

**Oregon Water Resources Department
Water Right Services Division**

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|---|---|--------------------------|
| In the Matter of the Protests Against |) | FINAL ORDER |
| Water Transfer Applications T-8309, 8310, |) | IN CONTESTED CASE |
| 8311, 8312 |) | |
| |) | |
| UNITED STATES FISH AND WILDLIFE |) | |
| SERVICE, <i>Applicant</i> |) | |
| |) | |
| ANDY DUNBAR; WATER FOR LIFE, INC.; |) | |
| HAMMOND RANCHES, INC.; DWIGHT |) | |
| AND SUSAN HAMMOND; HARNEY |) | |
| COUNTY HAYGROWERS |) | |
| ASSOCIATION; JOHN AND DEBBIE |) | |
| VOLLE; HARNEY SOIL & WATER |) | |
| CONSERVATION DISTRICT, |) | |
| <i>Protestants</i> |) | |

SUMMARY OF THIS ACTION

The Oregon Water Resources Department issues this final order adopting the recommendations made by the Administrative Law Judge (ALJ) in the Proposed Order to resolve the protests filed against Transfer Applications T-8309, T-8310, T-8311, and T-8312. In issuing this final order in contested case, the Department adopts without amendment, the Legal Rulings concerning the Motion for Reconsideration, the Motion to Strike, Issues Presented, and Evidentiary Rulings from the ALJ's Proposed Order. Where modifications are made to the Proposed Order, those modifications are noted as set out below.

HISTORY OF THE CASE

The Oregon Water Resources Department adopts this section of the ALJ's Proposed Order and modifies it only to note the dates of issuance of the Proposed Order and the filing of exceptions to the proposed order by Water for Life, Inc., Hammond Ranches, Inc., Harney County Haygrowers Association, WRD and the USFWS.

On July 28, 1999, the United States Fish and Wildlife Service (USFWS) filed transfer applications T-8309, 8310, 8311 and 8312 with the Oregon Water Resources Department (WRD or Department), proposing to modify water rights evidenced by certificates 28524, 15198, 15197, and 14367 by making changes to the place of use, nature of use and points of diversion. Protests to all four applications were timely filed by protestants Water for Life (representing protestants Water for Life, Harney County Haygrowers Association, Dwight Hammond and Suzi Hammond) (hereafter referred to collectively as Water for Life) and Harney Soil and Water Conservation District (HSWCD); a protest to application T-8309 was timely filed by Andy Dunbar.

The Department initiated a contested case hearing to determine whether the proposed transfers would result in injury to existing water rights. In its Notice of Hearing and Prehearing Conference dated October 9, 2000, the Department phrased the issue for hearing generally as: "Whether the proposed changes as described by the transfer applications would result in injury to existing water rights." The Department moved to limit the hearing issues in this matter and on March 5 and May 3, 2001, orders issued identifying the issues for hearing, with certain issues identified as legal issues to be decided on the basis of written argument prior to hearing. On August 14, 2000, an order issued with rulings on the identified legal issues. A contested case hearing was held in this matter at the Harney County Courthouse, Burns, Oregon on August 23, 24 and 25, 2001. The applicant USFWS appeared through and with Attorney Barbara Scott-Brier. The Department appeared through and with Assistant Attorney General Sharyl Kammerzell. Protestants Water for Life, Hammond Ranches and Harney County Haygrowers Association appeared through and with attorney Brad Harper. Protestant HSWCD appeared through and with Attorney Laura A. Schroeder. Protestant Andy Dunbar appeared on his own behalf. Witnesses Bernadette Williams and Mitch Lewis testified on behalf of the Department. Witnesses Robert Glaeser, Michael Eberle and Tom Downs testified on behalf of USFWS. Witness Senator Ted M. Ferrioli testified on behalf of HSWCD. Witnesses Blake Nuffer, Marvin Jess, Mitch Lewis, Steve Applegate, Andy Dunbar, William (Bill) Neal, Forest Cameron, Dwight Hammond and Steven Hammond testified on behalf of Water for Life.

On June 10, 2002, the Administrative Law Judge (ALJ) issued a Proposed Order to approve the draft transfer orders except for 21.1 acres of land above Krumbo Reservoir.

On July 5, 2002, Protestants Water for Life, Inc., Hammond Ranches, Inc., and Harney County Haygrowers Association timely filed exceptions to the ALJ's proposed order.

On July 10, 2002, WRD timely filed exceptions to the ALJ's proposed order.

On July 22, 2002, USFWS timely filed a response to the exceptions, and on July 24, 2002 it filed a correction to its response.

The record of this proceeding consists of a transcript of the hearing, all evidence received, all documents filed in the contested case, and exceptions and responses to exceptions. The findings of fact and conclusions of law are based upon the entire record.

MOTION FOR RECONSIDERATION OF LEGAL RULINGS

The Department adopts this section of the ALJ's Proposed Order without modification.

Protestant HSWCD requests reconsideration of the rulings on legal issues in this matter. HSWCD retained the services of counsel immediately prior to the hearing. The sole reason given by counsel for reconsideration of the previous rulings on legal issue is HSWCD's retention of counsel. However, HSWCD had ample opportunity to retain counsel in this matter prior to the ruling on legal issues and failed to do so. Notice of this case was made in November 2000, and the hearing date was set by agreement of the parties more than three months prior to hearing. Prior to hearing, the parties identified the preliminary legal issues in this case through prehearing motion and argument and an order issued. I agreed with the Department that the issues remaining for hearing appeared to be of a factual nature. Factual issues are specifically within the scope of an authorized representative's scope of representation. *See* OAR 137-003-0555. HSWCD was capable of making an effective presentation in prehearing motions, even in the absence of counsel. To the extent that legal issues were raised later at hearing, HSWCD had the assistance of counsel and was not prejudiced in any way by the prior rulings. Accordingly, I deny the motion for reconsideration.

MOTION TO STRIKE PORTIONS OF WATER FOR LIFE'S RESPONSE

The Department adopts this section of the ALJ's Proposed Order without modification.

The Department moves to strike those portions of Water for Life's Response to Motion for Reconsideration of Order dated August 14, 2001 that exceed the scope of briefing allowed by this hearing officer. I agree that Water for Life's response went beyond the issues presented in the Motion for Reconsideration. In addition to addressing the issue of whether the August 14, 2001 order on legal issues should be reconsidered, Water for Life addressed legal issues and made closing argument that addressed the record produced at hearing. This additional briefing was non-responsive to the Motion for Reconsideration and I grant the Motion to Strike.

ISSUES PRESENTED

The Department adopts this section of the ALJ's Proposed Order without modification.

The issues in this matter were established through a May 3, 2001 Prehearing Order identifying the issues to be resolved at hearing, and specifying those issues which were legal matters to be decided by written argument prior to hearing and those issues which were factual matters to be decided after hearing. The order identified the factual issues remaining as whether the proposed changes as described by the transfer applications would result in injury to existing water rights considering:

- A. Whether the proposed transfer would result in a net loss of water available to downstream water rights.
- B. Whether the water rights proposed to be transferred would be enlarged.

C. Whether the original place of use of the proposed water rights to be transferred can be prevented from receiving water from the same source.

D. Whether, due to the proposed transfers, there may be a change in the quantity of water previously available to another water right and to which the other water right is entitled.

EVIDENTIARY RULINGS

The Department adopts this section of the ALJ's Proposed Order without modification.

WRD Exhibits 1-14 were admitted by stipulation of the parties.

USFWS Exhibits 1-5 were admitted by stipulation of the parties; USFWS 7-A, 12-A, 13-A, 14-A, 15-A, 16-A, 17-A, 19A, 20-A, 21-A, 25-A, 26-A, 27-A, 28-A, 29-A, 31-A, 37-A, 40-A, 58-A, 59-A, 61-A, and 62-A were received without objection.

Water for Life Exhibits, B, C, D, F, I, J, K, M, N, O, Q and R were admitted by stipulation of the parties. Water for Life Exhibit E was admitted after redaction of all handwritten portions. Water for Life Exhibit A, page 1, was admitted without objection.

Dunbar Exhibits 1 and 2 were admitted without objection.

The parties stipulate that the hearing officer may take judicial notice of the Decree for the Donner und Blitzen River.

The request of Andy Dunbar to call Jim Graham, a hydrologist, as an expert witness was denied on the grounds that he was not named as a witness within the deadlines established at prehearing conference for the presentation of witness lists. A letter memorandum from James Graham was accepted into the record as an offer of proof. *See Water for Life Offer of Proof-1.*

WRD moved to quash the subpoena for testimony by Paul Cleary, Director of the Water Resources Department. The motion was made on the grounds that Mr. Cleary was being called to testify in his role as an agency decision maker, as opposed to factual inquiry into relevant matters in dispute. *See Citizens to Preserve Overton Park v. Volpe*, 401 US 402, 422, 9 S Ct 814, 28 L Ed2d 136 (1971). I concluded that the intended line of inquiry was relevant only to the decision making processes of the witness, and with no showing that the director's decision making process was properly in dispute, the subpoena was quashed.

USFWS stipulates that it did not intend for its water right transfers, T-8309 through T- 8312, to create a split irrigation duty for the irrigation sub-use of its wildlife Refuge management use of the water. USFWS further stipulates to inclusion in the transfer orders a condition precluding a split-irrigation duty for USFWS irrigation sub-use. When the USFWS designates the acreage, annually, that will be irrigated, the Service's use of the full irrigation duty at three acre feet per acre for the irrigated acres will be assumed. The volume remaining will be available for other sub-uses under the right.

FINDINGS OF FACT

The Department adopts this section of the ALJ's Proposed Order and amends Finding of Fact No. 7 in response to the Department's Exception No. 1. The Department also amends Finding of Fact No. 9 to provide a tabulation of those acres the ALJ found were not subject to transfer because of non-use.

1. Transfer Application T-8309 was filed by USFWS on July 28, 1999, requesting a change in the use, place of use and additional points of diversion for a water right confirmed by decree of the Circuit Court of the State of Oregon for Harney County as evidenced by a portion of Certificate 28524. The dates of priority are 1872 for 16,386.5 acres, 1877 for 1109.6 acres, 1881 for 638.4 acres, 1882 for 73.3 acres, 1883 for 546.3 acres, 1884 for 140.3 acres, 1885 for 2991.4 acres, 1886 for 1102.6 acres, 1887 for 4796.1 acres, 1888 for 839.9 acres, 1889 for 1532.6 acres, 1890 for 952.6 acres, 1891 for 627.5 acres, 1892 for 90.0 acres, 1893 for 227.5 acres, 1897 for 103.8 acres, 1899 for 236.2 acres, 1901 for 37.9 acres, and 1902 for 170.1 acres. The authorized places of use for this right are listed at WRD Exhibit 6, pages 2 through 28 and are hereby adopted by reference.¹ The authorized points of diversion are listed at WRD Exhibit 6, page 2 and are hereby adopted by reference. The amount of water to which this right is entitled is limited to an amount actually beneficially used and not to exceed 815.0 cubic feet per second (cfs) prior to June 15, and 407.53 cfs after June 15. The amount of water used for irrigation is limited to one-fortieth of one cfs per acre prior to June 15, and one-eightieth of one cfs per acre after June 15 and is further limited to a diversion of not more than 3.0 acre-feet for each acre irrigated during the irrigation season from March 15 to October 1 of each year. The right allows use of the Donner und Blitzen River and its tributaries, a tributary of Malheur Lake, for irrigation of 32,602.7 acres, domestic and stock use. USFWS proposes to change the use to wildlife refuge management, including wildlife, aquatic life, wetland enhancement, riparian area enhancement, fire control, domestic, irrigation, stock, recreation, construction, and dust control. USFWS proposes to change the places of use for this right as listed in WRD Exhibit 6, pages 28 through 36, which is hereby adopted by reference.² USFWS proposes to add nine additional points of diversion - New Buckaroo Dam, Old Buckaroo Dam, Bridge Creek/Eastside Canal Diversion, Kiger Creek Diversion, McCoy Creek Structure, Krumbo Pond Dike, Krumbo Reservoir Dam, Sodhouse Dam, and Dunn Dam. The locations for these points of diversion are listed at WRD Exhibit 6, pages 36 through 37 and are hereby adopted by reference.³

2. Transfer Application T-8310 was filed by USFWS on July 28, 1999, requesting a change in the use, place of use and additional points of diversion for a water right confirmed by decree of the Circuit Court of the State of Oregon for Harney County as evidenced by a portion of Certificate 15198. The date of priority is 1885. The authorized places of use for this right are listed at WRD Exhibit 7, page 2 and are hereby adopted by reference.⁴ The authorized point of diversion is Dunn Dam-NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 15, T 27 S, R 31 E, WM or its equivalent in case of rotation. The amount of water to which

¹ There are several hundred places of use for this right. The parties did not dispute the accuracy of the legal descriptions for this water right as listed in the Draft Order. *See* WRD Ex. 6 at pages 6 through 28.

² There are several hundred places of use proposed for this right. The parties did not dispute the accuracy of the legal descriptions as listed in the Draft Order. *See* WRD Ex. 6 at pages 28 through 36.

³ The parties did not dispute the accuracy of the legal descriptions of these locations as listed in the Draft Order. *See* WRD Ex. 6 at pages 36 through 37.

⁴ The parties did not dispute the accuracy of the legal descriptions for this water right as listed in the Draft Order. *See* WRD Ex. 7 at page 2.

this right is entitled is limited to an amount actually beneficially used and not to exceed 2.71 cubic feet per second (cfs) prior to June 15, and 1.36 cfs after June 15. The amount of water used for irrigation is limited to one-fortieth of one cfs per acre prior to June 15, and one-eightieth of one cfs per acre after June 15 and is further limited to a diversion of not more than 3.0 acre-feet for each acre irrigated during the irrigation season from March 15 to October 1 of each year. The right allows use of the Donner und Blitzen River, a tributary of Malheur Lake, for irrigation of 108.4 acres, domestic and stock use. USFWS proposes to change the use to wildlife refuge management, including wildlife, aquatic life, wetland enhancement, riparian area enhancement, fire control, domestic, irrigation, stock, recreation, construction, and dust control. USFWS proposes to change the places of use for this right as listed in WRD Exhibit 7, pages 2 through 10, which are hereby adopted by reference.⁵ USFWS proposes to add 15 additional points of diversion - New Buckaroo Dam, Old Buckaroo Dam, Bridge Creek/Eastside Canal Diversion, Kiger Creek Diversion, McCoy Creek Structure, Krumbo Pond Dike, Krumbo Reservoir Dam, Sodhouse Dam, Page Springs Dam, Grain Camp Dam, Busse Dam, Blitzen Canal, End of Blitzen Canal, Diamond Canal, and Bridge Creek Diversion. The locations for these points of diversion are listed at WRD Exhibit 7, pages 10 through 11 and are hereby adopted by reference.⁶

3. Transfer Application T-8311 was filed by USFWS on July 28, 1999, requesting a change in the use, place of use and additional points of diversion for a water right confirmed by decree of the Circuit Court of the State of Oregon for Harney County as evidenced by a portion of Certificate 15197. The date of priority is 1885. The authorized places of use for this right are listed at WRD Exhibit 8, page 2 and are hereby adopted by reference.⁷ The authorized point of diversion is Dunn Dam-NW ¼ SE ¼, Section 15, T 27 S, R 31 E, WM or its equivalent in case of rotation. The amount of water to which this right is entitled is limited to an amount actually beneficially used and not to exceed 2.08 cubic feet per second (cfs) prior to June 15, and 1.04 cfs after June 15. The amount of water used for irrigation is limited to one-fortieth of one cfs per acre prior to June 15, and one-eightieth of one cfs per acre after June 15 and is further limited to a diversion of not more than 3.0 acre-feet for each acre irrigated during the irrigation season from March 15 to October 1 of each year. The right allows use of the Donner und Blitzen River, a tributary of Malheur Lake, for irrigation of 83.4 acres, domestic and stock use. USFWS proposes to change the use to wildlife refuge management, including wildlife, aquatic life, wetland enhancement, riparian area enhancement, fire control, domestic, irrigation, stock, recreation, construction, and dust control. USFWS proposes to change the places of use for this right as listed in WRD Exhibit 8, pages 2 through 10, which are hereby adopted by reference.⁸ USFWS proposes to add 15 additional points of diversion - New Buckaroo Dam, Old Buckaroo Dam, Bridge Creek/Eastside Canal Diversion, Kiger Creek Diversion, McCoy Creek Structure, Krumbo Pond Dike, Krumbo Reservoir Dam, Sodhouse Dam, Dunn Dam, Grain Camp Dam, Busse Dam, Blitzen Canal,

⁵ There are several hundred places of use proposed for this right. The parties did not dispute the accuracy of the legal descriptions as listed in the Draft Order. *See* WRD Ex. 7 at pages 2 through 10.

⁶ The parties did not dispute the accuracy of the legal descriptions of these locations as listed in the Draft Order. *See* WRD Ex. 7 at pages 10 through 11.

⁷ The parties did not dispute the accuracy of the legal descriptions for this water right as listed in the Draft Order. *See* WRD Ex. 8 at page 2.

⁸ There are several hundred places of use proposed for this right. The parties did not dispute the accuracy of the legal descriptions as listed in the Draft Order. *See* WRD Ex. 8 at pages 2 through 10.

End of Blitzen Canal, Diamond Canal, and Bridge Creek Diversion. The locations for these points of diversion are listed at WRD Exhibit 8, pages 10 through 12 and are hereby adopted by reference.⁹

4. Transfer Application T-8312 was filed by USFWS on July 28, 1999, requesting a change in the use, place of use and additional points of diversion for a water right confirmed by decree of the Circuit Court of the State of Oregon for Harney County as evidenced by a portion of Certificate 14367. The right was perfected under Permit 11544 with a date of priority of September 30, 1930. The authorized places of use for this right are listed at WRD Exhibit 9, page 2 and are hereby adopted by reference.¹⁰ The authorized point of diversion is SW Y4 SE 14, Section 20, T3 1 S, R 32 E, WM. The amount of water to which this right is entitled is limited to an amount actually beneficially used and not to exceed 0.28 cubic feet per second. The right allows use of Bridge Creek, a tributary of the Donner und Blitzen for irrigation of 21.4 acres and stock use. USFWS proposes to change the use to wildlife refuge management, including wildlife, aquatic life, wetland enhancement, riparian area enhancement, fire control, domestic, irrigation, stock, recreation, construction, and dust control. USFWS proposes to change the places of use for this right as listed in WRD Exhibit 9, pages 2 through 10, which are hereby adopted by reference.¹¹ USFWS proposes to add seven additional points of diversion – Bridge Creek/Eastside Canal Diversion, Sodhouse Dam, Dunn Dam, Grain Camp Dam, Busse Dam, Blitzen Canal, and End of Blitzen Canal. The locations for these points of diversion are listed at WRD Exhibit 8, pages 10 through 11 and are hereby adopted by reference.¹²

5. The Malheur National Wildlife Refuge (Refuge) is an immense area, covering over 180,000 acres. The Blitzen Valley portion covers over 65,000 acres. The management of water on the Refuge is very complex, and has always been so, even when it was a working ranch. The Refuge's water is managed to meet its primary purpose as a refuge and breeding ground for migratory waterfowl and other wildlife. The Refuge uses its water to provide habitat to migratory birds and other wildlife. The habitat includes grains, grasses, wetland plants (often called emergent vegetation) and small ponds. Some commercial crops are grown on the Refuge but such plantings are integrated in the Refuge's biological planning. Wetland plants provide a number of benefits to waterfowl, including nesting, resting, feeding, and so forth. Ponds are also necessary for wildlife species that need some amount of open water.

6. Andy Dunbar is a rancher, a portion of whose property lies at the north end of the Refuge system where the water from the Donner und Blitzen River feeds into the mouth of Malheur Lake. The main Dunbar property is approximately 400 acres and is surrounded on three sides by Refuge land. Dunbar's main water right is based on Certificate 15198, with a priority date of 1889. He obtains his water from the Sodhouse Dam Diversion on the Donner und Blitzen through what is known as the Bull Ditch, which flows across Refuge Land. The Sodhouse Dam is approximately three quarters of a mile upstream from Dunbar's property line on the Donner und Blitzen River. Dunbar also has a ground water right for approximately 310 acres.

⁹ The parties did not dispute the accuracy of the legal descriptions of these locations as listed in the Draft Order. *See* WRD Ex. 8 at pages 10 through 12.

¹⁰ The parties did not dispute the accuracy of the legal descriptions for this water right as listed in the Draft Order. *See* WRD Ex. 9 at page 2.

¹¹ There are several hundred places of use proposed for this right. The parties did not dispute the accuracy of the legal descriptions as listed in the Draft Order. *See* WRD Ex. 9 at pages 2 through 10.

¹² The parties did not dispute the accuracy of the legal descriptions of these locations as listed in the Draft Order. *See* WRD Ex. 9 at pages 10 through 11.

7. Dunbar receives water¹³ from surface water delivery systems on the Refuge. There was testimony presented from both Dunbar and Beal that if the transfer were approved and the Refuge decided not to irrigate the portions of land near Dunbar's ranch, he would not receive the water he normally gets through the surface water delivery systems that run by his ranch. Additionally, Dunbar testified that he receives subsurface water from irrigation on Refuge property. Dunbar believes that groundwater levels on his property are hydrologically connected to water levels on the Donner und Blitzen River. This belief is supported by measurements taken by Beal, which show a correlation between water levels in the river and in Dunbar's groundwater. All nine additional proposed points of diversion in Draft Final Order T-8309 are upstream from Mr. Dunbar. The applicant, after the transfer, could take all of its water or none of its water from any of the points of diversion, completely bypassing the Sodhouse Dam that Dunbar currently uses as his point of diversion. Neither certificate nor decree indicate a point of diversion for Dunbar at either Sodhouse Dam or even Bull Ditch; Dunbar's authorized point of diversion is the river. The Decree did authorize a property other than Dunbar's to use Bull Ditch as a point of diversion. Water Master Lewis testified that there is no change in water use, and no probable change in water use, that could result in harm to Dunbar.

8. Dwight Hammond is a rancher. The main portion of his ranch, the Hammond Ranches, is surrounded on three sides by Refuge land near Krumbo Reservoir. He has lived at that location since 1983. The Hammond's point of diversion is on Krumbo Creek for water rights junior to the USFWS rights. The Refuge's first point of diversion in Krumbo Creek is four miles downstream from the Hammonds' diversion. USFWS currently has no rights to irrigate the lands above Kern Reservoir (through which the Hammonds irrigate).

9. Dwight Hammond, Steve Hammond and Bill Beal have personally observed that certain tracts above Krumbo Reservoir currently proposed for transfer have neither been irrigated in the last fifteen years, are not currently capable of being irrigated, nor have they been capable of being irrigated for the last 15 years. This water right is located at Township 30 South, Range 32 East, Sections 20 and 29. (Testimony of Bill Beal, Dwight Hammond and Steve Hammond; WRD Ex. 5-6).¹⁴ The excluded acres are set out in the table below.

| Priority Date | Township | Range | Section | Qtr/Qtr | Original Request | Authorized to be changed |
|---------------|----------|-------|---------|---------|------------------|--------------------------|
| 1883 | T30S | R32E | 20 | NWSW | 5.1 | 0 |
| 1883 | T30S | R32E | 20 | SWSW | 12.2 | 0 |
| 1891 | T30S | R32E | 29 | NWNW | 3.8 | 0 |
| | | | | Total | 21.1 | 0 |

¹³ This change to Finding of Fact #7 reflects the allowance of the first of WRD's exceptions. See, page 19. "Water" has been substituted for "return flows". The change in terminology to describe the water that Mr. Dunbar uses makes the nomenclature consistent with the characterization of the water as described in the finding of fact.

¹⁴ This change reflects the allowance of the second of WRD's exceptions, which corrects an error in the description of the location of the water right. See, page 19. The Department also amends this finding of fact to provide a tabulation of the priority date, location, and acreages found by the ALJ to have not been used and therefore not subject to transfer.

10. Mitch Lewis works for WRD, in the Field Services Division.¹⁵ He is the Watermaster for District 10, which includes all of the Malheur-Wright Basin and a portion of the Malheur River Basin. In this role he performed an injury review of these proposed transfers. His finding was that the proposed transfers may be made without injury.

11. Robert Glaeser is a co-owner of Minister and Glaeser Surveying. He is a licensed professional surveyer [*sic*] and Certified Water Rights Examiner in the State of Oregon. In 1994 he was hired to prepare maps for the USFWS to accompany the transfer applications for certificates 28524, 14367, 15197, and 15198. As part of the mapping process, he first employed aerial photographic mapping. These photographs were used to prepare preliminary base maps that were then used to do a field survey of actual water use at the Refuge. The field survey was accomplished by examining the aerial photographs to determine which areas had historically received water at the Refuge. Those areas which had not received water were excluded from the final transfer maps. Also excluded were areas covered by roads, canals, levies and rivers and some areas that showed on the photographs as open water. The accuracy of the maps was checked by a ground survey in 1995. After consultation with the USFWS, it was determined that certain areas that appeared to be open water in aerial photos were actually irrigated Refuge lands, not open water.

12. Michael Eberle is a Supervisory Hydraulic Engineer employed by the USFWS regional office in Portland, Oregon. In this role he is responsible for the protection and acquisition of water rights for the region, including the Refuge. He is familiar with the Refuge's use of water and its rights under the Donner und Blitzen Decree. He was responsible for the research that determined that many areas identified as open water during the initial aerial surveys taken for preparation of the transfer maps were in fact areas that had been irrigated at least once every five years for the last 15 years. In particular, he determined that many areas identified as "ponds" or open water were managed on a habitual drain and fill cycle with the object of producing aquatic habitat containing the appropriate vegetation for migrating waterfowl. Some ponds are filled and drained annually, others may be filled for several years before being drained out. He determined that all areas that were drained to the level that they produced emergent plant vegetation were irrigated lands. He has reviewed the transfer maps accompanying this transfer application and believes that they accurately reflect the actual areas irrigated on USFWS land within the Refuge.

13. Tom Downs is a USFWS employee who has worked at the Refuge since 1984. He is currently employed as a work leader (field work supervisor) who oversees various projects throughout the Refuge. He has also been employed as a maintenance mechanic irrigator and equipment operator at the Refuge since 1984. These duties have made him familiar with the entire irrigation system utilized within the Blitzen Valley portion of the Refuge. He affirms the accuracy of the transfer maps submitted with these transfer applications. The transfer maps, with one exception discussed below, accurately reflect the actual areas irrigated on USFWS land within the Refuge. In particular, he affirms the irrigation of ponds throughout the Refuge for purposes of emergent vegetation management in support of wildlife. He is familiar with Refuge practice of cyclically filling and draining ponds for this purpose and confirms that it has been the Refuge's regular practice for ponds throughout the Refuge.

14. Blake Nuffer worked for the USFWS at the Refuge in 1985 through 1986 and again from 1989 through 1992. He observed various locations proposed for transfer under water at the time he worked

¹⁵ Mr. Lewis has retired from OWRD.

there, but did not observe any ponds for a five-year-period. He was not familiar with the Refuges biological management plans while he worked there and did not understand the management of land for the production of emergent plants to be irrigation.

15. Marvin Jess was employed at the Refuge from 1962 through 1993, primarily as a crane operator. He has identified numerous ponds and land tracts within the Refuge as not "irrigated", but recognized that they were managed for the production of emergent vegetation or wildlife habitat, a usage he did not consider to be irrigation.

16. William (Bill) Neal is retired after serving for 21 years as the Watermaster in District 10, which covers all of Harney County, part of Malheur County, part of Grant County, and part of Lake County. He has identified numerous ponds and land tracts within the Refuge as not used for irrigation, but acknowledged that he had no direct knowledge of whether they were managed for the production of emergent vegetation or wildlife habitat.

17. In order to promote plant growth and nourish plants, the Refuge has a complex "moist soil management practice." The Refuge uses some water to irrigate fields for farm crops. The Refuge also irrigates native grasses, only some of which is mowed and hayed. The Refuge also irrigates marshes and wetland areas, some of which have shallow standing water on a regular basis. The Refuge uses ponds as part of its biological plan. Most ponds are shallow and dense in emergent vegetation. The Refuge drains all of its ponds in a regular cycle with the intent to promote emergent plant growth as part of its biological plan. Water use in ponds and wetlands at the Refuge varies depending on their current cycle from being completely dry, to a mere sheen of water on the surface, to several feet of water. At all stages the water is being artificially applied to promote plant growth and create wildlife habitat.

18. The Grain Field area has been irrigated on a regular basis for 20 years.

CONCLUSIONS OF LAW

The Department adopts this section of the ALJ's Proposed Order with modification to Conclusion of Law B. to address the acres excluded from transfer.

A. The proposed changes as described by the transfer applications will not result in injury to existing water rights through a net loss of water available to downstream water rights.

B. A portion of the water rights to be transferred has been shown to be subject to exclusion from transfer for non-use [21.1 acres]. After excluding the portion of the water rights for which nonuse is established, the proposed changes as described by the transfer applications will not result in injury to existing water rights through enlargement of the water rights proposed to be transferred.

C. The proposed changes as described by the transfer applications will not result in injury to existing water rights. The original place of use of the proposed water rights to be transferred can be prevented from receiving water from the same source.

D. The proposed changes as described by the transfer applications will not result in injury to existing water rights, due to the proposed transfers, through a change in the quantity of water previously available to another water right and to which the other water right is entitled.

OPINION

The Department adopts this section of the ALJ's Proposed Order and amends the Opinion only to make two corrections. First, it corrects the location of the lands above Krumbo Reservoir, so as to reflect the allowance of WRD's second exception. *See* page 19. Second, the opinion is modified to replace the term "return flow" with the term "water" as that term is used to describe water to which Mr. Dunbar is legally entitled.

The Malheur National Wildlife Refuge is a unique water user with unusual needs. The Refuge is an immense area, covering over 180,000 acres with the Blitzen Valley portion alone (that portion of the Refuge involved in this transfer) covering over 65,000 acres. The water rights in dispute are proposed for transfer from lands within the Blitzen Valley that cover a lesser portion of the Blitzen Valley (approximately 33,000 acres) for use on the Refuge's entire Blitzen Valley holdings. The management of water on the Refuge is very complex, and has always been so, even when it was a working ranch. The Refuge's water has been consistently managed, however, to meet its primary purpose as a Refuge and breeding ground for migratory waterfowl and other wildlife. The Refuge uses its water to provide habitat to migratory birds and other wildlife. The habitat includes grains, grasses, wetland plants (often called emergent vegetation) and small ponds. All of those uses are part of meeting the Refuge's purposes. Even though some commercial crops are grown, even these provide food, cover or other benefits to wildlife. For instance, some grasses are hayed in order to promote new growth, while other grasses are left standing. Again, when grains are grown and harvested, some grain is left for the wildlife. Additionally, wetland plants provide a number of benefits to waterfowl, including nesting, resting and feeding. Ponds are also necessary for wildlife species that need some amount of open water.

The Refuge describes these transfers as seeking three changes to clarify to the public that what it is doing is in fact irrigation, even though it believes its current water usage qualifies as irrigation under its existing certificates. These changes are:

- 1) A change in the character of use from "irrigation, domestic and stock" to "wildlife refuge management" including specified sub-uses described in the application.
- 2) The addition of points of diversion. The size of the Refuge requires that many points of diversion be used in order to spread the water by flood irrigation.
- 3) A change in the place of use to all of the lands within the Blitzen Valley portion of the Refuge. The existing place of use is approximately 33,000 acres of the approximately 65,000 acres of land within the Blitzen Valley portion of the Refuge.

JURISDICTION

HSWCD argued at hearing that WRD lacked jurisdiction under ORS 536.310(1) because the draft permits, WRD Exs. 6, 7, 8 and 9, make an impermissible change in use from "irrigation, domestic and stock" to "wildlife refuge management etc." While WRD objected that this was a legal issue that had been determined prior to hearing, I allowed argument and the presentation of evidence on this issue. I now find that WRD was correct in characterizing this issue as determined prior to hearing. In the August 14, 2001 Ruling on Legal Issues I found that the proposed use's incorporation of "sub uses" is valid under Oregon law. The Department argued persuasively that existing law contains several examples of "beneficial uses" incorporating "sub uses" which are, to some extent, open ended. There is no legal support for protestants' argument that the Department may not adopt a water use definition that incorporates other uses. HSWCD also argued that the proposed change from a rate and duty appurtenant to an acre to a "global rate and duty that can be applied anywhere in an area globally described by section" is not within the jurisdiction of the WRD. I agree with WRD that this issue was properly raised during the preheating stage of this hearing and may not be readdressed.

INJURY - DUNBAR

The protestants argue that the evidence produced at the hearing demonstrates that injury will occur if the proposed transfer is approved. Pursuant to OAR 690-015-0050 [renumbered OAR 690-380-5000], a transfer shall not result in injury to existing water rights. The rule states:

- (1) A transfer application shall not be approved if the proposed transfer would result in the injury of an existing water right. Injury shall include the following:
 - (a) A transfer would result in a net loss of water available to downstream water rights; or (b) The water right to be transferred would be enlarged.

- (2) An injury to an existing water right or an enlargement of the water right to be transferred shall be determined to result from, but is not limited to, the following:
 - (a) A change reducing the quantity of water previously available to another water right and to which the other water right is entitled;
 - (b) A diversion of more water than is specified as a rate of flow or duty of water per acre for the subject water right; or
 - (c) Under a change in place of use, the original place of use cannot be prevented from receiving water from the same source.

The protestants argue that Andy Dunbar will be injured if the transfer is approved because he will not receive water to his property from the applicant's land, both surface flows and groundwater flows, that he feels he has a right to. Dunbar testified that he receives water from surface water delivery systems on the Refuge. There was testimony presented from both Dunbar and Water Master Beal that if the transfer went through and the Refuge decided not to irrigate the portions of land near Mr. Dunbar's ranch, he would not receive the water he normally gets through the surface water delivery systems that run by his ranch. Additionally, Dunbar testified that he receives subsurface water from irrigation on Refuge property. If the Refuge were to change its management style they could

move water entirely away from Mr. Dunbar's property and he would no longer receive those subsurface flows.

The protestants also point to the testimony of Andy Dunbar, supported by measurements of Water Master Beal, that groundwater levels on Dunbar's property are hydrologically connected to levels on the Donner und Blitzen. They argue that changes in operations could result from the transfer that will affect Dunbar, with potential injury due to a hydrological connection between Dunbar's well and the Donner und Blitzen River. They argue that there was persuasive testimony from both Beal and Dunbar that there is a connection between the two that has not been properly examined in determining whether there is the potential for injury.

Finally, protestants point out that Dunbar has water rights that have senior, equal and junior priority dates to the applicant's various rights. Because the applicant can move those priority dates around under the proposed order, Dunbar feels they could be "used against him." Dunbar believes he will be injured because applicant will be adding nine points of diversion to its currently recognized seven points of diversion. All of these points of diversion are upstream from Mr. Dunbar and none are controlled by a rate. The applicant, after the transfer, could take all of its water or none of its water from any of the points of diversion, bypassing the Sodhouse Dam that Dunbar currently uses completely if it chose to do so. Thus, the transfer would hypothetically allow the applicant to either flood or dry up the land contiguous to his. In either case, he believes that it would be injurious to his ability to obtain water of his own that he has a right to. He also believes that the proposed transfer, by adding diversion points above his, could reduce the quantity of water previously available by allowing the applicant to divert water, even all the water, currently available to him. He notes that the transfer process would recognize a historical diversion point, Sodhouse Dam, as a point of diversion for the applicant, disregarding Dunbar who has had a historical use of the diversion point. Because he has no written agreement with the applicant that the historical delivery point will continue, he fears that he will be injured.

I find the argument of WRD and USFWS persuasive that the protestants have not shown injury to Dunbar as a result of this transfer; rather, the preponderance of evidence in this case shows that there is no injury. Injury is not a vague notion or speculation of enlargement. The transfers proposed will be limited to the rate, duty and season of the original rights. And they will be further limited by stipulation of the applicant to prevent splitting a duty of acres annually designated for irrigation. The new right will not allow any more rate or duty, any more water, than the original right. The allegation that Dunbar's wells will be injured is purely speculative and unsupported by any evidence. While Dunbar has testified that his well is hydrologically connected to the river, there is no reason to believe that both will not continue to receive water. While Dunbar may currently benefit from sub-surface and [surface] water when USFWS irrigates its lands, that is not a legal entitlement or part of Dunbar's legal water right. The preponderance of evidence in the record indicates that Dunbar will continue to receive the amount of water to which he is legally entitled, from his authorized sources, both surface and ground water.

USFWS characterizes all of the protestants' problems as originating from the fact that their rights are junior to most of the Refuge's rights. I agree. The protestants have simply not shown how these transfers will lessen the amount of water in the river to which Dunbar has a legal right. Dunbar's main concern is the continued permissive use the USFWS has given him for his diversion from

Sodhouse Dam. In regard to the addition of Sodhouse Dam as a point of diversion, USFWS correctly points out that neither the certificates nor decree indicate a point of diversion for Dunbar at either Sodhouse Dam or Bull Ditch. The Decree did authorize a property other than Dunbar's to use Bull Ditch as a point of diversion, but Dunbar's authorized point of diversion is the river. His claims regarding access to his point of diversion are simply not a question of injury, but a property matter that is not within the jurisdiction of this hearing. Finally, Eberle testified that USFWS intends to continue to operate the Refuge in a historically similar manner. Water Master Lewis, aware of this intent, testified that there is no change in water use, and no probable change in water use, that could result in harm to Dunbar. Physically, it simply cannot happen because his property lies at the north end of the system where the water feeds into the mouth of Malheur Lake.

INJURY - HAMMONDS

Water for Life points out that applicant currently has no rights to irrigate the lands above Kern Reservoir (through which the Hammonds irrigate). *See* WRD Ex. 5 at 14. If the applications go through without application of normal appurtenancy requirements, argues Water for Life, USFWS could move their rights upstream of the Hammonds, from anywhere on the Refuge. It would be a senior water right to the tributaries of the Donner und Blitzen River. USFWS would then be able to divert water into Krumbo Reservoir and place a call on the water the Hammonds are diverting into Kern Reservoir.

As to the Hammonds, USFWS and WRD again argue persuasively that the Hammond's point of diversion is on Krumbo Creek for water rights junior to the USFWS rights. That point of diversion is well upstream of the Refuge's first point of diversion in Krumbo Creek, four miles downstream from the Hammonds, and would remain so after the transfer because the Refuge has not applied for a diversion to be added above the Hammonds' water right. If the Refuge wanted to apply for such an upstream point of diversion, they would have to go through another transfer process like this one. WRD argues that Hammonds are upstream, junior water users to the applicant. No point of diversion of the applicant will be transferred above the Hammond's point of diversion, as illustrated by the draft orders, and therefore there will be no injury.

NON-USE AS ENLARGEMENT

In my ruling on legal issues, I found that the proposed transfer applications as presented to the Department were not in error or deficient because applicant's evidence of historical use of the water rights proposed for transfer is insufficient. Pursuant to ORS 540.520(2)(g), an application to change the use, place of use or point of diversion of a water right shall include "evidence that the water has been used over the past five years according to the terms and conditions of the owner's water right certificate." By Departmental rule such evidence may include affidavits from knowledgeable persons, such as the owner or user of the water right. OAR 690-15-060(12) [renumbered OAR 690-380-3000(12)(a)]. For each application before me, applicant submitted an affidavit by an employee, Forrest Cameron, attesting to historic use of water on the subject lands. (Department's Opening Brief, Exhibit 1). In its pre-hearing argument on legal issues, Water for Life contended that the application's evidence of historical water use was so cursory and lacking in detail that it did not "suffice" as evidence under the statutory standard. (Water for Life Response Brief at 5). In my ruling on legal issues, I found that the applicant's evidence of water use meets the legal requirements set out in ORS 540.520(2)(g) and

OAR 690-15-060(12) [renumbered OAR 690-380-3000(12)(a)] and was sufficient to establish historic use of the water. I found in favor of the Department on this issue.

Nevertheless, while the application and supporting affidavits were sufficient to withstand attack as a legal issue prior to hearing, they remain subject to rebuttal by the protestants at hearing. Here, the protestants have presented persuasive evidence that a portion of the applicant's representation of historical water use at the Refuge was inaccurate. The protestants have phrased this non-use as a question of enlargement and suggest that the transfer should be denied to prevent enlargement. While considering this matter following hearing, I transmitted the following question to the Department pursuant to OAR 137-003-00635:

In the absence of a pending water right cancellation proceeding pursuant to ORS 540.631, does proof by a preponderance of evidence presented at hearing demonstrating that a portion of the water right sought to be transferred has not been used in the past five years according to the terms and conditions of the owner's water right certificate or is subject to forfeiture under ORS 540.610 demonstrate an enlargement under OAR 690-015-050 [renumbered OAR 690-380-0100(2)] and injury pursuant to ORS 540.530?

The Department has responded with the following discussion, which I adopt as my own:

The application requirements and standard of review for a water right transfer application are set out in ORS 540.505 to ORS 540.580 and OAR Chapter 690 Division 15 [renumbered Division 380]. Under ORS 540.520(2)(g), a transfer application must include:

Evidence that the water has been used over the past five years according to the terms and conditions of the owner's water right certificate or that the water right is not subject to forfeiture under ORS 540.610.

See also OAR 690-015-0060(12) [renumbered OAR 690-380-3000(12)(a)] (giving examples of the types of evidence that may be submitted to show use of the water right). Thus, a transfer applicant may show either that the subject water rights have been used over the past five years, or that, if the water rights have not been used, they are not subject to forfeiture under ORS 540.610, which sets out several exceptions to forfeiture.

A transfer application that meets all of the application criteria is reviewed to determine whether the proposed transfer will cause injury to existing water rights. ORS 540.520(7). "Injury to an existing water right" means a proposed transfer would result in a water right not receiving the water to which it is legally entitled." OAR 690-015-0005(5) [renumbered OAR 690-380-0100(3)]. Examples of injury set out in rule include enlargement.

(1) A transfer application shall not be approved if the proposed transfer would result in the injury of an existing water right. Injury shall include the following:

- (a) A transfer would result in a net loss of water available to downstream water rights; or
- (b) The water right to be transferred would be enlarged.

(2) An injury to an existing water right or an enlargement of the water right to be transferred shall be determined to result from, but is not limited to, the following:

(a) A change reducing the quantity of water previously available to another water right and to which the other water right is entitled

(b) A diversion of more water than is specified as a rate of flow or duty of water per acre for the subject water; or

(c) Under a change in place of use, the original place of use cannot be prevented from receiving water from the same source.

OAR 690-015-0050 [renumbered OAR 690-380-0100]. If a proposed transfer can be made without injury to existing water rights, then the application shall be approved. ORS 540.530(1).

Based on the above criteria and standards, the Hearing Officer has asked whether proof that a portion of the water rights sought to be transferred have not been used within the past five years and are not otherwise exempt from forfeiture, necessarily demonstrates an enlargement under OAR 690-015-050 [renumbered OAR 690-380-0100(2)] and injury pursuant to ORS 540.530. This question presumes that a portion of the water rights sought to be transferred fail to meet a necessary requirement for a transfer application. Under ORS 540.520(2)(g), a transfer application must include evidence that the water has been used over the past five years or that it is not subject to forfeiture under ORS 540.610.

If a preponderance of the evidence in a transfer proceeding record demonstrates that a portion of the water right transferred has not been used over the past five years in accordance with the conditions of the certificate and are not otherwise exempt from forfeiture, then the water rights for which non-use has been established cannot be transferred. ORS 540.510 provides that a water right may be transferred "upon compliance with the provisions of ORS 540.520 and 540.530[.]" Because water rights for which evidence of nonuse has been established fail to comply with a specific statutory provision, they may not be transferred. Thus, whether the proof of non-use also demonstrates enlargement and injury is irrelevant. It is not necessary to reach this second level of inquiry for water rights that fail to comply with the initial application requirements.

[T]he Department proposes that the Hearing Officer exclude from the requested transfer any portion of the water rights sought to be transferred that, based on a preponderance of evidence in the record, has not been used in the past five years according to the terms and conditions of the owner's water rights certificate and is not otherwise exempt from forfeiture under ORS 540.610. Because transfer applications that meet the statutory requirements and that will not result in injury to existing water rights must be approved, only the portion of the water rights for which non-use is established are subject to exclusion from the transfer order,

assuming that the transfer of the remaining portion will not result in injury to existing water rights.

Applying the Department's statement of the applicable law to the facts determined at hearing, I find that the protestants have shown that water rights for certain tracts above Krumbo Reservoir that are currently proposed for transfer have neither been irrigated in the last fifteen years, nor are they capable of being irrigated. The testimony of Bill Beal, Dwight Hammond and Steve Hammond was persuasive that the water rights possessed by USFWS above Krumbo Reservoir, specifically identified at hearing, have never been irrigated and cannot be irrigated due to the lack of a functional water delivery system. This water right is located at Township 30 South, Range 32 East, Sections 20 and 29. *See* WRD Ex. 5-6. As pointed out by protestants, there was no rebuttal to those assertions, and no contrary evidence or testimony. Thus, having "not been used in the past five years according to the terms and conditions of the owner's water rights certificate and*** not otherwise exempt from forfeiture under ORS 540.610," the water rights appurtenant to these tracts of land do not meet the legal requirements set out in ORS 540.520(2)(g) and OAR 690-15-060(12) [renumbered OAR 690-380-3000(12)] and they may not be transferred. ORS 540.510. Only the portion of the water rights for which non-use is established are subject to exclusion from the transfer order, as I have found that transfer of the remaining portion will not result in injury to existing water rights.

Protestants have also alleged that numerous other acres are subject to forfeiture. They point to the testimony of Lewis, Nuffer, Jess, Beal, Steve Hammond, Dwight Hammond and Downs as supporting the conclusion that many of the acres proposed for transfer were either abandoned or forfeited by the applicant through inconsistent use or certificated storage of water overlaying the land. For instance, Beal testified that Boca Pond covers several sections and many acres overlying acres proposed for transfer and if they are underneath Boca Pond, they cannot be transferred. *See* WRD Ex. 5-7. Steve Hammond testified that several acres in Knox Pond are similarly not eligible because constantly under water. *See* WRD Ex. 5-7. Dwight Hammond testified that the Grain Field area had not been irrigated in more than 20 years. Nuffer and Jess listed multiple ponds and impoundments where they believed water has been stored on top of acres that are now proposed for transfer by the applicant. Protestants argue that any water right on these acres has been abandoned and cannot be transferred because it is subject to cancellation; to do otherwise would allow them to recover those acres and enlarge their water right.

I agree with WRD and USFWS that with the exception of the lands above Krumbo Reservoir mentioned above, protestant's enlargement argument is focused on conclusions not supported by record. The majority of the nonuse alleged by the protestants is associated with ponds. In essence, protestants are arguing that storage and irrigation cannot coexist. The patterns of water use at the Refuge simply don't fit protestant's traditional model of irrigation that would require a pond to be completely evacuated, tilled, seeded and irrigated in order for "irrigation" to take place. However, in order to promote and nourish emergent plant growth, the Refuge has instituted a complex "moist soil management practice." The Refuge does use some water to irrigate fields for traditional farm crops such as alfalfa and grain. But, the Refuge also irrigates to create marshes and wetland areas, some of which remain almost constantly under shallow water. The Refuge also irrigates native grasses, only some of which are mowed and hayed. The Refuge uses ponds. Most of these are shallow and dense in emergent vegetation. The Refuge also drains ponds with the intent to promote new plant growth.

Throughout the Refuge, the water is artificially applied to promote plant growth and create wildlife habitat.

The Department has promulgated an administrative rule defining "irrigation" to mean:

[T]he 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 agricultural crop, commercial garden, tree farm, orchard, park, golf course, play field or vineyard and alkali abatement. OAR 690-300-0010(26).

The Department argues that this definition of irrigation does not require storage and evacuation, use of farm equipment, and seeding. Because water is artificially applied at the Refuge with a clear intent to nourish plants as part of the overall Refuge biological and water management plan, it constitutes irrigation. Downs testified credibly that all of the ponds inquired about had been evacuated at least three or four times in the last 15 years as part of the Refuge's biological management of these ponds. To lawfully undertake such activities, it is necessary to have both consumptive and storage rights, both of which USFWS possesses for the land in dispute.

USFWS irrigation activity is consistent with the Department's interpretation of irrigation as defined by its own administrative rule. The court has previously explained that the Department's interpretation of this rule is entitled to great deference:

The Department's interpretation of that rule is subject to highly deferential review. As long as the interpretation of an agency's own administrative rule is plausible, we are not at liberty to reject it. *Don't Waste Oregon Committee v. Energy Facility Siting Council*, 320 Or 132, 142-43 (1994). In this case, petitioners do not explain why the Department's interpretation is implausible, only that they disagree with it. *Staats v. Newman*, 164 Or App 18, 24 (1999)

Protestants also argue that the Department's order in *Orchard Water Company* mandates that a storage right or use forfeits or abandons the irrigation use. However, I find that on the facts shown here, there is no conflict. The Department has found that the Refuge's repeated use of shallow, overlying water was an irrigation use with the intent to promote plant growth for wildlife use. While protestants argue that in order to sustain irrigation water rights on land underlying storage there needs to be an evacuation of water and application of water to a crop in order to meet the irrigation purpose, I find the Department's argument that the rule is not in conflict with past case law both plausible and persuasive. *See, e.g., Hennings v. Water Resources Dept.*, 50 Or App 121 (1981) where the court defined irrigation as the "operation of causing water to flow through lands to nourish plants." *See also, McCall v. Porter*, 42 Or 49 (1902), which requires an actual diversion of the water from the natural channel, an intent to apply it to a beneficial use, and the actual application to the use designed. As stated by the *Staats* court, "petitioners do not explain why the Department's interpretation is implausible, only that they disagree with it." *Staats* at 24.

EXCEPTIONS TO THE PROPOSED ORDER

Oregon Water Resources Department's Exceptions

Exception No. 1: WRD states that the ALJ's use of the term "return flow" in describing and dismissing Andy Dunbar's claim of injury is inaccurate. In order to be considered "return flow" upon which Dunbar may legally rely, the subject water would have to flow back into the water source [the Donner und Blitzen River] that Dunbar has a legal right to, and also return to the source above Dunbar's lawful point of diversion. In fact, both USFWS and Dunbar divert water at Sodhouse Dam, which is approximately ¾ mile upstream from Dunbar's property on the Donner und Blitzen River. The water to which Dunbar claims legal entitlement is diverted by USFWS at the Sodhouse Dam and passes by and through Dunbar's property by virtue of USFWS' use and runoff before the water returns to the source. The WRD proposes to remove the term "return flow" from the findings and discussion related to the Dunbar claim of injury, and replace it with the term "water". *See*, Department's Exceptions to Proposed Order, pages 2-3.

This exception is allowed, and the term "return flow" has been replaced with OWRD's suggested term "water" in the four places it is used in Finding of Fact #7, and in the five places it is used in the Opinion. *See*, pages 8, 12 and 13.

Exception No. 2: The Department asserts that the ALJ incorrectly described the location of the lands above Krumbo Reservoir.

This exception is allowed. The description of those lands in this order has been corrected to read "Sections 20 and 29, Township 30 South, Range 32 East, W.M." as being above the reservoir. *See*, page 8 and 17.

Water For Life, Inc., Hammond Ranches, Inc., And Harney County Haygrowers Association's Exceptions

On July 5, 2002, Protestants Water for Life, Inc., Hammond Ranches, Inc., and Harney County Haygrowers Association timely filed exceptions to the ALJ's proposed order. The exceptions are organized in sections titled "Assignment of Error", "Protestant's Findings of Fact", "Factual Argument", "Legal Argument" and "Protestant's Proposed Order", with the sections further subtitled in relation to issues identified for hearing.

These exceptions are addressed below, generally following the protestants' order.

"Assignment of Error"

The protestants correctly note the same error identified by the Department in its second exception above. The exception is allowed and a correction has been made in this order as indicated above.

Protestants' "Findings Of Fact"

The protestants include a section in the exceptions titled "Findings of Fact" and state that the testimony in the hearing of the existence of ponds is generally persuasive evidence that the lands lying underneath have not been used for irrigation. The ALJ weighed the evidence on this issue as it was presented in hearing and the Department adopts the ALJ's findings of fact and conclusions on this issue. The protestant's request to change the ALJ's findings and conclusions is denied.

The full transcript is part of the record and was relied upon for the Proposed Order. Protestant's request to include excerpts of the transcript in this order is denied.

Protestant's "Factual Arguments"

The protestants provide argument on pages 22-25 of the Exceptions that they characterizes as "factual". They are addressed below.

1. Issue 2A

The protestants argue that the Department does not have authority to change the appurtenancy requirements established by the Donner und Blitzen Decree, and the traditional appurtenancy requirements of the prior appropriation doctrine and Oregon law. This issue was fully briefed and decided in the Prehearing Order and Ruling on Legal Issues. The water rights, once transferred, will be appurtenant to the lands in the Blitzen Valley portion of the Refuge. *See* Prehearing Order and Ruling on Legal Issues at 2-4.

The exception is denied.

2. Issue 2B

The protestants argue that then-Refuge Manager Forrest Cameron's affidavit was not sufficient to meet the Department's transfer requirements. This issue was fully briefed and decided in the Prehearing Order and Ruling on Legal Issues. The ALJ held that the evidence of water use meets the legal requirements set out in ORS 540.520(2)(g) and OAR 690-15-060(12) [renumbered OAR 690-380-3000(12)(a)] and is sufficient to establish historic use of the water. Proposed Order at 13-14; Prehearing Order and Ruling on Legal Issues at 4-5.

The exception is denied.

3. Issue 2C

The protestants argue that portions of the water rights proposed for transfer are "not subject to transfer" because allegedly the acreage is under water and thus not capable of being irrigated or was not irrigated historically. This issue was fully briefed and decided in the Prehearing Order and Ruling on Legal Issues. The ALJ held that the administrative rules do not prohibit this type of transfer, and the protestants have cited no authority prohibiting such a transfer. Proposed Order at 9, *relying on* Prehearing Order and Ruling on Legal Issues at 5-6.

The exception is denied.

4. Issue 2E

The protestants reiterated their argument in No. 3 above. The response in No. 3 is adopted here.

The exception is denied.

5. Issue 2F

The protestants reiterated their appurtenancy argument in No. 1 above. The response in No. 1 is adopted here.

The exception is denied.

6. Issue 2H

The protestants argue that the Service's transfer application would remove the subject waters from the state's regulatory system by allowing an unrestricted beneficial use no longer subject to regulation. This issue was fully briefed and decided in the Prehearing Order and Ruling on Legal Issues. The ALJ held that the proposed transfers will result in water rights that remain subject to regulation in accord with the priority system and the approved conditions of use, in the same manner as any other state regulated right. Prehearing Order and Ruling on Legal Issues at 11.

The exception is denied.

7. Issue 2K

The protestants argue that the Service is prohibited from placing a transferred water right on lands that have an existing water right. This issue was fully briefed and decided in the Prehearing Order and Ruling on Legal Issues. The ALJ held that the proposed transfer does not constitute "stacking". Stacking involves an attempt to place two primary rights for the same use on the same acreage, whereas the use under the transfers would be for a different use. Two or more primary rights may be placed on the same lands where each, as here, has a different use. Prehearing Order and Ruling on Legal Issues at 13-14.

The exception is denied.

Protestant's "Legal Arguments"

1. Wildlife Refuge Management Use (Issue 2A)

The protestants argue that "wildlife refuge management" is not a beneficial use. This issue was fully briefed and decided in the Prehearing Order and Ruling on Legal Issues. The proposed use, wildlife refuge management, is a beneficial use. *See* Prehearing Order and Ruling on Legal Issues at 2-4.

The exception is denied.

a. Sub-uses

The protestants argue that the eleven beneficial uses ("sub-uses") of the wildlife refuge management use are not allowed. This issue was fully briefed and decided in the Prehearing Order and Ruling on Legal Issues. The ALJ found no legal support for Protestant's argument that the Department may not adopt a water use definition that incorporates other uses. Proposed Order at 10-11; Prehearing Order and Ruling on Legal Issues at 2-4. *See* ORS 537.170(8); ORS 540.520; OAR 690-300-0010.

The exception is denied.

b. Sub-uses Quantification

The protestants argue that each sub-use must be quantified in order to regulate the use and avoid waste. This issue was fully briefed and decided in the Prehearing Order and Ruling on Legal Issues. The ALJ held that the proposed limits and conditions on the use rendered the Protestant's assertions unfounded. Proposed Order at 10-11; Prehearing Order and Ruling on Legal Issues at 2-4, and supported by the Department's and the Service's briefs, and the testimony of the Watermaster, Mitch Lewis, stating the use is not unlimited and can be regulated without waste.

The exception is denied.

2. Evidence of Historical Use (Issue 2B)

The protestants argue that the transfer application did not contain sufficient evidence that the water proposed for transfer has been used at least once every five years over the past 15 years. This issue was fully briefed and decided in the Prehearing Order and Ruling on Legal Issues. The ALJ held that the evidence of water use meets the legal requirements set out in ORS 540.520(2)(g) and OAR 690-15-060(12) [renumbered OAR 690-380-3000(12)(a)] and is sufficient to establish historic use of the water. Proposed Order at 13-14; Prehearing Order and Ruling on Legal Issues at 4-5.

The exception is denied.

3. "From" Lands (Issue 2C)

The protestants argue that the lands from which the water is being transferred, so-called "from lands", cannot receive water after the transfer and, further, that the transfer constitutes illegal water spreading or a split rate or duty. This issue was fully briefed and decided in the Prehearing Order and Ruling on Legal Issues. The ALJ held that the administrative rules do not prohibit this type of transfer, and the protestants have cited no authority prohibiting such a transfer. Proposed Order at 9, *relying on* Prehearing Order and Ruling on Legal Issues at 5-6.

The exception is denied.

4. Transfer Application (Issue 2D)

The protestants argue that the Department erred in accepting the Service's transfer applications without requiring additional information. This issue was fully briefed and decided in the Prehearing Order and Ruling on Legal Issues. The ALJ held that the applications met the requirements of ORS 540.520 and OAR 690-015-060 [renumbered OAR 690-380-3000] and were not deficient. Prehearing Order and Ruling on Legal Issues at 2-3, 6-7. *See* ORS 540.520.

The exception is denied.

5. Tributaries (Issue 2E)

The protestant argues that the proposed transfer is an enlargement of the existing water rights because it includes tributaries to the Donner und Blitzen River as a source for certificate 28524 (T-8309), and the Refuge may not place a "call" on the Diamond area water. This issue was fully briefed and decided in the Prehearing Order and Ruling on Legal Issues. The ALJ held that the record was clear that the sources for the water rights include the Donner und Blitzen River and its tributaries. Prehearing Order and Ruling on Legal Issues at 7-9.

The exception is denied.

6. Lawfulness of Wildlife Refuge Management Use (Issue 2F)

The protestant argues that the wildlife refuge management use is unlawful because it would allow use without regard to appurtenancy. This issue was fully briefed and decided in the Prehearing Order and Ruling on Legal Issues. The ALJ held that the assertion is unsupported in the record. Prehearing Order and Ruling on Legal Issues at 10.

The exception is denied.

7. Instream Flows (Issue 2G)

The protestant argues that the Service's sub-uses of "aquatic life" and "riparian area enhancement" amount to an instream flow right. This issue was fully briefed and decided in the Prehearing Order and Ruling on Legal Issues. The ALJ held that the proposed transfers are not an impermissible instream right. Prehearing Order and Ruling on Legal Issues at 10-11.

The exception is denied.

8. Waiver of State Regulatory Oversight (Issue 2H)

The protestants argue that the Service's transfer application would remove the subject waters from the state's regulatory system by allowing an unrestricted beneficial use no longer subject to regulation. This issue was fully briefed and decided in the Prehearing Order and Ruling on Legal Issues. The ALJ held that the proposed transfers will result in water rights that remain subject to

regulation in accord with the priority system and the approved conditions of use, in the same manner as any other state regulated right. Prehearing Order and Ruling on Legal Issues at 11.

The exception is denied.

9. Landowner (Issue 2I)

The protestants assert that the Service needs the consent of the Bureau of Land Management, as an affected federal landowner. This issue was fully briefed and decided in the Prehearing Order and Ruling on Legal Issues. The ALJ correctly held that, in a transfer, only the name of the deeded owner of the land to which the water is appurtenant is required and the Service is the deeded landowner. Prehearing Order and Ruling on Legal Issues at 12.

The exception is denied.

10. Land Use Regulation Issue (Issue 2J)

The protestants argue that the Department must comply with local land use regulation. This issue was fully briefed and decided in the Prehearing Order and Ruling on Legal Issues. The ALJ correctly held that the Department has complied with its land use coordination requirements which exempt applications for water use on federally owned lands from compliance with local land use planning. Prehearing Order and Ruling on Legal Issues at 12-13.

The exception is denied.

11. Water Stacking Issue (Issue 2K)

The protestants argue that the Service is prohibited from placing a transferred water right on lands that have an existing water right. This issue was fully briefed and decided in the Prehearing Order and Ruling on Legal Issues. The ALJ held that the proposed transfer does not constitute "stacking". Stacking involves an attempt to place two primary rights for the same use on the same acreage, whereas the use under the transfers would be for a different use. Two or more primary rights may be placed on the same lands where each, as here, has a different use. Prehearing Order and Ruling on Legal Issues at 13-14.

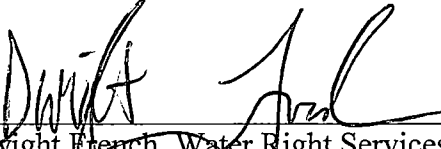
The exception is denied.

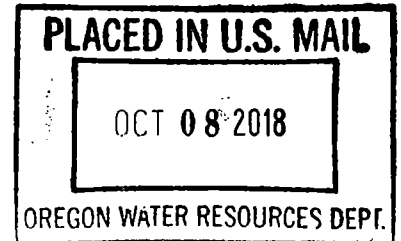
ORDER

The issues raised by protestants in their protests are addressed and resolved as provided in this order. The Department may issue orders approving Transfer Applications T-8309, T-8310, T-8311 and T-8312.

IT IS SO ORDERED.

Dated at Salem, Oregon this OCT 05 2018,


Dwight French, Water Right Services Administrator, for
Thomas M. Byler, Director
Oregon Water Resources Department



Appeal Rights

ORS 536.075(2) and ORS 183.482 allow for appeal of final orders in contested cases. This is a final order in a contested case. This order is subject to judicial review under ORS 183.482. Any petition for judicial review must be filed within the 60 day time period specified by ORS 183.482. Pursuant to ORS 536.075 and OAR 137-003-0080 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.

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2018, I served a full, true and correct copy of Final Order in Contested Case in The Matter of the Protests Against Water Transfer Applications T-8309, 8310, 8311 and 8312 upon the parties hereto as follows:

U.S. Fish and Wildlife Service
c/o Gary Ball, Water Resources Branch
911 NE 11th Avenue
Portland, OR 97232
Gary_Ball@fws.gov

- by regular mail, postage prepaid
- by hand-delivery
- by facsimile # _____
- by certified mail # _____
- Other: CMS & Email**

Frank S. Wilson
Office of the Regional Solicitor
601 SW 2nd Ave, Suite 1950
Portland, OR 97204
frank.wilson@sol.doi.gov

- by regular mail, postage prepaid
- by hand-delivery
- by facsimile # _____
- by certified mail # _____
- Other: Email**

Harney Soil & Water Conservation District
c/o Marty Goold
P.O. Box 848
Hines, Oregon 97738

- by regular mail, postage prepaid
- by hand-delivery
- by facsimile # _____
- by certified mail # _____
- Other: Email**

Andy Dunbar
HCR 72 Box 200E
36076 Sodhouse Lane
Princeton, OR 97721

- by regular mail, postage prepaid
- by hand-delivery
- by facsimile # _____
- by certified mail # _____
- Other: Email**

Dwight and Susan Hammond
Hammond Ranches, Inc.
46911 Hammond Ranch Rd
Diamond, OR 97722

- by regular mail, postage prepaid
- by hand-delivery
- by facsimile # _____
- by certified mail # _____
- Other: Email**

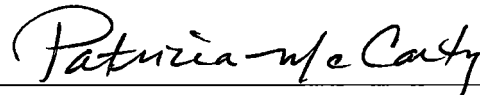
Laura Schroeder
Schroeder Law Offices PC
1915 NE Cesar E. Chavez Boulevard
Portland, OR 97212

- by regular mail, postage prepaid
- by hand-delivery
- by facsimile # _____
- by certified mail # _____
- Other: Email**

Renee Moulun
Oregon Department of Justice NR
1162 Court St. NE
Salem, OR 97301-4096

- by regular mail, postage prepaid
- by hand-delivery
- by facsimile # _____
- by certified mail # _____
- Other: Email**

DATED this 8th day of October, 2018.



Patricia McCarty, Agency Representative,
OREGON WATER RESOURCES DEPARTMENT

Copies to:

Dist 10 watermaster
East Region Manager
File: T-8309, T-8310, T-8311, T-8312