



Oregon

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Water Resources Department

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MEMORANDUM

TO: Water Resources Commission

FROM: Phillip C. Ward, Director

SUBJECT: Agenda Item M, April 20, 2012
Water Resources Commission Meeting

**Consideration of the Exceptions and Issuance of Final Order in the
Partial Cancellation of Water Right Certificates 9451, 22209 and
45409 – Hart Lake**

I. Issue Statement

The Commission is asked to consider exceptions and issuance of the Final Order in the Partial Cancellation of Water Right Certificates 9451, 22209 and 45409.

II. Background

On August 26, 2009, Warren and Jesse Laird (Proponents) each filed Affidavits of Non-Use of Water Right. On October 15, 2009, Oregon Water Resources Department (OWRD) issued three Notices of Proposed Partial Cancellation of Water Rights evidenced by Water Right Certificates 9451, 22209, and 45409. The Water Right Certificates are held by the United States Bureau of Land Management (BLM or Protestant). The water rights are for irrigation and livestock near Hart Lake in Lake County.

The portion of Water Right Certificate 9451 proposed to be canceled for non-use is for use of water from Hart Lake for Tract No. 4 for irrigation of 10,677.44 acres. The portion of Water Right Certificate 22209 proposed to be canceled for non-use is for use of water from Hart Lake for supplemental irrigation of 10,677.44 acres. The portion of Water Right Certificate 45409 proposed to be canceled for non-use is for use of water from Hart Lake Reservoir for supplemental irrigation of 10,677.44 acres.

On December 10, 2009, BLM filed a protest to all three notices. On January 5, 2010, OWRD referred the matter to the Office of Administrative Hearings (OAH) for hearing.

On January 26, 2010, OWRD issued a Notice of Hearing and Prehearing Conference. On March 15, 2010, a prehearing conference was held with Senior Administrative Law Judge (ALJ) Joe L. Allen presiding. Bradley Grenham, Attorney for the United States Department of the Interior, appeared on behalf of BLM. Laura Schroeder and Courtney Duke, Attorneys at law, appeared on behalf of Proponents. On April 20, 2010, the parties and the ALJ met in Lakeview, Oregon and conducted a site visit. At this time, the ALJ and the parties observed points of diversion (PODs) 8, 9 and 10 along the northern bank of Hart Lake.

A hearing was held on December 13 through December 17, 2010, at the Salem office of the OAH. All parties were represented and filed closing briefs according to the established schedule. The record closed on February 16, 2011.

The issues for hearing were (1) Whether a portion of the water right evidenced by Certificate 9451 has been forfeited by failure to make beneficial use of the water for a period of five or more consecutive years during the period March 2001 through August 2009; (2) Whether a portion of the water right evidenced by Certificate 22209 has been forfeited by failure to make beneficial use of the water for a period of five or more consecutive years during the period March 2001 through August 2009; and (3) Whether a portion of the water right evidenced by Certificate 45409 has been forfeited by failure to make beneficial use of the water for a period of five or more consecutive years during the period March 2001 through August 2009.

III. Proposed Order

Administrative Law Judge (ALJ) Allen issued a Proposed Order on March 31, 2011 (Attachment 1) finding that (1) The BLM has not failed to beneficially use water on the contested acres for a period of five or more years during the period in issue; and that (2) No portion of the water rights evidenced by Certificates 9451, 22209, and 45409 has been forfeited due to non-use during the period in issue.

IV. Corrected Proposed Order

ALJ Allen issued a Corrected Proposed Order on April 5, 2011 (Attachment 2), because the March 31, 2011, Proposed Order was issued without the required exceptions language. The Corrected Proposed Order corrected this omission. No other changes were made to the prior order and the March 31, 2011 Proposed Order was withdrawn.

Proponents (Laird) timely filed exceptions to the Corrected Proposed Order. Proponents' exceptions cover numerous issues, including the following: The Proponents argue that the evidence is sufficient to establish non-use of water between 2001 and 2005, the Corrected Proposed Order incorrectly decided that water was not "available" when the elevation of Hart Lake was too low to reach the Protestant's points of diversion, and certain

exemptions from forfeiture asserted by the Protestant do not apply. Protestant (BLM) timely filed responses to Proponents' exceptions (Attachment 3).

V. Amended Corrected Proposed Order

OWRD issued an Amended Corrected Proposed Order (Attachment 4) on November 14, 2011. The Amended Corrected Proposed Order does not change the outcome of the ALJ's Corrected Proposed Order, but it does change some of the reasoning in support of the outcome, makes some additional findings of fact supporting the outcome, and modifies a few of the Corrected Proposed Order's findings of fact. The Amended Corrected Proposed Order also incorporates OWRD's response to the exceptions filed by the Proponents and Protestant.

Proponents (Laird) timely filed exceptions to the Amended Corrected Proposed Order (Attachment 5). Protestant (BLM) timely filed responses to those exceptions. OWRD's responses to the exceptions to the Amended Corrected Proposed Order are in Attachment 5. The Proponents' exceptions to the Amended Corrected Proposed Order incorporate some of the Proponents' exceptions to the Corrected Proposed Order, and also make new arguments pertaining to OWRD's conclusions that the evidence is insufficient to establish non-use of water between 2001 and 2005, and that water was not "available" when the elevation of Hart Lake was too low to reach the Protestant's points of diversion.

The exception language in both the Corrected Proposed Order and the Amended Corrected Proposed Order provides that written exceptions may be filed within specified time periods. The exceptions language in the Proposed Order provides the opportunity required by ORS 183.460 and OAR 137-003-0645(5) for the Proponents and the Protestant to make arguments concerning the Proposed Order for the Commission's consideration. Neither the Corrected Proposed Order nor the Amended Corrected Proposed Order allows for oral argument to the Commission.

VI. Alternatives

1. Issue a Final Order (Attachment 6) that is consistent with the Department's Amended Corrected Proposed Order confirming the Department's responses to the exceptions (Attachment 5) and declares that no portion of the water rights evidenced in Certificates 9451, 22209, and 45409 have been forfeited due to non-use during the period in issue.
2. Request that staff gather additional information and report back to the Commission at its August meeting.
3. Request that staff modify the draft Final Order in a manner requested by the Commission.

VII. Recommendation

The Director recommends the Commission adopt Alternative 1.

Attachments:

1. Proposed Order
2. Corrected Proposed Order
3. Exceptions to Corrected Proposed Order and Responses
4. Amended Corrected Proposed Order
5. Proponents' and Protestants Exceptions to the Amended Corrected Proposed Order and OWRD's Responses to Exceptions Filed to the Amended Corrected Proposed Order
6. Draft Final Order Draft declaring that no portion of the water rights evidenced in Certificates 9451, 22209, and 45409 have been forfeited due to non-use during the period in issue

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