



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

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

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

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

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

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

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

The hearing was continued on March 12, 2007, in Salem, Oregon. ALJ Gutman presided. Mr. Sessler and Ms. Gilstrap appeared and were represented by Ms. Howard. Mrs. Sessler did not appear. Testifying on behalf of Proponents was Patricia Larson. Protestants

appeared and represented themselves. Testifying on behalf of Protestants was Scott Loring. OWRD was represented by Ms. Pandian. Mr. Sund appeared on behalf of OWRD. Ms. Rosenstock was present and interpreted the hearing as needed. Ms. Larson was qualified on the record as an expert on plants, grazing, and irrigated grazing pastures.

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

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

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

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

## ISSUES

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

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

## **EVIDENTIARY RULINGS**

### **Agency Exhibits**

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

### **Proponents Exhibits**

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

### **Protestant Nebmaier's Exhibits**

On October 25, 2006, Exhibits R70 (without Protestants typewritten additions), R81, R83, and R89 through R90 were admitted by stipulation of the parties. Exhibits R2 through R5, R13, R14, R47 through R51, R55 through R58, R71, R73, R75, R76, R80, R82, R84, R86 through R88, R101, R102, R106 through R109, R111 through R113, R116, R117, R119, and R121 through R125 were withdrawn by Protestants. Proponents and OWRD objected to Exhibits R10 through R12 on grounds they were not relevant. The objections were overruled and Exhibits R10 through R12 were admitted into evidence. Proponents and OWRD objected to Exhibits R34 through R36 on grounds they were not relevant. The objections were sustained and Exhibits R34 through R36 were excluded. Proponents and OWRD objected to Exhibits R37 through R40 on grounds they were not relevant. The objections were overruled and Exhibits R37 through R40 were admitted into evidence. Proponents and OWRD objected to Exhibit R42 on grounds it was not relevant. The objections were sustained and Exhibit R42 was excluded. Proponents and OWRD objected to Exhibits R77 through R79 on grounds they were not relevant. The objections were sustained and Exhibits R77 through R79 were excluded. Exhibits R81, R83, R89 and R90 were admitted without objection. Proponents and OWRD objected to Exhibits R110, R114, R115, and R118 on grounds they were not relevant. The objections were sustained and Exhibits R110, R114, R115, and R118 were excluded. On March 12, 2007, Exhibits R15 through R18 were admitted into evidence without objection. On March 13, 2007, Proponents and OWRD objected to paragraphs 1, 3, and 5 on page four, and paragraph 1 on page 5 of Exhibit R150 on grounds they were not relevant and the statements that were made required the affiant to be an expert in matters of which he was not. The objections were sustained and paragraphs 1, 3, and 5 on page four, and paragraph 1 on page 5 of Exhibit R150 were excluded. The remaining portion of R150 was admitted into evidence. On March 15, 2007, Exhibits R44 through R46 were admitted into evidence without objection. Exhibits R21, R22, R24, R27, and R29 were withdrawn by Protestants. Proponents and OWRD objected to Exhibits R19, R20,

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

### **Protestant Ma's Exhibits**

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

### **STIPULATION**

On October 25, 2006, Proponents stipulated to the alleged nonuse period of March 1997 through October 2003 for water right certificate 56024.

### **MOTIONS**

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

On May 21, 2007, Proponents requested that parts of Protestants' closing arguments be stricken and given no consideration because they offer new evidence and testimony that was not put before the tribunal during the course of the proceeding. On May 29, 2007, Protestants objected to Proponents request. Ruling: Proponents request is denied. As the fact-finder, I am quite capable of determining what evidence was properly brought before the tribunal in this matter and what evidence was not.

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

### **FINDINGS OF FACT**

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

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

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

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

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

(6) On July 25, 2005, Mr. Sessler filed an affidavit asserting nonuse of a portion of water right certificate 56024, from an unnamed stream, for irrigation of a total of 0.6 acre, within Tax Lot 300, located in Township 34 South, Range 5 West, in the SE ¼ NE ¼ of Section 17 in Josephine County, from June 1996 through July 2005. (Ex. A12.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



he used water from the spring for cooking and cleaning by filling up pots and pans. (Test. of Mr. Groen; Exs. T283, T284, T285.)

(25) From May 1997 through 2003, while visiting Tax Lot 300, Mr. Groen did not enter or stay in any of the structures, he did not make any improvements to the structures, he did not see anyone residing on the property, and he did not see any horses on his property. Mr. Groen did not raise crops, have a garden or plant a lawn. He did not instruct anyone to irrigate the .06 acre on his behalf. (Test. of Mr. Groen.)

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

(27) During the time that he owned Tax Lot 300, Mr. Groen periodically watered around the cabin to keep the grass green and he used turnouts to irrigate the .06 acre. From 1997 through 2003, Mr. Groen does not have a specific recollection of using turnouts on the pasture. (*Id.*)

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

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

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

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

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

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

(34) Domestic use includes use of water inside of the home and outside of the home. Human consumption is use of water inside the home and includes drinking, cooking, sanitation, laundry, etc. Use of water outside of the home includes washing the house down, filling the swimming pool, and filling a domestic animal's water dish. (*Id.*)

(35) To maintain a water right for domestic use of one family that includes irrigation of lawn and garden, there must be domestic use inside the house and irrigation of lawn and garden outside the house. If there is no domestic use inside the home, the water right is forfeited. (*Id.*)

## CONCLUSIONS OF LAW

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

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

## OPINION

Proponents of the proposed water cancellation have the burden of proving, by a preponderance of evidence, at least five successive years of nonuse. *Rencken v. Young*, 300 Or 352 (1985); *See* ORS 183.450(2); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); and *Cook v. Employment Div.*, 47 Or App 437 (1980) (in absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). As set forth below, Proponents have met their burden.

### I. Forfeiture of water right

ORS 540.610 is titled "Use as measure of water right; presumption of forfeiture of right for nonuse; basis for rebutting presumption; confirmation of rights of municipalities" and provides, in relevant part:

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

(2) Upon a showing of failure to use beneficially for five successive years, the appropriator has the burden of rebutting the presumption of forfeiture\*\*\*.

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

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

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

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

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

In this case, Protestants have two water rights that are at issue. I will address each one separately.

**A. Certificate 39995 – domestic use.**

Certificate of water right 39995 authorizes the use of 0.01 cfs from an unnamed stream, a tributary of Graves Creek, for domestic use of one family, including the irrigation of lawn and garden not to exceed ½ acre in area. Proponents contend the entire water right is forfeited by failure to make beneficial use of the water for domestic purposes from April 1997 through July 2003. As modified below, I agree with Proponents.

Domestic water use means the use of water for human consumption, household purposes, domestic animal consumption that is ancillary to residential use of the property or related accessory uses. OAR 690-300-0010(14). Human consumption means the use of water for the purposes of drinking, cooking, and sanitation. OAR 690-300-0010(24). Human consumption is use of water inside the home. (Test. of Sund.)

In this case, the evidence in the record establishes that sometime prior to 1997, Mr. Groen fixed up the cabin on Tax Lot 300 and plumbed in water from the stream. The evidence also

establishes that Mr. Anders made use of the water in the cabin and irrigated a garden while residing there until March or April 1997. Therefore, domestic water use was established on Tax Lot 300 through April 1997.

However, from May 1997 through July 2003, the evidence in the record establishes that there was no running water to any of the structures on Tax Lot 300. In addition, by his own admission, Mr. Groen did not make use of water inside the cabin for human consumption or domestic purposes. Furthermore, there is no evidence that Nick White, Cindy, Chuck or Anita made beneficial use of the water authorized under certificate 39995 for domestic purposes during their stay on Tax Lot 300. As such, from May 1997 through July 2003, there was no domestic water use for human consumption or household purposes inside the structures.

In addition, although Mr. Groen testified that during his visits to the property he used water from the spring for drinking, cooking and cleaning, he also acknowledged that he did not use a delivery system to obtain the water. Instead, Mr. Groen used plastic cups, jugs, pots and pans to get the water directly from the spring.<sup>1</sup> The question becomes whether Mr. Groen had a facility capable of handling the entire rate and duty authorized under the water right.

Pursuant to ORS 540.610(3), if the owner of a perfected and developed water right uses less water to accomplish the beneficial use allowed by the right, the right is not subject to forfeiture so long as the user has a facility capable of handling the entire rate and duty authorized under the right, and the user is otherwise ready, willing and able to make use of the right. If the facility does not have the capacity to use all of the water granted in the water certificate, than the portion that is not used is forfeited. *See Crandall v. Water Resources Department*, 290 Or 771, 777-778 (1981).

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

As such, the evidence in the record establishes that the water delivery system that Mr. Groen had in place prior to 1997 was not the same that was in place during the alleged period of nonuse. Consequently, because Mr. Groen never checked, there is no evidence that the disconnected and changed delivery system on Tax Lot 300 was still capable of handling the entire rate and duty authorized under the water right. In addition, there is no evidence that Mr. Groen was ready, willing and able to make full use of the water right. Therefore, I find, by a

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<sup>1</sup> According to the Department, human consumption must take place inside the home to be considered domestic water use. Consequently, Mr. Groen's use of water directly from the spring for drinking, cooking, and cleaning does not meet the criteria for human consumption or domestic water use under certificate of water right 39995. At some point in the future, the Department might want to clarify the definition of domestic water use so that it is apparent what use is required inside the household versus outside.

preponderance of the evidence that certificate of water right 39995 has been forfeited by failure to make beneficial use of the water for domestic purposes on Tax Lot 300 from May 1997 through July 2003.

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

Certificate of water right 56024 authorizes the use of 0.015 cfs, being 0.01 cfs for irrigation and 0.005 cfs for domestic use, from an unnamed stream, a tributary of Graves Creek, for domestic use of one family and irrigation of 0.7 acre. Proponents contend that a portion of the water right is forfeited by failure to make beneficial use of the water for irrigation purposes from March 1997 through October 2003. As modified below, I agree with Proponents.

Irrigation means the artificial application of water to crops or plants by controlled means to promote growth or nourish crops or plants. Examples of these uses include, but are not limited to, watering of an agriculture crop, commercial garden, tree farm, orchard, park, golf course, play field or vineyard and alkali abatement. OAR 690-300-0010(26). Naturally occurring sub-irrigation does not qualify as irrigation. *Staats v. Newman*, 164 Or App 18, 23 (1999). Irrigation requires more than just applying water to land. *Hennings v. Water Resources Department*, 50 Or. App. 121, 123-124 (1981) (court found that applying water to land for the purpose of wetting the dry ground to assist with plowing was not irrigation). Irrigation also requires a deliberate intent or purpose to promote growth or nourish crops or plants. In addition, if the water is not applied for a particular purpose, the water has not been put to a beneficial use. *See, In the Matter of the Proposed Cancellation of Water Right Certificate 29364 In the Name of Harold Biddle for Use of Water From East Branch of Long Branch and East Fork of East Branch and Reservoir, Jackson County, PC 91-2*, Special Order Book Volume 46, pp. 34-39, at p. 37 (noting that “Irrigation required deliberate and intentional diversion and application of water to a beneficial purpose”). Furthermore, beneficial use requires more than a token application of water. *See, In the Matter of Cancellation of Water Right Certificates 35744 and 14694 and The Partial Cancellation of Certificate 49695 for Use of Water From Lake Creek, a Tributary of the Metolius River, Jefferson County, Oregon, PC 90-3*, Special Order Book Volume 45, pp.55-60, at 45 (noting that “A token application of water once or twice during the irrigation season for 3-4 hours\*\*\*does not constitute beneficial use”).

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

Mr. Groen testified that he spent an average of two hours on the property and irrigated a small portion, less than one-half, of the .06 acre, by placing a hose in the stream and sprinkling water on the land. However, Mr. Groen did not present evidence that he applied water to different parts of the pasture during his visits, nor did he present evidence that he irrigated the entire 0.6 acre at least once in five years. In addition, Mr. Groen did not instruct anyone to irrigate the 0.6 acre on his behalf. Therefore, I find by a preponderance of the evidence that Mr. Groen failed to irrigate the entire 0.6 acre at least once during the period of May 1997 through October 2003. For the portion that Mr. Groen did irrigate, the question becomes whether the

water was put to beneficial use.

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

Mr. Groen testified that he applied water on the pasture for horses that may be pastured on the land. However, Mr. Groen never saw any horses on his property. In addition, although Ms. Ma observed piles of horse manure on the property in 2005, there was no direct evidence presented that horses were actually pastured on the land during May 1997 through October 2003. Furthermore, Ms. Gilstrap presented evidence that her horses would periodically escape and go onto Tax Lot 300 during that time frame, but she did not intentionally graze or pasture her horses on Mr. Groen's land. Therefore, I find by a preponderance of the evidence that there were no horses pastured on Tax Lot 300 during the period of May 1997 through October 2003. I further find that the horse manure that Ms. Ma observed on Tax Lot 300, more likely than not, came from Ms. Gilstrap's horses. Consequently, Mr. Groen's application of water on the lower field of Tax Lot 300 for horses that were not pastured there was not for a beneficial purpose.

Mr. Groen also testified that he applied water on the pasture to keep the place green. However, beneficial use requires more than a token application of water. The evidence in the record establishes that at the very most, Mr. Groen applied water to the pasture approximately three times per year for two hours. The Department has determined that applying water once or twice during the irrigation season for 3-4 hours is a token application of water and does not constitute beneficial use. Moreover, Mr. Nebmaier testified that it took approximately five hours of water application with a sprinkler over a two-day period before he saw green appear on the field. Therefore, I find by a preponderance of the evidence that Mr. Groen's application of water on the lower field of Tax Lot 300 to keep the place green was a token application and does not constitute beneficial use. Consequently, certificate of water right 56024 has been partially forfeited by failure to make beneficial use of the water for irrigation purposes on Tax Lot 300 from May 1997 through October 2003.

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

### **A. Two of the affidavits asserting nonuse under water right certificate 39995 fail to meet OAR 690-017-0400(2)(g).**

Protestant Nebmaier contends that because Mrs. Sessler and Ms. Gilstrap demonstrated their lack of knowledge of water law and misconceptions regarding points of diversion in their testimony, that their affidavits of nonuse under water right certificate 39995 fail to meet the criteria in OAR 690-017-0400(2)(g). Protestant Nebmaier is incorrect.

OAR 690-017-0400 is titled "Cancellation Initiated by Department" and provides, in pertinent part:

- (1) The Department shall initiate proceedings to cancel a perfected water right, as provided in ORS 540.631 and these rules, whenever

it appears that a right has been forfeited as provided in 540.610. The decision to initiate cancellation proceedings shall be based on evidence submitted to the Department, by any person, that alleges five or more years of nonuse so as to create a presumption of forfeiture, and from which evidence it further appears the presumption of forfeiture would not likely be rebutted under OAR 690-017-0800(2)(a), (d), or (e).

(2) Where the evidence submitted to the Department is in the form of affidavits, notarized affidavits from two individuals shall be required. An affidavit shall contain the following:

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

As set forth above, the Department is required to initiate cancellation proceedings after receiving sufficient evidence to create a presumption of forfeiture. The Department must first determine whether, on the face of the affidavits, it “appears” or looks like a water right has not been used for five or more successive years and would not be rebutted under ORS 540.610 before initiating cancellation proceedings by issuing written notice.

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

Therefore, the evidence in the record establishes that the criteria set forth in OAR 690-017-0400(2)(g) was met. The fact that Mrs. Sessler and Ms. Gilstrap may not understand water law or may have misconceptions regarding points of diversion does not negate the validity of the affidavits that were filed to initiate the process. Consequently, Protestant Nebmaier’s argument is unpersuasive.

## **B. Proponent's witnesses are not credible**

Protestant Nebmaier next contends that Proponents and their witnesses were not credible. To the extent that I relied upon said testimony, I disagree.

A witness testifying under oath or affirmation is presumed to be truthful unless it can be demonstrated otherwise. ORS 44.370 provides, in relevant part:

A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testified, by the character of the testimony of the witness, or by evidence affecting the character or motives of the witness, or by contradictory evidence.

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

### **1. Ms. Larson**

Protestant Nebmaier argued that the testimony of Ms. Larson was not credible in several matters. Because I have not relied upon the testimony of Mrs. Larson in the findings of fact, I will not address Protestant Nebmaier's arguments.

### **2. Mr. Smith**

Protestant Nebmaier argued that the testimony of Mr. Smith was not credible in several matters. Because I have not relied upon the testimony of Mr. Smith in the findings of fact, I will not address Protestant Nebmaier's arguments.

### **3. Proponent Gilstrap**

Protestant Nebmaier argued that the testimony of Proponent Gilstrap was not credible in several matters. As set forth below, to the extent that I have relied upon the testimony of Proponent Gilstrap, I have done so when the evidence was corroborated by Mr. Groen, by the Protestants, or in the case of the move-in date, when I found that the inconsistency was a simple mistake.

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

Proponent Gilstrap also presented evidence that in spring 1998, the pipe that carried water from the stream into the cabin broke and was not repaired or reconnected through July



2003. This evidence was corroborated by Mr. Groen's testimony that from May 1997 through 2003, the pipes that carried water from the stream to the cabin were not hooked up and the connecting pipe was bent back.

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

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

Proponent Gilstrap also testified that she moved onto Tax Lot 200 in December 1995, rather than December 1996 as indicated in the affidavits of nonuse that she filed with the Department. To the extent that the dates are inconsistent, I attach very little weight and find that it was a simple mistake.

#### **4. Proponent Mrs. Sessler**

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

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

#### **5. Proponent Mr. Sessler**

Protestant Nebmaier argued that the testimony of Proponent Mr. Sessler was not credible in several matters. Because I have not relied upon the testimony of Mr. Sessler in the findings of fact, I will not address Protestant Nebmaier's arguments.

Finally, even if I found that Proponents and their witnesses were not credible, the evidence that was presented by Protestants and their witnesses did not prove domestic use under water right certificate 39995 on Tax Lot 300 for the period of May 1997 through July 2003, nor did it prove irrigation under water right certificate 56024 of 0.6 acre on Tax Lot 300 for the period of May 1997 through October 2003.

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

Protestant Nebmaier next contends that Proponents failed to meet their burden of proof

and establish nonuse. As indicated previously in this order, I found to the contrary.

**D. Certificate 39995 was exercised**

Protestant Nebmaier next contends that Mr. Groen used water from the stream for domestic purposes. As indicated previously in this order, I found to the contrary.

Protestant Nebmaier also contends that Mr. Groen used water from the stream to water the “garden area” around the cabin. However, Mr. Groen testified that he did not plant a garden or a lawn. In addition, to maintain a water right for domestic use of one family that includes irrigation of lawn and garden, there must be domestic use inside the house and irrigation of lawn and garden outside the house. If there is no domestic use inside the home, the water right is forfeited. In other words, the water right holder cannot maintain a water right for domestic use that includes irrigation of lawn and garden if the water right holder only waters around the outside of the home. Because Mr. Groen did not make use of water inside the cabin for human consumption or domestic purposes, the entire water right is forfeited.

Protestant Nebmaier next contends that there was no convincing evidence that Nick White, Cindy, Chuck, and Anita did not use water from the stream on Tax Lot 300. Protestant Nebmaier is incorrect. Ms. Gilstrap credibly testified regarding her knowledge of the above-named individuals and their lack of water use on Tax Lot 300. In addition, Protestants did not present any evidence to the contrary. Thus, the argument is unpersuasive.

**E. Certificate 56024 was exercised**

Protestant Nebmaier next contends that Mr. Groen irrigated the pasture. As indicated previously in this order, I found to the contrary.

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

Protestant Nebmaier next contends that there was beneficial use. As indicated previously in this order, I found to the contrary.

**F. Means were in place to exercise certificate 56024**

Protestant Nebmaier next contends that there were hoses, ditches and turnouts in place to exercise certificate 56024. Protestant Nebmaier is correct. However, as indicated previously in this order, I found that Mr. Groen did not irrigate the entire 0.6 acre for beneficial use for the period of May 1997 through October 2003.

**G. Means were in place to exercise certificate 39995**

Protestant Nebmaier next contends that there were means in place to exercise certificate 39995. As indicated previously in this order, I found to the contrary.

## **H. Certificate 39995 was exercised by Mr. Smith and Ms. Gilstrap**

Protestant Nebmaier next contends that while exercising their domestic use under certificate 56024, Mr. Smith and Ms. Gilstrap were also exercising the domestic use under certificate 39995. Protestant Nebmaier is incorrect. The domestic use under certificate 56024 that is located on Tax Lot 200 does not satisfy the domestic use under certificate 39995 that is located on Tax Lot 300. In addition, there was no evidence presented that either Mr. Smith or Ms. Gilstrap used water on Tax Lot 300 to satisfy the domestic use under certificate 39995. As such, the argument is unpersuasive.

## **I. Proponents' motives**

Protestant Nebmaier next contends that Proponents' motivation in bringing the action is to thwart him and his wife from taking root in their new home. As set forth previously in this order, I have already addressed the credibility of the witnesses whose testimony I have relied upon in making my decision.

## **J. Badgering and Flak**

Protestant Nebmaier next contends that he and Ms. Ma were badgered by Ms. Howard's objections in the hearing. Protestant Nebmaier's contention is not a proper closing argument for consideration and will not be addressed.

## **K. Conclusion**

Protestant Nebmaier next contends that the proper question is whether the record demonstrates nonuse for five successive years by a preponderance of the evidence, not whether Protestants have established use. I agree with Protestant Nebmaier, and have so found.

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

### **A. Internal logic and consistency - evaluating the action, motives and testimony of Protestants**

Protestant Ma contends that it does not make sense that she and her husband (as new people moving on a property) would deliberately stir up trouble with the neighbors. As set forth previously in this order, I have already addressed the credibility of the witnesses whose testimony I have relied upon in making my decision.

### **B. Evaluating the Proponents' motives and internal consistencies**

Protestant Ma next contends that the Proponents had something to lose, their use of Tax Lot 300 for recreation and enjoyment, when she and her husband purchased the property. As set forth previously in this order, I have already addressed the credibility of the witnesses whose testimony I have relied upon in making my decision.

### **C. Easement issue and motive**

Protestant Ma next contends that the Sessler's did not want anyone living on Tax Lot 300. As set forth previously in this order, I have already addressed the credibility of the witnesses whose testimony I have relied upon in making my decision.

### **D. Did the Groens exercise their water rights**

Protestant Ma next contends that the Groens exercised their water rights. As set forth previously in this order, I have found to the contrary.

### **E. 1998 vs. 1999**

Protestant Ma next contends that the Groen's are credible regarding when they visited Tax Lot 300 because of their date books and calendars. I agree with Protestant Ma, and have relied heavily upon Mr. Groen's testimony in the findings of fact.

### **F. Ready, willing and able – cabin plumbing system intact**

Protestant Ma next contends that the cabin plumbing was intact and ready, willing and able. As set forth previously in this order, I have found to the contrary.

### **G. Ready, willing and able – irrigation system intact**

Protestant Ma next contends that the irrigation system for the 0.6 acre was intact and ready, willing and able. Protestant Ma is correct. However, as set forth previously in this order, I found that Mr. Groen did not irrigate the entire 0.6 acre for beneficial use for the period of May 1997 through October 2003.

### **H. Beneficial use**

Protestant Ma next contends that there was beneficial use on the pasture of Tax Lot 300. As set forth previously in this order, I have found to the contrary.

### **I. Credibility**

Protestant Ma next contends that Proponents and their witnesses are not credible. As set forth previously in this order, I have already addressed the credibility of the witnesses whose testimony I have relied upon in making my decision.

### **J. Water as a weapon**

Protestant Ma next contends that Proponents are using water as a weapon to drive out or harass her and Protestant Nebmaier. As set forth previously in this order, I have already addressed the credibility of the witnesses whose testimony I have relied upon in making my

decision.

**K. Water is a source of life**

Protestant Ma next contends that water is a source of life and the decisions made in this case have an impact that reverberates on a larger scale. Protestant Ma's contention is not a proper closing argument for consideration.

**L. Water itself**

Protestant Ma next contends that whatever the outcome, water endures. Protestant Ma's contention is not a proper closing argument for consideration.

**M. Conclusion**

Protestant Ma finally contends that the proper question is whether the record demonstrates nonuse for five successive years by a preponderance of the evidence, not whether Protestants have established use. I agree with Protestant Ma, and have so found.

**IV. Proponent's arguments**

Since I have determined that Proponent's met their burden of proof, there is no need to address Proponent's arguments.

**ORDER**

I propose that OWRD issue the following order:

1. The water right evidenced by certificate 39995 has been forfeited by failure to make beneficial use of the water for domestic purposes, including the irrigation of lawn and garden, for a period of six years and two months from May 1997 through July 2003.
2. A portion of the water right evidenced by certificate 56024 has been forfeited by failure to make beneficial use of the water for irrigation purposes for a period of six years and five months from May 1997 through October 2003.

**Dove L. Gutman**  
\_\_\_\_\_  
Administrative Law Judge  
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: November 19, 2007

## 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  
C/o Juno Pandian  
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.

**APPENDIX A  
LIST OF EXHIBITS CITED**

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