



Oregon

Theodore R. Kulongoski, Governor

Water Resources Department

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December 28, 2007

Dove Gutman
Administrative Law Judge
Office of Administrative Hearings
P.O. Box 14020
Salem, OR 97309-4020

RE: Wolfgang Nebmaier and Vajra Ma's Exceptions to the Proposed Order PC 06-06.1

Dear Judge Gutman:

Pursuant to OAR 137-003-0650(3), the Water Resources Department is requesting that you, as the presiding Administrative Law Judge in the above-mentioned case, review the written exceptions received by the Department and provide a draft Revised Proposed Order responding to the exceptions which will be made a part of the record in this matter. The captioning should read Revised Proposed Order Addressing Exceptions Filed by Wolfgang Nebmaier and Vajra Ma PC 06-06.1

A copy of the exceptions is enclosed for your information. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Ms. Juno Pandian
Agency Representative

cc (without enclosures): Wolfgang Nebmaier
Vajra Ma
Elizabeth Howard

FAX COVER PAGE

50 pages - Exceptions Document
For PC 06.06.1
from WOLFGANG NEBENK
and
541-957-4151
VATRA MA 541-272-6310

Att: Phil Ward
and
cc: June Penlain

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BEFORE THE OREGON WATER RESOURCES DEPARTMENT

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IN THE MATTER OF THE PROPOSED)
CANCELLATION OF THE WATER RIGHTS)
EVIDENCED BY CERTIFICATE 39995 FOR)
USE OF WATER FROM AN UNNAMED)
STREAM, A TRIBUTARY OF GRAVE CREEK,)
FOR DOMESTIC USE OF ONE FAMILY,)
INCLUDING THE IRRIGATION OF LAWN)
AND GARDEN NOT TO EXCEED 1/2 ACRE IN)
AREA, JOSEPHINE COUNTY, OREGON.)

**WOLFGANG NEBMAIER
AND VAJRA MA'S**

**EXCEPTIONS TO THE PROPOSED ORDER
BY ALJ D. GUTMAN**

AND)

IN THE CONTESTED CASE

IN THE MATTER OF THE PROPOSED)
PARTIAL CANCELLATION OF THE WATER)
RIGHTS EVIDENCED BY CERTIFICATE 56024)
FOR USE OF WATER FROM AN UNNAMED)
STREAM, A TRIBUTARY OF GRAVE CREEK,)
FOR DOMESTIC USE OF ONE FAMILY, AND)
IRRIGATION OF 0.7 ACRE, JOSEPHINE)
COUNTY, OREGON.)

PC 06-06.1

There is clear and convincing evidence, one may even say it is beyond a reasonable doubt, that the preponderance of evidence standard has not been met by the proponents in this case. Therefore, the Director is hereby requested to reverse the above Proposed Order, OAH case No.: WR 06-004, OWRD Case No.: PC 06-06.1, for the reasons first outlined and thereafter detailed below.

We refer the Director to

In the Matter of the Cancellation of a Water Right in the Name of John N. McCauley for Use of Water from Ladd Creek; Vol. 39 p 113 (1985)

where a Proposed Order was reversed for that very reason. On page p 117 it states:

The conflicts between testimony of proponents and testimony of protestants demand a careful analysis of the assertions made. and on p 118:

The burden of proof is upon the Water Resources Director and the proponents of cancellation to establish that five or more years of nonuse of water under the provisions of the water right in question did in fact take place. Therefore, when the record does not clearly establish the facts as to the occurrence of a period of five or more successive years of nonuse, any doubt should be resolved in favor of the protestants (emphases added).

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3 We ask the Director's forbearance with the extent and scope of these exceptions.
4 We have tried to structure them clearly and attempted to omit any unnecessary detail. The
5 problem, however, with the Proposed Order at hand is that it is, with all due respect,
6 riddled with errors, at times several layers of them in a single sentence, statement, or
7 conclusion. In general, we have tried to show

- 8 ✓ what the Administrative Law Judge Dove L. Gutman claims,
- 9 ✓ what we find to be in error about it, and
- 10 ✓ the evidence from the whole record which substantiates our exceptions.

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11 For easier reference of the errors in detail, we have attached an informational line-
12 numbered copy of the Proposed Order and we will refer to text as {page/line}. The
13 hearing audio protocol is referenced in the form [mm/dd/yy/ - hh:mm:ss], as in [10/24/07
14 - 07:43:46]. Further, we provide the following Table of Contents.

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31
32
33 **Overview**

34 In viewing the Proposed Order at issue, we would like to direct the reader's
35 attention to the factors below which directly impact the ALJ's decision:

- 36 • Shifted Burden of Proof
- 37 • Factual Errors

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- Internal Inconsistencies
- Claiming to have addressed credibility but failing to do so
- Eliminating 4 out of 5 of proponents' witnesses without divulging the reasons.
- Failing to meet the Preponderance standard.

Preponderance of what the ALJ chooses to rely upon is no preponderance by any but her own standard. As such

- omissions and non-consideration - beyond weighting discretion - of admitted evidence and testimony by persons not "not relied upon" by the ALJ,
- eliminating 4 out of 5 of the proponents' witnesses and
- electing to rely on only a portion of the sole remaining witness testimony and only when corroborated.

fails to meet ORS 183.450(5), which reads:

*No sanction shall be imposed or order be issued except upon consideration of the **whole record** or such portions thereof as may be cited by any party, and as supported by, and in accordance with, reliable, probative and substantial evidence. (emphasis added)*

We also refer to *In the Matter of the Proposed Partial Cancellation of the Water Rights Evidenced by Certificates 57582 and 32933 for Use of Water from Chaney Creek for Irrigation of Lands in Josephine County*, where the Director noted that :

The Hearing Officer relied on the absence of evidence of use to tip the scale in favor of nonuse and forfeiture. An absence of evidence of use does not amount to a preponderance of evidence of non-use.

And further down we will individually and directly address the largely unsubstantiated presumptions by which the ALJ arrives at her Conclusions of Law concerning the two water rights at issue.

No Basis for Conclusion of Law

But first, the question must be asked that, if the ALJ's Conclusion of Law is based on her Finding of about 20 testimonial/evidentiary Facts (#16 through #35, pages 8 through 10), how that Conclusion of Law must change when

- at least four (4) contain indisputable factual errors (#17, #18, #30, and #31),
- five (5) critical findings turn out to be non corroborated? (#19 - #23 and # 29, i.e. based solely on Ms Gilstrap's testimony),
- and when there are at least eight (8) occurrences of blatantly shifting the burden of proof, i.e. corroboration by lack of contrary evidence:

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- 3 #18 on {08/09} "Groen has no knowledge";
- 4 # 25 on {09/06} "did not see anyone";
- 5 {12/34} "consequently";
- 6 {18/23} "Proponents did not testify";
- 7 {17/31} "did not prove " ;
- 8 {17/06} "not see anyone residing";
- 9 {14/07} "there was no direct evidence";
- 10 {18/18} "not present any evidence to the contrary"?

11 We hold that, as we will show that the above is true to a disconcerting extent, the
12 Proposed Order must be wholly reversed by the Director.

13 Next, we must ask that, if the ALJ's Conclusion of Law contains any number of
14 indisputable

- 15 • errors against inherent probability, common logic, and general human experience
- 16 • factual errors and misrepresentations of fact and testimony,
- 17 • misconstrued and misrepresentations of statute and case law, partly by quoting out
18 of context and truncating text in a manner that distorts its intent,
- 19 • misrepresentations of evidence by quoting out of context and truncating testimony,
- 20 • factual errors in attributing testimony to the wrong source,
- 21 • errors in admittedly basing a decisive factor on no statute, no rule, nothing but
22 colloquial testimony and even confirming the lack of such legal basis in her own
23 footnote
- 24 • occurrences of failing to use only corroborated testimony of her sole witness on
25 proponents' side but failing to do so. Further, the so-called corroborative testimony
26 often fails by logical analysis to actually be corroborative.

27 how that Conclusion of Law must change. We hold once more that the Proposed Order
28 must be wholly reversed.

29 We will deal in detail with the issues of factual errors, uncorroborated testimony,
30 and credibility and motive toward the end of this document and focus first on the ALJ's
31 decision concerning the Domestic Water Right C. 39995.

32 ***The Domestic Water Right C. 39995***

33 If the Director will take an overall look at the ALJ's Opinion on C.39995, pages
34 11 to 13 of her Proposed Order, it will become evident that it has no convincing basis in
35 law or fact. Therefore the conclusion she makes is faulty and should be reversed. Her
36 entire argument first rests on a faulty definition of "human consumption" as having to be
37 inside a structure. Next, she hinges her argument on confining her considerations to a
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3 system that was no longer in use – the bent back pipes and/or broken pipe that was no
4 longer attached to the cabin – while omitting/ignoring the evidence regarding the
5 diversion system that indeed was used by Mr. Groen, a simple hose from the creek
6 capable of handling the entire rate and duty of the water right and “ready to go”
7 [10/25/06 – 04:07:05 to 4:09:32]. In fact, in # 27 at {09/15} the ALJ concedes that
8 Mr. Groen did irrigate around the cabin with a hose.

9 We will substantiate the above paragraph through our analysis and citations from
10 the record to follow below. We will also note several additional errors.

11 Thus, aside from the general considerations of Shifted Burden of Proof,
12 Uncorroborated Evidence, and Factual Errors, all more specifically dealt with later, we
13 will show that the ALJ’s arguments to shore up her Conclusion of Law concerning the
14 domestic water right C.39995 hinge on a number of further errors and fallacies. The most
15 important ones of these concern the issues of:

- 16 • “Inside a Structure”
- 17 • Ready, Willing, and Able
- 18 • 1998 v. 1999
- 19 • Nick White & Cindy Swan’s domestic use on TL300
- 20 • Gilstrap house partly on TL300

21
22 If any single one of these issue amount to a doubt, such “*doubt should be*
23 *resolved in favor of the protestants*” and the ALJ’s Proposed Order must be reversed.

24 **Inside a Structure**

25
26 Beginning at {11/32}, the ALJ develops her “inside the structure” issue. The
27 testimony alluded to as evidence is placed in the proximity of statute, but actually
28 consists of nothing but that of the Assistant Regional Director Bruce Sund’s testimony
29 the ALJ chooses to cite while omitting his extensive testimony to the contrary [10/25/06
30 – 04:00:35 through 04:08:07].

31 The ALJ herself disqualifies her “inside the structure” issue in her footnote on
32 page 12, implicitly stating that the OWRD has neither statute nor policy to define human
33 consumption as having to occur inside a house or structure.

34 *At some point in the future, the Department might want to clarify the definition of*
35 *domestic water use so that it is apparent what use is required inside the household*
36 *versus outside.*

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3 Household, however denotes the nature or purpose of the use, not the location.
4 Here we may point out that the particular form of how a water right holder's exercises
5 her/his domesticity (aka "household") is not within the department's purview. The
6 department issues water rights for domestic use within the bounds of a particular parcel
7 of land – appurtenancy –, not specifically within a residence or building and not requiring
8 modern plumbing. The presence of a functional system is sufficient for the "otherwise
9 ready, willing and able" standard.

10 The right does not require doors and it does not require running water to the cabin
11 or to any particular structure {09/10}. Neither doors nor a structure are necessary to
12 satisfy the requirement to **have** a diversion and delivery system that is **capable of**
13 **handling the full right**, and the requirement to be **ready, willing and able** to exercise the
14 right. The domestic use is for use "of one family", not for use in a specific structure.
15 Further, houses or other structures in or at which a right may be exercised for domestic
16 purposes may be destroyed, moved, reconstructed. Land cannot and does not move.
17 Consideration must be given to these differing factors in determining whether five years
18 of non-use of a domestic water right has been proven by a preponderance of evidence.

19 This explains why, according to Bruce Sund's testimony– and reiterated by the
20 ALJ herself in her re-calling him for clarification [03/14/07 04:15:53 through 04:16:22]
21 – diversion from the proper source (here the unnamed tributary to Shanks Creek) and
22 domestic use on the proper Tax Lot suffices for exercising a domestic water right.
23

24 **Memos and Notes**

25 Most importantly, however, the ALJ cites not a single statute or case to
26 substantiate her "inside a house" requirement. This is for the simple reason that no such
27 statute, regulation or case law exists. A closer look at the nature of Bruce Sund's
28 testimony reveals three things:

- 29
- 30 • He speaks predominantly about the distinction between household purposes and
31 irrigation of lawn and garden and was never asked explicitly if the term in-house
32 meant "inside a structure". This explains his colloquial use of the word in-house.
 - 33 • He also talks mostly in reference to the water right application and approval
34 procedures and not to the context of forfeiture and cancellation.
 - 35 • And Mr. Sund several times stated [10/25/07 - 3:58:09 et seq.] that the information
36 he provided was derived solely from inhouse notes and memos, not available to
37 the public, quite a number of them handwritten.

38 True, ignorance of the law does not save from consequences, but this refers to
39 laws and regulations available to the public. It cannot include information not available to

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3 someone like a property owner who goes to the local OWRD office asking for a copy of
4 her/his water rights certificate or an information leaflet. S/he has no way to conform to
5 unavailable information. Even the final proof accompanying the certificate does not
6 include any specifications documented in the course of the application process.

7 At {10/31 et seq.}, the ALJ – along with the proponents' attorney and the OWRD
8 in its Closing argument – cites ORS 540.610(1). But the ALJ fails to point us to the text
9 portion that defines domestic use as having to occur inside a structure.

10 *ORS 540.610(1) Beneficial use shall be the basis, the measure and the limit of all*
11 *rights to the use of water in this state. Whenever the owner of a perfected and*
12 *deve*loped water right ceases or fails to use all or part of the water appropriated for*
13 *a period of five successive years, the failure to use shall establish a rebuttable*
14 *presumption of forfeiture of all or part of the water right.*

15 At {11/31} and {11/32} the ALJ refers to OAR 690-300-0010(14) and (24), cited
16 below:

17 *(14) "Domestic Water Use" means the use of water for human consumption,*
18 *household purposes, domestic animal consumption that is ancillary to residential use*
19 *of the property or related accessory uses.*

20 *(24) "Human Consumption" means the use of water for the purposes of drinking,*
21 *cooking, and sanitation.*

22 Once more, the Fact Finder fails to refer us to the text portions that defines human
23 consumption as having to occur inside a structure or those defining domestic use as
24 confined to water diverted by a structure.

25 The reason for these failures is simple: These definitions do not exist.

26 If there is no published statute or regulation that makes the determination that one
27 must use a diversion system for human consumption and that it is limited to the inside of
28 a structure then how can a property owner be held to a standard that does not exist save
29 for internal notes and memos of the OWRD [10/25/06 - 03:53:28] and
30 [10/25/07 - 3:58:09].

31 If it is the intention of the Oregon Water Resources Department for no-statute and
32 non-case-lawed colloquialism to distinguish household purposes from domestic irrigation
33 of lawn and garden to supercede law and regulation, then it might seem appropriate to
34 impose a non-legislated and unprecedented "in-house" requirement onto unsuspecting
35 property owners. But then, what will end up being administered by the agency?

36 If, however, the Oregon Water Resources Department intends to administer and
37 manage the Water Resources of the State of Oregon on the basis of legality, it cannot and
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3 must not allow a wholly unsubstantiated and colloquially presumed requirement without
4 any basis in law or precedent to be elevated to legal significance.

5 **Ready, Willing and Able**

6 At {12/31-36} the ALJ's begins her paragraph with a vague "As such", claiming a
7 logical connection with the preceding text, and then progresses to "consequently" which
8 is assuming a legal requirements that doesn't exist. There is no requirement for a property
9 owner to check his system. And finally, it is illogical and bespeaks a grossly flawed
10 comprehension of the local situation at TL300, a 15 acre parcel in the mountains,
11 surrounded – aside from the proponents – by open land accessible to and by anyone, to
12 presume that a system checked one day cannot malfunction the next day, or week or
13 month, for any number of reasons. To equate Mr. Groen's not checking with a lack of
14 readiness is utter speculation. It would have been a waste of time, plain and simple. And
15 as we will point out later, Mr. Groen used an alternate system which was just as capable
16 of making use of the full rate and duty of 39995 [10/25/06 – 04:08:07] as the bent back
17 pipes which he chose not to connect up to the cabin plumbing.

18
19 We refer back to Mr. Sund's testimony [10/25/06 -- 4:07:05 to 4:08:47] where he
20 states that some people visit their property only for a short time of the year and keep a
21 pump and pipe in a cabin, then move it to the creek when they want to use it. This is
22 equivalent to the system Mr. Groen had "ready to go" to divert water at the cabin area at
23 TL300, except that Mr. Groen did not need a pump because the system was gravity fed
24 [Ex. R-89].

25 To summarize: Mr. Groen had a system. He used it for domestic irrigation around
26 the cabin {09/14}. It was sufficient for the full rate and duty of the certificate. But when
27 he camped on his property, it was his personal preference to use pots and pans to just dip
28 the water for washing and cooking. He had a diversion system. He chose not to use it for
29 cooking and cleaning but he was *otherwise ready willing and able* to use the system for
30 cooking and cleaning. He simply chose not to.

31 It bears noting here that, at {09/01}, the ALJ mischaracterizes Mr. Groen's
32 testimony, claiming he got all his domestic/human consumption water from the spring.
33 We refer the Director to [10/26/06 -- 02:13:52], where he stated clearly that he only went
34 to the spring for drinking water and took water out of the creek right by where he was
35 camping for cooking and cleaning.

36 Coming back to "Ready, Willing, and Able": Beginning on {10/28} the ALJ cites
37 ORS 540.610.
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3 Despite its fundamental ambivalences, the statute is very clear in what it does not
4 say:

5 *ORS 540.610 (3)*

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

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

9 (emphases added)

10 The content explicitly absent here is "uses the facility to" make whatever use s/he does
11 make. It only speaks of having the facility and being ready, willing and able.

12 **1998 v. 1999**

13
14 At {20/08 et seq.}, the ALJ dismisses the entire issue of credibility around Nick
15 White and Cindy Swan's departure from TL300. Here, the ALJ's dealing with our
16 arguments presents a vivid example of blatant distortion.

17 To set this issue in the proper context: please refer to Appendix A – Excerpt from
18 Wolfgang Nebmaier's Closing Argument, which the ALJ absolutely ignores in her
19 deliberation.

20 The ALJ tries to dispose of really addressing a full page of argument and factual
21 deliberation in Vajra Ma's Closing Argument, from the bottom of page 4 to the bottom of
22 page 5. under the heading 1998 vs 1999, by paraphrasing a single circumstance out of
23 context and answering it with a non-specific reference to general credibility, which she
24 does not even adhere to with any noticeable consistency.

25 In a matter hinging on time, dates are of critical importance. *Ladd Creek* reminds us on
26 page p 117 how "*The conflicts between testimony of proponents and testimony of*
27 *protestants demand a careful analysis of the assertions made.* Then how much more
28 must this admonition apply in a case with consistent *conflicts between testimony of*
29 *proponents among themselves and each other*, in a case where the only reliable source
30 of time and dates is the Groen's date books while proponents only consistency is a tale of
31 lost and found years.

32 This issue of 1998 v 1999 is closely linked to how the ALJ chose to "not rely
33 upon" the Sessler's testimony. However, while she might want to disregard them in her
34 deliberations, she cannot remove them from the record. Neither can our evidence
35 disproving the Sessler's contention as to the July 1998 date, be removed.

36 There is a whole construct of non-credible and/or non-corroborated claims into
37 which Ms. Gilstrap's testimony as to Nick and Cindy's departure links:
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3 • All three (RS, MS, and Ms. Gilstrap) synchronously changed their move-on date from
4 1996 to 1995.

5 While the ALJ dismisses Ms. Gilstrap's error as a "simple mistake" {16/28}, can she
6 make light of three concurrent "simple mistakes"?

- 7 • Robert Sessler [3/13/07 1.01.10] claims Nick and Cindy left in late spring of '98, to
8 the "best of my recollection".

9 These and other *conflicts between testimony of proponents among themselves and each*
10 *other* about July 1998 in general and Nick and Cindy's departure date in particular
11 cannot stand up faced with "direct evidence". This direct, and in part tangible evidence
12 includes but is not limited to:

- 13 □ Richard and Kathryn Groen's testimonies [12/21/06 00:03:28] along with
14 their date books (re-numbered Exhibits T283 to T285), placing their visit in
15 the summer of 1999.
16 □ Kathryn Groens' testimony explaining why 1998 was impossible (son's
17 wedding 08/12/98) [12/21/06 -- 00:03:53]
18 □ The Groens' firming intention to sell TL300 (exh. A8, pg 3, toward bottom)
19 was clearly more associated with their son's death in February 1999
20 [12/21/06 - 00.47.40]
21 (N.B.: Mr. Sessler's affidavit is still part of the record.)
22 □ Insurance papers (ex. R61A and B) addressed to Nick White and dated April
23 1999 concerning an accident Mr. White was involved in the neighborhood of
24 TL300 (while he had left the area?).
25
26

27 Yet in #20 {08/19} the ALJ finds, based on Ms. Gilstrap's testimony alone and
28 disregarding all the above that "Mr. White and Cindy were no longer residing on the
29 property by end of summer 1998." This is a crucial piece of evidence to keep proponents'
30 allegation of five years of non-use from crumbling.

31 How can Ms. Gilstrap's testimony alone constitute a preponderance of evidence?

32 But then, even if that departure date had been in the summer of 1998 (according
33 to [12/20/06 - 04:17:25]), do Nick and Cindy have to have had their primary residence at
34 TL300 to have been there and used the water?
35

36 **Nick White and Cindy Swan's Domestic Use on TL300**

37 Going back to the ALJ's Finding of Fact #20 at {08/14}. Even if one found Ms.
38 Gilstrap's uncorroborated testimony at [12/20/06 04:23:25] credible, about Cindy
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3 hauling water up the hill in 6 to 8 milk jugs, that denies with not a single word that Nick
4 and Cindy's domestic use actually took place on TL300, since "up the hill" from Ms.
5 Gilstrap's house indeed is TL300, and the A-frame especially was nowhere but on
6 TL300. And TL300 is the correct place of use for C.39995.

7 At [3/14/07 - 04.15.50 to 04:16:23], the Department's Bruce Sund testifies that if
8 someone uses the correct source of water and the domestic use takes place on the lands
9 filed for and final proofed in the water right at issue, then the domestic use requirement
10 for that water right has been satisfied.

11 If Nick and Cindy happened to prefer to take a hot shower once a week, that does
12 in no way preclude their washing themselves, their clothes, and their dishes on TL300 at
13 other times with water diverted otherwise. In fact, inherent probability, common logic,
14 and general human experience would strongly suggest that they did.

15 Even Ms. Gilstrap herself does not claim to know that they didn't but only
16 testifies [12/20/06 - 04:24:37] that she does not know if they ever obtained water from
17 the spring box and reiterates that they did not tell her that they did not obtain water from
18 the spring box.

19 Clearly, Ms. Gilstrap did not know, could not know with certainty that Nick
20 White and Cindy Swan did not take water from TL 300. And clearly, whatever water they
21 received, be it from Ms. Gilstrap's house or from the creek or directly from the spring
22 box, was water from the correct source. And they made domestic use of it on TL300.

23 How can the ALJ turn that into direct evidence for the presumed fact that Nick
24 White and Cindy Swan did not take water from TL 300 {08/17} while omitting
25 contradictory testimony by Wolfgang Nebmaier [3/16/07 - 02:11:22] about the white pvc
26 pipe behind the A-frame as well as by Mr. Sund [10/25/06 - 04.19.20] that there were
27 pipes going to different structures out there at the time, and [10/25/06 - 04.19.55] that
28 there was an old poly pipe that was attached to a sink in the A-frame?

29 And, if the ALJ's conclusion in this issue is wrong, what must be the consequence
30 for her preponderance?
31

32 **The Gilstrap Residence on TL300**

33 This is an instance {19/01}, where even the premise of how the ALJ seems to
34 understand the detailed expose in Wolfgang Nebmaier's Closing Arguments (beginning
35 at pg 17, ln 15) is distorted. We would like to refer the Director back to Wolfgang
36 Nebmaier's Closing. She claims Mr. Nebmaier had been contending that anyone could
37 exercise C. 39995 (appurtenant to TL300) while exercising the domestic portion of
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3 C. 56024 (appurtenant to TL200). No logical contortions could lead anyone to such a
4 conclusion. After all these months, we have learned enough to know that the domestic
5 use under C.56024 can only occur on TL200. To contend anything else would indeed be
6 a moot point.

7 The issue is actually much simpler:

8 Does domestic use on TL300 of water diverted from the source specified in the
9 water right C.39995 constitute exercising that water right? Again as Mr. Sund testifies
10 [3/14/07 – 04:15:50 to 04:16:23], the answer must be “Yes!”

11 The underlying facts are:

- 12
- 13 • C.39995 is appurtenant to TL300
 - 14 • C.39995 specifies the unnamed stream, tributary to Shanks Creek as source
 - 15 • Part of the Gilstrap residence and much of their back yard are on TL300
 - 16 • The water used for domestic purposes in that TL300 part of the Gilstrap
17 residence comes from the unnamed stream, tributary to Shanks Creek,
18 specified as source for C.39995.

19 Incidentally, at [12/21/06 2.10.00], the ALJ herself illuminates the situation quite clearly
20 and at [12/21/06 2.10.35] asks the pertinent question.

21 The long and confusing exchanges referenced in Appendix A (pages 24 et seq.) of
22 Mr. Nebmaier’s Closing seem to show one common denominator: whenever Wolfgang
23 Nebmaier attempts to raise the question, the ALJ objects and/or leads the line of
24 questioning or conversation elsewhere. See: [10/25/06 – 04:34:43], [3/14/07 – 04:49:17],
25 [3/14/07 – 01:57:00], and [3/14/07 – 04:47:35].

26
27 If Ms. Gilstrap can exercise the TL200 appurtenant water right (C.56024) while
28 on TL 300, then why can Nick and Cindy not exercise the TL 300 appurtenant water right
29 (C.39995) while on TL 200? According to Ms. Gilstrap, they showered in Mr. Gilstrap’s
30 home and drew water to fill their milk jugs with drinking water and take it back “up the
31 hill” to the A-frame on TL300.

32 We have two people who lived on TL 300 who went to a house that is half on TL
33 300 and half on TL 200 and showered and drew drinking water to take back to their
34 house on TL 300. The human consumption of the drinking water took place in the house
35 on TL 300.

36 Does the Department intend to have the entire appurtenancy factor of a water
37 right dismantled into irrelevance and render half of what defines a domestic water right as
38 inconsequential?
39

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3 By letting the ALJ take this issue "off the table" [3/14/07 – 01:57:00] the
4 Department is establishing a precedence that a person can exercise the water right of a
5 different Tax Lot than the one they are on.

6
7 ***Irrigation Water Right C.56024***

8 The ALJ's decision and opinion rest on her findings

- 9
10
11
- that Mr. Groen – not anyone else – irrigated the pasture on TL300
 - that the irrigation may not have covered the entire .6 acres
 - that there was no beneficial use

12 If, as we will demonstrate below, none of these findings are supported by a
13 preponderance of evidence, any doubt should be resolved in favor of the protestants.

14 ***Irrigation***

15
16 ***Did he or did he not?***

17 At {18/20-21} the ALJ explains:

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

20 The problem with this clear statement ("*I found to the contrary*") is that it is factually
21 wrong. She does not say Mr. Groen did not irrigate the field on TL300 but in her Finding
22 #24 {08/35} states that

23 *Mr. Groen used water from the spring to irrigate*

24 at {13/42} explains that

25 *For the portion that Mr. Groen did irrigate, the question becomes whether the water*
26 *was put to beneficial use. (emphasis added)*

27 and, beginning on {13/35} the ALJ herself recounts how the credible witness Richard
28 Groen told of how he had irrigated. But then ALJ concludes that Mr. Groen, because he
29 "did not present evidence" {13/37} and because he "did not present evidence" {13/38}
30 (incidentally, 2 x shifting the burden of proof) may not have irrigated the entire 0.6 acres.

31
32 The ALJ's conclusion, however, contradicts Bruce Sund, whose testimony she
33 likes to rely on elsewhere. When asked by the OWRD's Juno Pandian, at [12/19/06
34 2.29.59] if Mr. Groen could have irrigated a portion of the .6 acre every year and at the
35 end of the five years he could have irrigated the entire .6 of an acre, if that would have
36 sufficed to maintain his water right. Bruce Sund answered in the affirmative [12/19/06
37 02:30:20].

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At {14/20}, the ALJ's statement:

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.

likely refers to the case *In the Matter of the 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.*

However, the comparison to *Childrey* breaks down on several points because there are a number of substantial differences between the above case and the matter at hand:

Childrey's area of irrigation, aside from being slightly larger, had a significantly different vegetation: "*Ponderosa pine and sparse natural grass*" (*id*). "Sparse grass" indicates that the ground was largely bare soil, a condition to be expected, by the way, under pine trees. Sparse grass and bare soil would require more irrigation than *Childrey* had given it in order "*that the quantity applied would, in fact, be sufficient to do some good and make a noticeable difference.*" (*id*)

The grass on the TL 300 pasture, a facultative wetland meadow (Scot Loring testimony [3/13/07 2.47.00 et seq]), on the other hand is not sparse, the water is not 'lost' on bare soil. And as Bruce Sund testified, pasture grass never goes dormant [12/19/06 2.15.55] and that if grass starts to grow again after an application of water, there's some benefit to applying water to that property [12/19/06 2.16.40].

Secondly, Mr. *Childrey's* four waterings with a sprinkler over 3 years is not comparable to Mr. *Groen's* irrigating 12 to 18 times in 5-6 years using both turnouts and a pipe. Contrary to the ALJ's presumption {14/20}, the record, i.e. Dick *Groen's* testimony, establishes no such thing as the claimed "token" application of only two hours. He never said that when he was camping overnight or visiting for several days in a row and flood-irrigated the pasture that he removed the hose overnight to only re-activate it the next day. That's not how flood irrigation works. Once you have a flow established you keep it running so that it spreads rather than to repeatedly irrigating the same spot.

So we are looking at a lot more than mere 3-4 hours but at perhaps 14 to 28 hours at each of the visits where he camped overnight or came to TL300 once to return the next day or the day after.

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WATER RESOURCES DEPT
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As referenced above, Finding # 29 is also uncorroborated and it is used by the ALJ for a set of crucial presumptions about the beneficial use of the pasture,

- that Ms. Gilstrap did not intentionally graze or pasture her horses on Tax Lot 300, a crucial point greatly determining the ALJ's decision that beneficial use was not made of the pasture. This is solely based on Ms. Gilstrap's testimony, and
- that Ms. Gilstrap did not have an agreement with the Groens to do so.

But not only are these claims uncorroborated, they may, in fact, not even matter.

Whose intention is it anyway

There is not a single statute or regulation and probably not even a single OWRD-internal memo page stating that intentional grazing by others than a property owner can only take place based on an agreement. So, Ms. Gilstrap's uncorroborated testimony to that effect may indeed turn out to be of no significance.

Her claiming to not have had an agreement with Dick Groen to pasture her horses on TL300 only means that she did not have an agreement with Dick Groen to pasture her horses on TL300. It says nothing about if her horses did graze on TL300 and whether or not this happened with her intention. Nor does it address the fact that Ms. Gilstrap had no direct contact with Mr. Groen and thus her agreement would have been with Wade Anders who was the one who got permission from Mr. Groen for the pasturing of someone else's horses on TL 300 [10-26-06--0:40:20] and [10/26/06--0:42:09]. Ms. Gilstrap further testified that she and Wade were good friends and co-workers, and that she thought Wade Anders owned the property. [12/20/06 4:08:29].

Mr. Groen was on his property only a few days a year. That leaves hundreds of days when the horses could have been there. Thus, his not seeing horses there becomes fairly arbitrary. The 58 manure piles Ms. Ma testified to counting on the pasture and the 125 piles she observed on the remainder of TL 300 [3/15/07#2---2.57.50] are evidence, simply not direct evidence.

The judge affirms that Ms. Gilstrap's horses were on the pasture. The question of Ms. Gilstrap's intentionality throws back to Ms. Gilstrap's reliability and credibility. Mr. Groen presented testimony that he irrigated intentionally for the horses that he had given permission to graze. [10/26/06 0:40:20 to 0:43:40 and 0:45:15--0:45:52]

But perhaps the issue is not Ms. Gilstrap's intention to begin with. What matters is Mr. Groen's - and the horses' - intention, and neither is in dispute.

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At {17/30}, plain and simple before our eyes, we read a statement that seems to set the ground rules by which the ALJ seems bound on shifting the burden of proof:

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.

This amount to stated intention of shifting the burden of proof and is in stark and nearly defiant disregard of the generally accepted:

In the Matter of the Proposed Partial Cancellation of the Water Rights Evidenced by Certificates 57582 and 32933 for Use of Water from Chaney Creek for Irrigation of Lands in Josephine County, Case No. PC 00-01, Ref. No. 02099,

where the Director of the OWRD reversed the fact finders order for several reasons, one of them being:

Disregarding the judicially noticed calendula evidence, as well as the administratively noticed land value evidence and the inferences drawn therefrom, we are left with a record that fails to prove nonuse by a preponderance of evidence. Even with these facts the record would be inadequate, for the proper question is not whether the Protestants have established use, but whether the record demonstrates non-use for five successive years by a preponderance of the evidence. The Hearing Officer relied on the absence of evidence of use to tip the scale in favor of nonuse and forfeiture. An absence of evidence of use does not amount to a preponderance of evidence of non-use. (Emphases added.)

In view of the fact that, as we will show, the ALJ indeed proceeds to prove herself true to her stated intention of shifting the burden of proof, the conclusions drawn on that basis cannot hold up as basis for a Final Order.

Some Specific Untenable Arguments

At {08/09}, we have one of many incidents of the ALJ shifting the burden of proof, some more subtle, some rather blatant. By citing that "Groen has no knowledge" – i.e. a lack of evidence – the ALJ tries to prove Ms. Gilstrap's claim that she did not pasture her horses on TL300. Not only does the ALJ thus try to shift the burden of proof, but she also misrepresents Mr. Groen's observations. How can these observations during the short time he visited corroborate claims as to what was supposed to not have been happening for the remaining 300 and some days a year?

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3 The same error in assignment of significance occurs one page down {09/06}.
4 Because Mr. Groen "did not see anyone " during the short time he spent at TL300, the
5 ALJ comes to the conclusion that, during the time of the alleged non-use, there was no
6 one ever living, staying, residing, squatting, or even just hanging out there, not even the
7 squatters Proponents chased away. And yet, in her fact-finding #21 {08/20}, the ALJ
8 states that Nick White and Cindy and another couple, Anita and Chuck did indeed live on
9 the property during the time frame of the alleged non-use.

10
11 On another note, while quoting *Tew v. DMV*, 179 Or App 443 (2002), the ALJ
12 neglects to meet all but one of its tenets, that of the corroborated evidence, and even at
13 that she fails (see list above). The factors of

- 14 a) inherent probability of the evidence,
15 b) internal inconsistencies,
16 c) whether human experience demonstrates that the evidence is logically
17 incredible

18 are not met whatsoever:

- 19 • How inherently probable is it that horses wander onto a pasture only to defecate, i.e.
20 not pasture while leaving 183 piles [3/15/07#2 - 2.57.50]?
21 • Does human experience demonstrates that the *lack of* observations on a few days of
22 the year {09/06}, {16/32}, {17/07}, and {17/11} allows conclusions about the
23 remaining months and weeks?
24 • As to "is it logically credible", there is a good example at {14/06-16}.

25 Because

- 26
27 Mr. Groen never saw any horses on his property (during the few days he was
28 present), and because.
29 Vajra Ma observed piles of horse manure on the property in 2003 (see elsewhere
30 as to the ALJ's error in the year {09/26-28} vs [Vajra Ma test. 03/15/07#2 -
31 02:50:33]) and [3/15/07#1 00.18.55], and because
32 the horse manure Vajra Ma observed on Tax Lot 300, more likely than not, came
33 from Ms. Gilstrap's horses, and because
34 Ms. Gilstrap said (uncorroborated in #29 at {09/21}) that her horses would
35 periodically escape and go onto Tax Lot 300 during that time frame, but that did
36 she not intentionally graze or pasture her horses on Mr. Groen's land.
37
38
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3 there is a “preponderance of the evidence that there were no horses pastured on
4 Tax Lot 300 during the period of May 1997 through October 2003. and that {14/14}?

5 *Consequently, Mr. Groen's application of water on the lower field of Tax Lot 300 for*
6 *horses that were not pastured there was not for a beneficial purpose.*

7 So we are left with the question what to call Mr. Groen's watering to promote the
8 growth of grass for horses that ate, and left a significant amount of manure, but did not
9 “pasture”?

10 And, what “evidence” of no horses pasturing is it if Mr. Groen for the limited
11 time he was on TL300 did not see them? Can this truly be construed to be evidence for no
12 horse having grazed any of remaining days of the year?

13
14 (18/22-24) Here, the ALJ contends that my argument – that Proponents Sessler
15 may have irrigated the pasture by irrigating their field (see pages 14 and 15 of my
16 Closing Arguments) is pure speculation.

- 17 • Firstly, to cite a generic “The Proponents” whose testimony the ALJ claims not to
18 rely {16/17}, {16/21}, {16/23}, and {16/28} is internally inconsistent.
- 19 • Secondly, to claim that {18/24}

20 *The Proponents did not testify that they irrigated the pasture on Tax Lot 300*
21 *contradicts the record at [10/26/06 2:30:09], where Michele Sessler says:*

22 *“I could be outside watering up in my field...”,*

23 a field, incidentally, which, until 2004 had no clear boundary between TL300 and
24 TL400, a field on whose TL300 portion her children played and her friends quad-
25 tripped. The ALJ could only prevail in disposing of this issue if Michele Sessler's
26 testimony were not only not relied upon by herself but also stricken from the record –
27 along with her affidavits.

28 For more on my whole expose on this issue, please turn to pages 14 and 15 of my
29 Closing Arguments.

- 30 • And lastly, what basis is the reliance on non-testimony of not-relied upon witnesses
31 for calling someone else's argument “pure speculation” {18/23}?

32
33
34 **More Shifted Burden of Proof**

35 Further instances of a shifted burden of proof are found at {17/31} - “did not
36 prove”, {17/06} - “not see anyone residing”, {14/07} - “there was no direct evidence”,
37 and {18/18} - “not present any evidence to the contrary”.

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As to “no direct evidence presented that horses were actually pastured on the land” {14/07}. Just as the sight of a wrecked car at the side of the freeway would make it seem “more likely than not” that the vehicle was involved in an accident some time before that, the sight of old horse manure in a particular location, would allow the presumption that it is more likely than not that some time before that

Rather than to weigh in positive evidence as the promised corroboration for Ms. Gilstrap’s testimony, the ALJ attempts to use a lack of evidence to the contrary. A preponderance of “no evidence” is not a preponderance of evidence. In other words, a lack of evidence does not equal evidence. See also *In the Matter of the Proposed Partial Cancellation of the Water Rights Evidenced by Certificates 57582 and 32933 for Use of Water from Chaney Creek for Irrigation of Lands in Josephine County, Case No. PC 00-01, Ref. No. 02099*, cited above.

To shift the burden of proof back to the proper side, the proponents’ side, we must ask what direct evidence Ms. Gilstrap presented (Findings #20 and #21) that for the hundreds of days and thousands of hours that she did not observe TL300 during the time of the alleged non-use [12/20/06 04:58:56 to 04:59:04], no one lived there, no one visited there, and no one squatted there who could have made domestic use of the water?

Factual Errors

On {08/04 through 09} (#17) and (#18), the ALJ errs in the facts cited:

Mr. Groen did not put in a hot water heater. The shower set up he installed was OUTSIDE between some trees, but the hot water had to be filled in manually. Perhaps that unclear perception of what is inside and what is outside a structure can be applied as an additional frame of reference for her insistence that human consumption take place inside a structure – see further down. On {08/07}, the ALJ claims that the Groen’s had “moved to Santa Cruz, California “ and references Mr. Groen’s testimony and R89, an affidavit. But neither did Mr. Groen testify to that effect nor did the affidavit contain any more than the Groens’ address in Santa Cruz. The fact is that the Groens always HAD LIVED in Santa Cruz. In addition, the exhibit R89 cited here, not only says nothing about moving to SC, it even explicitly states on page 2, prgph 2 “since we did not live there” (in Sunny Valley).

And finally, at {09/09}, the Groens did not give Mr. Anders permission to pasture per se, but gave Wade Anders permission to allow someone “down the hill” to pasture her horses [10/26/06—0:40:28 to 0:43:40]. This distinction matters because considering that there was only one person “down the hill” with horses (Ms. Gilstrap) who,

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3 incidentally believed that Mr. Anders owned TL300 [12/20/06--4:08:29] and thus,
4 logically, would ask Mr. Anders for permission (who then turned to Mr. Groen in the
5 phone call testified about).

6
7 To # 30 {09/24}

8 Here, the ALJ errs in claiming that the Groens had sold Tax Lot 300 to Mr.
9 Nebmaier and Vajra Ma.

10 This claim is contrary to Mr. Groen's testimony, it is contrary to Vajra Ma's
11 testimony [3/15/07 00.15.18] where she states unequivocally that she is not the owner of
12 TL 300 but that her husband is and that she lives there; and it is contrary to any
13 ownership document the ALJ could cite. But, most startlingly, it is also contrary to the
14 ALJ's own knowledge that Vajra Ma, because she was not owner of the lands in
15 question, had to petition for party status {01/42}.

16
17 To # 31 {09/26 et seq.}

18 Not only does the ALJ err by implicitly dating Vajra Ma's and my own
19 observations as having taken place in June of 2005, while in reality it was in late 2003
20 [Vajra Ma test. 03/15/07#2 02:50:33] and early 2004, she also misrepresents Vajra
21 Ma's statement that she had not looked if any of the structures had running water inside.
22 [3/15/07#1 00:23:45] This defies logic and common sense: Close your eyes and the
23 reality ceases to exist. Vajra Ma did not look – therefore it did not exist? More about
24 shifting the burden of proof later.

25 **Uncorroborated Evidence**

26 At {16/25-27} the ALJ claims that

27 *"to the extent that I have relied upon the testimony of Proponent Gilstrap, I have done*
28 *so when the evidence was corroborated by Mr. Groen, by the Protestants, . . ."*

29 Several critical questions arise here:

- 30
- 31 • Why are five (5) critical findings, #19, #20, #21, #22, #23, and # 29, based solely on
 - 32 Ms Gilstrap's testimony, with not even an attempt at corroboration?
 - 33 • Why would the ALJ see the need to use Ms. Gilstrap's testimony only when qualified
 - 34 by corroboration unless her credibility were in question?
 - 35 • And finally, why corroboration would make a witness who is essentially non-credible
 - 36 into a credible witness?
- 37
38
39

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3 But then, Ms. Gilstrap, at [3/14/07 1.11.49], when asked if her recollection were faulty
4 or accurate. made it plain and simple for us: "I would say it's fairly accurate to what I
5 remember". More on this under Credibility?

6
7 The five uncorroborated findings the ALJ based her Conclusion of Law on are:

8 1. The fact that the ALJ's Finding #20 is uncorroborated raises serious doubt about the
9 claims made: [and in fact there is evidence to the contrary]:

- 10 • "The A-frame did not have plumbing, pipes, or running water."
- 11 • "Mr. White and Cindy used Ms. Gilstrap's home to take showers and to get jugs
12 of water for household use.
- 13 • (Mr. White and Cindy) did not obtain water from the stream on Tax Lot 300.
- 14 • Mr. White and Cindy were no longer residing on the property by end of summer
15 1998.

16
17 3. Finding #21 is not corroborated. But we are supposed to believe that

18 The trailer was not hooked up to water from the stream
19 even though Ms. Gilstrap states that she had not looked behind the trailer.

20 4. Findings #22 and #23 are not corroborated other than by Ms. Gilstrap herself, and she
21 certainly disagrees with herself a number of times. The ALJ chooses to disregard that
22 between Ms. Gilstrap's affidavit, her interrogatories and admissions, and her
23 testimony, there are countless inconsistencies, sometimes within the same document,
24 as in her affidavit concerning C.56024 (A-11), which the ALJ circumspectly omitted
25 from her list of cited documents. Nevertheless, it remains part of the "whole record"
26 to be considered.

27 As does Ms. Gilstrap's insistence, as late as the last leg of the hearings [03/14/07-
28 0:48:23] that Vajra Ma and I had not made domestic use of the water "because there
29 was no water system set up."

30 5. Finding # 29 is also uncorroborated and it is used by the ALJ for a set of crucial
31 presumptions about the beneficial use of the pasture. (Details under Beneficial Use,
32 above.)

33 **Gilstrap Credibility and Motive**

34 Among the selected inconsistencies of Ms. Gilstrap's testimony and other of her
35 evidence are:

36 Ms. Gilstrap claims as her motive for obtaining the forms for filing her affidavits
37 asserting non-use of C.39995 and portions of C.56024 the fact that we had filed an
38

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3 application for a home business permit [3/16/07 -- 05:04:00] and specifically, at great
4 detail, at [3/16/07 -- 05:06:0]. Expressing her concern that would leave her with no water
5 whatsoever.

6 There are two problems with that: The P.O.D for C.39995 is several hundred feet
7 downstream from where the "unnamed stream" forks between TL200 and TL300 and
8 thus C.39995 would in no way impact the water supply to TL200.

9 But more significantly, the home business application had not been filed until
10 September of 2005. On [03/16/07 - 05:37:23] the ALJ specifically asked Vajra Ma to
11 clarify that, on September 16 2005, she filed the application for the home business permit
12 on TL 300 with the Josephine County Planning Department. And Vajra Ma
13 unequivocally confirmed.

14
15 Another error in Ms. Gilstrap's recall concerns her visit --along with her partner
16 Greg Smith -- at the TL300 pond. She describes that visit in great detail, and at [12/20/06
17 5.32.35] states that visit to have been in the fall of 2004.

18 In reality, however [3/16/07 #2--3:39:40] that visit took place in mid-July of
19 2005

20
21 The powers and accuracy of Ms. Gilstrap's observations must further be
22 questioned in view of her failure to notice Vajra Ma and Mr. Nebmaier's two weeks of
23 camping on TL 300 in March of 2005 [03/16/07 03:14:54]. And not only that, she
24 failed to notice a bulldozer being brought up to TL300 [03/16/07 -- 03:16:27] and
25 operating for several hours of placing the two mobile home halves. [03/16/07 --
26 03:18:24].

27 Ms. Gilstrap, on the other hand, in her complaint of April 2005 to the OWRD
28 [03/14/07 - 01:02:50 through 01:03:45] claims we had been wasting water and not been
29 on the TL300 since October of 2004 .

30
31 Granted, ORS 44.370 provides that A witness is presumed to speak the truth, but
32 it also provided that

33 *This presumption, however, may be overcome by the manner in which the witness*
34 *testifies, by the character of the testimony of the witness, or by evidence affecting the*
35 *character or motives of the witness, or by contradictory evidence.*

36 Vajra Ma provided extensive testimony [3/16/07 #2--3:39:40 et seq.] as to Ms.
37 Gilstrap's character, motive, and credibility. While the actual occurrences described by
38 Vajra Ma may have been outside the time of the alleged non-use, they were not outside
39

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3 the context of Ms. Gilstrap's filing her affidavit and soliciting the complicity of the
4 Sessler's in doing so. But character tends not to change in the course of less than a
5 handful of years, and it rarely improves.

6
7 And finally, we are dealing with someone who explains [12/20/06 4.32.48] that
8 because there were no boundaries and no trespassing signs, everybody just kind of went
9 where they pleased, quad tripped around TL300. But the same person claims she would
10 not pasture her horses alleging there were hazards in the field such as barb wire, glass and
11 junk [3/14/07 - 1.24.21].

12 The list could go on and on.

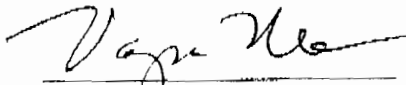
13
14 **Summary and Conclusion**

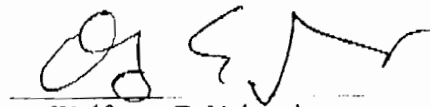
15 For all the foregoing reasons, we implore the Director to reverse the Proposed
16 Order, OAH case No.: WR 06-004, OWRD Case No.: PC 06-06.1.

17 We could have spent many times the pages to unravel each single error in the
18 ALJ's proposed Order, but believe it has been shown beyond a reasonable doubt that the
19 preponderance of evidence standard has not been met by the proponents in this case.

20 It cannot be justified to the public to waste any further resources by continuing to
21 pursue this meritless case.

22
23 Respectfully

24
25
26 
27 Vajra Ma

28 
29 Wolfgang E. Nebmaier

30 11 Tara Lane
31 Sunny Valley, OR 97497-9710

32 *VajraMa@GreatGoddess.org*

33 *Wolfgang@Nebmaier.de*

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WATER RESOURCES DEPT
SALEM, OREGON**APPENDIX A****Excerpt from Wolfgang Nebmaier's Closing Arguments**

A second highly critical issue is proponents' choice neither to call Nick White himself to corroborate his and Cindy Swan's alleged departure from TL300 in the late spring of 1998 [3/13/07 1:01:00], nor to call any of the loyal friends that allegedly visited proponents Sessler in July of 1998 [3/14/07 0:44:30] for even a declaration corroborating the 1998 date. If proponents Sessler were able to obtain an email somewhat confirming the alleged camp meeting dates, why was no corroboration offered for the crucial gathering that was allegedly held in 1998?

The details in Robert Sessler's description of the Groen visit alleged to have taken place in July of 1998 may be accurate in light of his truth definition. But nothing other than the speculative inference of their friends' visit at the same time was offered to corroborate the alleged date of that visit. Again, why was not as much as a shred of evidence supplied or even offered as proof in the form of a letter or a declaration from any of the friends allegedly present at the Sessler house at the time?

Considering the various one-year errors that have become apparent, such as the 1996-1995 error as to the Sessler family's move to TL400, a similar error concerning a particular one of several re-occurring events, such as their friends' visit, is more than possible because:

- Robert Sessler admits, that these gatherings took place in several years, not just in 1998.
- Mr. Sessler also establishes that church-related events such as these gatherings, visits, and camp meetings took place on a near yearly basis.
- The credibility of the July 1998 date for the cited visit by friends further suffers by virtue (misnomer) of the extremely close match of all the visit's descriptions. There is barely any variation between affidavits and interrogatories, and between interrogatories and testimony. Nor do the details deviate perceptibly between Robert Sessler and Michele Sessler's various descriptions. It is as if they all memorized the same script.
- As per his own testimony, Robert and Michele Sessler purchased TL400 in June of 1998. Why did Robert Sessler make no attempt to correlate the Groen visit alleged to have taken place in July of 1998 with the date of his and his wife's purchasing TL400 [3-13 1:00:25], just about one month earlier?

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1
2
3 Thus, the alleged key date of July 1998 does not stand up. All indications point at July
4 1999 instead:

- 5 • On several occasions, Mr. Sessler associates Nick & Cindy's departure, which
6 occurred in late spring of 1999, with the Groen visit. Nick White's departure remains
7 uncorroborated.
- 8 • Richard and Kathryn Groen's testimonies along with their date books place the visit
9 in the summer of 1999.
- 10 • The Groens datebooks corroborate that date. (re-numbered Exhibits T283 to T285)
- 11 • Kathryn Groens' testimony explains why 1998 was impossible (son's wedding)
- 12 • The Groens' firming intention to sell TL300 was clearly more associated with their
13 son's death in February 1999
- 14 • Mr. Groen's visit in September of 1999 with Ted ("from Slakey Brothers") to
15 persuade Ted to stay at TL300 fits that increasing sentiment of wanting someone else
16 to own and/or live at TL300. (Mr. Groen testimony)
- 17 • Both, Mr. and Mrs. Sessler insist on the Groens arriving in a white passenger car.
18 The Groens never ever owned a white passenger car. (Kathryn Groen's testimony that
19 they didn't own one)
- 20 • Nick White's mail up to April 1999 neatly stored in the Plymouth station wagon.
21 (WN's testimony)
- 22 • Mr. Sessler's own statement that Nick used the station wagon as storage.
23 Storage is not hurriedly dumped but neatly stacked, and this is how Nick White's
24 mail was found.
- 25 • No evidence was provided from Sesslers' guests of that alleged 1998 gathering.
- 26 • No evidence was provided by Nick White even as he allegedly is still good friends
27 with Greg Smith.
28 (Mr. White was dropped from the witness lists midstream in PC-05-05 after we
29 addressed his bilocation skills, that is, signing a petition as a Sunny Valley resident
30 while, as per the proponents own witness list, living in Missouri).
- 31 • No cross-reference was offered by Robert or Michele Sessler linking the alleged
32 Groen visit to the Sessler's own purchase of TL400 only one month earlier.

33 No proof other than testimony of Robert and Michele Sessler was offered to corroborate
34 the alleged date of July 1998. Since this date reference is not credible, all related (hinged)
35 dates are to be questioned, such as Nick White's alleged departure date, which has
36 already been questioned by way of all the correspondence to him and his mother found in
37 the abandoned vehicle on TL300.

38 From July or April of 1999 to August or even to the end of 2003, is only four
39 years. There is no way to find five years of alleged non-use in this period of time.

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**I HEREBY CERTIFY THAT THE AFOREGOING WOLFGANG NEBMAIER AND VAJRA
MA'S EXCEPTIONS TO THE PROPOSED ORDER BY ALJ D.L. GUTMAN IN THE
CONTESTED CASE PC 06-06.1, dated this December 19, 2007**

were served on

Phil Ward

Director - Oregon Water Resources Department
725 NE Summer Street, Suite A
Salem, OR 97301-1271

by fax at 503 - 986 0904

Renee Moulun

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Lee Rosenstock


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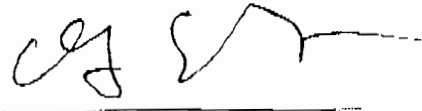
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December 19th, 2007



Vajra Ma



Wolfgang E. Nebmaier

11 Tara Lane

Sunny Valley, OR 97497-9710

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

IN THE MATTER OF

PROPOSED ORDER

**THE PROPOSED CANCELLATION OF
THE WATER RIGHTS EVIDENCED BY
CERTIFICATE 39995 FOR USE OF
WATER FROM AN UNNAMED STREAM,
A TRIBUTARY OF GRAVE CREEK,
FOR DOMESTIC USE OF ONE FAMILY,
INCLUDING THE IRRIGATION OF
LAWN AND GARDEN NOT TO EXCEED
½ ACRE IN AREA,**

OAH case No.: WR 06-004
Agency Case No.: PC 06-06.1

AND

**THE PROPOSED PARTIAL
CANCELLATION OF THE WATER
RIGHTS EVIDENCED BY CERTIFICATE
56024 FOR USE OF WATER FROM AN
UNNAMED STREAM, A TRIBUTARY OF
GRAVE CREEK, FOR DOMESTIC USE
OF ONE FAMILY, AND IRRIGATION
OF 0.7 ACRE, JOSEPHINE COUNTY,
OREGON.**

For Reference Only

HISTORY OF THE CASE

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

On May 26, 2006, OWRD referred the hearing request to the Office of Administrative Hearings (OAH). Administrative Law Judge (ALJ) Dove L. Gutman was assigned. to preside at 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

29 ISSUES

30 (1) Whether the water right evidenced by certificate 39995 has been forfeited by
31 failure to make beneficial use of the water for domestic purposes, including the irrigation of
32 lawn and garden, for a period of six years and three months from April 1997 through July
33 2003.

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

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1

Agency Exhibits

2

3 On October 25, 2006, Exhibits A1 through A1 6, offered by OWRD, were admitted into
4 the record without objection.

Proponents Exhibits

5

6 On October 25, 2006, Exhibits P1 through P11, P13 through P15, P26 through P42,
7 P169 through P 170, and P279 through P280 were admitted by stipulation of the parties.
8 Exhibits P12, P16, P18, P23 through P24, P43 through P168, and P178 through P278 were
9 withdrawn by stipulation of the parties. Exhibits P17, P19 through P22, and P25 were
10 withdrawn by Proponents. Protestants objected to Exhibits P171 through 175 on grounds they
11 were not relevant. The objections were overruled and Exhibits P171 through P175 were
12 admitted into evidence. Protestants objected to Exhibits P176 through P177 on grounds they
13 were cumulative. The objections were overruled and Exhibits P 176 through P177 were
14 admitted into evidence. On March 16, 2007, Exhibit P281 was admitted into evidence.

Protestant Nebmaier's Exhibits

15

16 On October 25, 2006, Exhibits R79 (without Protestants typewritten additions), R81,
17 R83, and R89 through R90 were admitted by stipulation of the parties. Exhibits R2 through R5,
18 R13, R14, R47 through R51, R55 through R58, R71, R73, R75, R76, R80, R82, R84, R86
19 through R88, R101, R102, R106 through R109, R111 through R113, R116, R117, R119, and
20 R121 through R125 were withdrawn by Protestants. Proponents and OWRD objected to
21 Exhibits R10 through R12 on grounds they were not relevant. The objections were overruled
22 and Exhibits R10 through R12 were admitted into evidence. Proponents and OWRD objected to
23 Exhibits R34 through R36 on grounds they were not relevant. The objections were sustained
24 and Exhibits R34 through R36 were excluded. Proponents and OWRD objected to Exhibits
25 R37 through R40 on grounds they were not relevant. The objections were overruled and
26 Exhibits R37 through R40 were admitted into evidence. Proponents and OWRD objected to
27 Exhibit R42 on grounds it was not relevant. The objections were sustained and Exhibit R42
28 was excluded. Proponents and OWRD objected to Exhibits R77 through R79 on grounds they
29 were not relevant. The objections were sustained and Exhibits R77 through R79 were
30 excluded. Exhibits R8 1, R83, R89 and R90 were admitted without objection. Proponents and
31 OWRD objected to Exhibits Ri 10, Ri 14, Ri 15, and Ri 18 on grounds they were not relevant.
32 The objections were sustained and Exhibits Ri10, R114, R115, and R118 were excluded. On
33 March 12, 2007, Exhibits Ri 5 through Ri 8 were admitted into evidence without objection. On
34 March 13, 2007, Proponents and OWRD objected to paragraphs 1, 3, and 5 on page four, and
35 paragraph 1 on page 5 of Exhibit Ri 50 on grounds they were not relevant and the statements
36 that were made required the affiant to be an expert in matters of which he was not. The
37 objections were sustained and paragraphs 1, 3, and 5 on page four, and paragraph 1 on page 5
38 of Exhibit Ri 50 were excluded. The remaining portion of Ri 50 was admitted into evidence.
39 On March 15, 2007, Exhibits R44 through R46 were admitted into evidence without objection.
40 Exhibits R2 1, R22, R24, R27, and R29 were withdrawn by Protestants. Proponents and
41 OWRD objected to Exhibits Ri 9, R20,
42

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

5 Protestant Ma's Exhibits

6 On October 25, 2006, Proponents and OWRD objected to Exhibits T1 through T6 on
7 grounds they were not relevant. The objections were sustained and Exhibits T1 through T6
8 were excluded. Exhibits T7 through T124, T31 through T141, T60, T62 through T66, T75
9 through T78, T80, T87 through T92, T94 through T1100, T12 through T1116, T142 through
10 T148, T202A through T202F, T203 through T220, T222, T225, T227 through T234, T236
11 through T238, T240, T241, T243 through T246, T275, T278, T281, and T282 were withdrawn
12 by Protestants. Proponents and OWRD objected to Exhibits T79, T81, T81A, and T93 on the
13 grounds they were not relevant. The objections were sustained and Exhibits T79, T81, T81A,
14 and T93 were excluded. Exhibits T1129 through T1140, and T1221 were admitted into evidence
15 without objection. Proponents and OWRD objected to Exhibits T1239 through T1242, T1279, and
16 T1280 on grounds they were not relevant. The objections were sustained and Exhibits T1239
17 through T1242, T1279, and T1280 were excluded. On March 12, 2007, Exhibits T82 through T85
18 were admitted into evidence without objection. On March 15, 2007, Exhibits T142 through T146,
19 T148 through T154, T156 through T159, and T1283 through T1285 were admitted into evidence
20 without objection. Proponents and OWRD objected to Exhibits T147, T155, T1117 through T1128,
21 and T11471 on grounds they were not relevant. The objections were sustained and Exhibits T147,
22 T155, T1117 through T1128, and T11471 were excluded. Proponents and OWRD objected to
23 Exhibits T1223, T1224, and T1226 on grounds they were not relevant. The objections were
24 overruled and Exhibits T1223, T1224, and T1226 were admitted into evidence. On March 16,
25 2007, Exhibits T125 through T130 were admitted into evidence without objection. Proponents
26 and OWRD objected to Exhibits T161, T161A, and T101B on ground they were not relevant. The
27 objections were sustained and Exhibits T161, T161A, and T161B were excluded. Exhibits T1247
28 through T1274 were withdrawn by Protestants.

29 STIPULATION

30 On October 25, 2006, Proponents stipulated to the alleged nonuse period of March
31 1997 through October 2003 for water right certificate 56024.

32 MOTIONS

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

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

7 On May 22, 2007, Protestants filed a Motion requesting that the Declaration of Patricia
8 Larson and the Soil Survey of Josephine County not be included in the record. On May 23,
9 2007, Proponents filed a Reply objecting to Protestants' motion. On May 24, 2007, Protestants
10 filed a Rebuttal and attached a letter from Josephine County Planning Office, a Soil Survey of
11 Josephine County, and a Web Soil Survey. Ruling: The attachments filed by both Proponents
12 and Protestants are excluded as untimely.

13 FINDINGS OF FACT

14 (1) Certificate of water right 39995 is in the name of Sue Patterson and authorizes the
15 use of 0.01 cubic foot per second (cfs) from an unnamed stream, a tributary of Graves Creek,
16 for domestic use of one family, including the irrigation of lawn and garden not to exceed ½
17 acre in area in the SE ¼ NE ¼, Section 17, Township 34 South, Range 5 West, Willamette
18 Meridian. The priority date is March 2, 1976. (Ex. A15.)

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

24 (3) On July 14, 2005, Robert Sessler filed an affidavit asserting nonuse of water
25 right certificate 39995, from an unnamed stream, for domestic use of one family, including
26 irrigation of lawn and garden, for a total of ½ acre, within Tax Lot 300, located in Township
27 34 South, Range 5 West, in the SE ¼ NE ¼ of Section 17 in Josephine County, from April
28 1997 through July 2003. (Ex. A8.)

29 (4) On July 15, 2005, Michele Sessler filed an affidavit asserting nonuse of water
30 right certificate 39995, from an unnamed stream, for domestic use of one family, including
31 irrigation of lawn and garden, for a total of ¼ acre, within Tax Lot 300, located in Township
32 34 South, Range 5 West, in the SE ¼ NE ¼ of Section 17 in Josephine County, from April
33 1997 through July 2003. (Ex. A9.)

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

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2 (6) On July 25, 2005, Mr. Sessler filed an affidavit asserting nonuse of a portion of
3 water right certificate 56024, from an unnamed stream, for irrigation of a total of 0.6 acre,
4 within Tax Lot 300, located in Township 34 South, Range 5 West, in the SE $\frac{1}{4}$ NE $\frac{1}{4}$
5 of Section 17 in Josephine County, from June 1996 through July 2005. (Ex. A12.)

6 (7) On July 25, 2005, Mrs. Sessler filed an affidavit asserting nonuse of a portion of
7 water right certificate 56024, from an unnamed stream, for irrigation of a total of 0.6 acre,
8 within Tax Lot 300, located in Township 34 South, Range 5 West, in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of
9 Section 17 in Josephine County, from December 1997 through July 2005. (Ex. A13.)

10 (8) On July 25, 2005, Ms. Gilstrap filed an affidavit asserting nonuse of a portion of
11 water right certificate 56024, from an unnamed stream, for irrigation of a total of 0.6 acre,
12 within Tax Lot 300, located in Township 34 South, Range 5 West, in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of
13 Section 17 in Josephine County, from March 1997 through July 21, 2005. (Ex. A 14.)

14 (9) On September 8, 2005, OWRD issued a Notice of Proposed Cancellation of Water
15 Right evidenced by Certificate 39995 to Wolfgang Nebmaier, the Record Owner of Tax Lot
16 300, due to nonuse for domestic use of one family including the irrigation of lawn and garden
17 not to exceed $\frac{1}{2}$ acre in area for the period of April 1997 through July 2003. (Ex. A7.)

18 (10) On September 8, 2005, OWRD issued a Notice of Proposed Partial Cancellation
19 of Water Right evidenced by Certificate 56024 to Mr. Nebmaier, the Record Owner of Tax
20 A6.)

22 (11) On October 31, 2005, Mr. Nebmaier filed a Protest against the Proposed
23 Cancellation of Water Rights 39995 and 56024 with OWRD. (7EEx. AS.)

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

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

32 (14) Karen Gilstrap resides on Tax Lot 200, which is located at 1245 Shanks Creek
33 Road, Sunny Valley, Oregon. Tax Lot 200 lies to the North and is adjacent to Tax Lot 300.

35 (15) Under certificate of water right 56024, irrigation of 0.1 acre and the domestic
36 use for one family is located on Tax Lot 200, and irrigation of 0.6 acre is located on Tax Lot
37 300 in the lower field (or pasture). (Test. of Sund; Ex. A14 at 2.)

38

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

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

7 (18) Sometime prior to 1997, Mr. and Mrs. Groen moved to Santa Cruz, California.
8 They gave Wade Anders and his nephew permission to live on Tax Lot 300. They also gave
9 Mr. Anders permission to pasture horses on the land. Mr. Groen has no knowledge of whether
10 horses were actually pastured on Tax Lot 300 or not. (*Id.*; Ex. R88.)

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

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

20 (21) Sometime in 1997 or 1998, a man named Chuck and a woman named Anita
21 resided in their travel trailer on Tax Lot 300 near the old barn. The trailer was not hooked up
22 to water from the stream. Chuck and Anita were no longer residing on the property by summer
23 1998. (*Id.*)

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

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

32 (24) From May 1997 through 1999, and 2001 through 2003, Mr. Groen visited Tax Lot
33 300 one to three times per year to check on the property. He spent an average of two hours on
34 the property and, on two separate occasions, he and a friend camped out overnight. During his
35 visits, Mr. Groen used water from the spring to irrigate a small portion, less than one-half, of
36 the .06 acre, by placing a hose in the stream and sprinkling water on the land. He applied water
37 on the pasture to keep the place green and for any horses that may be pastured on the land. Mr.
38 Groen also drank water from the spring by filling up plastic cups and jugs at the spring box, and
39

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

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

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

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

12 Beneficial use is defined as the reasonably efficient use of water without waste for a
13 purpose consistent with the laws, rules and the best interests of the people of the state, OAR
14 690-300-0010(5).

15 Water "use" refers to the type, season, and place of use authorized under the water
16 right certificate. *See Rencken*, 300 Or at 364 (use of water outside the period permitted in the
17 certificate is not use); *Hennings v. Water Resources Department*, 50 Or App 121, 124 125
18 (1981) (use of water for a purpose other than that set forth in the certificate does not constitute
19 use); and *Hannigan v. Hinton*, 195 Or App 345, 353 (2004) (place of use must be within the
20 place of use specified in the certificate). In addition, no change in use or place of use can be
21 made without compliance with ORS 540.520 and 540.530. ORS 540.5 10(1).

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

24 **A. Certificate 39995 — domestic use.**

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

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

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

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

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

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

17 Pursuant to ORS 540.6 10(3), if the owner of a perfected and developed water right
18 uses less water to accomplish the beneficial use allowed by the right, the right is not subject to
19 forfeiture so long as the user has a facility capable of handling the entire rate and duty
20 authorized under the right, and the user is otherwise ready, willing and able to make use of the
21 right. If the facility does not have the capacity to use all of the water granted in the water
22 certificate, then the portion that is not used is forfeited. See *Crandall v. Water Resources*
23 *Department*, 290 Or 771, 777-778 (1981).

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

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

¹ 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.

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1 preponderance of the evidence that certificate of water right 39995 has been forfeited by
2 failure to make beneficial use of the water for domestic purposes on Tax Lot 300 from May
3 1997 through July 2003.

4 **B. Certificate 56024 — irrigation of 0.6 acre.**

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

11 Irrigation means the artificial application of water to crops or plants by controlled
12 means to promote growth or nourish crops or plants. Examples of these uses include, but are
13 not limited to, watering of an agriculture crop, commercial garden, tree farm, orchard, park,
14 golf course, play field or vineyard and alkali abatement. OAR 690-300-0010(26). Naturally
15 occurring sub-irrigation does not qualify as irrigation. *Staats v. Newman*, 164 Or App 18, 23
16 (1999). Irrigation requires more than just applying water to land. *Hennings v. Water Resources*
17 *Department*, 50 Or. App. 121, 123-124 (1981) (court found that applying water to land for the
18 purpose of wetting the dry ground to assist with plowing was not irrigation). Irrigation also
19 requires a deliberate intent or purpose to promote growth or nourish crops or plants. In
20 addition, if the water is not applied for a particular purpose, the water has not been put to a
21 beneficial use. See, *In the Matter of the Proposed Cancellation of Water Right Certificate*
22 *29364 In the Name of Harold Biddle for Use of Water From East Branch of Long Branch and East*
23 *Fork of East Branch and Reservoir, Jackson County, PC 91-2, Special Order Book Volume*
24 *46, pp. 34-39, at p. 37* (noting that "irrigation required deliberate and intentional diversion and
25 application of water to a beneficial purpose"). Furthermore, beneficial use requires more than
26 a token application of water. See, *In the Matter of Cancellation of Water Right Certificates*
27 *35744 and 14694 and The Partial Cancellation of Certificate 49695 for Use of Water From*
28 *Lake Creek, a Tributary of the Metolius River, Jefferson County, Oregon, PC 90-3, Special*
29 *Order Book Volume 45, pp. 55-60, at 45* (noting that "A token application of water once or
30 twice during the irrigation season for 3-4 hours*** does not constitute beneficial use").

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

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

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1 water was put to beneficial use.

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

5 Mr. Groen testified that he applied water on the pasture for horses that may be pastured
6 on the land. However, Mr. Groen never saw any horses on his property. In addition, although
7 Ms. Ma observed piles of horse manure on the property in 2005, there was no direct evidence
8 presented that horses were actually pastured on the land during May 1997 through October
9 2003. Furthermore, Ms. Gilstrap presented evidence that her horses would periodically escape
10 and go onto Tax Lot 300 during that time frame, but she did not intentionally graze or pasture
11 her horses on Mr. Groen's land. Therefore, I find by a preponderance of the evidence that
12 there were no horses pastured on Tax Lot 300 during the period of May 1997 through October
13 2003. I further find that the horse manure that Ms. Ma observed on Tax Lot 300, more likely
14 than not, came from Ms. Gilstrap's horses. Consequently, Mr. Groen's application of water on
15 the lower field of Tax Lot 300 for horses that were not pastured there was not for a beneficial
16 purpose.

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

29 II Protestant Nebmaier's arguments

30 A. Two of the affidavits asserting nonuse under water right certificate 39995 fail 31 to meet OAR 690-017-0400(2)(g).

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

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

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

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1 it appears that a right has been forfeited as provided in 540.610.
2 The decision to initiate cancellation proceedings shall be based on
3 evidence submitted to the Department, by any person, that alleges
4 five or more years of nonuse so as to create a presumption of
5 forfeiture, and from which evidence it further appears the
6 presumption of forfeiture would not likely be rebutted under OAR
7 690-01 7-0800(2)(a), (d), or (e).

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

11 *****

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

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

24 In this case, the Department received three affidavits asserting nonuse of water, under
25 water right certificate 39995, from an unnamed stream (source), for domestic use of one family
26 (authorized use) including irrigation of lawn and garden, for a total of $\frac{1}{2}$ acre, within Tax Lot
27 300, located in Township 34 South, Range 5 West, in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17 in Josephine
28 County (the land and its description). With regard to the nonuse period (five or more years), Mr.
29 and Mrs. Sessler asserted nonuse from April 1997 through July 2003, and Ms. Gilstrap asserted
30 nonuse from March 1997 through July 2005. After reviewing the affidavits, the Department
31 determined that there was sufficient evidence to create a presumption of forfeiture and
32 subsequently issued a Notice of Cancellation to Protestant Nebmaier.

33 Therefore, the evidence in the record establishes that the criteria set forth in OAR 690-
34 01 7-0400(2)(g) was met. The fact that Mrs. Sessler and Ms. Gilstrap may not understand water
35 law or may have misconceptions regarding points of diversion does not negate the validity of the
36 affidavits that were filed to initiate the process. Consequently, Protestant Nebmaier's argument
37 is unpersuasive.
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SALEM, OREGON**1 B. Proponent's witnesses are not credible**

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

4 A witness testifying under oath or affirmation is presumed to be truthful unless it can
5 be demonstrated otherwise. ORS 44.3 70 provides, in relevant part:

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

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

15 1. Ms. Larson

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

19 2. Mr. Smith

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

23 3. Proponent Gilstrap

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

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

33 Proponent Gilstrap also presented evidence that in spring 1998, the pipe that carried
34 water from the stream into the cabin broke and was not repaired or reconnected through July
35
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1 2003. This evidence was corroborated by Mr. Groen's testimony that from May 1997 through
2 2003, the pipes that carried water from the stream to the cabin were not hooked up and the
3 connecting pipe was bent back.

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

8 Proponent Gilstrap also presented evidence that her horses would periodically escape
9 and go on to Tax Lot 300, but she did not intentionally graze or pasture her horses on the
10 property. This evidence was corroborated in part by Mr. Groen's testimony that from May
11 1997 through 2003 he did not see any horses on the property, and in part by Ms. Ma's
12 observations of horse manure on the property.

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

17 4. Proponent Mrs. Sessler

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

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

26 5. Proponent Mr. Sessler

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

30 Finally, even if I found that Proponents and their witnesses were not credible, the
31 evidence that was presented by Protestants and their witnesses did not prove domestic use
32 under water right certificate 39995 on Tax Lot 300 for the period of May 1997 through July
33 2003, nor did it prove irrigation under water right certificate 56024 of 0.6 acre on Tax Lot 300
34 for the period of May 1997 through October 2003.

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

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

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

2 **D. Certificate 39995 was exercised**

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

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

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

19 **E. Certificate 56024 was exercised**

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

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

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

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

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

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

33 Protestant Nebmaier next contends that there were means in place to exercise certificate
34 39995. As indicated previously in this order, I found to the contrary.

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

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

9 **I. Proponents' motives**

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

14 **J. Badgering and Flak**

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

18 **K. Conclusion**

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

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

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

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

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

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

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1 **C. Easement issue and motive**

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

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

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

8 **E. 1998 vs. 1999**

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

12 **F. Ready, willing and able - cabin plumbing system intact**

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

15 **G. Ready, willing and able — irrigation system intact**

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

20 **H. Beneficial use**

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

23 **I. Credibility**

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

27 **J. Water as a weapon**

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

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

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

6 **L. Water itself**

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

9 **M. Conclusion**

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

13 **IV. Proponent's arguments**

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

16 **ORDER**

17 I propose that OWRD issue the following order:

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

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

24
25
26 **Dove L. Gutman**
27 Administrative Law Judge

28 Office of Administrative Hearings

29
30
31 ISSUANCE AND MAILING DATE: November 19, 2007

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SALEM, OREGON****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 Ni., 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.

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SALEM, OREGON**APPENDIX A
LIST OF EXHIBITS CITED**

- 1
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5 Ex. A5: Wolfgang Nehmaier's Protest.
6
7 Ex. A6: Notice of Proposed Partial Cancellation of Water Right (Certificate 56024).
8
9 Ex. A7: Notice of Proposed Partial Cancellation of Water Right (Certificate 39995).
10
11 Ex. A8: The Affidavit of Robert Sessler Asserting Non Use of Water Right Certificate
12 39995.
13
14 Ex. A9: The Affidavit of Michele Sessler Asserting Non Use of Water Right Certificate
15 39995.
16
17 Ex. A10: The Affidavit of Karen Giistrap Asserting Non Use of Water Right Certificate
18 39995.
19
20 Ex. A12: The Affidavit of Robert Sessler Asserting Non Use of Water Right Certificate
21 56024.
22
23 Ex. A13: The Affidavit of Michele Sessler Asserting Non Use of Water Right Certificate
24 56024.
25
26 Ex. A14: Water Right Certificate 56024 and Final Proof Map.
27
28 Ex. A15: Water Right Certificate 39995 and Final Proof Map.
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30 Ex. P171: Affidavit of Richard Groen and Kathryn Groen, page 1.
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32 Ex. P 172: Affidavit of Richard Groen and Kathryn Groen, page 2.
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34 Ex. R70: Patterson-Groen deed 1977.
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36 Ex. R81: Aerial picture of pasture, August 2006.
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38 Ex. R89: Groen 27 year water affidavit, page 1.
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40 Ex. R90: Groen 27 year water affidavit, page 2.
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42 Ex. T283: Groen date books, 1997.
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44 Ex. T284: Groen date books, 1998-1999.
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46 Ex. T285: Groen date books, 2003.
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