



# Oregon

Theodore R. Kulongoski, Governor

## Water Resources Department

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### BEFORE THE WATER RESOURCES DEPARTMENT

In the Matter of Butter Creek	)	FINAL ORDER ON
2006 Annual Allocation of Ground	)	
Water, Umatilla County, Oregon	)	RECONSIDERATION
	)	
Hale Brothers Farms (Certificate 81408)	)	
<i>Petitioner</i>	)	

### Appeal Rights

**This is a final order in other than a contested case.** As provided in ORS 536.075, this order is subject to judicial review under ORS 183.484. Any petition for judicial review of the order must be filed within the 60 day time period specified by ORS 183.484(2). Pursuant to ORS 536.075 and OAR 137-004-0080 you may either petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, the petition shall be deemed denied.

### Background

On July 27, 2005, Hale Brothers Farms submitted a request for withdrawal of water from the Echo Junction Subarea within the Butter Creek Critical Ground Water Area under Water Right Permit G-434 (Certificate No. 81408) and G-1227 (Certificate No. 81409). The requested allocations were 1,256.7 acre-feet and 985.5 acre-feet, respectively. Hale Brothers Farms filed a timely request for the use of water in 2006, authorized under Water Right Permit G-434 (Certificate No. 81408).

On August 29, 2005, the Department issued a Final Order Approving Allocation of 604 acre-feet of Ground Water under Water Right Permit G-434 (Certificate No. 81408) (Special Order Volume 66, Pages 217-220). Hale Brothers Farms' allocation was limited by pumpage in recent years, historic use, and additional water rights in the subarea. The allocation does not exceed the limits of the water right.

On October 28, 2005, Hale Brothers Inc. submitted a Petition for Reconsideration of the August 29, 2005, Final Order Approving Allocation of Ground Water Pursuant to Certificate No. 81408.

As discussed in this order, the Department denies the petition and affirms its order allocating ground water in Umatilla County, Oregon for 2006 (Certificate 81408) because petitioner has failed to show that the allocation is inconsistent with OAR 690-507-0670

and because a determination of forfeiture as to a water right held by Michael McCarty has not yet been established.

### FINDINGS OF FACT

OAR 137-004-0080 provides that a person entitled to judicial review under ORS 183.484 of a final order in other than a contested case may file a petition for reconsideration of a final order in other than a contested case with the agency within 60 calendar days after the date of the order (OAR 137-004-0080(1) & (5)). A petition must set forth the specific grounds for reconsideration and may be supported by a written argument (OAR 137-004-0080(2)). Following reconsideration, the agency shall enter a new order which may be an order affirming the existing order (OAR 137-004-0080(8)).

#### **A. The Reduced Allocation is Inconsistent with OAR 690-507-670.**

The method for distributing the sustainable annual yield from the basalt ground water reservoir within each subarea in the Butter Creek Critical Ground Water Area is described at OAR 690-507-0670.

OAR 690-507-0670(1)(c) provides:

In determining the amount of ground water each water user is allocated to pump during the next calendar year or irrigation season, the Department may consider:

- (A) Request for allocations received;
- (B) The sustainable annual yield;
- (C) The limits of the ground water rights;
- (D) The relative dates of priority
- (E) Historical usage;
- (F) Whether or not a water user is physically capable of pumping and putting to a beneficial use the quantity requested; and
- (G) Any other factors deemed appropriate by the Department

OAR 690-507-0670(1)(c)(A – G).

In the petition for reconsideration, Hale Brothers Inc. contends that the Final Order is inconsistent with the Department's allocation method because it does not account for historical use of the subarea ground water, and does not consider McCarty's physical inability to pump water from the basalt ground water reservoir (Petition for Reconsideration).

Michael McCarty filed a timely request for the use of water in 2006, authorized under Water Right Permit U-425 (Certificate 24271 superseded by Certificate 68349). Michael McCarty has the most senior water right in the Echo Junction Subarea. Mr. McCarty's allocation was limited by the capacity of his irrigation system at the time the request was

received and does not exceed the limits of the water right (Water Right Certificate 68349).

The Department considered historical use when it determined the allocations for Mr. McCarty. Because water had not been allocated in recent years to Mr. McCarty, there was no basis for comparing actual use to the paper right. Priority date and pumping capacity were the major contributing factors in the Department's decision with regard to allocation of water to Mr. McCarty (Water Right Certificate 68349).

The Department also considered historical use in determining the allocation for Hale Brothers Farms. Since 1999, the annual request from Hale Brothers Farms has been 1,260 acre-feet under Water Right Certificates 81408 and 81409 (Working files for Butter Creek Critical Ground Water Area). This (1,260 acre-feet) is the total sustained annual yield for the Echo Junction Subarea. The actual pumpage for Hale Brothers Farms since 1999, based on flow meter readings, average 811.5 acre-feet annually under Water Right Certificates 81408 and 81409 (Working files for Butter Creek Critical Ground Water Area). The 2006 Allocation of Ground Water under Water Rights Certificates 81408 and 81409 is 1,208 acre-feet, being 604 acre-feet under each certificate. Sustained annual yield for the Echo Junction Subarea is 1,260 acre-feet of which 52.0 acre-feet were allocated to a senior appropriator.

Because the Department considered historical use, the allocation determinations for Mr. McCarty and for Hale Brothers Farms are consistent with OAR 690-507-0670.

**B. The Senior Water Right Holder Has Forfeited the Water Right.**

Petitioner requests that the Department reconsider its August 29, 2005, Final Order in light of evidence that McCarty has forfeited his water right through non-use (Petition for Reconsideration) On October 28, 2005, petitioners, Bob Hale and Doug Hale both submitted Affidavits Asserting Non-Use of Water Right under Certificate of Water Right 67876 and 68349 (Affidavits). The affidavits allege Mr. McCarty has not pumped and put to beneficial use any water from the basalt ground water reservoir for at least 20 years.

An action to cancel the perfected water right can be initiated as the result of a request by the record owner of the land to which the water right is appurtenant, or as the result of a request to determine the validity of a water right which may be forfeited due to five successive years of non-use (ORS 540.621; OAR 690-017-0400). Pursuant to ORS 540.621, the Department is required to initiate cancellation proceedings of such water right by causing written notice of the proceeding to the legal owner of the lands to which the water right is appurtenant, and to the occupant (ORS 540.621; OAR 690-017-0400).

The Department is processing the affidavits alleging non-use pursuant to ORS 540.621, but a determination of forfeiture has not yet been established. Accordingly, the Department cannot act on petitioner's assertions of forfeiture at this time.

## CONCLUSIONS OF LAW

In distributing the sustainable annual yield from the basalt ground water reservoir within Butter Creek Critical Ground Water Area, the Department considered the historical use of Michael McCarty. However, because the Department lacked information regarding Mr. McCarty's historical use, it made no conclusions regarding how historical use of this right compared with Mr. McCarty's "paper" right. In making such determination, the Department acted consistently with OAR 690-507-0670.

Because the Department has not yet finished proceedings begun through the process of receiving the affidavits of Bob Hale and Doug Hale, the Department cannot make any findings with regard to forfeiture of Mr. McCarty's water rights.

For the reasons discussed above, petitioner has failed to establish a basis upon which the Department must reverse or modify its order and the Department herein affirms its Final Order Approving Allocation of Ground Water for Hale Brothers Farms, Pursuant to Certificate No. 81408 in the name of Hale Brothers Farms.

## ORDER

Petitioners request to reconsider the August 29, 2005, Final Order is denied and the Final Order Approving Allocation of Ground Water for Hale Brothers Farms, Pursuant to Certificate 81408 is affirmed.

Dated this December 30<sup>th</sup> day of 2005.



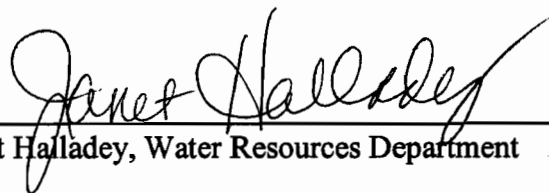
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Phillip C. Ward, Director  
Water Resources Department

## CERTIFICATE OF SERVICE

I certify that on December 30, 2005, I placed in the U.S. Postal Service, First Class postage prepaid a copy of Final Order on Reconsideration (Certificate 24271 superseded by Certificate 68349, 81408 and 81409) to:

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Janet Halladey, Water Resources Department