

**BEFORE THE OREGON WATER RESOURCES DEPARTMENT**

**IN THE MATTER OF THE PROPOSED  
CANCELLATION OF THE WATER RIGHT  
EVIDENCED BY WATER RIGHT  
CERTIFICATE 59059 FOR USE OF WATER  
FROM UMPQUA RIVER FOR IRRIGATION  
OF 58.6 ACRES, DOUGLAS COUNTY,  
OREGON**

**) FINAL ORDER**

) OAH Ref. No: WR-11-001

) OWRD Case No: PC 01-10 & PC 02-10

AND

**IN THE MATTER OF THE PROPOSED  
CANCELLATION OF THE WATER RIGHT  
EVIDENCED BY WATER RIGHT  
CERTIFICATE 41522 FOR USE OF WATER  
FROM UMPQUA RIVER FOR IRRIGATION  
OF 50.4 ACRES, DOUGLAS COUNTY,  
OREGON**

*Proponents:* Greg R. Miller, Douglas C. Wellet,  
Albert G. Satterla, and David R. Crane

*Protestant:* Gloria Ann Jones, Trustee; Gloria Ann  
Hager Jones Revocable Trust

**I. HISTORY OF THE CASE**

On November 30, 2010, the Oregon Water Resources Department issued to Gloria Ann Jones, Trustee of the Gloria Ann Hager Jones Revocable Trust, two Notices of Proposed Cancellation of Water Right. The notices proposed to cancel the entire water rights evidenced by Certificate of Water Rights 41522 and 59059, based on affidavits filed by Greg R. Miller, Douglas C. Wellet, Albert G. Satterla, and David R. Crane, which asserted that the water rights had been forfeited by non-use of the rights for five successive years.

Jones requested an administrative hearing and the Department referred the matter to the Office of Administrative Hearings (OAH) on January 21, 2011. Administrative Law Judge (ALJ) James W. Han was assigned to preside over the case. On March 4, 2011, ALJ Han conducted a telephone prehearing conference, at which the parties discussed witness subpoenas and agreed to hold the hearing on June 14 and 15, 2011. On May 25, 2011, ALJ Han viewed the lands described on the water rights certificates.

The hearing was held on June 14, 2011, at OAH's offices in Salem, Oregon. Juno Pandian appeared as the Department's representative. Water Masters Larry Menteer and David Williams testified. Greg Miller, Albert Satterla, and Douglas Wellet appeared and testified for the proponents. David Case and Rebecca Wellett testified by telephone. Gloria Jones appeared

and testified on her own behalf. The record closed at the conclusion of the hearing on June 14, 2011.

On May 25, 2011, OAH received Wellet's request for subpoenas to Mike Ritchie and Scott Busby.<sup>1</sup> Wellet asserted that he contacted OAH on May 31, 2011, to inquire about the subpoenas. OAH faxed the subpoenas to Wellet on June 9, 2011. Wellet asserted that he did not serve the subpoenas because he believed he must serve them at least 10 days before the hearing. On June 13, 2011, Wellett asked OAH to postpone the hearing to allow him more time to serve the subpoenas. ALJ Han denied the postponement request.

At the start of the June 14, 2011, hearing, Wellet asserted that he felt "handicapped" because he was unable to present the testimony of Mike Ritchie and, to a lesser extent, Scott Busby, because Wellet had not received OAH's subpoenas for the witnesses at least 10 days before the hearing. The ALJ asked Wellett to raise the matter at the end of the hearing if, after hearing the evidence, he still believed Ritchie's and Busby's testimonies were necessary for a full hearing. At the conclusion of the hearing, no one asked for an opportunity to present additional witnesses before the record closed.

On August 3, 2011, a Proposed Order was issued in which ALJ Han found that the Protestants' water rights have not been forfeited. On September 1, 2011, Mr. Willett filed exceptions to the Proposed Order with OWRD. The Proposed Order was not amended to reflect the exceptions filed by Mr. Willet. The Proponent did not file a response to Protestant's exceptions.

The Oregon Water Resources Commission (OWRC) herein issues its Final Order with responses to exceptions as provided herein.

## **II. ISSUES**

1. Whether a portion of the water right evidenced by Certificate 41522 has been forfeited by failure to make beneficial use of the water for a period of five or more consecutive years during the 2001 through 2006 irrigation seasons. ORS 540.610.
2. Whether Jones's portion of the water right evidenced by Certificate 59059 has been forfeited by failure to make beneficial use of the water for a period of five or more consecutive years during the 2001 through 2006 irrigation seasons. ORS 540.610.

## **III. EVIDENTIARY RULINGS**

### **AGENCY EXHIBITS**

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<sup>1</sup> On May 1, 2011, Miller asked the OAH to issue subpoenas to Mike Ritchie, Jamie Hopkins, and Jones for their appearance at the hearing. OAH mailed the subpoenas to Miller on May 17, 2011. On June 9, 2011, the OAH faxed to Wellet the subpoenas for Mike Ritchie and Scott Busby.

The following exhibits were admitted into evidence without objection: The Department's Exhibits F1 through F16, Jones's Exhibits A1 through A3, Miller's Exhibits B1 and B2, and Wellet's Exhibits C1 and C2.

#### **Proponent's Exhibits**

Miller offered as Exhibit B3 his calculations of the amount of water necessary to irrigate 108 acres, the number of truck loads of water required to deliver that amount, and the length of time needed to irrigate the acres using a water tank truck and K-lines. The exhibit was not admitted into evidence because Miller had not provided a copy of the exhibit to Jones and the Department before the hearing.

Wellet offered a letter from David Crane and a newspaper article regarding the amount of rain and the temperature in the region. The documents were not received or admitted in evidence because Wellet had not provided a copy of the documents to Jones and the Department before the hearing. During Crane's testimony, Crane read from the letter Wellet had offered.

#### **IV. FINDINGS OF FACT**

1. In January 1975, the Oregon State Engineer issued Certificate of Water Right 41522 to Ray E. and Patricia M. Doerner. The certificate authorized their use of 0.63 cubic feet per second (cfs) of water from Umpqua River to irrigate 50.4 acres of land (the West Lot) in Sections 23 and 26, Township 25 South, Range 7 West, Willamette Meridian, Douglas County, Oregon. On April 5, 1973, a final proof survey of the land confirmed that an operable pump and water delivery system was in place that was capable of delivering the full rate and duty authorized under the certificate. (Ex. F13; test. of Williams.)

2. In December 1988, the Oregon Water Resources Director issued Certificate of Water Right 59059 to the Doerners. The certificate authorized their use of 0.73 cfs from Umpqua River to irrigate 58.6 acres of land (the East Lot) in Sections 23 and 26, Township 25 South, Range 7 West, Willamette Meridian, Douglas County, Oregon. On February 28, 1985, a final proof survey of the land confirmed that an operable pump and water delivery system was in place that was capable of delivering the full rate and duty authorized under the certificate. (Ex. F14; test. of Williams.)

3. The certificates authorized the water use "during the irrigation season of each year." (Ex. F13 and 14.) In the Umpqua Basin, the annual irrigation season is from March 1 through October 31. OWRD does not allow irrigation, under water rights certificates, before or after the irrigation season. (Test. of Williams.)

4. Gloria Ann Jones, as the trustee of the Gloria Ann Hager Jones Revocable Trust, is the current record owner of the land described in Certificate 41522 and—except for 2.3 acres owned by Donald R. Heiden—the land described in Certificate 59059, Jones having bought the lands in 2005 from then-record owner Scott Busby. (Test. of Jones; Ex. F2 at 4 and 5; Ex. F9 at 7 and 14.) Heiden is the current record owner of 2.3 acres of the land described in Certificate 59059. (Ex. F8 at 1.) Heiden did not file a protest against the Department's Notice of Proposed

Cancellation of Water Right and the Department has cancelled his right to irrigate his 2.3 acres under Certificate 59059. (Statement of Pandian.)

5. Greg R. Miller, David R. Crane, Albert Gordon Satterla, and Douglas C. Wellet are Jones's neighbors. They each filed with the Department Affidavits Asserting Non-use of Water Right under Certificates 41522 and 59059. The affidavits asserted that the entire water rights under both certificates had not been used for irrigation from September 2001 through September 2006, or—in Satterla's affidavit regarding Certificate 41522—from September 2001 through June 2010. (Ex. F9 at 1, 9, and 17; Ex. F10 at 1, 10, and 19; Ex. F11 at 1 and 9.)

6. Miller's affidavit asserted:

I am familiar with these lands and I am aware of the non-use of this water right because: [Para.] For the past ten years on an average of 3 times a week I have drove through the middle of Mrs. Jones property to access my own irrigation pump, water lines, and electrical service and I can view that she has not irrigated all her lands from September 2001 through July 2010. I also live in a location on a hill that looks down on Mrs. Jones property and I again I can say she has not irrigated all her lands the past 9 years. I also have a point of diversion about 50 feet up river from Mrs. Jones and can say she did not have a pump in the river and did not pump any water from her point of diversion till 2009 when she irrigated an acre of land behind her home.

(Ex. F9 at 1.) Miller taught school full-time starting early September each year. Therefore, he removed his water pump from the river and stopped irrigating his property each September. (Test. of Miller.)

7. Crane's affidavit asserted:

Since Sept. 5, 2001, Hopkins gave up land lease on Sept. 1, 2001. From that time on, no irrigation has been used. I border their western side of property, approximately 2000' north to south and operate a 60-acre prune orchard there. No irrigation has been used since Sept. 5, 2001 through Sept. 5, 2006. I observed this visually while working in the orchard and also while inspecting the orchard during all times of the year.

(Ex. F10 at 1.) In early October 2006, Crane was away from his property for several days. (Test. of Crane.)

8. Satterla's affidavit asserted:

I own 60 acres next to Ms Jones and have not seen any irrigation on her land s[ince] she purchased the land and for several years before. I am on my land daily [and] have never seen her irrigation in use.

(Ex. F11 at 9.)

9. Wellet's affidavit asserted:

I am an immediate adjacent land owner to the property holding the water right in question, to the south and part of the west. I have a view of said property and can say I saw no irrigation on said land from Sept. 1, 2001 thru Sept 20, 2006. I have spoken to the prior lease holders of property from Aug 30, 2001 thru late 2004 and they assured me there was no irrigation during that period of time. Mrs. Jones, who moved onto land in early 2005, does not claim to have done any irrigation until after the end of 2006.

(Ex. F12 at 1.)

10. Jamie and Suzanne Hopkins leased the subject lots from Busby from 2000 until September 2001. Jamie Hopkins last irrigated the entire area of both lots from June 2001 to sometime in September 2001. During that time, Hopkins irrigated the subject lots "constantly," "24/7," using Busby's 50 hp water pump and the irrigation system that was present on the lots. Hopkins pulled the water pump from the river and stored the irrigation equipment at the end of September 2001. At that time, the irrigation system worked. (Test. of Miller.)

11. The power meters connected to the water pumps at the points of diversion showed in 2001 the pumps used 113,693 kilo-watt hours for the East Lot and 127,000 kilo-watt hours for the West Lot, resulting in power bills totaling \$18,000 for the two meters. The pumps supplied water to the irrigation pipes installed on the lots. (Test. of Jones; Ex. A3 at 1.) The pumps were connected to the power meters from June 1, 2001, through November 14, 2001. (Ex. A3 at 8 and 10.) The meter for the West Lot also reflected power to Jones's barn and Miller's pump. (Test. of Jones.)

12. In 2004, before Jones acquired the property, her broker Denny Kruse obtained a written statement from the property's then-owner Busby that the property "was last irrigated in the summer of 2002." (Exs. A2 and F2 at 3 and 4.) Jones knew she had to make use of the water within five years to keep her water rights. Therefore, she planned to irrigate the lots in 2007. (Test. of Jones.)

13. Jones has planted rye seed on the property every year since 2005. Rye normally does not require irrigation, but after the seedlings had germinated in September 2006, three weeks elapsed with no rain. Jones, therefore, hired a 3,000 gallon water tank truck from Mike Ritchie's company, LaBrie Ranch & Seed, Inc., to irrigate the rye seedlings just enough to help them survive. Jones did not use the pumps and pipes that were present on the lots because Miller had his pump connected to the West Lot pipes and Jones could not attach her pump until Miller first removed his pump. Miller and Jones had a dispute over control of the irrigation line that was not resolved until a court entered a judgment in 2009 awarding Jones the right to access the west irrigation line. (Test. of Jones.)

14. For three successive days in October 2006, for about 10 hours each day, Jones irrigated the entire West and East Lots using Ritchie's water tank truck, 800 feet of K-line

irrigation lines, and Rain Bird irrigation sprinklers. Jones's husband drove the water tank truck while Jones laid the K-line. (Test. of Jones; Ex. F1 at 6 through 50; Ex. A1.) Jones and her husband pumped the irrigation water from the stub out pipe at the point of diversion in the Umpqua River into the water tank truck, using the truck's pump. (Test. of Jones.)

15. Under Certificate 41522, the duty is 2.25 acre feet per acre, and the maximum rate is 283 gallons per minute. Under Certificate 59059, the duty is 2.5 acre feet per acre; the rate is 328 gallons per minute. (Test. of Williams.)

16. Currently on the East and West Lots are three stub outs in the river and three power poles near the authorized points of diversion. One of the stub outs is capped. (Test. of Menteer and Williams.) The most downstream stub out supplies water to the East Lot and a cross-over line that waters the West Lot. (Test. of Williams.) One of the power poles is abandoned; the other two poles are operable and are attached to power meters. Irrigation risers and wheel lines are present on both lots. (Test. of Menteer and Williams.) Jones has a 50 hp water pump she stores in her barn that was last used during the 2001 irrigating season. The pump and pipes are capable of being used to irrigate the West and East Lots. In 2008, Jones installed a submersible pump for the East Lot. (Test. of Jones.)

## V. CONCLUSIONS OF LAW

1. No portion of the water right evidenced by Certificate 41522 has been forfeited by failure to make beneficial use of the water for a period of five or more consecutive years during the 2001 through 2006 irrigation seasons.

2. Jones's portion of the water right evidenced by Certificate 59059 has not been forfeited by failure to make beneficial use of the water for a period of five or more consecutive years during the 2001 through 2006 irrigation seasons.

## VI. OPINION

The Department proposed to cancel Jones's water rights under Certificates 41522 and 59059 based on the allegations of non-use asserted by the proponents Miller, Wellet, Satterla, and Crane. The proponents argued that (1) they did not see any irrigation on the subject lots from September 2001 through September 2006, the alleged non-use period; (2) if, as Jones asserted, Jones irrigated the lots in October 2006, the irrigation occurred after the alleged non-use period expired; and (3) if Jones irrigated the lots in October 2006, she applied such a miniscule amount of water that it could not constitute a beneficial use. The proponents of cancellation have the burden both to present evidence and to prove by a preponderance of "reliable, probative and substantial evidence" that Jones failed to use the water for five successive years. *Rencken v. Young*, 300 Or 352, 364 (1985); ORS 183.450(2) and 540.610(2).

The proponents failed to carry their burden. Although the proponents established that they did not personally see any irrigation on the lots during the alleged non-use period, the preponderance of the evidence established that the water rights at issue had been used to irrigate the lots in 2001 and 2006. The evidence also established that the irrigation both years occurred

during the Umpqua Basin irrigation season, which is the applicable period for measuring the statutory five year non-use period. Finally, the evidence established that although in 2006 Jones used less water than allowed by the certificates, she had a facility capable of handling the entire rate and duty authorized by the certificates and was ready, willing, and able to make full use of the rights. Therefore, under ORS 540.610, Jones's water rights are not subject to forfeiture.

Forfeiture by non-use of perfected water rights is governed by ORS 540.610, which provides, in part:

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

ORS 540.610(1).<sup>2</sup>

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<sup>2</sup> The full text of ORS 540.610 provides:

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

(2) Upon a showing of failure to use beneficially for five successive years, the appropriator has the burden of rebutting the presumption of forfeiture by showing one or more of the following:

(a) The water right is for use of water, or rights of use, acquired by cities and towns in this state, by appropriation or by purchase, for all reasonable and usual municipal purposes.

(b) A finding of forfeiture would impair the rights of such cities and towns to the use of water, whether acquired by appropriation or purchase, or heretofore recognized by act of the legislature, or which may hereafter be acquired.

(c) The use of water, or rights of use, are appurtenant to property obtained by the Department of Veterans' Affairs under ORS 407.135 or 407.145 for three years after the expiration of the period of redemption provided for in ORS 18.964 while the land is held by the Department of Veterans' Affairs, even if during such time the water is not used for a period of more than five successive years.

(d) The use of water, or rights of use, under a water right, if the owner of the property to which the right is appurtenant is unable to use the water due to economic hardship as defined by rule by the Water Resources Commission.

(e) The period of nonuse occurred during a period of time within which land was withdrawn from use in accordance with the Act of Congress of May 28, 1956, chapter 327 (7 U.S.C. 1801-1814; 1821-1824; 1831-1837), or the Federal Conservation Reserve Program, Act of Congress of December 23, 1985, chapter 198 (16 U.S.C. 3831-3836, 3841-3845). If necessary, in a cancellation proceeding under this section, the water right holder rebutting the presumption under this paragraph shall provide documentation that the water right holder's land was withdrawn from use under a federal reserve program.

The “five successive years,” prescribed by the statute are not calendar years. *See Rencken v. Young*, 300 Or at 364. The Department does not allow irrigation use of Umpqua River water outside the basin’s irrigation season; and the water rights certificates also limit the use of the water to “the irrigation season of each year.” Therefore, irrigation occurring during

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(f) The end of the alleged period of nonuse occurred more than 15 years before the date upon which evidence of nonuse was submitted to the commission or the commission initiated cancellation proceedings under ORS 540.631, whichever occurs first.

(g) The owner of the property to which the water right was appurtenant is unable to use the water because the use of water under the right is discontinued under an order of the commission under ORS 537.775.

(h) The nonuse occurred during a period of time within which the water right holder was using reclaimed water in lieu of using water under an existing water right.

(i) The nonuse occurred during a period of time within which the water right holder was reusing water through land application as authorized by ORS 537.141 (1)(i) or 537.545 (1)(g) in lieu of using water under an existing water right.

(j) The owner or occupant of the property to which the water right is appurtenant was unable to make full beneficial use of the water because water was not available. A water right holder rebutting the presumption under this paragraph shall provide evidence that the water right holder was ready, willing and able to use the water had it been available.

(k) The holder of a water right is prohibited by law from using the water. If the prohibition is subject to remedial action that would allow the use of the water, the water right holder shall provide evidence that the water right holder is conducting the remedial action with reasonable diligence.

(L) The nonuse occurred during a period of time within which the exercise of all or part of the water right was not necessary due to climatic conditions, so long as the water right holder had a facility capable of handling the full allowed rate and duty, and was otherwise ready, willing and able to use the entire amount of water allowed under the water right.

(m) The nonuse occurred during a period of time within which the water was included in a transfer application pending before the Water Resources Department.

(n) The nonuse of a supplemental water right occurred during a period of time when the primary water right used in conjunction with that supplemental water right was leased as an in-stream water right pursuant to ORS 537.348.

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

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

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

(4) The right of all cities and towns in this state to acquire rights to the use of the water of natural streams and lakes, not otherwise appropriated, and subject to existing rights, for all reasonable and usual municipal purposes, and for such future reasonable and usual municipal purposes as may reasonably be anticipated by reason of growth of population, or to secure sufficient water supply in cases of emergency, is expressly confirmed.

(5) After a water right is forfeited under subsection (1) of this section, the water that was the subject of use shall revert to the public and become again the subject of appropriation in the manner provided by law, subject to existing priorities.



any part of the irrigation season can constitute use during that year. Thus, the five year period started from March 1, 2001, the beginning of the 2001 annual irrigation season, and ran through October 31, 2006, the end of the 2006 irrigation season.

#### *Irrigation During 2001*

There is no dispute that the lots were irrigated during the 2001 irrigation season. Miller and Satterla both testified that Hopkins had irrigated the entire subject lots between June and September 2001. Miller testified Hopkins may have irrigated into late September 2001. According to Miller, Hopkins irrigated the lots “constantly” and “24/7” during that period. Wellet testified that Hopkins irrigated the lots sometime before September 2001.

The records of the Douglas Electrical Cooperative, which Miller offered in evidence, supported the proponents’ testimonies that irrigation occurred in 2001. The cooperative provides electrical power to the water pumps located at the points of diversion under the certificates. The pumps are connected to irrigation pipes installed on the subject lots. The cooperative’s meter records showed that the pumps used a substantial amount of power between June 1, 2001, and November 14, 2001. Although one of the meter records also reflected power use for Jones’s barn and Miller’s pump, the reasonable inference from this evidence was that the pumps pumped a substantial amount of water from the Umpqua River to irrigate the lots during the 2001 irrigation season.

#### *Irrigation During 2006*

There was no evidence that anyone irrigated the lots during the 2002 through 2005 irrigation seasons.

Jones testified that she irrigated both lots during October 2006. For three successive days in October 2006, for about 10 hours each day, Jones and her husband irrigated the entire West and East Lots using a 3,000 gallon water tank truck they rented from Ritchie, 800 feet of K-line irrigation lines, and Rain Bird irrigation sprinklers. Jones’s husband drove the water truck while Jones moved and laid the irrigation lines. They pumped the water into the truck from the Umpqua River near the authorized points of diversion. Jones’s evidence included over 80 photographs of the irrigation in progress. Ritchie’s signed letter supported Jones’s testimony: “Gloria Jones used LaBrie Ranch & Seed, Inc.[’s] 3000 gallon tank truck and diesel pump to irrigate her farm land in October 2006. A booster pump mounted on the tank truck provided the pressure to pump the irrigation water through the K-line irrigation heads.”

Jones’s evidence was more persuasive than proponents’ assertion that they did not personally see irrigation of the lots in 2006. Although proponents are Jones’s neighbors, they did not establish that they observed the subject lots at all hours during the entire irrigation season.

Relying on attorney Jeffrey Monarich’s March 1, 2011, letter to Miller, the proponents argued that Ritchie filled his water truck with water on property owned by Henry Enterprises and trucked the water to Jones’s property, where Ritchie applied the water to only a small area. The

letter purports to describe a conversation Monarich had with Ritchie, but the brief letter provided insufficient information on which one could reasonably base a conclusion that the water Jones used to irrigate in October 2006 came from Henry Enterprises and that Ritchie, not Jones's husband, drove the water tank truck. The letter stated neither the date of the conversation nor the date of the event Ritchie described. The letter was double hearsay and neither Monarich nor Ritchie were subject to questioning at the hearing. Therefore, ALJ Han deemed the letter was unreliable and gave little weight to it.

The proponents offered no persuasive reason to disbelieve Jones's evidence of the October 2006 irrigation. Proponents had the burden to present reliable, substantial evidence of nonuse, such as by submitting Ritchie's own written statement confirming the statements in Monarich's letter or by subpoenaing Ritchie to testify at the hearing. Although, on the day before the hearing was to start, Wellet requested a postponement of the hearing to subpoena Ritchie, the postponement request was untimely. Proponents had known the hearing date since March 4, 2011, and had sufficient notice of the hearing to obtain and serve subpoenas. Indeed, on May 17, 2011, OAH had issued to Miller a subpoena for Ritchie's appearance. Further, no one asked to keep the record open to present additional witness testimony after the hearing.

The proponents also argued that even if Jones applied water to the lots in October 2006, the amount she applied was so small that it cannot be considered "irrigation." Proponents are correct to assert that irrigation requires more than a mere token application of water to the ground. *See e.g., Hennings v. Water Resources Department, 50 Or App 121, 123-124 (1981)*. But contrary to their argument, Jones used more than a token amount of water; she watered all day for nearly three days to promote the growth of her rye crop. Jones's activity, therefore, constituted "irrigation" under OAR 690-300-0010(26) because it was the "artificial application of water to crops or plants controlled by means to promote growth or nourish crops or plants."<sup>3</sup>

Further, although a user uses less water than allowed by the water rights, the user's rights are not subject to forfeiture if:

- (a) The user has a facility capable of handling the entire rate and duty authorized under the right; and
- (b) The user is otherwise ready, willing and able to make full use of the right.

ORS 540.610(3).<sup>4</sup> Jones satisfied these criteria.

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<sup>3</sup> OAR 690-300-0010(26) states:

"Irrigation" means the artificial application of water to crops or plants by controlled means to promote growth or nourish crops or plants. Examples of these uses include, but are not limited to, watering of an agricultural crop, commercial garden, tree farm, orchard, park, golf course, play field or vineyard and alkali abatement.

<sup>4</sup> OAR 690-300-0010(41) states:

Each certificate's final proof survey was evidence that at the time of the survey each lot had an operable water pump and water delivery system capable of handling the full rate and duty stated on the certificate. There was no direct evidence that the facilities continued to exist on the lots when Jones acquired the lots in 2005. Nevertheless, there was sufficient evidence to infer that adequate facilities were present on the lots in 2001 and 2006. According to Miller, in 2001 Hopkins used a 50 hp pump, irrigation lines, and waterwheels to water the entire two lots "constantly" and "24/7." No one contended that the irrigation equipment Hopkins used was inadequate to produce the full rate and duty under the certificates. When Hopkins took the pump out of the river and put away the irrigation equipment in September 2001, the equipment was working.

The equipment was still present on the lots in 2006. Stub outs, power poles, power meters, and irrigation risers were present on the lots. Jones had a 50 hp water pump in her barn and irrigation lines and water wheels on the lots that likely were the equipment present when the final proof surveys were completed. The proponents offered no evidence that the equipment was incapable of delivering the full rate and duty.

Jones established that she was ready, willing, and able to make full use of the water rights. In 2006, she knew she had to make beneficial use of the water, and she believed that she had until 2007 to do so, based on Busby's letter to Jones's real estate agent, in which Busby stated the property was last irrigated in 2002. Jones had planned to irrigate in 2007 to preserve her water rights. But in 2006, the rye seedlings she had planted were at risk of dying during a stretch of several weeks without rain. Jones knew she had to irrigate the lots in 2007 anyway; therefore, in October 2006 she applied enough water to help the rye seedlings survive.

In summary, the evidence established that the water rights under the certificates were used in the 2001 and 2006 irrigation seasons; and although Jones did not use the full amount of water allowed by the certificates, she had facilities capable of handling the entire authorized rates and duties and was otherwise ready, willing and able to make full use of the rights. Therefore, Jones's water rights are not subject to forfeiture under ORS 540.610.

## **VII. EXCEPTIONS TO PROPOSED ORDER**

Pursuant to OAR 137-003-0650, the OWRD provides a written response to the exceptions. The Department's Response to Exceptions Filed by Douglas Willet filed on September 1, 2011, are hereby made a part of the record for this proceeding. In addition, the Department's written responses are adopted as described below.

### **EXCEPTION (1):**

*"It states that 'Mr. Willet received requested subpoenas on 6-9-11', this is true but in the same letter packet it stated 'service may also be made by certified or registered mail, but must be*

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"Rate and Duty of Water for Irrigation" means the maximum flow of water in cubic feet per second or gallons per minute (instantaneous rate) and the total volume of water in acre-feet per acre per year that may be diverted for irrigation.

mailed more than 10 days prior to the hearing' ect ect. The O.A.H. received my request for subpoenas on 5-25-11".

**RESPONSE:**

The exception is denied. While ALJ Han denied Mr. Wellet's request for a postponement based on the subpoena issue, ALJ Han also offered Mr. Wellet an opportunity to raise the need for a postponement again at the close of the hearing, if Mr. Wellet still believed that the testimony of Ritchie or Busby was necessary for a full hearing. Mr. Wellet did not take advantage of this opportunity. Based on these facts, OWRD concludes that there was no legal error in ALJ Han's denial of the postponement. At the hearing Mr. Wellet asserted he requested the Office of Administrative Hearing issued subpoenas for Mike Ritchie and Scott Busby. The record also shows that Greg Miller, also a proponent in this case, requested subpoenas for Mike Ritchie, Jamie Hopkins and Gloria Jones. The OAH issued the subpoena requested by Mr. Miller on May 1, 2011, and mailed to Mr. Miller on May 17, 2011. On June 9, 2011, the OAH faxed Mr. Wellet copies of the subpoenas for Mike Ritchie and Scott Busby, however, Mr. Wellet did not serve the subpoenas because he believed he must serve them at least 10 days before the hearing. Mr. Wellet asked the OAH to postpone the hearing to allow him more time to serve the subpoenas, ALJ Han denied the postponement request.

On May 25, 2011, OAH received Wellet's request for subpoenas to Mike Ritchie and Scott Busby.<sup>5</sup> Wellet asserted that he contacted OAH on May 31, 2011, to inquire about the subpoenas. OAH faxed the subpoenas to Wellet on June 9, 2011.

**EXCEPTION (2):**

"At the conclusion of the hearing, no one asked for an opportunity to present additional witnesses before the record closed." Mr. Richie and Mr. Busby were on my original witness list along with the request for supoenas for both in letter received by O.A.H. on 5-25-11."

**RESPONSE:**

The exception is denied. Mr. Wellet did not have exhibits that were entered into the record at the beginning of the hearing. Judge Han stated he would offer Mr. Wellet an opportunity at the conclusion of the hearing to ask for an extension if necessary, and to state whether Mr. Wellet still believed that Ritchie's or Busby's testimony was necessary for a full hearing. However, at the conclusion of the hearing, ALJ Han asked Mr. Wellet if there was anything else he wanted to add and Mr. Wellet responded that he did not. The record was closed at the end of the hearing. In context, ALJ Han's statement concerning "additional witnesses" refers to Ritchie and Busby.

**EXCEPTION (3):**

"Page 3 para. 4 it stated 'testimony of Jones; Ex. F4 at 4 and 5', in F5 pages 4 thru 7 (transcript of trial) that the Judge sites Ms. Jones explains, under oath, that Mr. Ritchie did the irrigation on her property. Again under oath Ms. Jones states at the hearing 6-14-11 Page 9 para 3 that she and her husband did the irrigation work themselves. Could this be perjury?"

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<sup>5</sup> On May 1, 2011, Miller asked the OAH to issue subpoenas to Mike Ritchie, Jamie Hopkins, and Jones for their appearance at the hearing. OAH mailed the subpoenas to Miller on May 17, 2011. On June 9, 2011, the OAH faxed to Mr. Wellet the subpoenas for Mike Ritchie and Scott Busby.

*Both statements, under oath, cannot be factual but the judge stated the testimony at the hearing was a basis for compliance of water right."*

**RESPONSE:**

*The exception is denied. Mr. Willet did not cross examine Ms. Jones on the point raised in Exception (3) during the hearing. Mr. Willet was a proponent in the case and had the ability to cross examine Ms. Jones. A preponderance of the evidence establishes that Mr. and Ms. Jones irrigated the property, using a truck rented from Mr. Ritchie's company. The proponents in the cancellation have the burden to present evidence and to prove by a preponderance of evidence that Ms. Jones failed to use water for five consecutive years. The proponents failed to meet their burden. The preponderance of evidence established that the water rights at issue had been irrigated in 2001 and 2006.*

**EXCEPTION (4):**

*"Pg 5 para. 12 states in part 'her broker Denny Kruse obtained a written statement from the property's then owner Busby that the property 'was last irrigated in the summer of 2002.' Ex. F-2 pg 4 actually says 'to the best of my knowledge, this property know as the Doerner Ranch located at 2477 Hubbard Cr Rd Umpqua, Or. Was last irrigated in the summer of 2002.' Why was the full quote not referenced?"*

**RESPONSE:**

*The exception is denied. Incorporation of the full quote is not necessary to the determination of the issues in this proceeding. The proponents in the cancellation have the burden to present evidence and to prove by a preponderance of evidence that Ms. Jones failed to use water for five consecutive years. The proponents failed to meet their burden. The preponderance of evidence established that the water rights at issue had been irrigated in 2001 and 2006.*

**EXCEPTION (5):**

*"Pg. 5 para. 14 it was not mentioned in the findings that Ms. Jones was to irrigate over 100 acres. Three days of irrigating 'about 10 hrs. each day' adds up to 1800 minutes of irrigation at best in total. That works out to 18 minutes of irrigation of each acre over a three day period with a 'rain bird irrigation system'. This does not account for the time to fill the 3000 gal water truck with a siphon pump as Ms. Jones claims she operated. That is not a beneficial use of Water that is a waste of water. Actually Ms. Jones stated at the hearing 'it was done in three days or maybe two.' (from transcript)"*

**RESPONSE:**

*The exception is denied. Mr. Willet did not cross examine Ms. Jones on the point raised in Exception (5) during the hearing. Mr. Willet was a proponent in the case and had the ability to cross examine Ms. Jones. The proponents in the cancellation have the burden to present evidence and to prove by a preponderance of evidence that Ms. Jones failed to use water for five consecutive years. The proponents failed to meet their burden. The preponderance of evidence established that the water rights at issue had been irrigated in 2001 and 2006. The evidence established that in 2006 Ms. Jones used less water that allowed under the certificates, however, Ms. Jones had a facility capable of handling the entire rate and duty of water authorized by the certificates and was ready, willing and able to make full use of the water right. A preponderance*

*of evidence in the record supports the conclusion that “more than a mere token” of water was applied to the place of use, and that enough water was applied to help rye seedlings survive during a dry period.*

**EXCEPTION (6):**

*“Finally, Ms. Pandian of W.R.B. never mentioned in the over eight months of communications by letter and by phone conversations the term “irrigation season” as a basis for her recommendation in favor of Ms. Jones to the judge at the hearing. We had no contact with the Douglas County Watermaster because we thought we were dealing exclusively with the state W.R>B. It was never mentioned to use leading up to the hearing that we should consult the local watermaster.”*

**RESPONSE:**

*The exception is denied. Mr. Willet was a proponent in this case, Mr. Willet submitted affidavits asserting nonuse of water right certificates 41522 and 59059. Water Right Certificates are appurtenant to a place of use and a duty of water allowed for each acre irrigated ‘...during the irrigation season of each year’ (Water Right Certificates 41522 and 59059). Proponents’ assertions about Ms. Pandian’s statements are not part of the record in this proceeding, and may not be considered; furthermore, even if true, the assertions are not relevant to the determination of any issue in this proceeding. The proponents in the cancellation have the burden to present evidence and to prove by a preponderance of evidence that Ms. Jones failed to use water for five consecutive years. The proponents failed to meet their burden. The preponderance of evidence established that the water rights at issue had been irrigated in 2001 and 2006.*

**VIII. CONCLUSION**

For the reasons discussed above, a preponderance of evidence supports a finding that the presumption of forfeiture for Water Right Certificates 59059 and 41522 has not been established and has been rebutted.

**IX. ORDER**

Proponent Willet’s exceptions are denied.

It is HEREBY ORDERED that a portion Water Right Certificate 59059 for use of water from the Umpqua River for irrigation of 2.3 acres in the NW1/4 SW1/4, Section 26, Township 25 South, Range 7 West, Tax Lot 401, Douglas County, Oregon, be cancelled.

It is HEREBY ORDERED that the water rights of Gloria Ann Jones, Trustee of the Gloria Ann Hager Jones Revocable Trust, evidenced by Certificates of Water Rights 41522 and 59059, being 50.4 acres of land (the West Lot) in Sections 23 and 26, Township 25 South, Range 7 West, Willamette Meridian, and 56.3 acres of land (the East Lot) in Sections 23 and 26, Township 25 South, Range 7 West, Willamette Meridian, Douglas County, Oregon, respectively, are not canceled.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 2012

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John Jackson, Chair,  
Water Resources Commission

**APPEAL RIGHTS**

You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for review within 60 days from the date of service of this Order. If this Order was personally delivered to you, the date of service is the day you received the Order. If this Order was mailed to you, the date of service is the day it was mailed. Judicial review, pursuant to the provision of ORS 536.075 and ORS 183.482, is to the Oregon Court of Appeals. If you do not file a petition for judicial review within the 60 day time period, you will lose your right to appeal.

DRAFT