ATTACHMENT 4

Wolfgang Nebmaier & Vajra Ma
11 Tara Lane
Wolf Creek/Sunny Valley
OR 97497
541 951 4151
Wolfgang@MothersoftheWorld.net

Water Rights Commissioner

Sunny Valley, July 17, 2008

Re: Water Rights Case Grave Creek PC 06-06.1

Dear Commissioner,

We turn to you after our effort through standard channels seemed to provide us with little help.

As of September 2005, the WRD initiated Water Rights Cancellation proceedings concerning our two water rights 39995 and 56024 (partial). This should never have happened. And neither should a series of errors and transgressions have occurred, some on the part of the agency and some by the ALJ entrusted with presiding over the case. How can we help but feel that we are facing what seems a closed system of professionals, more concerned with their careers than serving the public and upholding the integrity of the law.

At the time the whole sad saga began our water rights and administrative law expertise was not as developed as it has become. Today we know that the affidavits submitted to allege the non-use in question - aside from verifiably having been based in ulterior motives by the affiants – did not meet the 690-017-400 (2) g, in that the affiants did **not** know

> "*with certainty that no water from the allowed source has been used for the authorized use on the lands, or a portion of the lands, the portion being accurately described, under the provisions of the water right within a period of five or more successive years*".

The agency personnel in charge should have discerned that and rejected the affidavits. The fact that the Proponents knew neither "*the authorized use on the lands*" nor "*the provisions of the water right*" became irrefutably clear when, during the hearings, Proponents' counsel repeatedly tried to prompt their clients with the correct information but they insisted on their own understanding – actually lack thereof – of the water rights at issue. This is one of the several issues first raised by the ALJ and then mysteriously dropped like a red-hot potato the next day (or after a break).

But instead of being rejected as it should have been from the start, the matter became what was first known as OWRD Case No.: PC 05-05 (OAH Case No.: Graves Creek, WR 05-005) and then as OWRD Case No.: PC 06-06, purportedly the most extensive private water rights cancellation proceeding on record. The story of the two case numbers, incidentally, caused by a withdrawal from and then re-assignment to the OAH, remains something of a puzzlement. Still we will try and summarize it below.

Since the shock when that first round of affidavits alleging non-use was served upon us in April of 2005, we have spent countless weeks of our time and substantial funds to undertake the defense of our water rights. This included research and preparation of legal documents, travel to the hearings, and the hearings themselves, grueling hearing days of facing three sides of professionals (agency, ALJ, Proponents' counsel) none of whose life was to be affected by the matter. Our life has essentially been on hold since April of 2005 in many ways concerning our attempt to build a home for us here.

In April of 2007 the hearings finally came to an end, but we were kept waiting for a proposed order by the ALJ, Dove L. Gutman, until the week of Thanksgiving. That proposed order flew in the face of some of the fundamental principles of water law and administrative law, which we pointed that out in our exceptions, filed December 19th, 2007. Then, on December 28th 2007, the WRD requested the ALJ to issue a Revised Proposed Order Addressing Exceptions Filed by Wolfgang Nebmaier and Vajra Ma, PC 06-06.1.

As of today, we have nothing.

While we did apply for and were granted a temporary license, that license limits us to a minimum of our regular domestic water rights. This means that, in addition to the preceding years since April 2005, any time the ALJ allows herself for writing a revised proposed order amounts to a detriment for us for not being able to plan, develop and operate with our full water rights.

Considering the above, it must come as no surprise that the litigation budget of the agency is thin-stretched.

Dear Commissioner, we respectfully urge to put this travesty to an end.

Thank you for your time

Wolfgang Nebmaier Vajra Ma

p.s. as indicated, we gladly provide you with more extensive material, such as the Proposed Order, our Exceptions, (informal) audio transcripts, copies of all the audio files for verification, etc. Please feel free to ask.

cc: Commissioners,
Dan Thorndike, Ashland, OR 97520
Jay Rasmussen, Newport, OR 97365,
John E Jackson Jr., Cornelius, OR 97113
Ray Williams, Milton Freewater, OR 97862
Charles Barlow, Nyssa, OR 97913
Mary Meloy, Bend, OR 97701
Susie L. Smith, Springfield, Oregon, 97477

Let us present you with a few brief highlights of the enigmas in and around this case. There are many more and we would like to focus on those not necessarily included in our exceptions. A lot goes down in 10 days of hearings and nearly three years of proceedings and briefs and motions etc. We will not address issues relating to administrative law per se (burden of proof questions, for example) but limit ourselves to but a few of the core issues and the underlying statute involving the agency of which you are a Commissioner.

Withdrawal and Re-Assignment of the Case

Shortly before the first hearing was to take place, the agency withdrew the case from the OAH, citing that I (Wolfgang) needed a translator present at all times because the Department had

> *"determined that it is not appropriate for the case to proceed to a hearing at this time. OAR 137-003-0515(4)(c). since "it has become clear to the agency that one of the parties* [me, a published author, teacher and translator] *is a non-English speaking person. . . . who, by reason of place of birth or culture speaks a language other than English and does not speak English with adequate ability to communicate effectively in the proceedings. OAR 137-003-0590(1)(c).* [and is] *unable to provide testimony in a manner that is adequate to protect their interests without the aid of a qualified interpreter. See OAR 137-003-0590(3)(a).*

The facts clearly indicate that none of these allegations would hold water if examined further. While I, personally, did get upset at the ALJ's Freislerian manner during a telephone pre-hearing conference shortly before that withdrawal, my command of the English language has nothing whatsoever to do with that.

By the Department's own Juno Pandian's admission, the case was restarted to assure "a good record".

Preventing On-Site Evidence

Preceding the first hearing date, a site visit took place October 23, 2006.

We (Protestants) requested that, at that occasion, the presiding judge (ALJ) be shown and take notice of some of the logistical on-site facts. At the advice by Juno Pandian, the ALJ limited the site visit to a narrow view of the P.O.D., stream and P.O.U.s and precluded to be shown situation and circumstance clearly necessary to properly evaluate testimony concerning the site and its logistics.

At that time, there was sufficient material available (interrogatories and admissions, for example) to indicate that knowledge of the exact location of places was of critical importance for the ALJ to base her evaluations on. Also, experience from previous water rights cancellation cases should have alerted Juno Pandian to the fact that much of the decisive testimony hinged on the accuracy of observations of a neighbor's property. Thus, she must have known how important the geography of a site in question and its neighboring properties is.

Whether that limitation to POD, stream and POU's at the site visit 10/23/2006 was intended to protect Proponents' allegations or an oversight is of less significance than its outcome: The fact is that it made it impossible for the ALJ to properly evaluate testimony. If she had known the geographic reality, she would have been in a better position to evaluate testimony, as the record clearly shows.

Eliminating Reference Material

Oddly, during the course of the hearing, pictorial evidence offered by us to illustrate and clarify the very spatial relationships which a more extensive site visit would have conveyed, was almost always rejected.

Even more odd is the frequent course of events in these rejections. Two variations of this come to mind:

a) On a number of occasions, the ALJ initially seems interested in getting information. In one instance, she even explicitly requests a survey. The next morning, the ALJ fully reverses her position on the issue, refuses to even look at the survey, claiming the property line has no significance.

   Considering how frequently the ALJ returned from breaks with questions and insights, we wonder how the importance of a property line for determining domestic water use on one side of it or the other or both, can evaporate overnight. And we wonder how an agency person, who testifying "on behalf of" the agency, can perform his own 180° turn-around and come up – that very same morning –with a seamlessly concurring legal opinion (which, by the way, he is not entitled to give – see 183.452 (3) and (4)).

b) Juno Pandian – in unison with Proponents' counsel – objects to proof that Proponents could not have seen what they claim on grounds that the pictures had been taken outside the relevant time frame (of the alleged non-use). As if the grade of a hillside or a dense stand of trees or a distance between two points would or even could change or be changed in the course of two years. The "outside the time frame" objection and its pat acceptance by the ALJ readily might be viewed with a degree of curiosity.

   In addition, within the time frame of the alleged non-use we, the Protestants had no opportunity to collect evidence because we didn't even own the property yet.

Reinventing Water Law

Some time during the hearings, the premise arose that domestic water use had to be taking place inside a structure. The applicable water law, however, nowhere defines such a requirement. The ALJ, Dove Gutman, in the footnote on page 12 in her Proposed Order reflects that contradiction: She claims:

> *According to the Department* [Department or statute?], *human* [= domestic?] *consumption must take place inside the home to be considered domestic water use. . . . .*

and two lines down requests:

> *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.*

Here we have domestic – household – home – human, which the ALJ requests the agency to clarify in the same paragraph that starts out claiming a clarity on the issue.

Uprooting Fundamental Water Law

One of the core issues involved in the reference material rejected concerned a fundamental rule for domestic water use: Right source and right place constitute exercise of a domestic water right. The Proposed Order turns this basic rule upside down. If one followed the course of the hearings, one might come to believe that the place of use doesn't seem to matter as long as evidence defining a critical property line is not admitted. The issue is dealt with in more detail in our exceptions which we will gladly provide. Here we wish to address how decisive evidence was first requested and then – after a mysterious "off-stage" enlightenment – adamantly rejected with the following logic: Since domestic water right A cannot be exercised on property B, people making domestic use of the water from the source for water right B on property B are not exercising water right B as long as we don't know where the property line is and prevent evidence from entering the record that could define it. Confusing?

Again, if you have any question or would like to see more material, please feel free to request it. Thank you.

Wolfgang Nebmaier & Vajra Ma
11 Tara Lane
Wolf Creek/Sunny Valley
OR 97497
541 951 4151
Wolfgang@MothersoftheWorld.net

Re: Water Rights Case Grave Creek PC 06-06.1

Phillip C. Ward, Director
Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301
director@wrd.,state.or.us

Sunny Valley, August 22, 2008

Dear Phil Ward,

we know you are down in Medford right now, tending to the Oregon Water Resources Commission Meeting, and, for a moment, we thought we should try and meet you there, put our faces to the issue. But we decided against it. We did not want to bother you at your short visit down here. We are attaching our "faces" to the email version of this letter, so that should take care of that. Also, we considered that this complicated issue may not be one for a necessarily truncated public discussion.

Furthermore, we do not know how involved you are with this case and did not wish to "ambush" you with it unprepared. Just makes for a bad atmosphere.

As you may know we turned to the Commissioners about a month ago – generic copy attached – after we (like your office) had been waiting for more than half a year for any response by the ALJ, Dove L. Gutman, to the Department's request for a "Revised Proposed Order Addressing Exceptions Filed by Wolfgang Nebmaier and Vajra Ma."

However, the mail crossed and, on the same day we sent our letter off to the Commissioners (July 17th), we received Judge Gutman's reply to the Department's request to provide a "Revised Proposed Order Addressing Exceptions Filed by Wolfgang Nebmaier and Vajra Ma, PC 06-06.1." As you may know, the ALJ rejected all our exceptions as either incorrect or improper.

The Administrative Law Judge's course of (in)action, of course, also flies in the face of the Department which must have seen at least some merit in our exceptions to make that request for a Revised Proposed Order. Otherwise why not simply issue a Final Order and let the chips fall where they may.

So, we are entirely wrong in every single one of our exceptions? The Department is entirely wrong in seeing any merit in even a single one of them? I, for one, have a hard time imagining someone who is entirely right and cannot even find a trace of justification in someone else's opposing thoughts! Even appeals court judges rejecting someone's arguments or exceptions do reason through them diligently and thoroughly and explain their reasons for not following an appellant's train of thought and argument.

Aside from the overarching issues of this case involving fundamental Water law, we would feel it morally wrong on a personal level, if we simply went the way of least resistance, caved in, and followed Juno Pandian's initial off-handed remark "Why don't you just dig a well?" despite all evidence of groundlessness, irregularities and doubts. How reasonable would it seem if someone unjustly tries to take something essential, life-sustaining away from me, to tell me "why don't you just buy another one?" This is especially true considering the established fact, that this case was never started about water. There is more than enough water to generously serve all the water rights involved. Rather it represents one of several attempts by our neighbors to abuse an administrative process at the taxpayers expense and Oregon's

Governmental time to harm us, to try and to make us go away, to punish us for moving in next door and wanting to stay here.

And though we are committed to go as far as we have to, to defend what is right and just, we would rather end this waste of time and resources and get on with our life.

What more can we say? We have spent many hundreds of hours, heartache, sleepless nights, innumerable resources, defending ourselves against this attack that has been and is being inflicted on us for no other reason but spite, greed, and bigotry.

Please dismiss this case, Phil Ward, please dismiss it.

Thank you for your time.

Respectfully,

Wolfgang Nebmaier

Vajra Ma

attachments

Oregon
Theodore R. Kulongoski, Governor

Water Resources Department
North Mall Office Building
725 Summer Street NE, Suite A
Salem, OR 97301-1266
503-986-0900
FAX 503-986-0904

September 5, 2008

Wolfgang Nebmaier & Vajra Ma
11 Tara Lane
Sunny Valley OR 97497

Dear Mr. Nebmaier and Ms. Ma,

Thank you for your letter of August 22, 2008, regarding water right cancellation PC 06-06.1. The Water Resources Commission and Water Resources Department take water right cancellation matters very seriously. We understand how important a valid water right is to the owner of the land to which the rights are appurtenant.

Oregon statutes relating to water right cancellations, and an extensive number of court decisions, guide how allegations of water right forfeiture are considered. Additionally, the Oregon Administrative Procedures Act directs how agencies handle matters of this nature. I do not have the authority to alter these processes.

The final decision is ultimately based on facts and the record created through the hearing process. The Water Resources Commission, as the final decision making body, will be considering this matter during their November meeting. It is expected that the Commission will issue a "Final Order" as directed by the statute and Administrative Procedures Act.

Sincerely,

Phillip C. Ward
Director

c: Water Resources Commission

Wolfgang Nebmaier & Vajra Ma
11 Tara Lane
Wolf Creek/Sunny Valley
OR 97497
541 951 4151
Wolfgang@MothersoftheWorld.net

Re: Water Rights Case Grave Creek PC 06-06.1

Phillip C. Ward, Director
Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301
director@wrd.,state.or.us

Sunny Valley, October 9, 2008

Dear Phil Ward,

we wish to thank you for notifying us of the scheduled Commission meeting in November. We appreciate your recognition that this is about lives not just about statute, case law and careers. We feel, based on the record and the rules and regulations of the OWRD, we have been and continue to be wronged in this particular proceeding. Therefore, we neither ask nor expect you to change statutes and/or procedures. Quite the contrary, we strongly support you in upholding and adhering to them.

Since the fact finder in this case in many instances assails applicable statute, the record created through the hearing process is more than problematic. It is the entire record of the case the final decision is to be based on. Neither an assumption nor a presumption nor an opinion concerning facts or evidence are a fact.

But aside from this, if you and the Commission were to concur with the ALJ Dove L. Gutman, the Department would set a precedent of, among many more,

1 enforcing laws and regulations that do not exist ("inside structure")
2 setting a policy whereby it is possible to exercise on one property the waterright appurtenant to another (exercise of the domestic portion of 56024 on TL300)
3 honoring affidavits that fail to meet the requirements (OAR 690-017-400 (2) g)
4 allowing the Chief Administrative Law Judge Thomas Ewing to violate OAR 471-060-0005 (3) by his denial to our 1st and only recusal request

Given the fact, that 536.320 (3) explicitly directs the Water Resources Commission not: *(3) To modify or amend any standard or policy as prescribed in ORS 536.310 nor to adopt any rule or regulation in conflict therewith.* should the Water Resources Commission decide on a Final Order to cancel, they would be violating this mandate by enacting ## 1, 2 and 4, above.

Indeed, there are a great many more issues that would make a final order which is simply based on the ALJ's Proposed Order a decision rife with issues begging for judicial review, extensive re-hearing, and perhaps assessment of actual harm. In other words, even though we raise only a limited number of questions here to limit our demand on your valuable time, that in no way means that this case is not riddled with an appalling number of indefensible inconsistencies.

Some of them are addressed in our exceptions, but these were limited to only those issues encompassed within the judge's Proposed Order. Matters omitted in the ALJ's case summary, such as our denied recusal request, starkly contradictory interrogatories and admissions, matters of prejudice, strong indications of ex parte communications, of lacking credibility, and of procedural errors clouding the record overall were not included in our exceptions. We will briefly sketch some of them in our Summaries, appended below.

This leaves the Water Resources Commission as such facing the formidable task of considering the entire record to gain an impartial and complete picture of this unusually involved case and allow for the adversely affected party – us – "[to] *present argument to the officials who are to render the decision*" as required, for example, by ORS 183.460.

Not only is there, as referred to by you, the record created by the hearing process, which amounts to audio recordings of 10 days along with a two-foot stack of paper. The record also extends into ancillary documentation, briefs, evidence selection and the manner employed in suppressing valid evidence, motions, and exceptions, interrogatories and admissions, along with their various responses, etc. The record further includes all proceedings in the hastily abandoned first OAH assignment (05-05), along with the large number of statutes and cases (and their context) cited. Even considering OAR 690-002-0175 (5), which allows the Commission to "form a subcommittee to review the exceptions and provide a report prior to the Commission issuing a final order", such a review requires a comprehensive understanding of what they relate to and why and obviously must entail more than reading the Proposed Order, our Exceptions, and the ALJ's Response saying there was not a single, solitary thing to re-consider.

With at least half the affidavits and two of the three affiants questionable, the unresolved re-assignment matter, the attempt to retro-actively impose the unprecedented "inside a structure" precedent, the refusal to grant the mandatory 1st recusal request, all that along with a number of inexplicable about-faces by the ALJ, the Commission here has very crucial decisions that impacts the adherence to the mission of the OWRD and its constitutional responsibility to the people of Oregon.

There is the option of the, at first, " easier, softer way" of going along with the ALJ's Proposed Order, which is likely to lead to yet another 2-foot stack of paper, maybe remanding, maybe subpoenas, anything that is possible in a judicial review process. While this option might eventually even serve some legal clarification and administrative benefit, we doubt that such public boon should be achieved on our back.

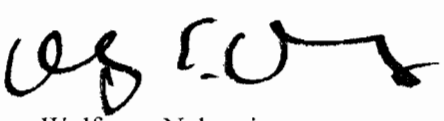
Theoretically, of course, there is the option of the Commissioners and/or their appointed sub-committee listening to every minute of the hearing and pre-hearing conferences of both OAH assignments and reading every page of every document that has influenced the case. We don't think that very likely.

Another high-overhead possibility is that of rolling back the entire proceeding, to its beginning. This would have to include a new protest –with translator if that is still on the agenda. And, again, that would be very high overhead for both, Department and us. We do have a life, we are not quite as young as we feel emotionally and spiritually, and we have already sacrificed months of our time and immeasurable mental and emotional resources. We should be allowed to get on with our beautiful life, our young love and our dreams.

And finally, there is an opportunity for a visionary recognition on the part of the decision makers – the Water Resources Commission and you, Mr. Ward – that an in-depth review of all the problem icebergs of which we have seen but the tips need not necessarily be conducted at our expense of life and resources but may be undertaken voluntarily: An agency taking care of its internal matters. You could save the Commission's and your time and issue a dismissal based on the essential groundlessness of the proceeding, not to mention the many infractions, from the very beginning of the case and throughout the hearing process.

We appreciate your serious consideration and thank you for your time,

Sincerely,



Wolfgang Nebmaier

Vajra Ma

cc: Commissioners

SUMMARIES of SOME ISSUES

In general, we find ourselves appalled how, every time we listen into the hearing audio record (N.B. part of the "record created by the hearing process") for specifics, we encounter more grievous abuses and miscarriages of administrative law. In one instance, for example, we hear the fact finder blatantly declaring she might base her findings of fact solely on the previous owners' testimony [3/16/07 0.21.25 et seq.], thus relieving Proponents of their legal burden to prove non-use. Not to mention the derisive, indiscriminate tirade at the knife incident on December 21, 2006. [12/21/06 2.04.30 et seq.]

1. The Affidavits Not Meeting the Requirements

Right at the start of these proceedings, an error occurred in that the affidavits submitted to allege the non-use in question did not meet the 690-017-400 (2) g, because the affiants did not know or understand the water rights in question and therefore could not truthfully state

> "*with certainty that no water from the allowed source has been used for the authorized use on the lands, or a portion of the lands, the portion being accurately described, under the provisions of the water right within a period of five or more successive years*".

At the beginning of this process, our knowledge of the regulations not being as acute as it is, we were not able to address this matter in our protest. The question (as pertains to 39995 and Proponent Michele Sessler), however, was raised at the hearings, first by the Department's own Juno Pandian ([12/19/06 1.18.00]), then picked up, and vehemently so ([12/19/06 1.22.04 et seq 1.24.12]), by the ALJ, but then vanished without any further discussion, at least not within the framework of the hearings. It seems likely that this was based on consultations and directives that all the parties should have been involved in and were not.
As to 56024, Proponents' own counsel unearthed (at [12/20/06 4.07.20 et seq.] to what extent affiant Gilstrap did not know the waterright, the only one of Proponents' witness the ALJ based her findings of fact on.

As a side note to the validity of the affidavits, we should mention that the ALJ has sidestepped the credibility of all but a single witness/affiant, and the question how credible that would make the affidavits of those deemed not credible might turn up interesting lore. The same goes for interrogatories and admissions, which confirm the lack of credibility but, once again, were not referenced by the ALJ.

All the above is in addition to the affidavits verifiably having been based in ulterior motives by the affiants (see hearing audio, last day at [3/15/07#2 3.18.00 et seq] and [3/16/07 5.24.30]). The motive given by Proponent Gilstrap was so obviously false since the event claimed as motive took place about a year later.

2. Error in Denying Recusal Request

The Chief Administrative Law Judge Thomas Ewing failed OAR 471-060-0005 (3) in his denial to our 1st and only recusal request. As per statute "The first request of that party or agency shall be automatically granted." Mr. Ewing should have granted ours because it was the first one.

3. The Translator Issue and the Flawed Re-Numbering

If not having a translator was determined by OWRD staff to be prejudicial against me, Wolfgang Nebmaier (*does not speak English with adequate ability to communicate effectively in the proceedings.* OAR 137-003-0590(1)(c)), that prejudice potential applies to the proceeding of the contested case as a whole.

First, a contested case – along with its name and numbering – begins with the protest (OAR 690-017-0700 (1). Therefore, since there was no new protest, there would be no new OWRD contested case and everything from the very beginning, starting with the affidavits submitted must be part of the present OWRD case record. The record thus includes the entirety of the first OAH case (05-05) to be considered in review by the Commission. Not to include 05-05, would be an infraction of (OAR 690-017-0700 (1).

Secondly, if one accepted the OWRD's determination then 06-06 is tainted from the beginning and continues to

be because no translator was provided for the protest, and no translator has been provided after the hearing. A question to the Department to that effect more than a month ago has remained unanswered as of this day.

5. TL300 Waterright Exercised in and around Gilstrap Residence on TL300

The issue of Proponent Gilstrap's residence being half on our property (TL300) was first raised – and side-stepped under the guidance of Juno Pandian – on October 25, 2006 [10/25/06 4.33.30]. The significance of this is that Ms. Gilstrap's domestic waterright comes from the identical source as ours. Thus her domestic use from our source on our land clearly constitutes use that maintains the waterright.

There are three clear definition boundaries as set by statute and delineated in testimony by the Assistant Regional Manager Bruce Sund: Proper source, right location, defined purpose. The extended testimony concerning the squatter issue [12/19/06 2.22.00 et seq.] and [3/14/07 4.54.58 - 4.58.28] produced ample clarity about the fact that the water user's intention does not matter. There needs to be no intention to exercise a given waterright. There needs to be no awareness of being on a particular property.

In other words, as long as water from the specific "unnamed tributary to Shanks Creek" (the same source as the one referenced in Ms. Gilstrap's C 56024) is used within the boundaries of TL300 for the purposes defined in OAR 690-300-0010 (14), it constitutes a valid exercise of the domestic C 39995.

The matter was again raised by the ALJ [12/21/06 2.10.10] and more specifically at [12/21/06 2.11.35],
"If this action has been brought and one of the neighbors actually has a house or a portion of it on the TL 300, we have wasted this entire time on that issue unless you can point to something in law that says I don't follow the certificate that says domestic use of water within that TL 300."

But then, nearly three month later [3/14/07 4.39.00] and [3/14/07 4.47.35] a final "clarification" is presented by the Assistant Regional Manager Bruce Sund as prompted and directed jointly by his superior, the Department's Ms.Pandian and the ALJ, Dove L. Gutman.

6. The Inside Structure Issue

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

This classic definition does not refer to a building. It speaks of consumption and purpose and use. The issue was created out of thin air based on a convoluted and tortuous verbal shell game instigated by proponents' counsel, mixing up references to diversion structures with references to living structures. [3/16/07 0.38 et seq.]. In her closing, Ms. Howard then proceeds to morph the definition item "household purposes" into "inside the household", thus changing the definition of a purpose into that of a location, and then continuing to mix up the terms "inside the home" and "inside the house" and finally generalizing it to "inside a structure".

Unfortunately, the ALJ adopted the faulty premise of conflating the nature of use with a location of use, i.e. about domestic use having to occur inside "a home." How people exercise their domesticity is outside the purview of the Department and it does not purport to have authority over that matter. The water right is not for domestic use in a structure, it is for domestic use. Or, to quote the former watermaster Bruce Sund's testimony: "*Domestic use is domestic use.*" [12/19/06 2.22.20]

In other words, if

- neither any statute
- nor the water master's explicit information, up to including the hearing itself, including the assurance that a "camping platform" is acceptable (see [12/21/06 3.42.00])

spells out anything about the exercise of a domestic waterright having to take place inside a structure then how can an arbitrary contrivance attempt to make a waterright's holder post factum responsible for complying with something that is

- in no statute

- in no enforcement manual applicable to the relevant time

How can a waterrights holder be expected to not believe but second-guess a watermaster's information? How can s/he be held to a higher standard of knowledge than the watermaster?

The bottom line here is that the inside structure requirement is not on the books and therefore could not have been communicated to a waterright's holder, nor could s/he even with the utmost on diligence have acquired information about non-existing statute. In our case, the Groens acted to the best of their knowledge to comply with the existing statutory provisions. And even should the fictional "inside structure" requirement be elevated to case law now, it definitely cannot be applied retroactively.

7. The "Token" Issue

Neither the ALJ nor Juno Pandian countered the former Watermaster Bruce Sund's answer (to Juno Pandian's question) that yes, covering the whole field in sections over five years would be sufficient to meet the irrigation requirements. They did not qualify or counter or contradict of further question or clarify what this meant, but took it as an acceptable answer.

[12/19/06 2.29.57] (Juno Pandian cross-examining Bruce Sund)
Juno Pandian: *Mr. Groen basically could have irrigated a portion of the 6/10th of an acre every year and at the end of the five years he would have – could have irrigated the entire 6/10th of an acre? Would that maintain his water right?*
Bruce Sund: *Yes it would.*

If such a gradual one-time coverage is deemed sufficient, then why doe the ALJ and Juno Pandian jointly declare Dick Groen's 15-18 applications of water across the pasture as being "token".

8. Error in Failing the Premise of ORS 536.220, especially (2)(a)

(2) The Legislative Assembly, therefore, finds that:

(a) It is in the interest of the public welfare that a coordinated, integrated state water resources policy be formulated and . . . control of such water resources . . . be carried out by a single state agency which, in carrying out its functions, shall give proper and adequate consideration to the multiple aspects of the beneficial use and control of such water resources with an impartiality of interest except that designed to best protect and promote the public welfare generally.

9. ALJ Error in Violating OAR 137-003-0545 (3)

OAR 137-003-0545 (3) and specifically thereunder **(a)(C)**

(3) The administrative law judge shall not allow an agency representative appearing under section (2) of this rule to present legal argument as defined in this rule.
(a) "Legal Argument" includes arguments on:
...
(C) The application of court precedent to the facts of the particular contested case proceeding.

. . . which is precisely what took place on several occasions when Dove L. Gutman permitted, and allowed, and even requested the agency representative to present legal argument as to "the application of court precedent to the facts of the particular contested case proceeding". Not only that, she proceeded to firmly embrace such legal argument and based some critical opinions of her own on it.

Note:

The above list of summaries is rather random, not addressing many instances of shifted burden of proof and other irregularities. The thorough analysis of the "record created by the hearing process" we would present as "argument to the officials who are to render the decision" will readily illuminate their nature and extent.