

1 IN THE MATTER OF THE APPEAL OF )  
2 CONDITIONAL USE PERMIT NO. 19-83) FINDINGS OF FACT AND ORDER  
3 FOR OREGON BROADCASTING COMPANY )  
4 )

4 BACKGROUND

5 This is an appeal from a decision of the Hearings  
6 Officer conditionally allowing a television transmitter in the  
7 F-I (Forestry) zone. The Oregon Broadcasting Company (doing  
8 business in Klamath Falls as KOTI Television, Channel 2) applied  
9 for a conditional use permit which would allow it to relocate its  
10 transmitter to a site on Stukel Mountain. The property involved  
11 is federal land, managed by the Bureau of Land Management. Stukel  
12 Mountain has three communications sites at the present time. The  
13 one nearest to the proposed transmitter is operated by Frank Plass  
14 and includes mobile radio service and low power FM and television  
15 translators. North of the Plass site is a two-way land mobile  
16 radio service operated by the Motorola Corporation. Farthest  
17 from the proposed transmitter is a communication and navigation  
18 facility operated by the Federal Aviation Administration. Mr. Plass  
19 and a representative of Motorola appeared in opposition to the  
20 application.

21 The Klamath County Hearings Officer reviewed the matter  
22 at a public hearing on August 18, 1983. After the close of that  
23 hearing, proponents and opponents both requested an opportunity  
24 to present additional information. The Hearings Officer then  
25 convened a second hearing, held on September 15, 1983. Extensive  
26 testimony and exhibits were received, with much of the information  
27 pertaining to the possibility of interference with the existing  
28 communications sites and the technical and regulatory means for

1 dealing with that interference. At the conclusion of the second  
2 hearing, the matter was taken under advisement and an order was  
3 signed on October 3, 1983. The order set forth the Hearings  
4 Officer's findings and conclusions and conditionally approved the  
5 application.

6 An appeal of this decision was filed by Frank Plass.  
7 The appeal was on the grounds "that the Hearings Officer failed  
8 and refused to allow Mr. Plass to complete his presentation of  
9 objections and the Findings of Fact and Conclusions of Law are  
10 unsupported by the evidence." The Board of Commissioners held a  
11 hearing on the appeal on November 21, 1983.

#### 12 DISCUSSION

13 The issue of the Hearings Officer's refusal to allow  
14 Mr. Plass to complete his presentation arose from two letters  
15 submitted after the close of the September 15 hearing. The first  
16 was a letter written by Frank Plass and dated September 19, 1983,  
17 and the second was a letter from Tim Plass dated September 20, 1983.

18 A review of the transcripts of the two hearings shows  
19 that both sides were given several opportunities to present and  
20 rebut testimony and that the Hearings Officer made it clear near  
21 the end of his second hearing (9-15-83 transcript, Page 31) that  
22 he would accept no more testimony after the last rebuttal. The  
23 Board of Commissioners feel that the record provides an adequate  
24 basis for reaching a decision and that each side was given an  
25 adequate opportunity to make its case. The primary concerns under  
26 the Klamath County Land Development Code are with land use compati-  
27 bility. The presentation of new technical information in addition  
28 to that already on the record would not aid the County in making,  
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1 what is strictly a land use decision.

2 Appellant raised the issue at the appeal hearing of  
3 whether the County could delegate its regulatory authority to  
4 outside agencies, contending that the County should exercise the  
5 control mandated by the Ordinance. Section 44.003C of the Klamath  
6 County Land Development Code requires of conditional uses "that the  
7 location, size, design and operating characteristics of the pro-  
8 posed development will be compatible with and will not adversely  
9 affect the livability or appropriate development of abutting  
10 properties and the surrounding neighborhood." Where possible  
11 conflicts are apparent, this requirement places a burden on the  
12 review authority to place adequate conditions on the approval to  
13 protect the owners and users of surrounding properties. It is  
14 agreed by all parties to this matter that Stikel Mountain, because  
15 of its height and location, is an ideal communications site for  
16 serving the Klamath Basin and its hinterland. Disagreement arose  
17 over the possibility of interference to the existing communications  
18 sites and over the ability of the concerned federal agencies  
19 (Federal Communications Commission, Federal Aviation Administration  
20 and the Bureau of Land Management) to protect the current users  
21 of the mountain.

22 Mr. Plass contended that the Federal Communications  
23 Commission established operating standards for the communications  
24 industry, but was not effective in enforcement or conflict resolu-  
25 tion. Oregon Broadcasting submitted several exhibits, notably  
26 excerpts from Title 47 of the Code of Federal Regulations (Exhibits  
27 E and I), detailing both the Commission's broadcasting standards  
28 and its monitoring and enforcement authority. The Board of  
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1 Commissioners feels that Klamath County does not have the power,  
2 technically or legally, to determine whether electronic interference  
3 is occurring, who is responsible, and what can be done about it.  
4 The County's intent is that no interference should occur to exist-  
5 ing service, but a determination of interference can only be made  
6 by the FCC.

7 In addition to the FCC Regulations, the Bureau of Land  
8 Management has prepared an "Activity Plan for the Stukel Mountain  
9 Communications Site" (Exhibit Y). In several places this plan  
10 expresses concern over electronic interference and requires right-  
11 of-way holders (Oregon Broadcasting in this case) and all subse-  
12 quent users "to mitigate their electronic transmission so that  
13 existing users, located on private land or in the multiple user  
14 site, will not be adversely affected." Steve Sherman, the BLM's  
15 Lost River area manager, testified at both hearings on this matter  
16 and emphasized the Bureau's capability and responsibility for  
17 overseeing the site. He also pointed out that a bond will be  
18 required to assure compliance with the terms of the right-of-way  
19 grant (August 18, 1983 transcript, pp. 15-16; September 15, 1983  
20 transcript, pp. 12-14).

21 With respect to the Federal Aviation Administration,  
22 there was uncontradicted testimony by the applicant that an agree-  
23 ment has been reached between Oregon Broadcasting and the FAA  
24 regarding an acceptable interference level at the FAA site.

25 In view of the above, the Board feels that the concerned  
26 Federal agencies have the authority and capacity to resolve inter-  
27 ference problems and that the Hearings Officer did not act impro-  
28 perly in conditioning approval of this permit on compliance with

1 the requirements of the FCC, BLM and FAA. In so doing, the County  
2 does not relinquish its responsibility to the current users of  
3 Stukel Mountain or to the community at large. The County retains  
4 its authority to modify or even revoke this permit should evidence  
5 of interference to current users be presented and should Oregon  
6 Broadcasting not live up to its responsibility.

7 CONCLUSION

8 Having considered the testimony at the hearing of  
9 November 21, 1983, and having reviewed the exhibits previously  
10 submitted and the transcripts of the earlier hearings, the Klamath  
11 County Board of Commissioners denies the appeal and upholds the  
12 decision of the Hearings Officer. In order to make it clear that  
13 the County's intent is to assure no interference with the current  
14 users of the mountain, the Hearings Officer's conditions are  
15 modified to read as follows:

16 1. In order that the permitted use will not interfere  
17 adversely with existing communications facilities on the Stukel  
18 Mountain site:

19 a. Applicant shall follow all terms and conditions  
20 for their operation as set by the Federal Communications  
21 Commission;

22 b. Applicant shall follow all terms and conditions  
23 for their operation as set by the Bureau of Land  
24 Management;

25 c. Applicant shall follow all terms and conditions  
26 for their operation as set by the Federal Aviation  
27 Administration.

28 2. Applicant shall obtain legal access to the site if

1 applicant has not already done so.

2  
3 DONE AND DATED THIS 4th DAY OF January, 1984.

4  
5 BOARD OF COUNTY COMMISSIONERS

6 Nell Kuonen  
7 Nell Kuonen, Commissioner

8 Carroll Zon Gerbert  
9 Carroll Zon Gerbert, Commissioner

10 Roger Hamilton  
11 Roger Hamilton, Chairman

12 APPROVED AS TO FORM:  
13 BOIVIN & BOIVIN

14 BY [Signature]

15  
16 RETURN TO COMMISSIONERS JOURNAL

17 STATE OF OREGON, )  
18 County of Klamath )  
19 Filed for record at request of

20 on this 6th day of Jan A.D. 19 84  
21 at 9:06 o'clock A M, and duly  
22 recorded in Vol. M84 of Deeds  
23 Page 290

24 EVELYN BIEHN, County Clerk

25 By [Signature] Deputy

26 Fee None