

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

In the Matter of Water Right Application)	
G-17165 in the Name of the Town of)	FINAL ORDER ON RECONSIDERATION
Lakeview,)	
<i>Applicant,</i>)	OAH Case No.: WR-12-007
)	OWRD Case No.: G-17165
Oregon Desert Farms, Inc.)	
<i>Protestant.</i>)	

I. BACKGROUND

On January 20, 2009, the Town of Lakeview submitted application G-17165 to the Department. Application G-17165 proposes to appropriate 1.11 cubic foot per second (cfs) of water for industrial use from an existing well LAKE 2040 (well #1). After the Town of Lakeview uses the thermal characteristics of the water, it will be injected into CROO 5243 (well #2).

On January 26, 2010, the Oregon Water Resources Department (OWRD or Department) issued a Proposed Final Order (PFO) for application G-17165 finding that the proposed use would ensure the preservation of the public welfare, safety and health and proposing approval of the application. On March 8, 2010, the Department received a timely-filed protest from Oregon Desert Farms, Inc. (ODF) but nonetheless issued a Final Order approving application G-17165 on February 11, 2011. On April 11, 2011, ODF petitioned for judicial review of the Department’s final order in Lakeview’s circuit court, and on September 22, 2011, the Department withdrew its final order for purposes of reconsideration.¹ The circuit court case was subsequently dismissed, and the Department referred ODF’s protest to the Office of Administrative Hearings for a contested case.

A contested case hearing was held in Lakeview, Oregon, on June 11, 2013. The evidentiary record closed on June 11, 2013, but the hearing record remained open for written closing arguments until September 3, 2013, at which time the record closed. On October 8, 2013, the Administrative Law Judge (ALJ) issued a Proposed Order recommending approval of application G-17165 on the stipulated condition that Lakeview provide an annular seal to a depth of at least 18 feet in well #1. Exceptions were filed by ODF on November 6, 2013, and a response to ODF’s exceptions was filed by the Town of Lakeview on November 12, 2013.

The Department herein considers ODF’s exceptions and denies them and adopts the ALJ’s Proposed Order without modification. The Department affirms its approval of application G-17165 and re-issues a permit to the Town of Lakeview on the condition that the Town of Lakeview provides an annular seal to a depth of at least 18 feet in well #1 before water use may begin.

¹ On reconsideration the Department reviewed its implicit finding that ODF’s protest raised no significant disputes and reconsidered issuance of the permit in light of the concerns raised by ODF in its protest.

II. CONSIDERATION OF EXCEPTIONS

EXCEPTION NO. 1: ODF argues that the applicant admitted at contested case that the access relied upon under OAR 690-310-0040(1)(a)(G) is not sufficient for access to all land crossed by the proposed ditch, canal or other work as expressly required by rule. As such, ODF argues, the Department must deny the proposed use.

RESPONSE: As discussed in the Proposed Order, the determination regarding whether the written authorizations and easements are sufficient to grant the Town of Lakeview required access across ODF's lands is one for the circuit court to decide. (Proposed Order, pp. 12 – 14.) For the purposes of issuing a permit to the Town of Lakeview, and as the ALJ determined, the application met the requirements in OAR 690-310-0040 because it contained the name and mailing address of the owner of any lands that are not owned by the applicant and that are crossed by the proposed ditch, canal or other work and because the application contained a statement declaring the existence of written authorization or easement permitting access to land crossed by the proposed work(s). OAR 690-310-0040(1)(a)(F) and (G). The rule requires notice to affected landowners and a statement declaring that authorization exists, but does not require the OWRD to examine the sufficiency of the access the applicant declares is present. Further, the record does not reflect such clear admission as ODF purports, but indicates that a six-foot easement is sufficient for the Town of Lakeview's works. (Transcript p. 103.) If the easement is insufficient for the Town to access land crossed by its works, the Town will not be able to perfect its permit, as issuance of a water right does not authorize trespass. This exception is denied.

EXCEPTION NO. 2.: ODF argues that although "there is no dispute that OWRD does not have authority to adjudicate real property disputes between an applicant and a protestant," OWRD has made a determination as to the applicant's right to use the protestant's real property by accepting applicant's claims over protestant's evidence to the contrary. As such, ODF argues, the OWRD should condition an approval of application G-17165 on the applicant submitting proof that the use of ODF's property is authorized.

RESPONSE: The rules of the Oregon Water Resources Commission require applicant only to provide a statement "declaring the existence of written authorization or an easement permitting access to land crossed by the proposed ditch, canal or other work." OAR 690-310-0140(1)(a)(G). The application contained such statement, and the existence of written authorization and easement was corroborated in the record at hearing. None of the evidence presented illustrates that the applicant did not contain a statement declaring the existence of written authorization or easements. In fact, the evidence at contested case shows that written authorizations and easements exist. As ODF states, only a circuit court may determine whether the written authorizations or easements grant the legal rights to entry that the Town of Lakeview claims. If they do not, applicant may not trespass upon ODF's lands, and the lack of access may prove ultimately fatal to the Town of Lakeview's ability to prove up on its permit. This exception is denied.

EXCEPTION NO. 3.: ODF makes several exceptions to findings in the Proposed Order which are cited verbatim as follows.

1. Finding of Fact No. 2 states “The application also included an extension of the lease agreement...” In fact, Application G-17165 did not include the extension. The extension was submitted in the record as Lakeview Exhibit L3.

RESPONSE: The rules of the Water Resources Commission require an applicant to declare the existence of written authorization or easement, which applicant did. Notwithstanding that applicant is not required to produce written authorizations or easements with an application, the record at contested case shows that a written authorization exists (including extensions of that agreement). The merits of the authorizations or easements are for the circuit court to decide. The evidence at contested case establishes that the Department correctly applied its rules when it processed application G-17165 and this exception is denied.

2. Finding of Fact No. 10 states: “On April 7, 2011, ODF filed a petition for review with the Lake County Circuit Court, contesting OWRD’s refusal to give ODF a contested case hearing on its protest.” In fact, the petition in the Lake County Circuit Court was a Petition for Judicial Review (“PJR”) under ORS 183.484, challenging the substance of OWRD’s order approving Application NO. G-17165 and issuing water use permit. The PJR did not challenge OWRD’s “refusal to give ODF a contested case,” but rather challenged OWRD’s order in other than a contested case that granted the permit.

RESPONSE: The record supports the ALJ’s Finding of Fact No. 10. ODF’s PJR mentions in detail that it filed a protest to the PFO but that the Department never did contact ODF about its protest despite promises to do so. The PJR also questions the merit of the Department’s issuance of a permit for the Town of Lakeview. (Ex. A-2, pp. 1-2.) In sum, the PJR appears to have both challenged the Department’s issuance of a permit and also the fact that the Department did not act on its protest. This exception is denied.

3. Page 7 states: “Only after ODF filed suit in Lake County (to require a contested case hearing) did OWRD agree to refer the matter to the office of Administrative Hearings for a contested case hearing.” [ODF also asserts that the next paragraph contains similar erroneous assertions.] Again, ODF filed a PJR to review OWRD’s order in other than a contested case approving Application G-17165 and issuing a water use permit. OWRD then decided on its own to reconsider its Final Order approving Application G-17165 per ORS 183.484 [footnote with text of ORS 183.484 omitted]. One year later, the matter was referred to contested case to resolve ODF’s protest.

RESPONSE: ODF filed its petition *pro se*. It is not precisely written but seems to assert, among other things, that ODF filed a protest that was not heard and should have been. The Proposed Order accurately reflects the petition’s content and accurately frames the issues properly before the ALJ. This exception is denied.

4. Page 12, footnote 6 states: “Later in the hearing process, long after the time for protests, ODF began to allege an additional issue: that it actually owned the rights to all


of the water in the Utley Well because of a 1970 document between the Utleys and Mr. Parker of ODF. That issue was not raised in the protest; in fact, the protest referred to Utley as the 'owner' of the well and the property. Because that issue was not raised in a timely fashion, I do not consider it in this case." Here, the ALJ completely misinterpreted the purpose of raising such information. ODF made clear in its Closing Brief that information about the rights to use the geothermal well (not about rights to water in the well) was offered as evidence that the Utleys no longer have any interest in the six-foot easement, and therefore Lakeview does not have access as a necessary prerequisite to permit issuance. [Citation from closing argument omitted.] Therefore, ALJ Barber disregarded and did not consider factual evidence entered in the record to support a finding that Lakeview lacks access to support Application G-17165. In light of such an admission that the ALJ did not review or consider pertinent factual evidence in the record, OWRD must modify the Proposed Final Order under OAR 137-003-0655(3) because the Proposed Final Order is not supported by substantial evidence in the whole record.

RESPONSE: ODF included Attachment 1 "Contract of Sale" between ODF and Andrew and Carol Parker with its Closing Argument. The "Contract of Sale" was not offered before the evidentiary record closed and the ALJ did not err if he did not consider this document. ORS 183.417; OAR 137-003-0645. If the "Contract of Sale" was attached to ODF's Closing Argument only to make the point that the Utleys no longer have any interest in the six-foot easement and therefore Lakeview does not have access as a necessary prerequisite to permit issuance, there is no evidence in the record that would tend to support this reading of the Contract of Sale. Further, even if there were evidence to support this interpretation of the Contract of Sale, neither the argument nor the evidence change the outcome of this proceeding. The Commission's rules require only a statement that written authorization or easements exist and do not require the Department to adjudicate the rights represented by the written authorizations or easements. This exception is denied.

III. ORDER

The Department adopts and incorporates by reference the attached Proposed Order dated October 8, 2013, and re issues a permit for application G-17165 on the condition that the Town of Lakeview provides an annular seal to a depth of at least 18 feet in well #1 before water use may begin.

DATED this 7th day of March 2013.



PHILLIP C. WARD, Director
Oregon Water Resources Department

NOTICE: Parties must file their written exceptions with the Department at its Salem offices within 20 days following the date of service of the final order on the parties to the contested case proceeding. ORS 537.173; OAR 690-002-00190. If exceptions are not filed within 20 days following the date of service of the final order, the order will become final by operation of law. If exceptions are filed within 20 days following the date of service of the final order on the parties, the Oregon Water Resources Commission shall issue a modified order or deny the exceptions within 60 days after the close of the exception period.

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
FOR THE
OREGON WATER RESOURCES DEPARTMENT**

IN THE MATTER OF WATER RIGHTS)
 APPLICATION G-17165 FOR A)
 PROPOSED WATER USE PERMIT FOR)
 THE TOWN OF LAKEVIEW)
)
 Oregon Desert Farms, Inc.)
Protestant)
)
 Town of Lakeview, Oregon)
Proponent)
)

PROPOSED ORDER

CASE NO. WR-12-007
 Agency Case G-17165

PROCEDURAL SUMMARY

On January 26, 2010, the Oregon Water Resources Department (OWRD or the Department) issued a Proposed and Final Order approving water use application G-17165 for the Town of Lakeview, Oregon (Lakeview). On February 22, 2010, Donald Andrew Parker, on behalf of Oregon Desert Farms, Inc. (ODF), filed a protest of the Department's decision. On September 20, 2012, OWRD referred the case to the Office of Administrative Hearings (OAH) for a contested case hearing.¹ The file was assigned to Administrative Law Judge (ALJ) Rick Barber.

A prehearing conference was held by telephone on December 6, 2012. Lakeview appeared and was represented by Attorney Martin Hansen. ODF was represented by Attorney Laura Schroeder. Patricia McCarty appeared for OWRD. ALJ Barber presided. A hearing date was selected,² and the parties developed a schedule for filing motions.

Summary Determination. Lakeview and ODF both filed Motions for Summary Determination within the time frame determined by the parties. On April 9, 2013, ALJ Barber issued the Ruling on Motions for Summary Determination. Lakeview's motion was granted in part, dismissing ODF's grounds of protest that had not been raised in a timely fashion. ODF's motion was denied. The issue of whether Lakeview had legal access over ODF land was reserved for hearing. Hearing remained scheduled for June 11 and 12, 2013, in Lakeview.

Second Prehearing Conference. On May 14, 2013, a second prehearing conference was held at the request of Senior Assistant Attorney General Renee Moulun, who had recently

¹ The basis for the delay between protest and hearing is addressed in some detail in the Findings of Fact.
² Hearing was originally set for dates in May 2013, but due to a scheduling conflict was rescheduled for June 11 and 12, 2013, in Lakeview.

appeared as counsel for OWRD. Mr. Hansen and Ms. Schroeder also participated, and ALJ Barber again presided. OWRD suggested that the hearing location be changed to Bend for the ease of the parties. That motion was denied because of the number of witnesses from the Lakeview area scheduled to testify at hearing.

During the prehearing, ODF indicated its intention to file a civil action in Lake County Circuit Court, contesting the existence of an easement across ODF property, as well as a Motion in Limine in the present case. On May 22, 2013, ODF filed its Motion in Limine Re Jurisdiction and an Alternative Motion to Postpone [the] Contested Case. Lakeview filed a Response to the Motion on May 23, 2013, and OWRD filed its Response on May 29, 2013. Lakeview filed a Reply to OWRD's Response on June 4, 2013.

On May 28, 2013, ODF filed yet another Motion in Limine, seeking to limit or exclude consideration of preliminary title reports and conveyances to and from the Utley Family Trust. OWRD filed a Response on June 5, 2013. The Motions in Limine and the Motion to Postpone were denied.

Hearing convened in Lakeview, Oregon on June 11, 2013. Mr. Hansen represented Lakeview, and Ms. Moulun represented OWRD. Ms. Schroeder, along with her associate, Sarah Liljefelt, represented ODF. The hearing was recorded over the Bridge recording system and was close-captioned for the benefit of Mr. Parker. The following witnesses testified at hearing: Water Rights Program Manager E. Timothy Wallin; Title Examiner June Albertson; Lakeview Town Manager Raymond Simms; Engineer Darryl Anderson; and Robert Randall Utley.

Written Direct Testimony (WDT) from Mr. Wallin, Well Construction Manager Juno Pandian and Mr. Parker were also presented, with opportunity to cross-examine each witness. Only Mr. Wallin was cross-examined.

The evidentiary record closed on June 11, 2013.³ The hearing record remained open for written closing arguments until September 3, 2013, at which time the record closed.

STATEMENT OF ISSUES

1. Whether Lakeview's application for water right G-17195 was correctly approved by the Oregon Water Resources Department (OWRD).
2. Whether Lakeview's application for water right G-17195 should have been denied because Lakeview did not establish it had legal access to the Utley Well over protestant's land.

EVIDENTIARY RULINGS

OWRD offered Exhibits A1 through A7, all of which were admitted into evidence without objection. Lakeview offered Exhibits L1 through L29, all of which were admitted into evidence. ODF objected to several exhibits (L2-L8, L14, L15, L17, L18, and L23-29), but the

³ The second scheduled date of hearing proved to be unnecessary.

objections were overruled.⁴ ODF offered Exhibits P1 through P38, and Lakeview objected only to Exhibit P14. The objection was overruled.

OWRD presented Written Direct Testimony from Juno Pandian and Mr. Wallin, and ODF presented Written Direct Testimony from Mr. Parker, as noted above. Lakeview sought to present the testimony of Larry Utley at hearing, but ODF objected because Mr. Utley was not included in Lakeview's witness list. The objection was sustained.

OWRD also provided pleading documents, which it marked as P1 through P25. To avoid confusion with ODF's exhibits, I have re-designated the pleading documents as PL1 through PL25.

FINDINGS OF FACT

1. On January 14, 2009, the Town of Lakeview submitted Application G-17165 to OWRD, seeking a water right for 500 gallons per minute (gpm), or 1.1 cubic feet per second (cfs) of water for year-round industrial use (geothermal heating/cooling and power development) from a well in Lake County. The well was identified as Lake 2040, and is also known as the Utley Well. Lakeview sought a non-consumptive right; it proposed to pump water from the Utley Well and then re-inject it into a different well (CROO 52423) in the Warner Basin. OWRD received the application on January 20, 2009. (Ex. L1; DWT⁵ of Wallin).

2. Accompanying Lakeview's application was a Geothermal Well Lease Agreement between Lakeview and the Utley Family Trust, the owners of the real property where the Utley Well is located. The application also included an extension of the lease agreement, the legal description of an easement purporting to cross the real property owned by ODF, and a series of maps and aerial photographs of the area. (Ex. L2-L7).

3. When an application is received, OWRD staff initially check it for proper form and completeness. Then the reviewer looks to see if the proposed use is prohibited by statute. If it is not prohibited, the reviewer does an initial review to determine, among other things: 1) whether the water use where the source is located is restricted or limited; 2) whether the source is in a designated critical ground water area; and 3) whether water is available at the proposed source. OWRD then provides public notice of the application and gives an opportunity for public comment on the application. Once public comment, if any, is received, the reviewer completes the review process and publishes a Proposed and Final Order, either approving or denying the application or, in certain circumstances, approving the application with conditions. (DWT of Wallin).

4. OWRD further reviews an application to make sure the proposed use will ensure the preservation of the public welfare, safety and health as described in ORS 537.525. OWRD presumes that the use will preserve the public welfare if the following are proved: 1) the

⁴ Many of the objections were based upon the offer of the same documents by ODF, accompanied by the argument that ODF had submitted its documents first. Because the documentary record is not very large, I overruled those objections without concern for duplication.

⁵ Direct Written Testimony.

proposed use is permitted in the basin; 2) water is available; 3) no other water rights are injured; and 4) the proposed use complies with the rules of the Water Resources Commission. (DWT of Wallin).

5. When OWRD received Lakeview's application, it was assigned to reviewer Joel Plahn. The Groundwater Hydrology Section performed a public-interest review on April 23, 2009, and the initial review of the file was performed on June 12, 2009. OWRD gave public notice of the application on June 16, 2009, including a request for comments, but did not receive any comments on the proposed water right application. OWRD requested additional information from Lakeview, and Lakeview provided it. OWRD completed its review of the application, with the following findings: that the designated industrial use was permissible in the basin; that the place of use was not within or above a State Scenic Waterway; that there was sufficient water to meet the proposed appropriation, over and above senior water rights; that the use was non-consumptive because the water was being re-injected (following heat exchange) back into the same aquifer; that the proposed use would not injure existing water rights; that the use was compatible with existing land use laws; and that it would not interfere with any surface water sources. (DWT of Wallin).

6. On June 12, 2009, OWRD sought additional information from Lakeview concerning other landowners possibly affected by the water right. Lakeview provided the requested information. (Ex. A1 at 47; DWT of Wallin). In October 2009, OWRD sought additional information about additional tax lots in the area, and asked for an amended Land Use form to address those issues. Lakeview provided the additional information. (Ex. A1 at 32-43).

7. On January 26, 2010, OWRD issued a Proposed Final Order (PFO), proposing to issue the permit with conditions. (Ex. A1 at 16).

8. On March 8, 2010, OWRD received a protest from ODF dated February 22, 2010. That protest stated in part:

We, [ODF], are granted a right that is legally filed in the County Clerk Office of Lake County, Oregon to utilize this hot water well, commonly known as the Utley well. We have continuously used this well to heat our facility and have in our possession a legal water right from the Water Rights Division to make such use. There are no restrictions on the use or potential future expansion of current use or potential other uses of this well in writing or orally from the owner (Utley) in the conveyance to ODF.

The potential issuance of this Right would prohibit any future development of our property adjacent to this well, expansion of current operation or other potential uses by ODF.

There is no legal access to this well for vehicles across the property owned by ODF. There is no legal access to the well across the remaining bounding property. In essence the well is isolated on a small parcel owned by Utley with no legal access.

Any granting of any Right by the Water Rights Division would be an unfair taking of a resource utilized through a legal agreement without any compensation to the owner of such right to use.

(Ex. A1 at 14). ODF has a water right in the Utley Well that is senior to the proposed Lakeview water use permit at issue in this hearing. OWRD considered this right in its review of Lakeview's application, concluding the senior right would not be impaired by the proposed use permit. (DWT of Wallin).

9. OWRD received and considered the protest from ODF, but determined that the protest did not raise any pertinent issues in the approval of the water use permit. On February 11, 2011, OWRD issued a Final Order which stated in part:

Application History

On January 20, 2009, Town of Lakeview submitted an application to the Department for a water use permit. The Department issued a Proposed Final Order on January 26, 2010. The protest period closed March 12, 2010. A timely protest was received from Donald Andrew Parker, Oregon Desert Farms, Inc., which was considered during development of the Final Order.

The proposed use would not impair or be detrimental to the public interest, and the applicant has paid all required examination and recording fees.

Order

Application G-17165 therefore is approved as proposed by the Proposed Final Order, and Permit G-16836 is issued as limited by the conditions proposed in the Proposed Final Order.

(Ex. A1 at 1). Permit G-16836 was also issued on February 11, 2011. (Ex. A1 at 3).

10. On April 7, 2011, ODF filed a petition for review with the Lake County Circuit Court, contesting OWRD's refusal to give ODF a contested case hearing on its protest. (Ex. A2). On September 22, 2011, OWRD issued the following:

Summary Order

On February 11, 2011 the Department issued a Final Order approving Application G-17165 and Permit G-16836.

On August 8, 2011 the Department received notice of the filing of a Petition for Judicial Review with the Lake County Circuit Court of Oregon. The Petition was filed by Oregon Desert Farms, Inc., and requests the review of the Final Order for Application G-17165.

It is ORDERED:

Pursuant to ORS 183.484(4) the Department withdraws the Final Order approving Application G-17165 and Permit G-16836 for purposes of reconsideration, effective this day, September 22, 2011.

(Ex. A3). The action in Lake County was dismissed as a result of the withdrawal of the Order and Permit. (Ex. A4, A5, A6). On September 20, 2012, OWRD referred the case to the OAH. (Doc. PL1).

11. Juno Pandian is the Manager of the Well Construction and Compliance Section at OWRD. She reviewed Lakeview's application and the history of the well. It was constructed in 1959, and was drilled to a level of 450 feet. It does not have an annular seal to a minimum depth of 18 feet, as OWRD regulations require. OWRD conditioned its approval of the water right on the correction of the seal problem. (DWT of Pandian). Lakeview does not contest this condition on the approval of the water right. (Stipulation of Counsel).

CONCLUSIONS OF LAW

1. Lakeview's application for water right G-17195 was correctly approved by OWRD.
2. Lakeview's application for water right G-17195 did not require it to establish that it had legal access to the Utley Well over protestant's land.

OPINION

OWRD has the burden of proof to establish, by a preponderance of the evidence, that it followed its own statutes and rules in the review process that led to the approval of Lakeview's application for a water right. Likewise ODF, the protestant in the case, has the burden to establish its protest by a preponderance of the evidence. *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); *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). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

In this case, OWRD has established that it correctly followed its procedures when it approved the application and issued the water right use permit sought by Lakeview. ODF has failed to establish a valid protest to that approval.

Background of the Application. Lakeview applied for a water right on land owned by the Utley Trust (Utley). Along with the application, Lakeview provided a Geothermal Well Lease Agreement between Utley and the Town of Lakeview, and also provided documents showing the presence of an easement across the land owned by Oregon Desert Farms (ODF).

OWRD reviewed the application and approved it in the Proposed and Final Order dated January 26, 2010.

ODF filed its protest on February 22, 2010, contending that Lakeview did not have legal access to the Utley Well across ODF land. OWRD considered ODF's protest before its February 11, 2011 Final Order, but did not consider it necessary to refer the protest for a contested case hearing because OWRD concluded the protest did not raise any issues pertinent to the application process. Only after ODF filed suit in Lake County (to require a contested case hearing) did OWRD agree to refer the matter to the Office of Administrative Hearings for a contested case hearing.

While OWRD agreed to refer the case for a contested case hearing, apparently to resolve the petition in Lake County, OWRD's position has remained the same since the protest was filed: ODF's basis of protest—that Lakeview does not have legal access across ODF property to get to the Utley well—does not affect OWRD's review or approval of Lakeview's water rights application. After review of the evidence in the case, I agree with OWRD that, although legal access (across ODF land or the land of another) may be a key issue in Lakeview's *perfection* of the water right applied for, resolving the legal access issue is not necessary to the approval of the application for the water right.

Determination of Property Rights. The question whether Lakeview has legal access to cross ODF property to reach the Utley Well involves the interpretation of deeds and the determination whether the easement claimed by the Utley Trust (and, indirectly, by Lakeview), still exists. Both Lakeview and ODF have submitted various deeds and easements in support of their positions. However, all parties to the proceeding, including OWRD, agree that actual determination of the property rights is within the jurisdiction of the circuit court, not the Office of Administrative Hearings.

Therefore, since the jurisdiction to determine the real property rights lay elsewhere, the issue in this case is whether OWRD had a basis to approve Lakeview's application for the water right it seeks. As OWRD argued:

The issue for hearing, however, *may not* be framed in terms of whether legal access over ODF land exists—the issue is whether written authorization exists in the Department's record. This is because the rules of the Water Resources Commission only require an attestation that written authorization exists, notice of the application to affected landowners and the public, and corroboration as to the existence of the written authorizations if an attestation is challenged. The OWRD has no legal authority to substantively interpret documents presented to determine the legal merits of written authorizations nor to adjudicate disputes involving competing interpretations so as to, in effect, declare the property rights and status of one party over another's. For these reasons, the issue presented by [ODF's] protest may only be considered in the terms of whether the Department acted consistently with its statutes and rules governing appropriation of ground water, and namely, whether it acted consistently with the rules of the Water Resources

Commission governing access to lands not owned by the applicant but crossed by a proposed ditch, canal or other work.

(Italicized emphasis in original, underlining added).

Thus, although it is clear that ODF contests Lakeview's claimed right to cross ODF land to get to the Utley Well, that access question is not one that OWRD—or the OAH—is able to decide. Given the universal agreement that the OAH does not have jurisdiction to interpret real property matters, OWRD is correct in its conclusion that it is the application process and the review of the criteria necessary to establish the water right—not Lakeview's access to the well—that is at issue here.

Establishing the Water Right. Therefore, the issue is whether the Town of Lakeview provided the information necessary for OWRD to grant the water right. Once again, I agree with OWRD's conclusion that the application was complete and correctly approved. OAR 690-310-0040 provides the requirements for appropriating water, and states:

Application Requirements

(1)(a) Each application for a permit to appropriate water shall be made to the Department on a form prescribed by the Department and shall set forth:

(A) The name and mailing address of the applicant(s);

(B) The source(s) of water from which the water is proposed to be diverted or appropriated, including the name and mailing address of any owner of the land upon which the source of the water supply is located;

(C) The amount of water to be appropriated from each source;

(D) A map of the proposed water use as set forth in the mapping requirements in OAR 690-310-0050;

(E) The nature of the proposed use(s);

(F) *The name and mailing address of the owner of any lands that are not owned by the applicant and that are crossed by the proposed ditch, canal or other work even if the applicant has obtained written authorization or an easement from the owner.*

(G) *A statement declaring the existence of written authorization or an easement permitting access to land crossed by the proposed ditch, canal or other work. This requirement shall not apply to applications for irrigation or domestic use where the applicant would occupy state-owned submersible lands for the construction, maintenance, and operation of any structure or facility necessary for the use of water;*

- (H) Proposed dates for the beginning of construction, completion of construction, and complete application of the water to the proposed beneficial use;
- (I) The legal description of:
- (i) The property from which the water is to be diverted;
 - (ii) Any property crossed by the proposed ditch, canal or other work; and
 - (iii) Any property on which the water is to be used as depicted on the map.
- (J) A description, including drawings if required by the Department, of the proposed means of diversion, construction, and operation of the diversion works and conveyance of the appropriated waters;
- (K) Information the applicant has that describes why the amount of water requested is needed, measures the applicant proposes to prevent waste, to measure the amount of water diverted, to prevent damage to aquatic life and riparian habitat, to prevent the discharge of contaminated water to a surface stream and measures the applicant proposes to prevent damage to public uses of affected surface waters;
- (L) Land use information as outlined in the Department's Land Use Planning Procedures Guide described in OAR 690-005-0035(4) or a receipt signed and dated by a local government official acknowledging the land use information request was received by the local planning Department;
- (M) Signature of the applicant(s), and, if the applicant is a public agency, corporation or business, the title or authority of the person who signs the application on behalf of the entity;
- (N) An oath that the information contained in the application is true and accurate;
- (O) The estimated capacity of each pump in gallons per minute, and the horsepower of each pump motor;
- (P) All other data concerning the proposed project and the applicant's ability and intention to construct the project, as the Department considers necessary;
- (Q) Any other information required in the application form that is necessary to evaluate the application in accordance with applicable statutory requirements;
- (R) If the requested water use is supplemental to an existing water use, identification of any application for a permit, permit, certificate or adjudicated

right to appropriate water made or held by the applicant that is primary to the supplemental use.

(b) If the application is for a permit to appropriate ground water, in addition to the information required under subsection (a) of this section, the application shall contain:

(A) For any well already constructed, a copy of the well constructor's log, if available. If a well log is not available, or if the well is not already constructed, the proposed total depth, depth of casing and seal, and the anticipated perforation and open intervals;

(B) The horizontal distance for each proposed point of ground water appropriation to the nearest surface water, if less than one mile, and the difference in land surface elevation between them;

(C) If the ground water is to be used for irrigation purposes, a description of the lands to be irrigated, giving the number of acres to be irrigated in each 40-acre legal subdivision;

(D) The depth to the water table, if known;

(E) The location of each well with reference to government survey corners or monuments or corners of recorded plats;

(F) The estimated capacity of each well;

(G) If the ground water does not require pumping, the rate of flow in gallons in such manner as the Commission may prescribe.

(c) If the application is to store water and to construct a reservoir, or multiple reservoirs on a single contiguous property on the same stream system, the application also shall include or be accompanied by:

(A) Preliminary plans, specifications and supporting information for the dam and impoundment area including dam height, width, crest width and surface area;

(B) Proposed dates for the beginning and completion of construction of the reservoir, the date the water will be stored and put to beneficial use and the uses to be made of the impounded water;

(C) A legal description of the property upon which the water is to be stored;

(D) A map of the proposed place of use prepared by a certified water right examiner in accordance with OAR 690-014-0150 unless the application is to construct a reservoir storing less than 9.2 acre-feet of water or with a dam less

than 10 feet in height, in which case the map need not be prepared by a certified water right examiner.

(d) If the application is to appropriate stored surface water, the application also shall include or be accompanied by documentary evidence that:

(A) The applicant has provided notice of the application to the operator of the reservoir, if other than the applicant. This requirement may be satisfied by providing a copy of written notice to the operator of the reservoir, or a notarized affidavit signed by the applicant stating that notice has been provided to the operator of the reservoir;

(B) An agreement has been entered into with the owner of the reservoir to provide enough water for the purposes set forth in the application. If the applicant is the reservoir owner, no such agreement is required. If the application is made under the expedited review process for applications to use stored water under OAR 690-340-0060, the agreement may be submitted at any time prior to permit issuance; and

(C) An agreement has been entered into with any entity delivering the stored water other than the applicant. If the application is made under the expedited review process for applications to use stored water under OAR 690-340-0060, the agreement may be submitted at any time prior to permit issuance.

(e) If for agricultural purposes, in addition to any other information required, the application shall give the legal subdivisions of the land and the acreage to be irrigated, as near as may be;

(f) Except as otherwise provided in OAR 690, division 51, if for power purposes, in addition to any other information required, the application shall give the nature of the works by means of which the power is to be developed, the head and amount of water to be utilized, and the uses to which the power is to be applied;

(g) If for municipal or quasi-municipal water supply, in addition to any other information required, the application shall give the already installed and available capacities to provide water service, present population to be served, and, as near as may be, the future requirements of the population served, and if known, the methods that may be used to meet such future requirements;

(h) If for mining purposes, in addition to any other information required, the application shall give the nature of the mines to be served, and the methods of supplying and utilizing the water.

(2) Each application for a permit to appropriate water shall be accompanied by the examination fee set forth in ORS 536.050.

(3) If the proposed use of the water is for operation of a chemical process mine as defined in ORS 517.953, the applicant shall provide the information required under this section as part of the consolidated application under ORS 517.952 to 517.987.

(4) If the department determines that the source of a proposed use of water is in or above a scenic waterway, in addition to any other information required, the applicant shall provide the information required under OAR 690-310-0260.

(Emphasis added). This lengthy rule describing the application process is included in its entirety to demonstrate that it is an extensive process for the both the applicant and OWRD.

Mr. Wallin's written testimony, as well as his oral testimony at hearing, explained how OWRD reviewed the Lakeview application. The review was complete. When Lakeview failed to provide information about additional tax lots or failed to submit all necessary Land Use forms, OWRD requested and Lakeview provided additional information to answer all of the questions in the rule. The exhibits and testimony establish that OWRD appropriately reviewed the Lakeview application.

Moreover, although not challenged by ODF's protest, the evidence shows that the water right sought by Lakeview was for water that was available and would not harm any senior water rights, including ODF's senior rights. OWRD concluded that the water right preserved the public welfare, safety and health. ODF did not contest these findings.

The Protest. In fact, ODF did not protest any part of the Proposed and Final Order other than the question of legal access.⁶ The basis of the protest, as previously noted, was ODF's claim that Lakeview would have no right of access to the Utley Well across ODF's land.

As noted above, the actual determination whether Lakeview has legal access to the Utley Well is one for the circuit court to decide. As OWRD and Lakeview argue, the key issue concerning legal access for purposes of the application concerns whether Lakeview made the appropriate declarations concerning access. The two emphasized sections of OAR 690-310-0040(1), quoted above, are the ones at issue here and bear repeating. The applicant must provide:

(F) *The name and mailing address of the owner of any lands that are not owned by the applicant and that are crossed by the proposed ditch, canal or other work even if the applicant has obtained written authorization or an easement from the owner.*

⁶ Later in the hearing process, long after the time for protests, ODF began to allege an additional issue: that it actually owned the rights to all of the water in the Utley Well because of a 1970 document between the Utleys and Mr. Parker of ODF. That issue was not raised in the protest; in fact, the protest referred to Utley as the "owner" of the well and the property. Because that issue was not raised in a timely fashion, I do not consider it in this case.

(G) A statement declaring the existence of written authorization or an easement permitting access to land crossed by the proposed ditch, canal or other work. This requirement shall not apply to applications for irrigation or domestic use where the applicant would occupy state-owned submersible lands for the construction, maintenance, and operation of any structure or facility necessary for the use of water[.]

(Emphasis added).

Pursuant to this rule, Lakeview was required to provide the name and address of any lands crossed by a canal, ditch, or other work “even if” there is written authorization. Lakeview provided that information, including the address of “The Greenhouse,” which is ODF’s business name.

Lakeview also provided a Geothermal Well Lease Agreement (demonstrating access to the real property on which the Utley Well is located), and provided a copy of the easement it claimed granted access to the Utley Well, across ODF land.

OWRD reviewed the information provided by Lakeview and concluded that it was sufficient to satisfy the requirements of the rule. Again, OWRD did not seek to actually determine the viability of the easement across ODF land because, as noted, the jurisdiction for such determinations is with the circuit court.

ODF takes issue with the Department’s decision, but has not clearly explained the basis for its disagreement. In its motions in limine, ODF repeatedly argued that the ALJ did not have jurisdiction to determine the real property access issues, so it cannot be arguing that OWRD should have determined there was *no* access across ODF land. Jurisdiction on real property matters is not selective, and the ALJ lacks jurisdiction to fully interpret ODF’s proffered deeds in the same way he cannot determine the validity of the deeds offered by Lakeview.

What ODF appears to want is to delay the approval of the water right, as its argument shows:

If OWRD is unwilling to weigh the factual evidence to make a preponderance of the evidence determination, it should defer to the pending, civil court action that will adjudicate the parties’ property rights. In so deferring, OWRD should condition the permit to require that evidence of access be submitted before a permit will be issued.

(ODF Reply Brief at 10).

However, as OWRD has argued, there is no reason to defer or delay action on the application, once all of the factors required in the rule have been met. The issues raised by ODF are issues concerning the perfection of the right, not the granting of it.

ODF is not harmed by the approval of Lakeview's application for the water use permit. ODF's water right is undeniably senior and is unaffected by the granting of the Lakeview junior water right. ODF did not protest the availability of water to meet the Lakeview water right.

If ODF is correct that Lakeview does not have legal access to the Utley Well over ODF land, and if Lakeview cannot then find another means of accessing the well, then Lakeview will be unable to perfect the water right. As Mr. Wallin stated at hearing, the granting of a water right does not give that party the right to trespass.

In summary, OWRD has established that it correctly followed its own rules in approving Lakeview's application for a water use permit in the Utley Well. While ODF may have arguments about Lakeview's ability to access the Utley Well, those arguments are unavailing here. OWRD correctly approved Water Right Application G-17165.

Stipulated Condition. OWRD has noted that the Utley Well is lacking an annular seal to the depth of 18 feet, as required by OWRD's regulations. Lakeview agrees that the approval of the water right should be conditioned on its repair or replacement of the annular seal in accordance with the Department's standards.

ORDER

I propose that OWRD issue the following order:

That the Proposed and Final Order dated January 26, 2010, approving Application G-17165 for a water right allowing use of 1.11 cfs of water for industrial use (geothermal heating/cooling) from Well 1 (Lake 2040) and returning water in Injection Well (CROO 52423), be approved, subject to the following condition:

Lakeview agrees to provide an annular seal to a depth of at least 18 feet in Well 1 (the Utley Well).

/s/ Rick Barber

Rick Barber, Administrative Law Judge
Office of Administrative Hearings

APPEAL PROCEDURE

NOTICE

This Proposed Order is issued by the administrative law judge pursuant to OAR 137-003-0645. As provided in ORS 537.445, OAR 137-003-0650 and OAR 690-002-0175, any party to this proceeding or the Department may file exceptions to this proposed order with the Oregon Water Resources Director. The exceptions must be in writing and received at the Water Resources

Department no later than 30 days after the date of service (the date served according to the certificate of service) of this proposed order. You should also send a copy of your exceptions to any other party or parties to the contested case hearing. Send any exceptions to:

Oregon Water Resources Department
725 Summer Street N.E., Suite A
Salem, OR 97301

Exceptions are legal or factual arguments illustrating legal or factual error in the proposed order, as demonstrated by the record. Evidence not in the record may not be offered in exceptions. Exceptions must clearly and concisely identify the portion(s) of the proposed order excepted to, and cite to appropriate portions of the record or Commission policies to which modifications are sought in the exceptions.

If exceptions are filed, any party or the Department may respond to the exceptions. The Department must receive responses no later than 10 days after the date of service of the exceptions. An opportunity may be provided for making additional written or oral argument to the Director, at the Director's determination and discretion. After reviewing the record, the exceptions and any additional argument, the Director will issue a final order. The Director may issue a final order that differs from the proposed order or may adopt the proposed order as the final order.

If exceptions are not filed within the allowed period, the Director will issue a final order.

CERTIFICATE OF MAILING

On October 8, 2013, I mailed the foregoing **PROPOSED ORDER** in OAH Reference No. WR-12-007

BY FIRST CLASS MAIL

Darryl Anderson
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Lakeview, OR 97630

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COURTESY COPY

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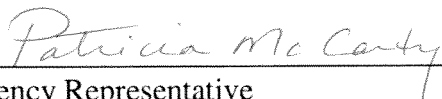
Misty Fragua
Hearing Coordinator

CERTIFICATE OF FILING/SERVICE

I hereby certify that on March 7, 2014 I served the within OWRD Final Order On Reconsideration Application G-17165 on the parties hereto by first class mail, a true, exact and full copy thereof to:

Applicant	Attorney for Applicant
Town of Lakeview Darryl Anderson 525 North 1 st Street Lakeview, OR 97630 E-mail: darryla@andersonengineering.com	Martin E. Hansen, Attorney at Law Francis, Hansen & Martin, LLP 1148 NW Hill Street Bend, OR 97701-1914 meh@francishansen.com
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Agency Representative – hand delivered	Attorney for Water Resources Dept.
Patricia McCarty, Protest Program Coordinator Water Resources Department 725 Summer St. NE, Suite A Salem, OR 97301-1266 E-mail: Patricia.E.McCarty@wrđ.state.or.us	Renee Moulun, Senior AAG Department of Justice, NR 1162 Court St. NE Salem, OR 97301-4096 renee.m.moulun@state.or.us

DATED March 7, 2014



 Agency Representative
 OREGON WATER RESOURCES DEPARTMENT

STATE OF OREGON

COUNTY OF LAKE

PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS PERMIT IS HEREBY ISSUED TO

TOWN OF LAKEVIEW
525 N 1ST ST
LAKEVIEW, OR 97630

The specific limits and conditions of the use are listed below.

APPLICATION FILE NUMBER: G-17165

SOURCE OF WATER: SUPPLY WELL 1 (LAKE 2040) AND INJECTION WELL 2 (CROO 52423) IN WARNER CREEK BASIN

PURPOSE OR USE: INDUSTRIAL USE (GEOTHERMAL HEATING/COOLING) AND POWER DEVELOPMENT

MAXIMUM RATE: 1.11 CUBIC FEET PER SECOND

PERIOD OF USE: YEAR-ROUND

DATE OF PRIORITY: JANUARY 20, 2009

WELL LOCATIONS:

SUPPLY WELL 1 (LAKE 2040) - SWSE, SECTION 33, T38S, R20E, W.M.; 330 FEET NORTH AND 2000 FEET WEST FROM SE CORNER, SECTION 33

INJECTION WELL 2 (CROO 52423) - SENW, SECTION 4, T39S, R20E, W.M.; 1810 FEET SOUTH AND 1060 FEET WEST FROM N1/4 CORNER, SECTION 4

THE PLACE OF USE IS LOCATED AS FOLLOWS:

SW ¼ SE ¼
SECTION 33
TOWNSHIP 38 SOUTH, RANGE 20 EAST, W.M.

NW ¼ NE ¼
NE ¼ NW ¼
SECTION 4
TOWNSHIP 39 SOUTH, RANGE 20 EAST, W.M.

Measurement devices, and recording/reporting of annual water use conditions:

- A. Before water use may begin under this permit, the permittee shall install a totalizing flow meter at each point of appropriation and injection well. The permittee shall maintain the device in good working order.
- B. The permittee shall allow the watermaster access to the device; provided however, where any device is located within a private structure, the watermaster shall request access upon reasonable notice.
- C. The permittee shall keep a complete record of the volume of water diverted each month, and shall submit a report which includes water-use measurements to the Department annually or more frequently as may be required by the Director. Further, the Director may require the permittee to report general water-use information, including the place and nature of use of water under the permit.
- D. The Director may provide an opportunity for the permittee to submit alternative measuring and reporting procedures for review and approval.

Prior to using water, the permit holder must provide an annular seal to a depth of at least 18 feet in Supply Well 1 (LAKE 2040), listed on this permit.

Prior to using water from any well listed on this permit, the permit holder shall ensure that the well has been assigned an OWRD Well Identification Number (Well ID tag), which shall be permanently attached to the well. The Well ID shall be used as a reference in any correspondence regarding the well, including any reports of water use, water level, or pump test data.

Prior to use of water under this permit, the permit holder must register the injection activity with the Oregon Department of Environmental Quality's Underground Injection Control Program, which can be contacted at 2020 SW 4th Ave, Ste 400, Portland OR 97201, or 503-229-5263.

All water produced under this permit shall be injected into the authorized well(s). Prior to receiving a certificate of water right, the permit holder shall submit documentation affirming that any applicable additional requirements of the Department's Division 230 rules have been met.

The use of water under this right must be non-consumptive.

STANDARD CONDITIONS

Failure to comply with any of the provisions of this permit may result in action including, but not limited to, restrictions on the use, civil penalties, or cancellation of the permit.

If the number, location, source, or construction of any well deviates from that proposed in the permit application or required by permit conditions, this permit may be subject to cancellation, unless the Department authorizes the change in writing.

If substantial interference with a senior water right occurs due to withdrawal of water from any well listed on this permit, then use of water from the well(s) shall be discontinued or reduced and/or the schedule of withdrawal shall be regulated until or unless the Department approves or implements an alternative administrative action to mitigate the interference. The Department encourages junior and senior appropriators to jointly develop plans to mitigate interferences.

The well(s) shall be constructed in accordance with the General Standards for the Construction and Maintenance of Water Wells in Oregon. The works shall be equipped with a usable access port, and may also include an air line and pressure gauge adequate to determine water level elevation in the well at all times.

If the riparian area is disturbed in the process of developing a point of appropriation, the permittee shall be responsible for restoration and enhancement of such riparian area in accordance with ODFW's Fish and Wildlife Habitat Mitigation Policy OAR 635-415. For purposes of mitigation, the ODFW Fish and Wildlife Habitat Mitigation Goals and Standards, OAR 635-415, shall be followed.

The use may be restricted if the quality of downstream waters decreases to the point that those waters no longer meet existing state or federal water quality standards due to reduced flows.

Where two or more water users agree among themselves as to the manner of rotation in the use of water and such agreement is placed in writing and filed by such water users with the watermaster, and such rotation system does not infringe upon such prior rights of any water user not a party to such rotation plan, the watermaster shall distribute the water according to such agreement.

Prior to receiving a certificate of water right, the permit holder shall submit to the Water Resources Department the results of a pump test meeting the Department's standards for each point of appropriation (well), unless an exemption has been obtained in writing under OAR 690-217. The Director may require water-level or pump-test data every ten years thereafter.

This permit is for the beneficial use of water without waste. The water user is advised that new regulations may require the use of best practical technologies or conservation practices to achieve this end.

By law, the land use associated with this water use must be in compliance with statewide land-use goals and any local acknowledged land-use plan.

Completion of construction and application of the water shall be made within five years of the date of permit issuance. If beneficial use of permitted water has not been made before this date, the permittee may submit an application for extension of time, which may be approved based upon the merit of the application.

Within one year after making beneficial use of water, the permittee shall submit a claim of beneficial use, which includes a map and report, prepared by a Certified Water Rights Examiner.

Issued March 7, 2014



E. Timothy Wallin, Water Rights Program Manager
for Phillip C. Ward, Director