

**OREGON WATER RESOURCES COMMISSION**

IN THE MATTER OF: ) **FINAL ORDER**  
)  
**THE CANCELLATION OF THE WATER** ) OAH Case No.: WR 06-004  
**RIGHTS EVIDENCED BY CERTIFICATE** ) Agency Case No.: PC 06-06.1  
**39995 FOR USE OF WATER FROM AN** )  
**UNNAMED STREAM, A TRIBUTARY OF** )  
**GRAVES CREEK, FOR DOMESTIC USE** )  
**OF ONE FAMILY, INCLUDING THE** )  
**IRRIGATION OF LAWN AND GARDEN** )  
**NOT TO EXCEED ½ ACRE IN AREA;** )  
)  
**AND** )  
)  
**THE PARTIAL CANCELLATION OF** )  
**THE WATER RIGHTS EVIDENCED BY** )  
**CERTIFICATE 56024 FOR USE OF** )  
**WATER FROM AN UNNAMED STREAM,** )  
**A TRIBUTARY OF GRAVES CREEK,** )  
**FOR DOMESTIC USE FOR ONE** )  
**FAMILY AND IRRIGATION OF 0.7** )  
**ACRE, JOSEPHINE COUNTY, OREGON** )  
)  
)

**HISTORY OF THE CASE**

On September 8, 2005, the Oregon Water Resources Department (OWRD) issued a Notice of Proposed Cancellation of Water Right evidenced by Certificate 39995, and a Notice of Proposed Partial Cancellation of Water Right evidenced by Certificate 56024 to Wolfgang Nebmaier (Protestant). On October 31, 2005, Protestant filed a Protest in both matters and requested a hearing.

On May 26, 2006, OWRD referred the hearing request to the Office of Administrative Hearings (OAH). Administrative Law Judge (ALJ) Dove L. Gutman was assigned to preside at the hearing. On June 1, 2006, Vajra Ma petitioned OWRD for party status in the above-entitled case. On June 14, 2006, OWRD granted Ms. Ma (Protestant) party status.

A pre-hearing conference was scheduled for June 29, 2006, but was postponed. On July 6, 2006, a pre-hearing conference was conducted by telephone. ALJ Gutman presided. Elizabeth Howard and Jim Hillas appeared and represented Robert Sessler, Michele Sessler, and Karen Gilstrap (Proponents). Protestants appeared and represented themselves. Juno Pandian appeared and represented OWRD. Lee Rosenstock, a German interpreter, appeared, was

qualified on the record and interpreted the proceeding.

A site visit was held on October 23, 2006, in Wolf Creek, Oregon. ALJ Gutman presided. Proponents were present and represented by Ms. Howard and Mr. Hillas. Protestants were present and represented themselves. Ms. Pandian was present and represented OWRD. Also appearing on behalf of OWRD was Bruce Sund.

A hearing was held on October 25, 2006, in Salem, Oregon. ALJ Gutman presided. Proponents appeared and were represented by Ms. Howard and Mr. Hillas. Protestants were present and represented themselves. Testifying on behalf of Protestants was Richard Groen. OWRD was represented by Ms. Pandian. Mr. Sund appeared on behalf of OWRD and testified. Ms. Rosenstock was present and interpreted the hearing as needed.

The hearing was continued on October 26, 2006, in Salem, Oregon. ALJ Gutman presided. Proponents appeared and were represented by Ms. Howard and Mr. Hillas. Testifying on behalf of Proponents was Michele Sessler. Protestants were present and represented themselves. Testifying on behalf of Protestants was Richard Groen. OWRD was represented by Ms. Pandian. Mr. Sund appeared on behalf of OWRD. Ms. Rosenstock was present and interpreted the hearing as needed.

The hearing was continued on December 19, 2006, in Eugene, Oregon. ALJ Gutman presided. Proponents appeared and were represented by Ms. Howard. Testifying on behalf of Proponents were Mrs. Sessler and Robert Sessler. Protestants appeared and represented themselves. OWRD was represented by Ms. Pandian. Mr. Sund appeared on behalf of OWRD and testified. Ms. Rosenstock was present and interpreted the hearing as needed.

The hearing was continued on December 20, 2006, in Eugene, Oregon. ALJ Gutman presided. Proponents appeared and were represented by Ms. Howard. Testifying on behalf of Proponents were Mr. Sessler, Gregory Smith, and Karen Gilstrap. Protestants appeared and represented themselves. OWRD was represented by Ms. Pandian. Mr. Sund appeared on behalf of OWRD. Ms. Rosenstock was present and interpreted the hearing as needed.

The hearing was continued on December 21, 2006, in Eugene, Oregon. ALJ Gutman presided. Proponents appeared and were represented by Ms. Howard. Protestants appeared and represented themselves. Testifying on behalf of Protestants was Kathryn Groen. OWRD was represented by Ms. Pandian. Mr. Sund appeared on behalf of OWRD. Ms. Rosenstock was present and interpreted the hearing as needed.

The hearing was continued on March 12, 2007, in Salem, Oregon. ALJ Gutman presided. Mr. Sessler and Ms. Gilstrap appeared and were represented by Ms. Howard. Mrs. Sessler did not appear. Testifying on behalf of Proponents was Patricia Larson. Protestants appeared and represented themselves. Testifying on behalf of Protestants was Scott Loring. OWRD was represented by Ms. Pandian. Mr. Sund appeared on behalf of OWRD. Ms. Rosenstock was present and interpreted the hearing as needed. Ms. Larson was qualified on the record as an expert on plants, grazing, and irrigated grazing pastures.

The hearing was continued on March 13, 2007, in Salem, Oregon. ALJ Gutman presided. Proponents appeared and were represented by Ms. Howard. Protestants appeared and represented themselves. Testifying on behalf of Protestants were Mr. Sessler and Mr. Loring. OWRD was represented by Ms. Pandian. Mr. Sund appeared on behalf of OWRD. Ms. Rosenstock was present and interpreted the hearing as needed. Mr. Loring was qualified on the record as an expert in Botany.

The hearing was continued on March 14, 2007, in Salem, Oregon. ALJ Gutman presided. Proponents appeared and were represented by Ms. Howard. Protestants appeared and represented themselves. Testifying on behalf of Protestants were Mr. Sessler, Ms. Gilstrap, Mrs. Sessler, Mr. Smith, and Mr. Sund. OWRD was represented by Ms. Pandian. Mr. Sund appeared on behalf of OWRD. Ms. Rosenstock was present and interpreted the hearing as needed.

The hearing was continued on March 15, 2007, in Salem, Oregon. ALJ Gutman presided. Proponents appeared and were represented by Ms. Howard. Protestants appeared and represented themselves. Testifying on behalf of Protestants were Ms. Ma, Mrs. Groen, and Mr. Sund. OWRD was represented by Ms. Pandian. Mr. Sund appeared on behalf of OWRD. Ms. Rosenstock was present and interpreted the hearing as needed.

The hearing was continued on March 16, 2007, in Salem, Oregon. ALJ Gutman presided. Proponents appeared and were represented by Ms. Howard. Testifying on behalf of Proponents were Ms. Larson, Ms. Gilstrap, and Mr. Sessler. Protestants appeared and represented themselves. Testifying on behalf of Protestants were Ms. Ma, Mr. Nebmaier, and Mr. Sund. OWRD was represented by Ms. Pandian. Mr. Sund appeared on behalf of OWRD. Ms. Rosenstock was present and interpreted the hearing as needed. The record was held open to receive closing arguments and reply briefs from the parties. The record closed June 1, 2007.

On November 19, 2007, a Proposed Order was issued in which ALJ Gutman found that Protestants' water rights had been forfeited. On December 19, 2007, Mr. Nebmaier and Ms. Ma filed exceptions to the Proposed Order with OWRD. On December 28, 2007, Proponents filed a response to Protestant's exceptions. On December 31, 2007, pursuant to OAR 137-003-0650, OWRD submitted the exceptions to ALJ Gutman for a written response, as well as a revised proposed order. The ALJ did not issue a revised proposed order, but denied all of the exceptions.

The Oregon Water Resources Commission (OWRC) herein issues its Final Order with modifications to the Proposed Order as described. In addition, this Final Order adopts the ALJ's responses to exceptions as provided herein.

## II. ISSUES

(1) Whether the water right evidenced by Certificate 39995 has been forfeited by failure to make beneficial use of the water for domestic purposes, including the irrigation of lawn and garden, for a period of six years and three months from April 1997 through July 2003.

(2) Whether a portion of the water right evidenced by Certificate 56024 has been forfeited by failure to make beneficial use of the water for irrigation purposes for a period of six

years and seven months from March 1997 through October 2003.

### III. EVIDENTIARY RULINGS

#### A. Agency Exhibits

On October 25, 2006, Exhibits A1 through A16, offered by OWRD, were admitted into the record without objection.

#### B. Proponents Exhibits

On October 25, 2006, Exhibits P1 through P11, P13 through P15, P26 through P42, P169 through P170, and P279 through P280 were admitted by stipulation of the parties. Exhibits P12, P16, P18, P23 through P24, P43 through P168, and P178 through P278 were withdrawn by stipulation of the parties. Exhibits P17, P19 through P22, and P25 were withdrawn by Proponents. Protestants objected to Exhibits P171 through 175 on grounds they were not relevant. The objections were overruled and Exhibits P171 through P175 were admitted into evidence. Protestants objected to Exhibits P176 through P177 on grounds they were cumulative. The objections were overruled and Exhibits P176 through P177 were admitted into evidence. On March 16, 2007, Exhibit P281 was admitted into evidence.

#### C. Protestant Nebmaier's Exhibits

On October 25, 2006, Exhibits R70 (without Protestants typewritten additions), R81, R83, and R89 through R90 were admitted by stipulation of the parties. Exhibits R2 through R5, R13, R14, R47 through R51, R55 through R58, R71, R73, R75, R76, R80, R82, R84, R86 through R88, R101, R102, R106 through R109, R111 through R113, R116, R117, R119, and R121 through R125 were withdrawn by Protestants. Proponents and OWRD objected to Exhibits R10 through R12 on grounds they were not relevant. The objections were overruled and Exhibits R10 through R12 were admitted into evidence. Proponents and OWRD objected to Exhibits R34 through R36 on grounds they were not relevant. The objections were sustained and Exhibits R34 through R36 were excluded. Proponents and OWRD objected to Exhibits R37 through R40 on grounds they were not relevant. The objections were overruled and Exhibits R37 through R40 were admitted into evidence. Proponents and OWRD objected to Exhibit R42 on grounds it was not relevant. The objections were sustained and Exhibit R42 was excluded. Proponents and OWRD objected to Exhibits R77 through R79 on grounds they were not relevant. The objections were sustained and Exhibits R77 through R79 were excluded. Exhibits R81, R83, R89 and R90 were admitted without objection. Proponents and OWRD objected to Exhibits R110, R114, R115, and R118 on grounds they were not relevant. The objections were sustained and Exhibits R110, R114, R115, and R118 were excluded. On March 12, 2007, Exhibits R15 through R18 were admitted into evidence without objection. On March 13, 2007, Proponents and OWRD objected to paragraphs 1, 3, and 5 on page four, and paragraph 1 on page 5 of Exhibit R150 on grounds they were not relevant and the statements that were made required the affiant to be an expert in matters of which he was not. The objections were sustained and paragraphs 1, 3, and 5 on page four, and paragraph 1 on page 5 of Exhibit R150 were excluded. The remaining portion of R150 was admitted into evidence. On March 15, 2007, Exhibits R44 through R46 were admitted into evidence without objection. Exhibits R21, R22, R24, R27, and

R29 were withdrawn by Protestants. Proponents and OWRD objected to Exhibits R19, R20, R23, R25, R26, R28, R30 through R33, R41, R54, R72, R103 through R105, and R120 on grounds they were not relevant. The objections were sustained and Exhibits R19, R20, R23, R25, R26, R28, R30 through R33, R41, R54, R72, R103 through R105, and R120 were excluded. On March 16, 2007, Exhibit R1 was admitted into evidence.

#### **D. Protestant Ma's Exhibits**

On October 25, 2006, Proponents and OWRD objected to Exhibits T1 through T6 on grounds they were not relevant. The objections were sustained and Exhibits T1 through T6 were excluded. Exhibits T7 through T24, T31 through T41, T60, T62 through T66, T75 through T78, T80, T87 through T92, T94 through T100, T112 through T116, T142 through T148, T202A through T202E, T203 through T220, T222, T225, T227 through T234, T236 through T238, T240, T241, T243 through T246, T275, T278, T281, and T282 were withdrawn by Protestants. Proponents and OWRD objected to Exhibits T79, T81, T81A, and T93 on the grounds they were not relevant. The objections were sustained and Exhibits T79, T81, T81A, and T93 were excluded. Exhibits T129 through T140, and T221 were admitted into evidence without objection. Proponents and OWRD objected to Exhibits T239 through T242, T279, and T280 on grounds they were not relevant. The objections were sustained and Exhibits T239 through T242, T279, and T280 were excluded. On March 12, 2007, Exhibits T82 through T85 were admitted into evidence without objection. On March 15, 2007, Exhibits T42 through T46, T48 through T54, T56 through T59, and T283 through T285 were admitted into evidence without objection. Proponents and OWRD objected to Exhibits T47, T55, T117 through T128, and T141 on grounds they were not relevant. The objections were sustained and Exhibits T47, T55, T117 through T128, and T141 were excluded. Proponents and OWRD objected to Exhibits T223, T224, and T226 on grounds they were not relevant. The objections were overruled and Exhibits T223, T224, and T226 were admitted into evidence. On March 16, 2007, Exhibits T25 through T30 were admitted into evidence without objection. Proponents and OWRD objected to Exhibits T61, T61A, and T61B on ground they were not relevant. The objections were sustained and Exhibits T61, T61A, and T61B were excluded. Exhibits T247 through T274 were withdrawn by Protestants.

#### **IV. STIPULATION**

On October 25, 2006, Proponents stipulated that the period of alleged nonuse was March 1997 through October 2003 for Water Right Certificate 56024.

#### **V. MOTIONS**

On April 16, 2007, as part of her closing argument, Protestant Ma requested that ALJ Gutman take judicial notice of the fact that Tax Lot 300 is "zoned as Serpentine Land." On May 21, 2007, as part of their reply brief, Proponents objected to the request on the basis that it was not put before the tribunal during the course of the proceeding and because it contradicts Ms. Larson's testimony. Proponents also attached a Declaration of Patricia Larson and a Soil Survey of Josephine County. Protestant Ma's request is denied as untimely.

On May 21, 2007, Proponents requested that parts of Protestants' closing arguments be stricken and given no consideration because they offer new evidence and testimony that was not put before the tribunal during the course of the proceeding. On May 29, 2007, Protestants objected to Proponents request. Proponents request is denied.

On May 22, 2007, Protestants filed a Motion requesting that the Declaration of Patricia Larson and the Soil Survey of Josephine County not be included in the record. On May 23, 2007, Proponents filed a Reply objecting to Protestants' motion. On May 24, 2007, Protestants filed a Rebuttal and attached a letter from Josephine County Planning Office, a Soil Survey of Josephine County, and a Web Soil Survey. The attachments filed by both Proponents and Protestants are excluded as untimely.

## VI. FINDINGS OF FACT

(1) Certificate of Water Right 39995 is in the name of Sue Patterson and authorizes the use of 0.01 cubic foot per second (cfs) from an unnamed stream, a tributary of Graves Creek, for domestic use of one family, including the irrigation of lawn and garden not to exceed ½ acre in area in the SE ¼ NE ¼, Section 17, Township 34 South, Range 5 West, Willamette Meridian. The priority date is March 2, 1970. (Ex. A15.)

(2) Certificate of Water Right 56024 is in the name of Leslie Henneuse and authorizes the use of 0.015 cfs, being 0.01 cfs for irrigation and 0.005 cfs for domestic use, from an unnamed stream, a tributary of Graves Creek, for domestic use of one family and irrigation of 0.7 acre in the SE ¼ NE ¼, Section 17, Township 34 South, Range 5 West, Willamette Meridian. The priority date is May 3, 1977. (Ex. A14.)

(3) On July 14, 2005, Robert Sessler filed an affidavit asserting nonuse of Water Right Certificate 39995, from an unnamed stream, for domestic use of one family, including irrigation of lawn and garden, for a total of ½ acre, within Tax Lot 300, located in Township 34 South, Range 5 West, in the SE ¼ NE ¼ of Section 17 in Josephine County, from April 1997 through July 2003. (Ex. A8.)

(4) On July 15, 2005, Michele Sessler filed an affidavit asserting nonuse of Water Right Certificate 39995, from an unnamed stream, for domestic use of one family, including irrigation of lawn and garden, for a total of ½ acre, within Tax Lot 300, located in Township 34 South, Range 5 West, in the SE ¼ NE ¼ of Section 17 in Josephine County, from April 1997 through July 2003. (Ex. A9.)

(5) On July 25, 2005, Karen Gilstrap filed an affidavit asserting nonuse of Water Right Certificate 39995, from an unnamed stream, for domestic use of one family, including irrigation of lawn and garden, for a total of ½ acre, within Tax Lot 300, located in Township 34 South, Range 5 West, in the SE ¼ NE ¼ of Section 17 in Josephine County, from March 1997 through July 2005. (Ex. A10.)

(6) On July 25, 2005, Mr. Sessler filed an affidavit asserting nonuse of a portion of Water Right Certificate 56024, from an unnamed stream, for irrigation of a total of 0.6 acre,

within Tax Lot 300, located in Township 34 South, Range 5 West, in the SE ¼ NE ¼ of Section 17 in Josephine County, from June 1996 through July 2005. (Ex. A12.)

(7) On July 25, 2005, Mrs. Sessler filed an affidavit asserting nonuse of a portion of Water Right Certificate 56024, from an unnamed stream, for irrigation of a total of 0.6 acre, within Tax Lot 300, located in Township 34 South, Range 5 West, in the SE ¼ NE ¼ of Section 17 in Josephine County, from December 1997 through July 2005. (Ex. A13.)

(8) On July 25, 2005, Ms. Gilstrap filed an affidavit asserting nonuse of a portion of Water Right Certificate 56024, from an unnamed stream, for irrigation of a total of 0.6 acre, within Tax Lot 300, located in Township 34 South, Range 5 West, in the SE ¼ NE ¼ of Section 17 in Josephine County, from March 1997 through July 21, 2005. (Ex. A14.)

(9) On September 8, 2005, OWRD issued a Notice of Proposed Cancellation of Water Right evidenced by Certificate 39995 to Wolfgang Nebmaier, the Record Owner of Tax Lot 300, due to nonuse for domestic use of one family, including the irrigation of lawn and garden not to exceed ½ acre in area for the period of April 1997 through July 2003. (Ex. A7.)

(10) On September 8, 2005, OWRD issued a Notice of Proposed Partial Cancellation of Water Right evidenced by Certificate 56024 to Mr. Nebmaier, the Record Owner of Tax Lot 300, due to nonuse for irrigation of 0.6 acre for the period of March 1997 through July 2005. (Ex. A6.)

(11) On October 31, 2005, Mr. Nebmaier filed a Protest against the Proposed Cancellation of Water Rights 39995 and 56024 with OWRD. (Ex. A5.)

(12) Tax Lot 300 is located at 1241 Shanks Creek Road, Sunny Valley, Oregon. Richard and Kathryn Groen owned Tax Lot 300 from March 1977 through January 2004. Mr. Groen was aware of his water rights as owner of Tax Lot 300. (Test. of Mr. Groen; Exs. P171, P172, R70, R89, R90.)

(13) Robert and Michele Sessler reside on Tax Lot 400, which is located at 1237 Shanks Creek Road, Sunny Valley, Oregon. Tax Lot 400 lies to the South of and is adjacent to Tax Lot 300. The Sesslers moved to Tax Lot 400 in May 1995. (Test. of Mrs. Sessler; Exs. A8, A9.)

(14) Karen Gilstrap resides on Tax Lot 200, which is located at 1245 Shanks Creek Road, Sunny Valley, Oregon. Tax Lot 200 lies to the North and is adjacent to Tax Lot 300. Ms. Gilstrap moved to Tax Lot 200 in December 1995. (Test. of Gilstrap; Ex. A10.)

(15) Under Certificate of Water Right 56024, irrigation of 0.1 acre and the domestic use for one family is located on Tax Lot 200, and irrigation of 0.6 acre is located on Tax Lot 300 in the lower field (or pasture). (Test. of Sund; Ex. A14 at 2.)

(16) For the time period of 1997 through 2003, Tax Lot 300 had several structures on it, including an A-frame, a cabin (commonly referred to as the pole barn), and an old barn. (Ex. R81.)

(17) Sometime prior to 1997, Mr. Groen fixed up the cabin and plumbed in water from the stream. He put in sinks, lighting, a table, bunks, and a hot water heater. The cabin had running water. (Test. of Mr. Groen.)

(18) Sometime prior to 1997, Mr. and Mrs. Groen moved to Santa Cruz, California. They gave Wade Anders and his nephew permission to live on Tax Lot 300. They also gave Mr. Anders permission to pasture horses on the land. Mr. Groen has no knowledge of whether horses were actually pastured on Tax Lot 300 or not. (*Id.*; Ex. R89.)

(19) Mr. Anders resided in the cabin on Tax Lot 300 until March or April 1997. Ms. Gilstrap visited with Mr. Anders in the cabin. The cabin had a sink and running water. Mr. Anders also grew a garden on Tax Lot 300. (Test. of Gilstrap; Ex. A8 at 4.)

(20) Nick White and his girlfriend, Cindy, resided in the A-frame on Tax Lot 300 for a period of time in 1997 and in 1998. Ms. Gilstrap visited with Mr. White and Cindy in the A-frame. The A-frame did not have plumbing, pipes, or running water. Mr. White and Cindy used Ms. Gilstrap's home to take showers and to get jugs of water for household use. They did not obtain water from the stream on Tax Lot 300. Mr. White and Cindy were no longer residing on the property by end of summer 1998. (Test. of Gilstrap.)

(21) Sometime in 1997 or 1998, a man named Chuck and a woman named Anita resided in their travel trailer on Tax Lot 300 near the old barn. The trailer was not hooked up to water from the stream. Chuck and Anita were no longer residing on the property by summer 1998. (*Id.*)

(22) In spring 1998, the pipe that carried water from the stream into the cabin on Tax Lot 300 broke. The pipe was not repaired or reconnected to the cabin through July 2003. (*Id.*; Ex. A10 at 3.)

(23) From the end of summer 1998 through July 2003, no one resided on Tax Lot 300. The structures that were on the property deteriorated. The A-frame was looted. The old barn collapsed. The roof on the cabin leaked and the floor in the cabin collapsed. During that time period, Ms. Gilstrap and the Sesslers had to run off vagrants and hunters who would camp out on the property. (*Id.*)

(24) From May 1997 through 1999, and 2001 through 2003, Mr. Groen visited Tax Lot 300 one to three times per year to check on the property. He spent an average of two hours on the property and, on two separate occasions, he and a friend camped out overnight. During his visits, Mr. Groen used water from the spring to irrigate a small portion, less than one-half, of the .06 acre, by placing a hose in the stream and sprinkling water on the land. He applied water on the pasture to keep the place green and for any horses that may be pastured on the land. Mr. Groen also drank water from the spring by filling up plastic cups and jugs at the spring box, and he used water from the spring for cooking and cleaning by filling up pots and pans. (Test. of Mr. Groen; Exs. T283, T284, T285.)

(25) From May 1997 through 2003, while visiting Tax Lot 300, Mr. Groen did not enter



or stay in any of the structures, he did not make any improvements to the structures, he did not see anyone residing on the property, and he did not see any horses on his property. Mr. Groen did not raise crops, have a garden or plant a lawn. He did not instruct anyone to irrigate the .06 acre on his behalf. (Test. of Mr. Groen.)

(26) From May 1997 through 2003, there was no running water to any of the structures on Tax Lot 300. There were no doors on any of the structures. The pipes that carried water from the stream to the cabin were not hooked up. The connecting pipe to the cabin was bent back. Mr. Groen did not hook the pipes back up to the cabin or check to see if the water delivery system worked. (*Id.*)

(27) During the time that he owned Tax Lot 300, Mr. Groen periodically watered around the cabin to keep the grass green and he used turnouts to irrigate the 0.6 acre. From 1997 through 2003, Mr. Groen does not have a specific recollection of using turnouts on the pasture. (*Id.*)

(28) At some point in time, after he plumbed the cabin, Mr. Groen observed that someone had made changes to the plumbing and hooked up black hoses. (*Id.*)

(29) In late 1999, Ms. Gilstrap purchased several horses and pastured them on Tax Lot 200. The horses would periodically escape and go onto other property, including Tax Lot 300. Ms. Gilstrap did not intentionally graze or pasture her horses on Tax Lot 300, and she did not have an agreement with the Groens to do so. (Test. of Gilstrap.)

(30) In January 2004, the Groens sold Tax Lot 300 to Mr. Nebmaier and Vajra Ma. (Test. of Mrs. Groen; Ex. P172.)

(31) In June 2005, Mr. Nebmaier and Ms. Ma moved onto Tax Lot 300. There was no running water to any of the structures. (Test. of Ma.) The system that supplied water to the cabin was disconnected. (Test. of Nebmaier.) Ms. Ma observed numerous piles of horse manure on the property. (Test. of Ma.)

(32) Sometime in August, for a period of two consecutive days, Mr. Nebmaier irrigated a portion of the field with a cheap sprinkler. On the first day, Mr. Nebmaier irrigated for two hours. On the second day, Mr. Nebmaier irrigated for approximately three hours. Within 36 hours of the water application, Mr. Nebmaier saw green appear on the field. (Test. of Nebmaier.)

(33) The water right holder must have a facility or diversion structure that is capable of handling the entire rate and duty authorized under the water right, and must be ready, willing and able to make full use of the water right. (Test. of Sund.) Ready, willing and able means it must be there and ready to go. (*Id.*)

(34) Domestic use includes use of water inside of the home and outside of the home. Human consumption **as it is a component of domestic use** is use of water **for household purposes inside the home—including but not limited to** drinking, cooking, sanitation, laundry,

etc. **Domestic** use of water **also includes uses ancillary to residential use of the property outside of the home including but not limited to** washing the house down, filling the swimming pool, and filling a domestic animal's water dish. (*Id.*) Reasons for modification of finding of fact: To clarify the definition of "domestic water use" as stated in OAR 690-300-0010(14) and to make the finding of fact more consistent with the Testimony of Bruce Sund.

(35) To maintain a water right for domestic use of one family that includes irrigation of lawn and garden, there must be domestic use inside the house and irrigation of lawn and garden outside the house. **If water is only used for lawn and garden, but not for household purposes in a residence there is no domestic use inside the home**, the water right is forfeited. (*Id.*; OAR 690-300-0010(15)) Reasons for modification of finding of fact: To clarify the definition of domestic water use as stated in OAR 690-300-0010(14) and (15) and to make the finding of fact more consistent with the Testimony of Bruce Sund.

## VII. CONCLUSIONS OF LAW

(1) The water right evidenced by Certificate 39995 has been forfeited by failure to make beneficial use of the water for domestic purposes, including the irrigation of lawn and garden, for a period of six years and two months from May 1997 through July 2003.

(2) A portion of the water right evidenced by Certificate 56024 has been forfeited by failure to make beneficial use of the water for irrigation purposes for a period of six years and five months from May 1997 through October 2003.

## VIII. OPINION

Proponents of the proposed water cancellation have the burden of proving, by a preponderance of evidence, at least five successive years of nonuse. *Rencken v. Young*, 300 Or 352 (1985); *See* ORS 183.450(2); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); and *Cook v. Employment Div.*, 47 Or App 437 (1980) (in absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence); *Staats v. Newman*, 164 Or App 18, 22 (clear and convincing evidence standard does not apply in contested cases for water rights cancellation proceedings). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

The Final Order modifies the Proposed Order by clarifying some aspects of the discussion regarding establishing and rebutting the presumption of forfeiture. As discussed below, Proponents have established a presumption of forfeiture and this presumption is un rebutted by Protestants.

### A. Forfeiture of water right

ORS 540.610 provides, in relevant part:

\* \* \*

(1) Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state. Whenever the owner of a perfected and developed water right ceases or fails to use all or part of the water appropriated for a period of five successive years, the failure to use shall establish a rebuttable presumption of forfeiture of all or part of the water right.

\* \* \*

Beneficial use is defined as the reasonably efficient use of water without waste for a purpose consistent with the laws, rules and the best interests of the people of the state. OAR 690-300-0010(5).

Water “use” refers to the type, season, and place of use authorized under the Water Right Certificate. *See Rencken*, 300 Or at 364 (use of water outside the period permitted in the certificate is not use); *Hennings v. Water Resources Department*, 50 Or App 121, 124-125 (1981) (use of water for a purpose other than that set forth in the certificate does not constitute use); and *Hannigan v. Hinton*, 195 Or App 345, 353 (2004) (place of use must be within the place of use specified in the certificate). In addition, no change in use or place of use can be made without compliance with ORS 540.520 and 540.530. ORS 540.510(1).

1. Establishing the presumption of forfeiture

The Department’s decision to initiate a cancellation proceeding is based upon the appearance of facts as they are stated in affidavits of nonuse. ORS 540.631. If the Department determines from the face of the affidavits that a water use has not been used for five or more successive years and that a presumption of forfeiture would not be rebutted, it issues a notice of proposed cancellation. ORS 540.631. If the legal owner or the occupant receiving the notice of cancellation files a protest within the 60-day period prescribed in the notice, the Department conducts a contested case hearing. ORS 540.641. At a contested case hearing, Proponents bear the burden of production and persuasion to establish a presumption of forfeiture. ORS 530.610; *Rencken v. Young*, 300 Or 352, 364 (1985).

2. Rebutting the presumption of forfeiture

If the Proponents successfully establish a presumption of forfeiture at the hearing, the appropriator “has the burden of rebutting the presumption of forfeiture” by showing, among other possible affirmative defenses that:

\* \* \*

(3) Notwithstanding subsection (1) of this section, if the owner of a perfected and developed water right uses less water to accomplish the beneficial use allowed by the right, the right is not subject to forfeiture so long as:

(a) The user has a facility capable of handling the entire rate and duty authorized under the right; and

(b) The user is otherwise ready, willing and able to make full use of the right.

\* \* \*

ORS 540.610(3).

The term “ready” refers to whether the diversion and delivery facilities are prepared for immediate functioning. ORS 540.610(3); *See for e.g. Day v. Hill*, 241 Or 507, 509 (Court found water right had been forfeited because there was no way water user could have accessed the water though it was available, because there was no ditch to the property to be irrigated). Willingness, refers to the water users demonstrated intent to use water consistently with the terms of the water right. The term “able” which is the corollary to “ready” refers to whether the water user has the needed resources to accomplish the objective of the water right including whether the water user had water diversion and use facilities sufficient for the purposes of the water right. *Id.*

In this case, Protestants have two water rights that are at issue. Each is addressed separately.

**B. Certificate 39995 – domestic use.**

Certificate of Water Right 39995 authorizes the use of 0.01 cfs from an unnamed stream, a tributary of Graves Creek, for domestic use of one family, including the irrigation of lawn and garden not to exceed ½ acre in area. Proponents contend the entire water right is forfeited by failure to make beneficial use of the water for domestic purposes from April 1997 through July 2003. As discussed below, a preponderance of evidence supports a finding that Proponents have established a presumption of forfeiture for Certificate 39995.

Domestic water use “means the use of water for human consumption, household purposes, domestic animal consumption that is ancillary to residential use of the property or related accessory uses.” OAR 690-300-0010(14). “Human consumption” as a component of domestic water use is limited to uses of water associated with household purposes – that is, water use inside the home. (Test. of Sund.) This interpretation of “domestic water use” is supported by the text of the rule that refers to “household purposes” and “residential uses of property” and is consistent with the Commission’s authority to define water uses and the Department’s authority establish the terms of use in a water right certificate as those uses are developed and perfected. ORS 537.153; OAR 690 division 310; ORS 537.250.

In this case, the evidence in the record establishes that sometime prior to 1997, Mr. Groen fixed up the cabin on Tax Lot 300 and plumbed in water from the stream. The evidence also establishes that Mr. Anders made use of the water in the cabin and irrigated a garden while residing there until March or April 1997. Therefore, domestic water use was established on Tax Lot 300 through April 1997.

However, from May 1997 through July 2003, the evidence in the record establishes that

there was no running water to any of the structures on Tax Lot 300. In addition, by his own admission, Mr. Groen used water taken directly from the stream for human consumption while he camped on the property, but did not make use of water for household purposes or for residential use of the property. Furthermore, there is no evidence that Nick White, Cindy, Chuck or Anita made beneficial use of the water authorized under Certificate 39995 for domestic purposes during their stay on Tax Lot 300. As such, from May 1997 through July 2003, there was no domestic water use on Tax Lot 300.

In addition, although Mr. Groen testified that during his visits to the property he used water from the spring for drinking, cooking and cleaning, he also acknowledged that he did not use a delivery system to obtain the water for his periodic camping needs between 1997 and 2003. Instead, Mr. Groen used plastic cups, jugs, pots and pans to get the water directly from the spring. Because the water was not consistently diverted and delivered or used for household purposes a preponderance of evidence supports a finding that a presumption of forfeiture has been established.

The question thus becomes whether the presumption is rebutted by a showing that Mr. Groen did not forfeit the whole water right because he made use of less water than was allowed under the right. ORS 540.610(2) and (3). That is, does the record support a finding that Mr. Groen used less water to accomplish the beneficial use allowed by the right but that he otherwise had "a facility capable of handling the entire rate and duty authorized under the right" and was "ready, willing and able to make full use of the right." ORS 540.610(3).

In this case, Mr. Groen testified that from May 1997 through 2003, the pipes that carried water from the stream to the cabin were not hooked up, and the connecting pipe was bent back. Even though Mr. Groen testified that someone made changes to the plumbing and hooked up black hoses, the pipe that carried water to the cabin was damaged in early 1998 and not repaired or reconnected through July 2003. Finally, Mr. Groen testified that during this period he did not hook the hoses or pipes back up to the cabin and check to see if the water delivery system still worked.

As such, the evidence in the record establishes that the water delivery system that Mr. Groen had in place prior to 1997 was not maintained or functionally equivalent to the system that was in place during the alleged period of nonuse. In addition, the evidence in the record establishes that during the period of nonuse, the delivery system was not functioning in a manner so as to deliver water to residences on Tax Lot 300 for domestic use. As such, Mr. Groen's testimony fails to establish that although he used less water during the period of forfeiture, the water diversion and delivery facilities were sufficiently "ready" to deliver the full rate and duty described by Certificate 39995 to the domiciles on Tax Lot 300. In addition, there is no evidence that Mr. Groen checked the diversion and delivery facilities, nor any evidence showing that the disconnected and changed delivery system on Tax Lot 300 had the capacity to handle or was "able" to deliver and distribute the entire rate and duty authorized under the water right. Finally, because Mr. Groen did not use the water for domestic purposes during the forfeiture period, but used the water for human consumption only when he camped on the property by means of taking water directly from the stream, he did not use the water consistently with the terms of the water right (i.e. for domestic use). *Hennings v. Water Resources Department*, 50 Or

App at 124. Notwithstanding that Mr. Groen may have derived some benefit from the use of the water while he camped on the property, the use was not domestic use as provided by the water right and defined by rule, and therefore does not constitute “use” of the right for the purpose of rebutting the presumption of forfeiture. *Id.* As such, Mr. Groen’s use of the water as it occurred between 1997 and 2003 does not serve the purpose of illustrating that Mr. Groen was ready, willing and able to exercise the full right for the beneficial purposes established by Certificate 39995.

Because Mr. Groen did not use the water consistently with the terms of the right, between 1997 and 2003, Proponents have established a presumption of forfeiture for Certificate 39995. Evidence of Mr. Groen’s sporadic use of water for camping purposes between 1997 and 2003 does not rebut the presumption of forfeiture. Nor does the evidence support a finding that notwithstanding a presumption of forfeiture the owner of the water right used less water to accomplish the beneficial use allowed by the right but was otherwise ready, willing and able to make full use of the water right ORS 540.610(3). Consequently, a preponderance of the evidence establishes that Certificate of water right 39995 has been forfeited by failure to make beneficial use of the water for domestic purposes on Tax Lot 300 from May 1997 through July 2003.

**C. Certificate 56024 – irrigation of 0.6 acre.**

Certificate of Water Right 56024 authorizes the use of 0.015 cfs, being 0.01 cfs for irrigation and 0.005 cfs for domestic use, from an unnamed stream, a tributary of Graves Creek, for domestic use of one family and irrigation of 0.7 acre. Proponents contend that a portion of the water right is forfeited by failure to make beneficial use of the water for irrigation purposes from March 1997 through October 2003. As discussed below, a preponderance of the evidence establishes that the 0.6 acre of irrigation use under Certificate 56024 is forfeited for nonuse.

OAR 690-300-0010(26) states:

Irrigation means the artificial application of water to crops or plants by controlled means to promote growth or nourish crops or plants. Examples of these uses include, but are not limited to, watering of an agriculture crop, commercial garden, tree farm, orchard, park, golf course, play field or vineyard and alkali abatement.

Naturally occurring sub-irrigation does not qualify as irrigation. *Staats v. Newman*, 164 Or App 18, 23 (1999). Irrigation requires more than just applying water to land. *Hennings v. Water Resources Department*, 50 Or. App. 121, 123-124 (1981) (court found that applying water to land for the purpose of wetting the dry ground to assist with plowing was not irrigation). Irrigation also requires a deliberate intent or purpose to promote growth or nourish crops or plants. OAR 690-300-0010(26). In addition, water use for a purpose other than that set forth in the certificate does not constitute “use” that could avoid forfeiture of water rights. *Hannigan v. Hinton*, 195 Or App at 351 citing *Hennings v. Water Resources Department*, 50 Or App 121, 124 (1981); See also *In the Matter of the Proposed Cancellation of Water Right Certificate 29364 In the Name of Harold Biddle for Use of Water From East Branch of Long Branch and East Fork of*

*East Branch and Reservoir, Jackson County, PC 91-2, Special Order Book Volume 46, pp. 34-39, at p. 37 (noting that “Irrigation required deliberate and intentional diversion and application of water to a beneficial purpose”). Finally, beneficial use includes a component of continuity of use and requires more than a token application of water. Hale v. Hoskins, 184 Or App 36, 42 (2002) (beneficial use includes an element of continuity of use); See also, In the Matter of Cancellation of Water Right Certificates 35744 and 14694 and The Partial Cancellation of Certificate 49695 for Use of Water From Lake Creek, a Tributary of the Metolius River, Jefferson County, Oregon, PC 90-3, Special Order Book Volume 45, pp.55-60, at 45 (noting that “A token application of water once or twice during the irrigation season for 3-4 hours\*\*\*does not constitute beneficial use”).*

In this case, the evidence in the record establishes that from May 1997 through 1999, and 2001 through 2003, Mr. Groen visited Tax Lot 300 one to three times per year to check on the property, and during those visits he applied water to the lower field. The question becomes whether the water that was applied was for irrigation and whether the water was applied to the entire 0.6 acre.

Mr. Groen testified that when he visited the property he spent an average of two hours on the property and that while he was there he applied water to a small portion, less than one-half, of the 0.6 acre, by placing a hose in the stream and sprinkling water on the land. However, Mr. Groen did not present evidence that he applied water to different parts of the pasture during his visits, nor did he present evidence that he applied water to the entire 0.6 acre between 1997 and 2003. In addition, while he was absent, Mr. Groen did not instruct anyone to irrigate the 0.6 acre on his behalf. For these reasons, a preponderance of the evidence supports a finding that between May 1997 and October 2003, Mr. Groen failed to apply water to the entire 0.6 acre. For the portion that Mr. Groen did apply water to, the question becomes whether the water was put to beneficial use such that the use may be characterized as “irrigation” use consistent with the terms of Certificate 56024.

As discussed above, irrigation requires a deliberate intent or purpose to promote growth or nourish crops or plants for a beneficial purpose. Production of pasturage for animals is a beneficial purpose. OAR 690-300-0010(5) and (26).

Mr. Groen testified that he applied water on the pasture for horses that may be pastured on the land. However, Mr. Groen never saw any horses on his property. In addition, although Ms. Ma observed piles of horse manure on the property in 2005, there was no direct evidence presented that horses were actually pastured on the land during May 1997 through October 2003. Furthermore, Ms. Gilstrap presented evidence that her horses would periodically escape and go onto Tax Lot 300 during that time frame, but that she did not intentionally graze or pasture her horses on Mr. Groen’s land. Because a preponderance of the evidence supports a finding that there were no horses pastured on Tax Lot 300 during the period of May 1997 through October 2003 and that horses that may have used the pasture used it incidentally when they escaped from adjoining property, it cannot be found that Mr. Groen applied water to his land for the purpose of promoting growth of pasture. Consequently, Mr. Groen’s incidental and sporadic application of water on the lower field of Tax Lot 300 cannot form the basis for finding that water was beneficially used for irrigation of pasture or other plants. As such, the use was not consistent

with the provisions of Certificate 56204 and has been forfeited.

Mr. Groen also testified that he applied water on the pasture to keep the place green. However, beneficial use requires more than a token application of water on a sporadic basis. The evidence in the record establishes that at the very most, Mr. Groen applied water to the pasture approximately three times per year for two hours. The Department has determined that applying water once or twice during the irrigation season for 3-4 hours is a token application of water and does not constitute beneficial use. Special Order Book Volume 45, pp. 55-60, at 45. Moreover, Mr. Nebmaier testified that it took approximately five hours of water application with a sprinkler over a two-day period before he saw green appear on the field; which confirms that Mr. Groen's use was too short in duration of application and too inconsistent to be considered irrigation. OAR 690-300-0010(26); *Hennings*, 50 Or App at 124; *Staats v. Newman*, 164 Or App at 23. As such it is more likely than not that Mr. Groen's application of water on the lower field of Tax Lot 300 was insufficient to achieve the irrigation purpose of Certificate 56024. For these reasons, 0.6 acre of irrigation under Certificate 56024 has been partially forfeited by failure to make beneficial use of the water for irrigation purposes on Tax Lot 300 from May 1997 through October 2003.

#### **D. Protestant Nebmaier's arguments**

1. Two of the affidavits asserting nonuse under Water Right Certificate 39995 fail to meet OAR 690-017-0400(2)(g).

Protestant Nebmaier contends that because Mrs. Sessler and Ms. Gilstrap demonstrated their lack of knowledge of water law and misconceptions regarding points of diversion in their testimony, that their affidavits of nonuse under Water Right Certificate 39995 fail to meet the criteria in OAR 690-017-0400(2)(g). Such assertions, even if proven correct do not affect the substance of the assertions of nonuse made in the affidavits.

As discussed above, the Department must initiate cancellation proceedings when it appears that a presumption of forfeiture has been established and would not be rebutted. ORS 540.631. Affidavits of nonuse, in turn, must contain:

A statement that the affiant knows with certainty that no water from the allowed source has been used for the authorized use on the lands, or a portion of the lands, the portion being accurately described, under the provisions of the water right within a period of five or more successive years, and the beginning and ending years of the period of nonuse. Where possible, beginning and ending months should also be given.

OAR 690-017-0400(2)(g).

In reviewing affidavits, the Department must first determine whether, on the face of the affidavits, it "appears" or looks like a water right has not been used for five or more successive years and would not be rebutted under ORS 540.610 before initiating cancellation proceedings



by issuing written notice. ORS 540.631.

In this case, the Department received three affidavits asserting nonuse of water, under Water Right Certificate 39995, from an unnamed stream (source), for domestic use of one family (authorized use), including irrigation of lawn and garden, for a total of ½ acre, within Tax Lot 300, located in Township 34 South, Range 5 West, in the SE ¼ NE ¼ of Section 17 in Josephine County (the land and its description). With regard to the nonuse period (five or more years), Mr. and Mrs. Sessler asserted nonuse from April 1997 through July 2003, and Ms. Gilstrap asserted nonuse from March 1997 through July 2005. After reviewing the affidavits, the Department determined that there was sufficient evidence to create a presumption of forfeiture and subsequently issued a Notice of Cancellation to Protestant Nebmaier.

An apparent lack of understanding of water law or misconceptions about points of diversion do not disqualify the statements of nonuse asserted in an affidavit of nonuse and do not rebut the presumption of forfeiture established by the affidavits. As a result, Protestant Nebmaier's arguments do not support a finding that the presumption of forfeiture was not established.

## 2. Proponent's witnesses are not credible

Protestant Nebmaier contends that Proponents and their witnesses were not credible. The Commission herein adopt the credibility determinations from the Proposed Order to support a conclusion that witness testimony that was used to make a determination about the facts of this case were corroborated as discussed below, and little or no weight given to the testimony of other witnesses as discussed.

A determination of a witness' credibility can be based on a number of factors other than the manner of testifying, including the inherent probability of the evidence, internal inconsistencies, whether or not the evidence is corroborated, and whether human experience demonstrates that the evidence is logically incredible. *Tew v. DMV*, 179 Or App 443 (2002).

### a. Ms. Larson

Protestant Nebmaier argued that the testimony of Ms. Larson was not credible in several matters. Because the ALJ did not rely upon the testimony of Mrs. Larson in the findings of fact, the ALJ did not address Protestant Nebmaier's arguments with regard to Ms. Larson.

### b. Mr. Smith

Protestant Nebmaier argued that the testimony of Mr. Smith was not credible in several matters. The ALJ did not rely upon the testimony of Mr. Smith in the findings of fact, so there is no need to address Protestant Nebmaier's arguments on this point.

### c. Proponent Gilstrap

Protestant Nebmaier argued that the testimony of Proponent Gilstrap was not credible in

several matters. As set forth below, to the extent that the ALJ relied upon the testimony of Proponent Gilstrap, the ALJ did so when the evidence was corroborated by Mr. Groen, by the Protestants, or in the case of the move-in date, when the ALJ found that the inconsistency was a simple mistake.

In this case, Proponent Gilstrap presented evidence that there was no water use on Tax Lot 300 in 1997 and 1998 by Nick White, Cindy, Chuck or Anita. This evidence was corroborated by Mr. Groen's testimony that from May 1997 through 2003 there was no running water to any of the structures and he did not see anyone residing on the property.

Proponent Gilstrap also presented evidence that in the spring of 1998, the pipe that carried water from the stream into the cabin broke and was not repaired or reconnected through July 2003. This evidence was corroborated by Mr. Groen's testimony that from May 1997 through 2003, the pipes that carried water from the stream to the cabin were not hooked up and the connecting pipe was bent back.

Proponent Gilstrap also testified that from summer 1998 through July 2003, no one resided on Tax Lot 300 and the structures that were on the property deteriorated. This evidence was corroborated by Mr. Groen's testimony that from May 1997 through 2003 he did not see anyone residing on the property, and there were no doors on the structures.

Proponent Gilstrap also presented evidence that her horses would periodically escape and go on to Tax Lot 300, but she did not intentionally graze or pasture her horses on the property. This evidence was corroborated in part by Mr. Groen's testimony that from May 1997 through 2003 he did not see any horses on the property, and in part by Ms. Ma's observations of horse manure on the property.

Proponent Gilstrap also testified that she moved onto Tax Lot 200 in December 1995, rather than December 1996 as indicated in the affidavits of nonuse that she filed with the Department. To the extent that the dates are inconsistent, the ALJ attached very little weight and found that it was a simple mistake not affecting credibility.

d. Proponent Mrs. Sessler

Protestant Nebmaier argued that the testimony of Proponent Mrs. Sessler was not credible in several matters.

Proponent Mrs. Sessler testified that she and her family moved onto Tax Lot 400 in May 1995 rather than May 1996 as indicated in the affidavits of nonuse that she filed with the Department. To the extent that the dates are inconsistent, the ALJ attached very little weight and found that it was a simple mistake. Because the ALJ did not rely upon the testimony of Proponent Mrs. Sessler regarding any other matters, the Commission need not address Protestant Nebmaier's remaining arguments.

e. Proponent Mr. Sessler

Protestant Nebmaier argued that the testimony of Proponent Mr. Sessler was not credible in several matters. Because the ALJ did not rely upon the testimony of Mr. Sessler in the findings of fact, the Commission does not address Protestant Nebmaier's arguments.

Finally, notwithstanding the credibility of Proponents and their witnesses, the evidence that was presented by Protestants and their witnesses did not establish domestic use under Water Right Certificate 39995 on Tax Lot 300 for the period of May 1997 through July 2003, nor did such evidence and testimony prove irrigation under Water Right Certificate 56024 of 0.6 acre on Tax Lot 300 for the period of May 1997 through October 2003.

### 3. Proponents failed to meet their burden of proof and establish nonuse

Protestant Nebmaier next contends that Proponents failed to meet their burden of proof and establish nonuse. As discussed above, the Proponents have established a presumption of forfeiture and this presumption is un rebutted.

### 4. Certificate 39995 was exercised

Protestant Nebmaier next contends that Mr. Groen used water from the stream for domestic purposes. As discussed above, the evidence and testimony do not support a finding that water was used for domestic purposes in accordance with the terms and conditions of Certificate 39995.

Protestant Nebmaier also contends that Mr. Groen used water from the stream to water the "garden area" around the cabin. However, Mr. Groen testified that he did not plant a garden or a lawn. Because Mr. Groen did not make use of water for domestic purposes and did not use the water for residential uses of the property such as watering a garden, Certificate 39995 is forfeited.

Protestant Nebmaier next contends that there was no convincing evidence that Nick White, Cindy, Chuck, and Anita did not use water from the stream on Tax Lot 300. This assertion is unsupported by the record as Ms. Gilstrap credibly testified regarding her knowledge of the above-named individuals and their lack of water use on Tax Lot 300. In addition, Protestants did not present any evidence to the contrary. Accordingly, the evidence in the record supports the observations about the lack of water use on Tax Lot 300 during the forfeiture period.

### 5. Certificate 56024 was exercised

Protestant Nebmaier contends that Mr. Groen irrigated the pasture. As discussed above, the evidence in the record does not support a finding that Mr. Groen irrigated the pasture.

Protestant Nebmaier also contends that the Proponents may have irrigated the pasture when they were watering their adjacent field. The argument is completely unsupported as Proponents did not testify that they irrigated the pasture on Tax Lot 300 during the period of nonuse.

Protestant Nebmaier argues that there was beneficial use. As discussed above, beneficial use was not accomplished during the period of forfeiture.

6. Means were in place to exercise Certificate 56024

Protestant Nebmaier next contends that there were hoses, ditches and turnouts in place to exercise Certificate 56024. Protestant Nebmaier is correct. However, as discussed above, Mr. Groen did not consistently apply water to the entire 0.6 acre for irrigation during the period of May 1997 through October 2003.

7. Means were in place to exercise Certificate 39995

Protestant Nebmaier next contends that there were means in place to exercise Certificate 39995. As discussed above, the evidence does not support a finding that the user used less water than they were entitled to but were otherwise “ready, willing and able” to exercise the full rate and duty under the right.

8. Certificate 39995 was exercised by Mr. Smith and Ms. Gilstrap

Protestant Nebmaier next contends that while exercising their domestic use under Certificate 56024, Mr. Smith and Ms. Gilstrap were also exercising the domestic use under Certificate 39995. The evidence in the record does not support this assertion as domestic use under Certificate 56024 located on Tax Lot 200 may not satisfy the domestic use under Certificate 39995 that is located on Tax Lot 300. *Hannigan v. Hinton*, 195 Or App at 352. In addition, there was no evidence presented that either Mr. Smith or Ms. Gilstrap used water on Tax Lot 300 to satisfy the domestic use under Certificate 39995. As such, Protestant’s argument is unpersuasive.

9. Proponents’ motives

Protestant Nebmaier next contends that Proponents’ motivation in bringing the action is to thwart him and his wife from taking root in their new home. As discussed above, the ALJ’s credibility determinations are adopted into the findings made in this order.

10. Protestant’s Assertions of “Badgering and Flak”

Protestant Nebmaier contends that he and Ms. Ma were badgered by the objections made by Proponent’s attorney at the hearing. Any concerns about objections made are determined as an evidentiary matter, and substantive objections to evidence submitted are addressed in the order as discussed above.

11. Conclusion

Protestant Nebmaier contends that the proper question is whether the record demonstrates nonuse for five successive years by a preponderance of the evidence, not whether Protestants

have established use. As discussed above, a presumption of forfeiture has been established for Certificate 39995 and a presumption of partial forfeiture has been established for Certificate 56024. These presumptions have not been rebutted.

### **E. Protestant Ma's arguments**

1. Internal logic and consistency - evaluating the action, motives and testimony of Protestants

Protestant Ma contends that it does not make sense that she and her husband (as new people moving on a property) would deliberately stir up trouble with the neighbors. As discussed above, insofar as these arguments address the credibility of witnesses, the testimony used to support the factual findings in this matter was corroborated as discussed.

2. Evaluating the Proponents' motives and internal consistencies

Protestant Ma next contends that the Proponents had something to lose, their use of Tax Lot 300 for recreation and enjoyment, when she and her husband purchased the property. Insofar as these arguments address the credibility of witnesses, the ALJ's credibility findings have been adopted into this order.

3. Easement issue and motive

Protestant Ma next contends that the Sesslerers did not want anyone living on Tax Lot 300. Insofar as these arguments address the credibility of witnesses, the ALJ's findings have been adopted into this order.

4. Whether the Groens exercised their water rights

Protestant Ma contends that the Groens exercised their water rights. As discussed above, the Groens did not make beneficial use of the water as set forth by the terms of Certificate 39995 and 56024 between 1997 and 2003.

5. Discrepancies in testimony about dates: 1998 vs. 1999

Protestant Ma contends that the Groen's are credible regarding when they visited Tax Lot 300 because of their date books and calendars. Mr. Groen's testimony has been given substantial weight but does not support a finding that the presumption of forfeiture has been rebutted.

6. Whether the cabin plumbing system was intact so as to establish that the water user was ready, willing and able to use the full rate and duty allowed under Certificate 39995.

Protestant Ma next contends that the cabin plumbing was intact and ready, willing and able. See discussion above.

7. Whether the irrigation system was intact so as to establish that the water user was

ready, willing and able to irrigate the full rate and duty established under Certificate 56024.

Protestant Ma next contends that the irrigation system for the 0.6 acre was intact such that it may be established that the water user was ready, willing and able to use the full amount under the right. Protestant Ma is correct. However, as set forth previously in this order, Mr. Groen did not apply water to the entire 0.6 acre for the beneficial use of irrigation during the period of May 1997 through October 2003. As such, the irrigation use was forfeited for nonuse.

8. Beneficial use

Protestant Ma next contends that there was beneficial use on the pasture of Tax Lot 300. This argument is discussed above.

9. Credibility of witnesses

Protestant Ma contends that Proponents and their witnesses are not credible. The credibility determinations in this matter are discussed above.

10. Water as a weapon

Protestant Ma contends that Proponents are using water as a weapon to drive out or harass her and Protestant Nebmaier. Insofar as these arguments address the credibility of witnesses, this is discussed above.

11. Water is a source of life

Protestant Ma contends that water is a source of life and the decisions made in this case have an impact that reverberates on a larger scale. This argument insofar as it may be considered relevant does not establish use of the water rights at issue.

12. Water itself

Protestant Ma contends that whatever the outcome, water endures. This argument insofar as it may be considered relevant does not establish use of the water rights at issue.

13. Conclusion

Protestant Ma finally contends that the proper question is whether the record demonstrates nonuse for five successive years by a preponderance of the evidence, not whether Protestants have established use. As discussed above, a presumption of forfeiture has been established and is un rebutted for the water rights at issue in this proceeding.

**F. Proponent's arguments**

The Proponents met their burden of proof. There is no need to address Proponent's closing arguments.

## IX. EXCEPTIONS TO THE PROPOSED ORDER

Pursuant to OAR 137-003-0650, the OWRD requested the ALJ to review any written exceptions received and to provide a written response to the exceptions. The ALJ's Response to Exceptions Filed by Wolfgang Nebmaier and Vajra Ma issued July 17, 2008 are hereby made a part of the record for this proceeding. In addition, the ALJ's written responses are adopted as described below.

### A. Water Right Certificate 39995

#### EXCEPTION (1):

Protestants claim that there is no basis in the record for the conclusion that human consumption must take place "inside a structure."

#### RESPONSE:

Protestants are incorrect.

Bruce Sund, Water Master for OWRD, testified that human consumption is for household purposes. In addition, the definition for domestic water use was cited in the order.

#### EXCEPTION (2):

Protestants claim that "inside the structure" requirement consists of nothing but Mr. Sund's testimony.

#### RESPONSE:

Protestants are incorrect.

The basis for the conclusions are Mr. Sund's testimony and rules governing domestic water use.

#### EXCEPTION (3):

Protestants claim that Mr. Sund testified extensively to the contrary regarding "inside a structure" requirement.

#### RESPONSE:

Protestants are incorrect.

Mr. Sund did not testify to the contrary. He provided additional examples of domestic use.

Mr. Sund testified about water rights for domestic use being issued to families with camping

platforms that have a pipe and a spigot that they hook up to for short periods of time during the year. This case does not involve a camping platform.

Mr. Sund also testified about water rights for domestic use being issued to families with cabins that have a pump with a pipe that they set in the stream and turn on so they can use water in the cabin. This case does not involve that scenario.

**EXCEPTION (4):**

Protestants claim that ALJ Gutman disqualified the “inside the structure” requirement in a footnote on page 12 of the order.

**RESPONSE:**

Protestants exception is denied and the discussion of domestic use is clarified in this final order.

**EXCEPTION (5):**

Protestants claim that how a water right holder exercises his/her domestic water right is not within OWRD’s purview.

**RESPONSE:**

Protestants are incorrect.

OWRD has the authority to administer and enforce laws concerning the use and control of the water resources of this state, including regulating the distribution of water between the various users, ensuring beneficial use of the water, and enforcing waste.

**EXCEPTION (6):**

Protestants claim that water rights for domestic use are appurtenant to the land and do not require doors, structures, or running water to any structure.

**RESPONSE:**

Appropriation of water must satisfy the terms of the water right in question. In this case, the water right Certificate 39995 was issued to Sue Patterson for the purpose of domestic use of one family, including the irrigation of lawn and garden not to exceed ½ acre in area. As set forth in the order, the definition of domestic use includes human consumption and household purposes.

**EXCEPTION (7):**

Protestants claim that no statute or case-law was cited in the order to substantiate the “inside a house” requirement because none exists.



RESPONSE:

Protestants' exception is incorrect.

The definitions for domestic use were cited in the proposed order and are cited in this order. In addition, Mr. Sund's testimony regarding that requirement was set forth in the findings of fact. As such, the evidence in the record is sufficient to substantiate the "inside a house" requirement.

**EXCEPTION (8):**

Protestants claim that OWRD cannot allow the "inside a house" requirement without any basis in law or precedent.

RESPONSE:

Protestants' exception is denied. *See* response to exceptions 1 – 7 above,

**EXCEPTION (9):**

Protestants claim that there is no requirement for a property owner to check his or her system.

RESPONSE:

Protestants asserted ORS 540.610(3) at the hearing. Pursuant to ORS 540.610(3), if the owner of a perfected and developed water right uses less water to accomplish the beneficial use allowed by the right, the right is not subject to forfeiture so long as the user has a facility capable of handling the entire rate and duty authorized under the right, and the user is otherwise ready, willing and able to make use of the right.

As set forth in the order, the water delivery system that Mr. Groen had in place prior to 1997 was not the same that was in place during the alleged period of nonuse. In addition, Mr. Groen testified that he did not hook up the disconnected pipes and hoses and check to see if the water delivery system still worked. Thus, there was no evidence that the changed delivery system on Tax Lot 300 was still capable of handling the entire rate and duty authorized under the water right. Furthermore, there was no evidence that Mr. Groen was ready, willing and able to make full use of the water right.

**EXCEPTION (10):**

Protestants claim that ORS 540.610(3) only speaks of having the facility and being ready, willing and able.

RESPONSE:

Protestant is incorrect. *See* discussion above at section III.A.

As discussed, the record provides no evidence that the changed delivery system on Tax Lot 300 was capable of handling the entire rate and duty authorized under the water right during the period of forfeiture. In addition, there was no evidence that Mr. Groen was ready, willing and able to make full use of the water right during this period.

**EXCEPTION (11):**

Protestants claim that the system Mr. Groen used for domestic irrigation around the cabin was sufficient for the full rate and duty of the certificate.

**RESPONSE:**

Protestants' exception misstates the evidence and calls for speculation.

There was no evidence presented that the system that Mr. Groen used to keep the grass green around the cabin was capable of handling the full rate and duty of the certificate.

More importantly, as set forth in the order, to maintain a water right for domestic use of one family that includes irrigation of lawn and garden, there must be household use and irrigation of lawn and garden outside the house. If there is no household use of water, the water right is forfeited. Mr. Groen acknowledged that during the period of alleged nonuse, he did not make use of water inside the cabin for human consumption or household purposes.

**EXCEPTION (12):**

Protestants claim that ALJ Gutman mischaracterized Mr. Groen's testimony regarding his domestic use.

**RESPONSE:**

Protestants are incorrect.

Mr. Groen testified that he drank water from the spring by filling up plastic cups and jugs at the spring box, and that he used water from the spring for cooking and cleaning by filling up pots and pans. Mr. Groen also testified that he periodically watered around the cabin to keep the grass green.

Mr. Groen's testimony was properly set forth in the findings of fact.

**EXCEPTION (13):**

Protestants claim that ALJ Gutman dismissed the entire issue of credibility regarding the departure of Nick White and Cindy Swan from Tax Lot 300.

RESPONSE:

Protestants are incorrect.

The ALJ reviewed the evidence and made findings of fact based on testimony that was credible and corroborated.

As set forth in the order, Karen Gilstrap testified that Mr. White and Cindy were no longer residing on Tax Lot 300 by the end of summer 1998. Ms. Gilstrap also testified that from the end of summer 1998 through July 2003, no one resided on Tax Lot 300. Ms. Gilstrap's testimony was corroborated by Mr. Groen's testimony that from May 1997 through 2003 when he visited the property he did not see anyone residing on the property.

**EXCEPTION (14):**

Protestants claim that Nick White and Cindy Swan satisfied domestic use on Tax Lot 300 by obtaining water from Ms. Gilstrap's home and using it in the A-frame.

RESPONSE:

Protestants are incorrect.

As set forth in the order, domestic use under certificate 56024 that is located on Tax Lot 200 (water from Ms. Gilstrap's house), does not satisfy domestic use under certificate 39995 that is located on Tax Lot 300.

**EXCEPTION (15):**

Protestants claim that Mr. Sund testified that if someone uses the correct source of water and the domestic use takes place on the land filed for in the water right at issue, then the domestic use requirement has been satisfied.

RESPONSE:

Protestants' exception fails to address the entirety of Mr. Sund's testimony.

Although Mr. Sund testified that if someone uses the correct source on the correct tax lot then domestic use is satisfied, Mr. Sund also testified as to what qualifies as domestic use under the water right at issue, which was not met in this case.

In addition, Mr. Sund testified that domestic use on a different tax lot does not satisfy domestic use on Tax Lot 300. Finally, Mr. Sund testified that domestic use under certificate 56024 does not satisfy domestic use under certificate 39995.

**EXCEPTION (16):**

Protestants claim that common logic would suggest that Nick and Cindy used water out of spring to wash themselves, their clothes and their dishes on Tax Lot 300.

RESPONSE:

Protestants' exception calls for speculation.

As set forth in the order, Ms. Gilstrap presented credible evidence that Mr. White and Cindy used her house to take showers and to get jugs of water for household use, and they did not obtain water from the stream on Tax Lot 300.

**EXCEPTION (17):**

Protestants claim that Mr. Nebmaier's observation of white pvc pipe behind the A-frame and Mr. Sund's observation of old poly pipe attached to a sink in the A-frame is contradictory evidence regarding Mr. White's use of water on Tax Lot 300.

RESPONSE:

Protestants' exception is incorrect and calls for speculation.

The observations made by Mr. Nebmaier and Mr. Sund in 2004, do not prove that Mr. White or Cindy used water from the spring in the A-frame during the period of nonuse, nor do the observations contradict the evidence that was presented in the hearing.

As set forth in the order, Ms. Gilstrap presented credible evidence that she visited with Nick and Cindy in the A-frame, that the A-frame did not have plumbing, pipes or running water, and that Nick and Cindy used her home to take showers and get water for household use. Ms. Gilstrap's testimony was corroborated by Mr. Groen's testimony that from 1997 through 2003 there was no running water to any of the structures on Tax Lot 300.

**EXCEPTION (18):**

Protestants claim that Nick and Cindy exercised the domestic water right under certificate 39995 while on Tax Lot 200.

RESPONSE:

Protestants are incorrect.

As set forth above, Mr. Sund testified that domestic use on a different tax lot does not satisfy domestic use on Tax Lot 300. In addition, Mr. Sund testified that domestic use under certificate 56024 (Tax Lot 200) does not satisfy domestic use under Certificate 39995 (Tax Lot 300).

**B. Water Right Certificate 56024**

**EXCEPTION (19):**

Protestants claim that ALJ's conclusion that Mr. Groen did not irrigate the entire 0.6 acres was contradicted by the testimony of Mr. Sund.

**RESPONSE:**

Protestants are incorrect.

Mr. Sund agreed that it was possible to maintain the water right if Mr. Groen irrigated a different portion of the 0.6 acre every year thus irrigating the entire 0.6 acre at the end of the five years.

However, as set forth in the order, Mr. Groen did not present evidence that he applied water to different parts of the pasture during his visits, nor did he present evidence that he irrigated the entire 0.6 acre at least once in five years.

**EXCEPTION (20):**

Protestants claim that Mr. Groen's application of water on the pasture was not a token application.

**RESPONSE:**

Protestants are incorrect. *See* discussion in section VIII.C.

Mr. Groen presented evidence that from May 1997 through 1999, and 2001 through 2003, he visited Tax Lot 300 one to three times per year to check on the property, and that he spent an average of two hours on the property and, on two separate occasions, he and a friend camped out overnight.

Mr. Groen testified that during those visits, he irrigated a small portion, less than one-half, of the .06 acre by placing a hose in the stream and sprinkling water on the land. Mr. Groen did not present evidence that he irrigated the pasture for more than two hours at a time. In addition, Mr. Groen did not have a specific recollection of using turnouts on the pasture from 1997 through 2003. At the very most, Mr. Groen applied water three times per year for two hours at a time, which was a token application.

**EXCEPTION (21):**

Protestants claim that the grass on the pasture is facultative wetland meadow and the water that is applied to it is not lost on bare soil.

**RESPONSE:**

Protestants' exception fails to address the beneficial use requirement. See discussion at section VIII.C.

Mr. Groen testified that he applied water on the pasture for horses that may be pastured on the land. However, Mr. Groen never saw any horses on his property and there was no direct evidence presented that horses were actually pastured on the land during May 1997 through October 2003.

Mr. Groen also testified that he applied water on the pasture to keep the place green. However, beneficial use requires more than a token application of water. At the very most, Mr. Groen applied water three times per year for two hours at a time, which was a token application.

**EXCEPTION (22):**

Protestants claim that Mr. Groen irrigated 12-18 times in 5-6 years using both turnouts and a pipe, and that perhaps he spent 14-28 hours irrigating the pasture.

**RESPONSE:**

Protestants' exception misstates the evidence and calls for speculation.

As indicated previously, Mr. Groen presented evidence that from May 1997 through 1999, and 2001 through 2003, he visited Tax Lot 300 one to three times per year to check on the property, and that he spent an average of two hours on the property and, on two separate occasions, he and a friend camped out overnight.

Mr. Groen testified that during those visits, he irrigated a small portion, less than one-half, of the .06 acre by placing a hose in the stream and sprinkling water on the land. Mr. Groen did not present evidence that he irrigated the pasture for more than two hours at a time. In addition, Mr. Groen did not have a specific recollection of using turnouts on the pasture from 1997 through 2003. At the very most, Mr. Groen applied water three times per year for two hours at a time, which was a token application.

**EXCEPTION (23):**

Protestants claim that finding of fact (29) is uncorroborated.

**RESPONSE:**

Protestants' exception is denied.

Ms. Gilstrap testified that in late 1999, she purchased several horses and pastured them on Tax Lot 200. Ms. Gilstrap also testified that the horses would periodically escape and go onto other property, including Tax Lot 300, but she did not intentionally graze or pasture her horses on Tax Lot 300 and she did not have an agreement with the Groens to do so.

Ms. Gilstrap's testimony was credible and there was no direct evidence presented to the contrary. In addition, the evidence that was presented by Ms. Gilstrap was corroborated, in part, by Mr. Groen's testimony that he did not see any horses on Tax Lot 300.

**EXCEPTION (24):**

Protestants claim that Ms. Gilstrap's intent does not matter because her horses grazed on Tax Lot 300.

**RESPONSE:**

Protestants' exception is improper.

Irrigation requires a deliberate intent or purpose to promote growth or nourish crops or plants for a beneficial purpose. Production of pasturage for animals is a beneficial purpose. OAR 690-300-0010(5) and (26).

Mr. Groen testified that he applied water on the pasture to keep the place green and for any horses that may be pastured on the land. However, Mr. Groen never saw any horses on his property. In addition, there was no direct evidence presented that horses were actually pastured on the land during the relevant time period. Furthermore, Ms. Gilstrap presented credible evidence that she did not intentionally graze or pasture her horses on Tax Lot 300.

**EXCEPTION (25):**

Protestants claim that because Ms. Gilstrap was friends with Mr. Anders, her agreement to graze horses on Tax Lot 300 would have been with him, not Mr. Groen.

**RESPONSE:**

Protestants' exception calls for speculation.

There was no direct evidence presented that Ms. Gilstrap had an agreement with Mr. Anders to graze her horses on Tax Lot 300.

In addition, as set forth in the findings of fact, Mr. Anders left the property in March or April 1997, well before the horses were purchased by Ms. Gilstrap in 1999.

**EXCEPTION (26):**

Protestants claim that the manure piles on Tax Lot 300 is evidence the horses were on the property.

**RESPONSE:**

Protestants' exception is denied.

There was no direct evidence presented that horses were actually pastured on the land during the relevant time period. In addition, manure piles do not prove that horses were pastured on Tax Lot 300.

**EXCEPTION (27):**

Protestants claim that ALJ Gutman shifted the burden of proof to Protestants.

RESPONSE:

Protestants are incorrect.

As set forth in the order, Proponents had the burden of proof and they met their burden.

**EXCEPTION (28):**

Protestants claim that ALJ Gutman misrepresented Mr. Groen's observations regarding people and horses on the property.

RESPONSE:

Protestants are incorrect.

Mr. Groen presented evidence that from May 1997 through 2003, while visiting Tax Lot 300, he did not see anyone residing on the property and he did not see any horses on his property. Mr. Groen's observations were properly set forth in the findings of fact.

**EXCEPTION (29):**

Protestants claim that ALJ Gutman failed to address all of the credibility factors set forth in *Tew v. DMV*, 179 Or App 443 (2002).

RESPONSE:

Protestants' exception is improper.

As set forth in the order, a determination of a witness' credibility can be based on a number of factors other than the manner of testifying, including the inherent probability of the evidence, internal inconsistencies, whether or not the evidence is corroborated, and whether human experience demonstrates that the evidence is logically incredible. *Tew v. DMV*, 179 Or App 443 (2002).

*Tew v. DMV* does not stand for the proposition that all the factors must be met before the testimony provided by a witness can be considered credible.



**EXCEPTION (30):**

Protestants claim that ALJ Gutman erroneously dismissed their argument that Mrs. Sessler may have irrigated Tax Lot 300 while watering her field.

RESPONSE:

Protestants' exception is denied.

There was no evidence presented that Mrs. Sessler irrigated Tax Lot 300 while watering her field. The argument was properly dismissed as pure speculation.

**EXCEPTION (31):**

Protestants claim that Mr. Groen did not put in a hot water heater.

RESPONSE:

Protestants are incorrect.

Mr. Groen presented evidence that sometime prior to 1997 he fixed up the cabin and put in sinks, lighting, a table, bunks and a hot water heater.

**EXCEPTION (32):**

Protestants claim that the Groens always lived in Santa Cruz and ALJ Gutman made a factual error in FOF (18) when she found that sometime prior to 1997 the Groens moved to Santa Cruz.

RESPONSE:

Protestants are incorrect.

When questioned on cross, Mr. Groen testified that he did not know when he moved to Santa Cruz. However, Mr. Groen did present evidence that sometime prior to 1997 he and his wife were residing in Santa Cruz. The reasonable inference is that sometime prior to 1997 the Groens moved to Santa Cruz. FOF (18) accurately reflects the testimony and evidence in the record.

**EXCEPTION (33):**

Protestants claim that Mr. Groen gave Mr. Anders permission to allow someone down the hill to pasture horses on Tax Lot 300 and that FOF (18) is inaccurate.

RESPONSE:

Mr. Groen testified that he gave Mr. Anders permission to pasture horses on the land. Mr. Groen

also testified that Mr. Anders had called on behalf of someone else. However, on cross, Mr. Groen acknowledged that he only directed Mr. Anders to put horses on the pasture. FOF (18) accurately reflects the testimony and evidence in the record.

**EXCEPTION (34):**

Protestants claim that FOF (30) is inaccurate because Tax Lot 300 was sold to Mr. Nebmaier only.

RESPONSE:

Mr. Groen and Mrs. Groen both testified that they sold Tax Lot 300 to Protestants. FOF (30) accurately reflects the Groens' testimony.

**EXCEPTION (35):**

Protestants claim that ALJ Gutman misstated Ms. Ma's testimony in FOF (31).

RESPONSE:

Protestants are incorrect. FOF (31) accurately reflects Ms. Ma's testimony.

**EXCEPTION (36):**

Protestants claim that FOFs (19), (20), (21), (22), (23), and (29) were based solely on Ms. Gilstrap's testimony.

RESPONSE:

Protestants' exception is denied.

As set forth in the order, the ALJ made findings of fact based on testimony that was credible, corroborated, and when there was no direct evidence presented to the contrary. The ALJ determined Ms. Gilstrap's testimony was credible.

**EXCEPTION (37):**

Protestants claim that Ms. Gilstrap's testimony was not credible.

RESPONSE:

Protestants' exception is denied.

As set forth in the order, ALJ Gutman made findings of fact based on testimony that was credible, corroborated, and when there was no direct evidence presented to the contrary. ALJ Gutman determined Ms. Gilstrap's testimony was credible.

## X. CONCLUSION

For the reasons discussed above, a preponderance of evidence supports a finding that the presumption of forfeiture for Water Right Certificate 39995 is established and is not rebutted. In addition, for the reasons discussed above, a preponderance of evidence supports finding that for 0.6 acre of water for irrigation under Water Right Certificate 56024 a presumption of forfeiture has been established and is not rebutted.

## XI. ORDER

Protestants exceptions are denied.

It is HEREBY ORDERED that Water Right Certificate 39995 for domestic use of one family, including the irrigation of lawn and garden not to exceed ½ acre in area in the SE ¼ NE ¼, within Tax Lot 300, Section 17, Township 34 South, Range 5 West, Willamette Meridian, be cancelled.

It is FURTHER ORDERED that a portion of Water Right Certificate 56024, being 0.6 acre in the SE ¼ NE ¼, within Tax Lot 300, Section 17, Township 34 South, Range 5 West, Willamette Meridian, be cancelled.

Dated this 21st day of November, 2008

  
Jay Rasmussen, Vice Chair  
Oregon Water Resources Commission

### Appeal Rights

You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for review within 60 days from the date of service of this Order. If this Order was personally delivered to you, the date of service is the day you received the Order. If this Order was mailed to you, the date of service is the day it was *mailed*. Judicial review, pursuant to the provisions of ORS 536.075, is to the Court of Appeals. If you do not file a petition for judicial review within the 60-day time period, you will lose your right to appeal.

**APPENDIX A  
LIST OF EXHIBITS CITED**

- Ex. A5: Wolfgang Nebmaier's Protest.
- Ex. A6: Notice of Proposed Partial Cancellation of Water Right (Certificate 56024).
- Ex. A7: Notice of Proposed Partial Cancellation of Water Right (Certificate 39995).
- Ex. A8: The Affidavit of Robert Sessler Asserting Nonuse of Water Right Certificate 39995.
- Ex. A9: The Affidavit of Michele Sessler Asserting Nonuse of Water Right Certificate 39995.
- Ex. A10: The Affidavit of Karen Gilstrap Asserting Nonuse of Water Right Certificate 39995.
- Ex. A12: The Affidavit of Robert Sessler Asserting Nonuse of Water Right Certificate 56024.
- Ex. A13: The Affidavit of Michele Sessler Asserting Nonuse of Water Right Certificate 56024.
- Ex. A14: Water Right Certificate 56024 and Final Proof Map.
- Ex. A15: Water Right Certificate 39995 and Final Proof Map.
- Ex. P171: Affidavit of Richard Groen and Kathryn Groen, page 1.
- Ex. P172: Affidavit of Richard Groen and Kathryn Groen, page 2.
- Ex. R70: Patterson-Groen deed 1977.
- Ex. R81: Aerial picture of pasture, August 2006.
- Ex. R89: Groen 27 year water affidavit, page 1.
- Ex. R90: Groen 27 year water affidavit, page 2.
- Ex. T283: Groen date books, 1997.
- Ex. T284: Groen date books, 1998-1999.
- Ex. T285: Groen date books, 2003.

## CERTIFICATE OF SERVICE

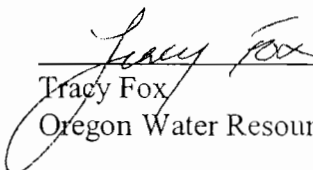
I certify that on November 24, 2008, I mailed the attached Final Order by certified mail to:

Wolfgang Nebmaier  
PO Box 317  
Wolf Creek OR 97497-0317

Vajra Ma  
PO Box 317  
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Robert and Michelle Sessler  
PO Box 234  
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Karen Gilstrap  
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Tracy Fox  
Oregon Water Resources Department