFIC HIGHWAY EAST; THENCE SOUTH  $2^{\circ}45'30''$  WEST ALONG THE WESTERLY RIGHT-OF-WAY LINE OF SAID HIGHWAY 980.34 FEET TO THE NORTH BOUNDARY OF A TRACT CONVEYED TO A. JOE WRIGHTMAN AND WIFE BY DEED RECORDED MAY 28, 1947, IN BOOK 192, PAGE 0693, DEED RECORDS; THENCE NORTH  $89^{\circ}51'30''$  WEST ALONG THE NORTHERLY BOUNDARY OF SAID TRACT 371.89 FEET TO THE EASTERLY RAILROAD RIGHT-OF-WAY LINE OF THE SOUTHERN PACIFIC COMPANY; THENCE NORTH  $4^{\circ}16'$  WEST ALONG SAID EASTERLY RIGHT-OF-WAY 750.20 FEET; THENCE ON A 3408 FOOT RADIUS CURVE

TO THE RIGHT (THE LONG CHORD OF WHICH BEARS NORTH 2°19' WEST 232.28 FEET) A DISTANCE OF 232.32 FEET TO THE PLACE OF BEGINNING.

EXCEPTING THEREFROM: BEGINNING 89°24'30" WEST 1736.59 FEET FROM A POINT ON THE EAST LINE OF AND SOUTH 0°11' EAST 1833.17 FEET FROM THE MOST EASTERLY NORTHEAST CORNER OF THE JOHN MEEKER DONATION LAND CLAIM NO. 60 IN TOWNSHIP 10 SOUTH, RANGE 3 WEST OF THE WILLAMETTE MERIDIAN, LINN COUNTY, OREGON, SAID BEGINNING POINT BEING ON THE WESTERLY RIGHT-OF-WAY LINE OF INTERSTATE HIGHWAY NO. 5, AND RUNNING THENCE NORTH 89°24'30" WEST 181.0 FEET; THENCE SOUTH 89°24'30" EAST 181.0 FEET TO THE WEST RIGHT-OF-WAY LINE OF SAID HIGHWAY; THENCE NORTH 2°45'30" EAST ALONG SAID RIGHT-OF-WAY 181.0 FEET TO THE PLACE OF BEGINNING.

FURTHER EXCEPTING THEREFROM: THAT TRACT CONVEYED TO THE STATE OF OREGON, BY AND THROUGH ITS STATE HIGHWAY COMMISSION AS RECORDED IN BOOK 254, PAGE 0373, DEED RECORDS, LINN COUNTY, OREGON.

PARCEL II:

BEGINNING SOUTH 00°11' EAST 2,809.97 FEET AND NORTH 89°32' WEST 1,735.43 FEET FROM THE MOST EASTERLY NORTHEAST CORNER OF THE JOHN MEEKER DONATION LAND CLAIM NO. 60 IN TOWNSHIP 10 SOUTH, RANGE 3 WEST

OF THE WILLAMETTE MERIDIAN, COUNTY OF LINN AND STATE OF OREGON, SAID BEGINNING POINT BEING AT THE INTERSECTION OF THE WESTERLY RIGHT-OF-WAY LINE OF THE PACIFIC HIGHWAY EAST AND THE SOUTH LINE OF A TRACT CONVEYED BY A. JOE WRIGHTMAN BY DEED RECORDED OCTOBER 31, 1945 IN BOOK 173, PAGE 0549, DEED RECORDS; THENCE NORTH 89°51'30" WEST, ALONG THE SOUTH BOUNDARY OF SAID TRACT, 371.29 FEET TO THE EASTERLY RAILROAD RIGHT-OF-WAY LINE OF THE SOUTHERN PACIFIC COMPANY; THENCE SOUTHERLY, ALONG SAID EASTERLY RIGHT-OF-WAY (RAILROAD) LINE TO THE SOUTH BOUNDARY OF SAID CLAIM NO. 60; THENCE EAST, ALONG THE SOUTH LINE OF SAID CLAIM NO. 60, TO THE WESTERLY RIGHT-OF-WAY OF SAID HIGHWAY; THENCE NORTHERLY ALONG SAID HIGHWAY RIGHT-OF WAY LINE TO THE PLACE OF BEGINNING.

EXCEPTING THEREFROM: BEGINNING AT THE INTERSECTION OF THE EAST RIGHT-OF-WAY OF THE SOUTHERN PACIFIC RAILROAD WITH THE SOUTH LINE OF THE JOHN MEEKER DONATION LAND CLAIM NO. 60 IN TOWNSHIP 10 SOUTH, RANGE 3 WEST OF THE WILLAMETTE MERIDIAN, LINN COUNTY, OREGON, SAID POINT BEING ALSO NORTH 89°49' WEST 1,956.32 FEET FROM THE SOUTHEAST CORNER OF SAID JOHN MEEKER DONATION LAND CLAIM NO. 60; AND RUNNING THENCE NORTHERLY, ALONG THE EAST RIGHT-OF-WAY LINE OF SAID RAILROAD, 313.70 FEET; THENCE SOUTH 89°49' EAST, PARALLEL TO THE SOUTH LINE OF SAID CLAIM NO.

60, A DISTANCE OF 128.28 FEET, MORE OR LESS, TO THE WEST RIGHT-OF-WAY LINE OF INTER-STATE HIGHWAY NO. 5; THENCE SOUTHERLY, ALONG SAID RIGHT-OF-WAY, 314.20 FEET TO THE SOUTH LINE OF SAID CLAIM NO. 60; THENCE NORTH 89°49' WEST 79.93 FEET TO THE PLACE OF BEGINNING.

FURTHER EXCEPTING THEREFROM, THAT TRACT CONVEYED TO THE STATE OF OREGON, BY AND THROUGH ITS STATE HIGHWAY COMMISSION AS RECORDED IN BOOK 254, PAGE 0373, DEED RECORDS, LINN COUNTY, OREGON.

PARCEL III:

A TRACT OF LAND SITUATED IN SECTION 16, TOWNSHIP 10 SOUTH, RANGE 3 WEST OF THE WILLAMETTE MERIDIAN, IN THE CITY OF MILLERSBURG, COUNTY OF LINN, STATE OF OREGON, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A 5/8 INCH IRON ROD ON THE EASTERLY RIGHT-OF-WAY LINE OF THE SOUTHERN PACIFIC COMPANY SAID POINT BEING 842.35 FEET SOUTH 00°23'47" EAST AND 1287.90 FEET SOUTH 89°16'00" EAST FROM THE NORTHEAST CORNER OF THE SARAH FARLOW DONATION LAND CLAIM NO. 59 AND BEING IN THE SOUTHEAST ONE-QUARTER OF SECTION 16, TOWNSHIP 10 SOUTH, RANGE 3 WEST OF THE WILLAMETTE MERIDIAN, LINN COUNTY, OREGON; THENCE NORTHEASTERLY, ALONG

SAID RIGHT OF WAY ALONG THE ARC OF A 3407.87 FOOT RADIUS CURVE TO THE RIGHT (THE CHORD OF WHICH BEARS NORTH 14°50'30" EAST 1732.20 FEET) 1751.42 FEET TO A 5/8 INCH IRON ROD AT THE POINT OF INTERSECTION WITH THE WESTERLY RIGHT OF WAY OF PACIFIC HIGHWAY EAST, (INTERSTATE HIGHWAY I-5); THENCE SOUTHERLY, ALONG SAID WESTERLY RIGHT OF WAY ALONG THE ARC OF A 11,259.16 FOOT RADIUS CURVE TO THE RIGHT (THE CHORD OF WHICH BEARS SOUTH 00°36'04" WEST 536.57 FEET) 536.62 FEET TO A 5/8 INCH IRON ROD AT THE POINT OF SPIRAL TO CURVE AT HIGHWAY STATION 853+61.71; THENCE CONTINUING ALONG SAID RIGHT OF WAY, ALONG THE ARC OF 200 FOOT OFFSET FROM A 400 FOOT CENTERLINE SPIRAL CURVE TO THE RIGHT (THE CHORD OF WHICH BEARS SOUTH 02°38'05" WEST 396.50 FEET) 396.51 FEET TO A 5/8 INCH IRON ROD AT THE POINT OF TANGENT AT HIGHWAY STATION 857+61.71; THENCE CONTINUING SOUTH 02°58'00" WEST 747.67 FEET ALONG SAID RIGHT OF WAY TO A 5/8 INCH IRON ROD; THENCE NORTH 89°16'00" WEST 381.18 FEET TO THE POINT OF BEGINNING.

PARCEL IV:

BEGINNING AT THE INTERSECTION OF THE EAST RIGHT OF WAY LINE, OF THE SOUTHERN PACIFIC RAILROAD WITH THE SOUTH LINE OF THE JOHN MEEKER DONATION LAND CLAIM NO. 60 IN TOWNSHIP 10 SOUTH, RANGE 3 WEST

OF THE WILLAMETTE MERIDIAN, LINN COUNTY, OREGON, SAID POINT BEING ALSO NORTH 89°49' WEST 1956.32 FEET FROM THE SOUTH-EAST CORNER OF SAID JOHN MEEKER DONATION LAND CLAIM NO. 60; THENCE RUNNING NORTHERLY ALONG THE EAST RIGHT OF WAY LINE OF SAID RAILROAD 313.70 FEET; THENCE SOUTH 89°49' EAST PARALLEL TO THE SOUTH LINE OF SAID DONATION LAND CLAIM NO. 60, A DISTANCE OF 128.28 FEET, MORE OR LESS, TO THE WEST RIGHT OF WAY LINE OF INTERSTATE HIGHWAY NO. 5; THENCE SOUTHERLY ALONG SAID RIGHT OF WAY 314.20 FEET TO THE SOUTH LINE OF SAID DONATION LAND CLAIM NO. 60; THENCE NORTH 89°49' WEST 79.93 FEET TO THE PLACE OF BEGINNING.

PARCEL V:

BEGINNING NORTH 89°24'30" WEST 1736.59 FEET FROM A POINT ON THE EAST LINE OF AND SOUTH 0°11' EAST 1833.17 FEET FROM THE MOST EASTERLY NORTHEAST CORNER OF THE JOHN MEEKER DONATION LAND CLAIM NO. 60 IN TOWNSHIP 10 SOUTH, RANGE 3 WEST OF THE WILLAMETTE MERIDIAN, LINN COUNTY, OREGON, SAID BEGINNING POINT BEING ON THE WESTERLY RIGHT OF WAY LINE OF INTERSTATE HIGHWAY NO. 5; RUNNING THENCE NORTH 89°24'30" WEST 181.0 FEET; THENCE SOUTH 2°45'30" WEST PARALLEL TO HIGHWAY SAID RIGHT OF WAY 181.0 FEET; THENCE SOUTH 89°24'30" EAST 181.0 FEET TO THE WEST

RIGHT OF WAY LINE OF SAID HIGHWAY;  
THENCE NORTH 2°45'30" EAST ALONG SAID  
RIGHT OF WAY 181.0 FEET TO THE PLACE OF  
BEGINNING.

THE LEGAL DESCRIPTION WAS CREATED PRIOR  
TO JANUARY 01, 2008.

Tax Parcel Number: 0830509 and 0042677 and  
0043519 and 0042669 and 0043501

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