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

SCOTT FERNANDEZ, an elector and
resident of the City of Portland, Oregon

Plaintiff,

v.

CITY OF PORTLAND, OREGON, a
municipality incorporated under the Laws of
the State of Oregon,

Defendant.

Case No.: _____

COMPLAINT
(Trespass, Public Nuisance)

**NOT SUBJECT TO MANDATORY
ARBITRATION**

**PRAYER: Injunctive Relief, Attorney
Fees under *Deras v. Myers***

Filing fee set by ORS 21.135(1)(a)

Plaintiff alleges:

(COMMON ALLEGATIONS)

1.

Plaintiff Scott Fernandez is an Oregon elector and citizen of Portland, Oregon. Plaintiff Fernandez owns and lives in a home in Northeast Portland, and receives water as a residential customer of the City of Portland. Plaintiff's home was formerly provided with water stored in the Mt. Tabor open reservoirs until December of 2015, at which point the Mt. Tabor reservoirs were disconnected and Plaintiff began receiving water directly from the underground reservoirs at Powell Butte.

2.

Defendant City of Portland, Oregon (hereinafter “Defendant City”) is a municipality located in Multnomah County, State of Oregon, and incorporated under the laws of this State. Defendant City operates a Water Bureau, which is tasked in pertinent part with providing safe, potable water to its residential and business customers.

3.

Most of Defendant City’s water comes from the Bull Run Watershed, a 102 square-mile protected area in which rain and snowmelt flow into two open air reservoirs, storing over 17 billion gallons of water. Defendant City treats this water as needed and transports it via conduit it to underground storage in the Powell Butte reservoirs. However, during the summer months and periods of increased turbidity in Bull Run (heavy rains, landslides in the watershed, etc.), water is pumped from groundwater wells near the Columbia River known as the Columbia South Shore Well Field (hereinafter the “wellfield”). With the closing of the Mt. Tabor open reservoirs, the wellfield water will now be similarly pumped directly into the underground Powell Butte reservoirs. In 2015, Defendant City pumped 5.3 billion gallons of water from the wellfield over the course of 112 days, beginning on July 16, 2015.

4.

According to the City’s own materials, radioactive “[radon gas] has been detected at varying levels in Portland’s groundwater wells from the Columbia South Shore Well Field, Portland’s secondary source of drinking water.” The radon comes from granite in the substrate. Granite is recognized to contain trace amounts of uranium, and uranium decays in relevant part into radon gas. Therefore, radioactive gas is invariably present to some extent in the groundwater as it is pumped from the wellfield for storage. According to City documents, the

1 level of radon radiation in groundwater taken from the wellfield was tested as high as 370
2 picocuries per liter in 2015.

3 5.

4 Radon is a known carcinogen, and exposure to radon is the second leading cause of lung
5 cancer in the United States after the smoking of tobacco. Radon has a half-life of about four
6 days—half of a given quantity of it breaks down every four days. When radon undergoes
7 radioactive decay, it emits ionizing radiation in the form of ionizing alpha particles. It also
8 produces short-lived decay products, often called progeny or daughter elements, such as
9 radioactive and highly toxic isotopes of polonium, bismuth, lead, and mercury. Unlike radon,
10 the progeny are not gases and can easily attach to dust and other airborne material, and emit
11 alpha and beta particles, as well as gamma rays. These elements can be transported by air and
12 can also be breathed, bringing ionizing radiation into the body.

13 6.

14 In open reservoirs, radon is naturally off-gassed into the atmosphere in a safe and
15 unconcentrated form. In covered reservoirs, the radon cannot escape efficiently and its progeny
16 elements cannot escape and instead are retained in the water as it is pumped through the system,
17 and eventually into the homes, businesses, schools, and other facilities throughout Portland,
18 Oregon. The State of Oregon recognizes and advises that “there is no safe level of radon.” The
19 EPA likewise states, “no level of radon is safe,” and “cancer risk from radon in water is higher
20 than the cancer risk estimated to result from any other drinking water contaminant.”

21 7.

22 On information and belief, when Defendant City begins to use the wellfield to augment
23 the Bull Run watershed this year, radon, other radioactive elements, and ionizing radiation will

1 all be present in wellfield water. The wellfield water will then be stored entirely in covered
2 reservoirs, with no chance for efficient off-gassing into the atmosphere, and from there
3 transported into the homes and businesses throughout Portland. Plaintiff alleges that discovery
4 will show that when wellfield water is placed into the system and transported to Plaintiff's home,
5 radioactive elements such as radon, polonium, bismuth, lead, and mercury, as well as the
6 energized particles resulting from radioactive decay, will be brought directly into Plaintiff's
7 home to be released into the air, absorbed by the Plaintiff's body, or unknowingly consumed.

8 8.

9 In addition to radon, its progeny elements, and the radioactive decay products, the pipes
10 comprising Defendant City's water system are lined with what is known as "biofilm"—a layered
11 surface of organic matter and naturally occurring bacteria that coats the insides of water pipes.
12 Sodium hypochlorite ("chlorine") is necessary to sterilize water and kill microorganisms in any
13 water system. However, the biofilm interferes with the disinfection of the water system by
14 interacting with the chlorine to produce a chemical called chloramine, which in turn converts to
15 ammonia and ammonia byproducts. This effect is greatly exacerbated when water is stored in
16 covered underground reservoirs. In covered tanks, ammonia in the water forms various harmful,
17 toxic nitrification compounds, including nitrates, nitrites, and nitrosamines, as well as leading to
18 the formation of other compounds such as haloacetic acids, nitrosodimethylamine, and
19 chloroform gas. All of these nitrification compounds are carcinogenic and/or toxic to some
20 extent. Plaintiff alleges that discovery will show that these chemical compounds are currently
21 present and will continue to be present in the water he receives in his home from Defendant City
22 in unhealthy amounts.

1 9.

2 The most reliable and cost effective means of preventing the delivery of radon, radon
3 progeny elements, radioactive decay particles, nitrates, nitrites, nitrosamines, haloacetic acids,
4 nitrosodimethylamine, and chloroform is by storing water in open reservoirs prior to its delivery
5 to consumers, and disinfecting the water when it leaves open reservoirs. An open reservoir's
6 surface area allows radon—a gas—to dissipate into the open air, without concentrating it at any
7 single endpoint. Sunlight on open reservoirs breaks down nitrates, nitrites, nitrosamines,
8 nitrosodimethylamine, haloacetic acids, and chloroform gas into harmless constituent elements
9 and inhibits further growth prior to delivery to consumers.

10
11 **FIRST CLAIM FOR RELIEF**
12 *Against Defendant City*
13 (Trespass)

14 10.

15 Plaintiff reasserts and incorporates by reference the allegations contained in paragraphs 1
16 through 9, above.

17 11.

18 Defendant City currently has a system of open reservoirs that it has disconnected from its
19 drinking water system, and has begun the process of decommissioning these open reservoirs
20 despite the known health risks of underground storage, and the level of radon and other toxic and
21 carcinogenic chemicals in the City's drinking water, as cited above.

22 12.

23 Defendant City has caused or will imminently cause an intrusion on Plaintiff's property
by transporting the radon, radon progeny elements, radioactive decay particles, nitrates, nitrites,

1 nitrosamines, haloacetic acids, nitrosodimethylamine, and chloroform gas into Plaintiff's home
2 water system. Plaintiff has a protected interest in exclusive possession of his property, and in
3 agreeing to water service from the City, has only excepted Defendant City's supplying of water
4 and other necessary, non-toxic or nonradioactive substances such as chlorine to the water.

5 13.

6 On information and belief, Plaintiff alleges that discovery will show the invasion of
7 Plaintiff's property by the radon, radon progeny elements, radioactive decay particles, nitrates,
8 nitrites, nitrosamines, haloacetic acids, nitrosodimethylamine, and chloroform gas is not *de*
9 *minus* and that it constitutes a substantial invasion of Plaintiff's possessory interest in his
10 property, and interferes with Plaintiff's legitimate use of his home. In Oregon, "a possessor's
11 interest in land ... may, under the appropriate circumstances, be violated by ... an atomic
12 particle[.]" and "in this atomic age even the uneducated know the great and awful force
13 contained in the atom and what it can do to a man's property if it is released[.]" *Martin v.*
14 *Reynolds Metals Co.*, 221 Or 86, 93, 100, 342 P2d 790 (1959). Such is the case here. Plaintiff is
15 harmed by the likely future intrusion of radon into his home via drinking water contamination, as
16 well as by contamination from radon progeny elements, radioactive decay particles, nitrates,
17 nitrites, nitrosamines, haloacetic acids, nitrosodimethylamine, and chloroform gas introduced
18 through water provided by Defendant City.

19 14.

20 Plaintiff prays this Court enjoin Defendant City, and all its employees, agents,
21 contractors, and those needing its approval or permission to act, from invading Plaintiff's
22 property with radon, radon progeny elements, radioactive decay particles, nitrates, nitrites,
23 nitrosamines, haloacetic acids, nitrosodimethylamine, and chloroform gas when Plaintiff

1 purchases the water distributed by Defendant City. Plaintiff prays for an order and judgment of
2 this Court that any such invasion through the water supply is trespassory, and must not be
3 permitted to occur or continue, and that Defendant City must act to prevent any such trespass of
4 the listed chemicals in the future unless they form a *de minimus* invasion.

5 15.

6 Plaintiff further seeks an injunction against the City, and all its employees, agents,
7 contractors, and those needing its approval or permission to act, prohibiting it from degrading,
8 demolishing or further impairing the open reservoir system until such time as this case can be
9 adjudicated, so that the existing economically feasible and provably effective open reservoir
10 system will not be lost during the pendency of this action. Plaintiff intends to file a preliminary
11 injunction motion to prevent any additional damage to Portland's open reservoir system. The
12 current system, particularly the open reservoirs in Portland's Washington Park, are slated for
13 demolition over the coming months, and would be impossible to replace in an economically
14 feasible manner once lost.

15
16 **SECOND CLAIM FOR RELIEF**
17 *Against Defendant City*
18 (Public Nuisance)

19 16.

20 The radon, radon progeny elements, radioactive decay particles, nitrates, nitrites,
21 nitrosamines, haloacetic acids, nitrosodimethylamine, and chloroform gas are radioactive,
22 carcinogenic, and/or toxic and unsafe, and their presence in the water affects the rights of the
23 public who rely upon the City's water supply, and affects the reasonable use and enjoyment of
this public benefit.

17.

The presence of radioactive, carcinogenic, and toxic chemicals in the public water supply represents a substantial and unreasonable interference with the public's right to safe water, and creates a substantial and unreasonable interference with the public's use and enjoyment of the Portland water infrastructure system, which the public supports and pays for directly as customers and indirectly through taxation and fees.

18.

Plaintiff seeks an order and judgment of this Court declaring the presence in the water supply of radioactive, carcinogenic, and toxic chemicals to be a public nuisance, and a permanent injunction against Defendant City, and all its employees, agents, contractors, and those needing its approval or permission to act, requiring Defendant City to remove radioactive, carcinogenic, and toxic chemicals from the water supply.

19.

Plaintiff further seeks an injunction against the City, and all its employees, agents, contractors, and those needing its approval or permission to act, prohibiting it from degrading, demolishing or further impairing the open reservoir system until such time as this case can be adjudicated, so that the existing economically feasible and provably effective open reservoir system will not be lost during the pendency of this action. Plaintiff intends to file a preliminary injunction motion to prevent any additional damage to Portland's open reservoir system. The current system, particularly the open reservoirs in Portland's Washington Park, are slated for demolition over the coming months, and would be impossible to replace in an economically feasible manner once lost.

Pursuant to the rule in *Deras v. Myers*, and having brought this suit to benefit all of the citizens of Portland, not only himself, if successful on this claim for relief, Plaintiff requests this Court award Plaintiff his attorney fees incurred in bringing this action.

WHEREFORE, Plaintiff prays for relief from this Court against Defendant City of Portland as follows:

1. On Plaintiff's First Claim for Relief, an order and judgment from this Court prohibiting Defendant City, and all its employees, agents, contractors, and those needing its approval or permission to act, from trespassing upon Plaintiffs property with radioactive, carcinogenic, or toxic chemicals via the Portland water system through mitigation of the risk;

2. On Plaintiff's First Claim for Relief, an injunction at least during the pendency of this litigation prohibiting Defendant City, and all its employees, agents, contractors, and those needing its approval or permission to act, from degrading, demolishing, or further impairing the existing open water reservoir system to preserve an existing, economically viable, and efficient means of preventing this trespass;

3. On Plaintiff's Second Claim for Relief, an order and judgment from this Court declaring that the presence of radioactive, carcinogenic, or toxic chemicals in Defendant City's water system is a public nuisance which must be abated through mitigation of the risk;

4. On Plaintiff's Second Claim for Relief, an injunction at least during the pendency of this litigation prohibiting Defendant City, and all its employees, agents, contractors, and those needing its approval or permission to act, from degrading, demolishing, or further impairing the existing open water reservoir system to preserve an existing, economically viable, and efficient

1 means of abating this nuisance;

2 . 5. On Plaintiff's Second Claim for Relief, an award of Plaintiff's reasonable attorney
3 fees incurred in bringing this action, pursuant to this Court's equitable powers and the rule of
4 *Deras v. Myers*;

5 6. For costs and fees incurred in bringing this action; and

6 7. For any other relief the Court deems just and equitable.

7 DATED this 5th day of July, 2016.

8 **ROGGENDORF LAW LLC**

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