



# Oregon

Theodore R. Kulongoski, Governor

## Water Resources Department

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### MEMORANDUM

**TO:** Water Resources Commission

**FROM:** Phillip C. Ward, Director

**SUBJECT:** Agenda Item O, November 21, 2008  
Water Resources Commission Meeting

**Consideration of Exceptions and Direction to Issue a Final Order that is Consistent with the Administrative Law Judge's Proposed Order**

#### I. Issue Statement

The Commission is asked to consider exceptions filed by Wolfgang Nebmaier and Vajra Ma to a Proposed Order resulting from a water right cancellation contested case hearing. The Commission is also asked for direction to issue a final order that is consistent with the Administrative Law Judge's proposed order.

#### II. Background

Based on affidavits received from Robert Sessler, Michele Sessler and Karen Gilstrap, the Water Resources Department (OWRD) issued a Notice of Proposed Cancellation of Water Right evidenced by Certificate 39995, and a Notice of Proposed Partial Cancellation of Water Right evidenced by Certificate 56024 to Wolfgang Nebmaier (Protestant) on September 8, 2005. On October 31, 2005, Protestant filed a Protest in both matters and requested a hearing.

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

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

The issues for hearing were whether the water right evidenced by Certificate 39995 has been forfeited by failure to make beneficial use of the water for domestic purposes, including the irrigation of lawn and garden, for a period of six years and three months from April 1997 through July 2003 and;

Whether a portion of the water right evidenced by Certificate 56024 has been forfeited by failure to make beneficial use of the water for irrigation purposes for a period of six years and seven months from March 1997 through October 2003.

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

A hearing was held on October 25 and 26, 2006, in Salem, Oregon. ALJ Gutman presided. Proponents appeared and were represented by Ms. Howard and Mr. Hillas. Protestants were present and represented themselves. OWRD was represented by Ms. Pandian. Mr. Sund appeared on behalf of OWRD and testified. Ms. Rosenstock was present and interpreted the hearing as needed.

The hearing was continued on December 19 through December 21, 2006, in Eugene, Oregon. ALJ Gutman presided. Proponents appeared and were represented by Ms. Howard. Protestants appeared and represented themselves. OWRD was represented by Ms. Pandian. Mr. Sund appeared on behalf of OWRD and testified. Ms. Rosenstock was present and interpreted the hearing as needed.

The hearing was continued on March 12 through 16, 2007, in Salem, Oregon. ALJ Gutman presided. Mr. Sessler and Ms. Gilstrap appeared and were represented by Ms. Howard. Protestants appeared and represented themselves. OWRD was represented by Ms. Pandian. Mr. Sund appeared on behalf of OWRD. Ms. Rosenstock was present and interpreted the hearing as needed. The record closed June 1, 2007.

### **III. Proposed Order**

On November 19, 2007, a Proposed Order was issued in which ALJ Gutman found that Protestants' water rights had been forfeited. ALJ Gutman based this on a preponderance of evidence supported by a finding that the presumption of forfeiture for water right Certificate 39995 has been established and was not rebutted. The Proposed Order also found that a preponderance of evidence supported by a finding that the presumption of forfeiture for a portion of water right Certificate 56024 has been established and was not rebutted.

#### **IV. Exceptions**

On December 19, 2007, Mr. Nebmaier and Ms. Ma filed exceptions to the Proposed Order with OWRD. On December 31, 2007, pursuant to OAR 137-003-0650, OWRD forwarded the exceptions to ALJ Gutman. OWRD asked ALJ Gutman for a response to the exceptions as well as a draft revised proposed order. On July 22, 2008, ALJ Gutman issued the Response to Exceptions filed by Wolfgang Nebmaier and Vajra Ma denying all of the exceptions and ruling that it was not necessary to revise the Proposed Order issued on November 19, 2007.

#### **V. Alternatives**

The Commission may consider the following alternatives:

1. Deny Mr. Nebmaier and Ms. Ma's exceptions and issue a Final Order that is consistent with the ALJ's Proposed Order as provided in Attachment 1.
2. Direct staff to develop a final order that differs from that in Attachment 2.
3. Request staff gather additional information and report back to the Commission at its February meeting.

#### **VI. Recommendation**

The Director recommends the Commission adopt Alternative 1 to deny Mr. Nebmaier and Ms. Ma's exception and issue a Final Order that is consistent with the ALJ's proposed order.

Attachments:

1. Draft Final Order
2. ALJ's Proposed Order
3. Protestant's exceptions to the Proposed Order
4. Correspondence

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