

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

IN THE MATTER OF THE PROPOSED PARTIAL)
 CANCELLATION OF THE WATER RIGHT)
 EVIDENCED BY CERTIFICATE 9451 FOR USE)
 OF WATER FROM HONEY CREEK FOR TRACT)
 NO. 1, DEGARMO CREEK FOR TRACT NO. 2,)
 NORTON CREEK FOR TRACT NO. 3, AND)
 HART LAKE FOR TRACT NO. 4, FOR)
 IRRIGATION OF 5,595.5 ACRES AND STOCK)
 WATER, LAKE COUNTY, OREGON)

CORRECTED PROPOSED ORDER¹

AND)

IN THE MATTER OF THE PROPOSED PARTIAL)
 CANCELLATION OF THE WATER RIGHT)
 EVIDENCED BY CERTIFICATE 22209 FOR USE)
 OF WATER FROM HART LAKE, TRIBUTARY)
 OF WARNER LAKES & STREAMS FOR)
 SUPPLEMENTAL IRRIGATION OF 4,276.54)
 ACRES, LAKE COUNTY, OREGON)

AND)

IN THE MATTER OF THE PROPOSED PARTIAL)
 CANCELLATION OF THE WATER RIGHT)
 EVIDENCED BY CERTIFICATE 45409 FOR USE)
 OF WATER FROM HART LAKE RESERVOIR,)
 TRIBUTARY OF WARNER LAKE BASIN, FOR)
 SUPPLEMENTAL IRRIGATION OF 6,475.25)
 ACRES, LAKE COUNTY, OREGON)

UNITED STATES BUREAU OF LAND)
 MANAGEMENT, DEPARTMENT OF THE)
 INTERIOR,)

Protestant)

WARREN C. LAIRD AND JESSE LAIRD,)

Proponents)

OAH Ref. No: WR-10-001

OWRD Case No: PC 05-09

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¹ The original order, dated March 31, 2011, was issued without exception language or a certificate of service. This order corrects those errors. No other changes have been made to the prior order. Pursuant to OAR 137-003-0655(1), the Proposed Order issued March 31, 2011 is hereby withdrawn.

PROCEDURAL HISTORY

On August 26, 2009, Warren and Jesse Laird (Proponents) each filed an Affidavit 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 certificate numbers 9451, 22209, and 45409 (Notices). On December 10, 2009, the United States Bureau of Land Management (BLM or Protestant) filed a protest to all three notices. On January 5, 2010, OWRD referred this 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 12, 2010, the parties submitted a Stipulated Prehearing Statement. On March 15, 2010, a prehearing conference was held with Senior Administrative Law Judge (ALJ) Joe L. Allen presiding. Juno Pandian appeared on behalf of OWRD. 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 March 16, 2010, ALJ Allen issued a Prehearing Order that set out a schedule of proceedings in this matter. 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.²

On July 8, 2010, the parties filed a stipulated motion seeking to extend the cutoff date for depositions to August 27, 2010. ALJ Allen granted the motion. On August 24, 2010, the parties filed a second motion seeking an additional amendment to the prehearing schedule. This time, the parties asked the ALJ to extend the cutoff date for filing motions for summary determination. OWRD did not file an opposition to the motion. On August 30, 2010, ALJ Allen granted the parties request.

On September 8, 2010, Proponents and Protestant filed cross-motions for summary determination (motions). In the motions, each party requested summary determination in their favor on all issues. On October 1, 2010, the parties filed responses to the opposing party's motion. Also on this date, OWRD filed a consolidated response to the parties' motions. OWRD's response addressed only select issues raised in the motions. No party filed reply briefs. On October 26, 2010, ALJ Allen denied the parties cross-motions for summary determination *in toto*.

On November 8, 2010, the parties filed exhibit lists and exhibits, as well as witness lists and time estimates for each witness. A prehearing conference was held on November 10, 2010. At the conference, the parties agreed to a schedule for presenting witnesses at the hearing. On this date, the parties also indicated their intent to use a court reporter to prepare a real-time transcript of the proceedings.³

On November 28, 2010, Proponents filed a Motion to Establish Evidentiary Standards and Burdens of Proof. ALJ Allen issued an oral ruling denying this motion at the hearing. On

² At the time of the site visit, inclement weather in the Hart Lake area prevented viewing of the contested areas.

³ ALJ Allen informed the parties this was acceptable so long as the parties agreed to bear the costs involved, including the cost of providing an original transcript to the ALJ. The parties agreed.

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APR 06 2011

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SALEM, OREGON

December 10, 2010, Proponents filed Proponents' Objections to Proffered Exhibits from Protestant; Proponents' Opening Brief; and Notice of Objection to James Elvin. ALJ Allen issued oral rulings on the objections at the hearing.

An in-person hearing was held on December 13 through December 17, 2010, at the Salem office of the OAH. Jesse D. Ratcliffe, Assistant Attorney General, appeared on behalf of OWRD. Kyle Gorman appeared as a witness and testified on behalf of OWRD. Mr. Grenham appeared and represented BLM. Vernon Stofleth and James Elvin appeared as witnesses and testified on behalf of BLM. Ms. Duke and W. Alan Schroeder, Attorney at law,⁴ appeared and represented Proponents. Warren and Jesse Laird appeared and testified on their own behalf. At the hearing, BLM requested an extension to the schedule for closing briefs to allow the parties time to obtain transcripts from the court reporter. ALJ Allen granted the request and set the due date for closing briefs as January 26, 2010. The parties were ordered to file responsive briefs by February 9, 2010, and reply briefs no later than February 16, 2010. All parties filed closing briefs according to the established schedule. The record closed on February 16, 2010.

On March 31, 2011, ALJ Allen issued a Proposed Order, which erroneously omitted notice of the right to file exceptions. The order was also issued without a certificate of service. This order corrects those deficiencies.

ISSUES

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.
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.

EVIDENTIARY RULINGS

Exhibits A1 through A12, offered by OWRD, were admitted into evidence without objection.

Exhibits LAIRD 4 through LAIRD 7, LAIRD 9, LAIRD 23 through LAIRD 25, LAIRD 27, LAIRD 29 through LAIRD 30, LAIRD 32, LAIRD 53 through LAIRD 69, and LAIRD 77, offered by Proponents, were admitted into evidence without objection. BLM objected to Exhibits LAID 40, LAIRD 70, LAIRD 71, and LAIRD 72 through LAIRD 74 on various

⁴ W. Alan Schroeder was admitted *pro hac vice* for the purpose of participating in this proceeding. Mr. Schroeder is duly admitted to practice law in the state of Idaho, bar # 4118.

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APR 06 2011

WATER RESOURCES DEPT
SALEM OREGON

grounds. The ALJ excluded LAIRD 40 as irrelevant and overruled all other objections to Proponents' exhibits. Proponents withdrew Exhibit LAIRD 71.⁵

Protestants offered Exhibits BLM 1 through BLM 41.⁶ Proponents objected to Exhibits BLM 3, BLM 4, BLM 9, BLM 16, BLM 21 through BLM 25, BLM 28, BLM 29, BLM 32 through BLM 34, BLM 36, and BLM 38 on various grounds.⁷ The ALJ overruled each objection. Exhibits BLM 1 through BLM 41 were admitted into evidence. The ALJ also overruled Proponents' prehearing motion to exclude the testimony of James Elvin.

FINDINGS OF FACT

1. The United States Bureau of Land Management is the holder of certificated water rights identified by certificate numbers 9451, 22209, and 45409 issued by OWRD. (Notices.)

2. Certificate 9451 authorizes use of a specified quantity of water for irrigation and livestock watering on lands specified therein. The certificate designates the authorized places of use as Tracts 1 through 4, identifiable by reference to township-range descriptions provided therein. The certificate identifies the authorized water sources as Honey Creek, DeGarmo Creek, Norton Creek, and Hart Lake. The priority dates for Tracts 1 through 4 are 1867, 1877, 1882, and 1892 respectively. (Ex. LAIRD 24.)

3. Certificate 22209 authorizes use of a specified quantity of water for supplemental irrigation on lands specified therein. The certificate designates the authorized places of use identifiable by reference to township-range descriptions provided therein. The certificate identifies the authorized water source as Hart Lake. The priority date for this water right is identified as March 15, 1951. (Ex. LAIRD 25.)

4. Certificate 45409 authorizes use of a specified quantity of water for supplemental irrigation on lands specified therein. The certificate designates the authorized places of use identifiable by reference to township-range descriptions provided therein. The certificate identifies the authorized water source as Hart Lake Reservoir. The priority date for this water right is identified as August 30, 1950. (Ex. LAIRD 28.)

5. Between March 2001 and August 2009 (the period in issue), BLM irrigated the lands specified in the certificates at issue through three points of diversion along Hart Lake. The points of diversion at issue are referred to as POD 8, 9, and 10. During the period in issue, BLM operated a 75 horsepower (hp) pump at POD 8. There was no pump located at either POD 9 or 10 during the period in issue. (Exs. LAIRD 19 at 2 and 7, and BLM 26 at 2.) POD 8 is located along the northern bank of Hart Lake in Township 36 South, Range 25 East, Section 18.⁸ PODs

⁵ Proponents' exhibits were not sequentially numbered. At the hearing, Proponents did not offer exhibits marked LAIRD 1-3, 8, 10-22, 26, 28, 31, 33-39, 41-52, or 76.

⁶ All exhibits offered by Protestants are numbered sequentially with the exception of BLM 30A, offered on December 14, 2010. BLM 30A was admitted into evidence without objection.

⁷ Proponents originally objected to the admittance of BLM 31 as well. Proponents withdrew the objection when they offered LAIRD 76, which is identical to BLM 31.

⁸ All Township and Range designations in Oregon are measured from the Willamette Meridian.

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APR 06 2011

WATER RESOURCES DEPT

SALEM, OREGON

9 and 10 are also located along the northern bank of Hart Lake in T36S, R25E, S19. (Tr. vol. I at 53 through 54; Exs. BLM 2 at 7 and BLM 9 at 5.)

6. POD 8 is a constructed ditch, in excess of 10 feet wide. The mouth of the ditch consists of a concrete sill at the base and stone walls on either side. The concrete sill accommodates wood planks across the width to control the flow of water into the main irrigation ditch. (Tr. vol. I at 55 through 59; Ex. BLM 9 at 1 through 4.) The pump at POD 8 is situated at 4,460 feet, the lowest elevation of the three PODs along Hart Lake. (Ex. BLM 26 at 2 through 3.) During the period in issue, the pump located at POD 8 generally required a minimum lake elevation of 4,470 ft. in order to operate.⁹ (Tr. vol. II at 261 and 263; Ex. BLM 26 at 2.)

7. PODs 9 and 10 are manmade structures consisting of timber and concrete. A constructed footbridge spans POD 10. The piers of the footbridge accommodate wood planks capable of controlling the flow of water from Hart Lake into the attached channel. (Tr. vol. I at 54; Exs. BLM 20 at 3, BLM 35 at 2 through 6, and LAIRD 70 at 46 through 48.) The sill heights of PODs 9 and 10 are approximately 4,471.25 ft. (Tr. vol. II at 274; Exs. BLM 20 at 3 at A7 at 131.) Both PODs 9 and 10 empty into a single ditch (referred to by the parties as either the main spillway ditch or the Lynch bypass channel), which runs north along the western edge of the southern contested acres. (Tr. vol. I at 60 and 124. Exs. BLM 30 at 2 and BLM 30 A.)

8. Water from Hart Lake travels through POD 8 via direct diversion (gravity flow) as well as pump driven diversions. Water from Hart Lake enters PODs 9 and 10 through direct diversion only. Generally, BLM's irrigation season begins March 1 and continues through October 1 of each year. (Ex. BLM 5 at 2.)

9. The contested areas are part of the larger Warner Wetlands area of critical environmental concern (ACEC). (Tr. vol. I at 83 through 84; Ex. BLM 10 at 1.) BLM manages the Warner Wetlands ACEC with the goals of maintaining wetland wildlife habitats, wetland plant communities, and scenic and prehistoric site preservation. (Tr. vol. I at 85; Ex. BLM 5.) The Warner Wetlands ACEC is open to the public for educational and recreational activities, including hunting, site seeing, and hiking. (Tr. vol. I at 86 through 89.) A primary goal of BLM is maintaining a proper functioning wetland habitat within the Warner Wetlands ACEC. (Tr. vol. I at 92; Ex. BLM 5 at 1.)

10. BLM utilizes the water rights at issue to divert water to the Warner Wetlands ACEC in order to irrigate wetland obligate and facultative plant communities. Wetland obligate plants require complete soil saturation for extended periods in order to thrive. Wetland obligate plants are generally found only in wetland communities. Wetland facultative plants also require increased amounts of water and can be found in and around wetland communities. (Tr. vol. I at 95 through 96.)

⁹ At the hearing, Mr. Stofleth testified that, on occasion, a strong, sustained southerly wind could drive sufficient water to the pump, located at POD 8, to allow the pump to operate when water elevations of Hart Lake did not reach 4470 ft. *See also*, Ex. BLM 26 at 2.

11. BLM limits the amount of excavation and trenching in the Warner Wetlands ACEC in order to promote propagation of wetland plant communities within the irrigation ditches and prevent disturbance of prehistoric sites. (Tr. vol. I at 98.)

12. The Southern Contested Area (SCA) consists of 505 acres in T36S, R25E, Sections 6, 7, 8, 18, and 19. (Exs. A 2 at 5, A5 at 4, and A8 at 5 through 6; BLM 2 at 7.) The elevation of the southernmost edge of the SCA borders Hart Lake and sits at an approximate elevation of 4472 ft. The northernmost end of the SCA sits at approximately 4,464 ft. (Tr. vol. II at 448 through 449; Ex. BLM 30 at 2.) The SCA is bounded on the west by a constructed levee. The SCA contains at least five manmade ditches, including the main spillway channel. (Exs. BLM 30 at 2 and 30A.)

13. The Northern Contested Area (NCA)¹⁰ consists of 562.44 acres in T35S, R24E, Sections 24, 25, and 36. (Exs. A 2 at 5, A5 at 4, and A8 at 5 through 6; BLM 2 at 7.) The elevation of the southernmost edge of the NCA sits at an approximate elevation of 4,465 ft. The northernmost end of the NCA sits at approximately 4,459 ft. The southern edge of the NCA is bounded by a constructed levee that runs in a northeasterly direction and extends beyond the NCA. The main ditch from POD 8 enters the NCA at the southernmost edge and runs along this levee. (Tr. vol. II at 473 through 474; Ex. BLM 30 at 1.) To the east of the NCA, but still within the Warner Wetlands administered by BLM, is a constructed ditch capable of directing water into the northernmost units of the NCA. (Tr. vol. III at 498, Ex. BLM 30 at 1.)

14. The Warner Wetlands also contain several hundred acres between the SCA and NCA. These acres extend from the northern edge of Hart Lake to the southern edge of the NCA. These acres are bounded on the east by a constructed levee at the western edge of the SCA and on the west by BLM's main irrigation ditch. This area contains a network of manmade ditches and canals with over 50 head gates and 500 boards used to control the flow of water. BLM refers to this area as the "intensely managed acres" because irrigation in this area is very labor intensive. (Tr. vol. I at 110; Exs. BLM 9 at 5 and BLM 10 at 1.)

15. Water diverted from POD 8 enters BLM's main irrigation ditch. Several yards south of POD 8, the main irrigation ditch branches off to the southeast and forms a distribution ditch. Several yards from this junction, along the main ditch, is a head gate designated head gate A. Water from POD 8 will travel down the distribution ditch into the intensely managed area so long as head gate A is closed. Water from this distribution ditch will service units 1 through 25 in the Warner Wetlands. Once the distribution ditch is filled, BLM will open head gate A and allow water to travel down the main ditch to head gate B in order to irrigate the remainder of the units in the intensely managed area. (Tr. vol. I at 101 through 103; Ex. BLM 9 at 5.)

16. When BLM is ready to divert water to the NCA, it will open head gate B and allow water from POD 8 to travel the full length of the main ditch into the south end of the NCA. BLM makes the determination, at the beginning of each irrigation season, how many days it will apply water to each area of the Warner Wetlands. In drier seasons, BLM will try to distribute water evenly to ensure each area gets some water. BLM irrigates from north to south in order to take advantage of gravity flow throughout the Warner Wetlands. (Tr. vol. I at 103 through 105;

¹⁰ The Northern and Southern Contested Areas are referred to collectively in this order as "the contested areas."

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SALEM, OREGON

Ex. BLM 9 at 5.) In a short irrigation season, the NCA could get little or no water due to availability and distance from POD 8. (Tr. vol. I at 106.)

17. Once water is diverted to the NCA, BLM employs a gravity flow irrigation system. This system takes advantage of the natural topography, as well as manmade diversion structures, in order to direct water from south to north across the NCA. (Tr. vol. I at 107.)

18. The combination of levees, ditches, and swales throughout the NCA and other BLM lands are capable of distributing water throughout the entirety of the NCA in order to achieve the irrigation goals of BLM. (Tr. vol. II at 473 through 4479 and vol. III at 490 through 499; Ex. BLM 30 at 1.)

19. Water diverted through PODs 9 and 10 travels into the SCA via the main spillway. The main spillway opens up at various low spots (swales) that allow water to enter the SCA and saturate the land. BLM can direct water throughout the entire SCA using a series of ditches and swales so long as sufficient water is available. (Tr. vol. I at 110 through 113; Ex. BLM 30 at 2.)

20. The combination of levees, ditches, channels and swales throughout the SCA are capable of distributing water throughout the entirety of the SCA in order to achieve the irrigation goals of BLM. (Tr. vol. II at 463 through 472; Exs. BLM 30 at 2 and BLM 30A.)

21. In 2001, the contested areas were saturated with water from a particularly wet irrigation season the previous year. BLM's irrigation ditches in the contested areas were nearly filled with water. (Tr. vol. II at 263 through 264; Ex. BLM 1 at 1.) In March and early April, the water level in Hart Lake exceeded 4471 ft. at PODs 8, 9, and 10. BLM diverted water through direct diversion at all PODs. BLM also ran the pump at POD 8 during this period. BLM was able to apply a limited amount of water to the contested areas during this period. (Tr. vol. II at 267 through 270 and 274; Exs. BLM 1 at 1 and A12 at 1.)

22. During the 2002 irrigation season, the water level of Hart Lake did not reach the diversion threshold. However, a strong southern wind during the month of August drove sufficient water to POD 8 to enable BLM to operate the pump at that location. BLM pumped water into the main ditch from August 19 through 30. (Tr. vol. II at 278; Ex. BLM 1 at 1.) The waters of Hart Lake did not exceed the sill heights for PODs 9 or 10 anytime during the 2002 irrigation season. (Tr. vol. II at 283.)

23. During the 2003 irrigation season, the water level of Hart Lake never reached the diversion threshold at PODs 8, 9, or 10. As such, BLM was unable to divert water through either direct or pump diversion to the contested areas. (Tr. vol. II at 284; Exs. BLM 1 at 1 and A12 at 1.)

24. Likewise, during the 2004 irrigation season, the water level of Hart Lake never reached the diversion threshold at PODs 8, 9, or 10. As such, BLM was unable to divert water through either direct or pump diversion to the contested areas. (Tr. vol. II at 285; Exs. BLM 1 at 2 and A12 at 1.)

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25. In 2005, the water level of Hart Lake did not reach the 4,470 ft. diversion threshold for POD 8 until late June. However, BLM was able to pump water from POD 8 between May 23 and June 6 due to strong sustained south winds that drove water to the pump. (Tr. vol. II at 286; Exs. BLM 1 at 2 and A12 at 1.) Due to low water levels early in the season, BLM diverted water to the NCA by opening head gates A and B on the main ditch after just a few days of pumping. (Tr. vol. II at 287.)

26. In late June 2005, the water level of Hart Lake rose rapidly. By June 27, 2005, the water level exceeded the diversion threshold at PODs 8, 9, and 10 by more than two feet and remained at such levels for the remainder of the irrigation season. BLM was able to divert water to all contested acres through direct diversion and pumping during this time. Because BLM opened head gates A and B earlier in the season, much of the water diverted from POD 8 was directed to the NCA. (Tr. vol. II at 288 through 289; Exs. BLM 1 at 2 and A12 at 1.)

27. In 2006, the Warner Valley experienced a flood event. Beginning in January 2006, the water levels of Hart Lake exceeded 4470 ft. and remained above 4,473 ft. for most of the irrigation season. (Exs. BLM 1 at 2 through 3 and A12 at 1.) BLM diverted water from PODs 8, 9, and 10 through direct diversion during the entire irrigation season. On March 6, 2006, BLM started pumping water into its main ditch from POD 8. BLM continued to run the POD 8 pump until May 1, 2006. At times, water flowed through PODs 9 and 10 in excess of 300 cfs. On May 1, 2006, BLM observed nearly all contested areas had been saturated. Therefore, BLM shut down the pump at POD 8 and continued to divert water through direct diversion only. (Tr. vol. II at 290 through 300; Ex. BLM 1 at 2 through 3.)

28. During the 2007 irrigation season, the contested areas remained saturated from flooding the previous year. In addition, all BLM irrigation ditches on the contested areas were filled with water. (Ex. BLM 1 at 3 through 4.) Beginning April 18, 2007, BLM operated its pump at POD 8 and diverted approximately 30 cfs until July 11, 2007. On July 11, the water level of Hart Lake dropped below the 4,470 ft. diversion threshold and remained below that level for the remainder of the season. The water level of Hart Lake never reached the diversion threshold of PODs 9 or 10 during this irrigation season. (Tr. vol. II at 302 through 305; Ex. BLM 1 at 3 through 4.)

29. During the 2008 irrigation season, the water level of Hart Lake did not reach the 4,470 ft. diversion threshold at POD 8 until on or about April 1. However, BLM was able to begin pumping on March 10, due to strong sustained south winds, which drove sufficient water to POD 8 to allow the pump to operate. On May 14, 2008, BLM directed water to the NCA because the southern units had received sufficient water to fulfill the irrigation purposes. (Tr. vol. II at 306; Ex. BLM 1 at 4.)

30. On May 30, 2008, Proponents contacted BLM and indicated their belief that BLM had exceeded its allocated water rights under the certificates at issue. BLM was unable to verify the total amount diverted at that time but did observe approximately 95 percent of the contested areas had been irrigated. Therefore, BLM discontinued use of the POD 8 pump on June 2, 2008. The water level of Hart Lake did not reach the diversion threshold of PODs 9 or 10 during this irrigation season. (Tr. vol. II at 306 through 309; Ex. BLM 1 at 4.)

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APR 06 2011

WATER RESOURCES DEPT
SALEM, OREGON

31. Sometime between July and December 2008, BLM filed an application to transfer the location of the POD 8 pump. Between November 2008 and March 2009, BLM installed a new pump at POD 8. BLM installed the new pump 82 feet east of the previous pump location. (Tr. vol. I at 62 through 63; Ex. BLM 33 at 2 and BLM 36.) The new POD 8 pump was ready to operate prior to the start of the 2009 irrigation season. (Tr. vol. I at 66 and vol. II at 309.)

32. During the 2009 irrigation season, the water level of Hart Lake never reached the diversion threshold at PODs 8, 9, or 10. As such, BLM was unable to divert water through either direct or pump diversion to the contested areas. (Tr. vol. II at 310 through 311; Exs. BLM 1 at 4 and A12 at 1.)

33. On or about August 26, 2009, Proponents Jesse and Warren Laird filed affidavits with OWRD asserting BLM failed to beneficially use a portion of the water rights at issue for a period in excess of five years. (Tr. vol. III at 570; Exs. LAIRD 4 and LAIRD 5.)

34. Proponents operate Laird Ranch. Laird Ranch is adjacent to the Warner Wetlands ACEC. The eastern border of Laird Ranch abuts the western edges of the intensely managed area and the NCA. (Tr. vol. III at 546; Ex. BLM 41.) Proponents operations on Laird Ranch include raising cattle, growing alfalfa, and cultivating pastureland for cattle grazing. (Tr. vol. III at 555 through 556.) Proponents also operate Bluejoint Ranch, which is located approximately 10 miles south of Laird Ranch. (Tr. vol. III at 549 and 552.) Proponents use Bluejoint Ranch primarily as pastureland for cattle. (Tr. vol. III at 556.)

CONCLUSIONS OF LAW

1. No portion of the water right evidenced by Certificate 9451 has been forfeited due to non-use of water for irrigation on the subject lands for a period of five years or more during the period in issue.

2. No portion of the water right evidenced by Certificate 22209 has been forfeited due to non-use of water for irrigation on the subject lands for a period of five years or more during the period in issue.

3. No portion of the water right evidenced by Certificate 45409 has been forfeited due to non-use of water for irrigation on the subject lands for a period of five years or more during the period in issue.

CREDIBILITY

Testimony at the hearing was in direct conflict regarding events relevant to a determination in this matter. The contradictions must therefore be resolved. Credibility that attaches to testimony can be determined by a number of factors, including witness demeanor, the inherent probability or improbability of the testimony, the possible internal inconsistencies, the fact that it is nor is not corroborated, that it is contradicted by other testimony or evidence, and finally that human experience demonstrates that it is logically incredible. *See Lewis and Clark College v. Bureau of Labor*, 43 Or App 245 (1979) (Richardson, J., concurring in part, dissenting in part.)

In the Matter of the Proposed Partial Cancellation of Water Rights Evidenced by Certificate Nos. 9451, 22209, and 45409

OAH Case No. WR-10-001

Page 9 of 17

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APR 06 2011

WATER RESOURCES DEPT
SALEM, OREGON

During testimony, Proponents were, at times, evasive in their answers. Proponents continually qualified responses to questions based on personal definitions of the terms "irrigation," "irrigation water," and "irrigation structures."¹¹ Proponents also provided internally and externally inconsistent testimony. For instance, in his direct testimony, Warren Laird provided extensive testimony regarding his observations of water levels at PODs 9 and 10 and BLM's failure to irrigate. Water measurements by OWRD's water master and BLM's irrigation chronology are in direct conflict with this testimony. Further, on cross-examination, Mr. Laird admitted he rarely paid attention to the irrigation practices of water users on Hart Lake. This testimony contradicts statements made in the affidavits of non-use filed in this matter. Finally, neither Proponent kept records of the purported observations of water levels at PODs 8, 9, or 10, or of the alleged non-use by BLM over the nine-year period at issue here. Testimony of BLM's witnesses was consistent with contemporaneous documents of BLM and OWRD personnel.

Based upon the above recitation, I conclude Proponents' testimony was internally and externally inconsistent, implausible, and therefore lacked probative value. BLM's evidence as a whole was consistent and plausible. Therefore, where the parties offered conflicting evidence, greater probative value is allocated to BLM's evidence than that offered by Proponents.

OPINION

Jesse and Warren "Cook" Laird (Proponents or Lairds) assert the United States Bureau of Land Management has failed to make beneficial use of all or part of the water rights granted under Certificates 9451, 22209, and 45409 for a period exceeding five years. Consequently, Proponents assert a portion of each water right is subject to cancellation. As the proponents, the Lairds have the burden to prove this position by a preponderance of the evidence. ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Cook v. Employment Division*, 47 Or App 437 (1980) (in absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

The arguments put forth by the Lairds are convoluted, at best. Nonetheless, at the bottom, each hinges on interpretation of statutes and administrative rules promulgated by OWRD. The Lairds assert interpretations proffered by BLM and OWRD are erroneous and advocate for cancellation of the subject water rights under alternate, more restrictive, interpretations of the relevant statutes and rules. As the proponents of this position, the Lairds bear the burden. As set forth below, the Lairds have failed to meet their burden.

¹¹ As an example, Warren Laird testified BLM did not irrigate the southern contested area through PODs 9 or 10 in 2006 despite his own testimony demonstrating water flowed through these PODs and into the southern contested area. Mr. Laird characterized the water flowing through PODs 9 and 10 as "flood water" rather than irrigation water. See, Tr. vol. III at 597 through 599. Mr. Laird appears to imply that climactic conditions can convert water, flowing through an identified point of diversion into distribution ditches and other diversion structures and onto the subject lands, from irrigation water into flood water. The proposed distinction is both illogical and implausible.

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APR 06 2011

WATER RESOURCES DEPT
SALEM, OREGON

Forfeiture of perfected water rights for non-use is governed by ORS 540.610 as well as administrative rules promulgated thereunder. ORS 540.610 provides, in relevant part:

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

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

* * * * *

(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.

* * * * *

(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.

* * * * *

(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.

(Emphasis added.)

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APR 06 2011

WATER RESOURCES DEPT
SALEM, OREGON

The Lairds assert BLM has failed to make beneficial use of water on certain identified acres for a period of at least five consecutive years between 2001 through 2009. Proponents further allege BLM cannot rebut the presumption of forfeiture under ORS 540.610(2)(a) through (n). Before BLM can be required to rebut the presumption of forfeiture, Proponents must satisfy their burden of proof. *See*, ORS 540.610(2).

Proponents offer two bases for their assertions. First, the Lairds argue BLM did not divert water to the contested acres when available. This argument hinges on Proponents' definition of the term "available" as it applies to the waters of Hart Lake and their assertion that water is available for diversion from Hart Lake anytime it exceeds 4,466 ft. Second, the Lairds assert any diversion and use of water to the contested acres did not constitute beneficial use because BLM's use does not meet the definition of "irrigation" found in the applicable administrative rules and because BLM was not ready, willing and able to make full use of the water rights at issue. The latter portion of Proponents' second argument relies on their views of what constitutes irrigation or diversion structures and the conclusion that BLM's structures rely heavily on natural surface flow and are therefore wasteful.

Each argument is addressed below in a manner that attempts to track the text of the relevant statutes and rules and not necessarily in the order presented by the parties' briefs.

1. Diversion and use during period in issue.

Proponents' initial burden in this matter is to establish that BLM failed to make beneficial use of a portion of the water rights at issue for a period of at least five consecutive years. The certificated water rights at issue serve the Warner Wetlands. Proponents assert BLM failed to make beneficial use of a portion of the water rights because they failed to divert water to the contested acres as soon as it became available during the irrigation season. This argument hinges on Proponents' definition of the term "available" as it applies to the waters of Hart Lake and their assertion that water is available for diversion from Hart Lake anytime it rises above 4,466 ft. To the contrary, BLM and OWRD assert water is not considered available for diversion until it reaches the point of diversion identified.

a. Availability of water at BLM's points of diversion.

At the hearing, Proponents argued water was available for diversion from Hart Lake any time it was above the 4,466 ft. elevation during the irrigation season of each year at issue. Each of BLM's PODs was situated at an elevation at or above 4,470 ft. BLM did not divert water from PODs 8, 9, or 10 unless and until it reached these points of diversion. Proponents claim BLM failed to divert available water to the contested acres because it made no efforts to draw water to the PODs when it was above 4,466 ft. but below 4,470 ft.

The relevant statutes and rules do not define the term "available" for these purposes. In reviewing the text of ORS 540.610(2)(j), I find "available" to be a delegative term as used

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APR 06 2011

WATER RESOURCES DEPT
SALEM, OREGON

therein.¹² In *J. R. Simplot Co. v. Department of Agriculture*, 340 Or 188 (2006), the court defined delegative terms as:

[Terms] which the legislature uses when it intends to confer discretion on the agency to “refin[e] and execut[e] generally expressed legislative policy.” (Citing *Springfield Education Assn. v. School Dist.*, 290 Or at 228.) When it is acting pursuant to a delegative term, an agency carries out a function that is “essentially legislative.” *Id.* at 229. This court reviews a final order applying a delegative term as a matter of law to determine whether that decision “is within the range of discretion allowed by the more general policy of the statute.” *Id.* at 229; *see also* ORS 183.482(8)(b)(A)

J.R. Simplot, at 196-197. OWRD has determined that water is available for diversion when it can be accessed at a water user’s authorized POD. (*See*, OWRD’s Closing Argument at 7.) I find this interpretation of the term “available” to be within the range of discretion allowed by the general policy of ORS Chapter 540.

Proponents argue BLM had an affirmative duty to draw the water to its PODs through methods such as digging trenches from the 4,466 ft elevation to PODs 8, 9, and 10. I cannot agree. To adopt Proponents definition would impose upon BLM, and presumably other Hart Lake water users, the duty to take affirmative steps to draw water to its PODs through artificial means. This would equate to a change in the current points of diversion to a location several hundred feet north of their current location. Such alteration, without approval of OWRD cannot be sanctioned.

As OWRD correctly points out, “[a] POD is a recognized attribute of water right. A description of the POD * * * is a required element of an application for a right o use water.” (Oregon Water Resources Department’s Closing Argument at 7; *See also*, ORS 537.140 and Ex. A7 at 131.) Pursuant to ORS 540.510-540.530, a water user must apply to OWRD for a change in the point of diversion. Proponents’ interpretation of the term “available” is implausible within the context of the applicable statutes.

I find water was not available for diversion by BLM during any period it was not at or above the sill height of the PODs at issue. Accordingly, Proponents failed to establish BLM failed to make beneficial use of any portion of the water rights at issue because it did not take steps to draw water from the 4,466 ft. elevation to its PODs.

b. *BLM was ready, willing, and able to divert water.*

Proponents assert BLM was not ready, willing, or able to make beneficial use of the full water rights at issue because it lacked irrigation structures within the contested areas. I cannot agree. BLM diverts water to the contested areas through three points of diversion. Each of these

¹² In its closing brief, OWRD asserts the term “available” is either inexact or delegative. OWRD determined it was unnecessary, for the purposes of this matter, to decide which delegation was more appropriate for this term. (*See*, Oregon Water Resources Department’s Closing Argument at 6.) Nonetheless, I find it more helpful to the parties and the reviewing agency or court to make such a determination.

PODs is a man made structure consisting of concrete and timber. In addition, BLM operated a 75hp pump at one POD that pumped water into the main ditch serving the north contested acres. PODs 9 and 10 divert water directly into the south contested acres. Each of the PODs at issue accommodates wood planks capable of controlling the flow of water into the contested areas.

Once water reaches the SCA, it travels through a series of no less than five man made ditches. Water exits these ditches at various swales throughout the SCA. This combination of ditches and swales allows BLM to distribute water over the entirety of the SCA, so long as sufficient water is available.

Water enters the NCA through BLM's main distribution ditch. Once water reaches the NCA, it travels across multiple ditches and swales. While it is true some water may exit the northern portion of the NCA, such water is redirected into the NCA via a BLM ditch located just east of the NCA. So long as sufficient water is available, BLM is able to distribute water to all lands within the NCA by use of its ditches and swales.

BLM diverted water to the northern contested area via POD 8 during the irrigation seasons of 2001 and 2002, as well as 2005 through 2008. BLM diverted water to the southern contested area via PODs 9 and 10 during the irrigation seasons of 2001, 2005, and 2006. The irrigation chronology provided by BLM, in conjunction with water measurements of Hart Lake provided by OWRD, establish that, in many of these years, water availability was limited and the amount of water that reached the contested areas may have been likewise limited. Nonetheless, the limited availability of water is not the primary issue here. Before BLM can be required to establish a failure to use some portion of its water rights was due to the unavailability of water, Proponents must establish non-use. Proponents have failed to do so here. Proponents offer only bare assertions of non-use. This is insufficient to meet their burden, particularly in light of evidence presented by BLM and OWRD.

2. *Beneficial use of water on the contested acres.*

In conjunction with the arguments above, Proponents contend any water that reached the contested areas was not beneficially used because BLM lacked adequate irrigation structures and therefore any purported use was wasteful. Proponents also assert BLM's use of water on the Warner Wetlands does not meet the definition of irrigation. Again, Proponents' arguments are unpersuasive.

OAR 690-300-0010 provides, in relevant part:

(5) "Beneficial Use" means the *reasonably efficient use of water without waste* for a purpose consistent with the laws, rules and the best interests of the people of the state.

* * * * *

(26) "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

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APR 06 2011

WATER RESOURCES DEPT
SALEM, OREGON

garden, tree farm, orchard, park, golf course, play field or vineyard and alkali abatement.

(Emphasis added.)

As discussed above, BLM's irrigation method utilized a combination of man made structures and natural topography to distribute water throughout the contested areas. Evidence provided by BLM established its irrigation goals of wetland propagation were best served by minimizing the extent of trenching and excavating in the contested areas. As such, I am persuaded BLM's irrigation system constitutes a reasonably efficient use of water without waste. BLM's irrigation method may be insufficient if employed by a water user operating a farm or ranch. However, BLM's stated purpose is the preservation of a proper functioning wetland habitat. The evidence established a proper functioning wetland habitat requires total soil saturation for extended periods each irrigation season. The evidence shows it is more likely that not that BLM's irrigation method accomplishes this.

Finally, the evidence at hearing established BLM's artificial application of water to the contested areas meets the definition of irrigation found in OAR 690-300-0010(26). Proponents argue the administrative rule at issue does not consider the application of water to wetland plants to be irrigation. I cannot agree. In fact, to find such would ignore the plain text of the rule, which requires application of water to crops *or plants*. Any argument that such language should be read to exclude wetland plant communities from the definition of plants is unsustainable. Accordingly, I find BLM's artificial application of water to the contested areas for the purpose of promoting growth of wetland plant communities constitutes irrigation under the applicable statutes and rules.

Proponents Warren and Jesse Laird failed to establish the United States Bureau of Land Management did not use a portion of the water rights at issue for a period of at least five successive years during the period in issue. As such, no portion of the water rights evidenced by the enumerated certificates is subject to cancellation due to forfeiture.

Because Proponents have failed to meet their initial burden in this case, it is unnecessary to address the limited periods of non-use presented and I decline to do so at this time. In addition, I find it inappropriate to address the BLM's assertions that the water rights at issue constitute federal property rights and, therefore, are subject to disposal only by direct acts of Congress.

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APR 06 2011

WATER RESOURCES DEPT
SALEM, OREGON

ORDER

I propose the Oregon Water Resources Department issue the following order:

1. The United States Bureau of Land Management has not failed to beneficially use water on the contested acres for a period of five or more years during the period in issue.
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.



Joe L. Allen, Senior Administrative Law Judge
Office of Administrative Hearings

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APR 06 2011
WATER RESOURCES DEPT
SALEM, OREGON

RIGHT TO FILE EXCEPTIONS

Pursuant to OAR 137-003-0655(4) and OAR 690-002-0175, if the recommended action in the proposed order is adverse to any party the party may file exceptions. Exceptions must be in writing, and clearly and concisely identify the portions of the proposed order excepted to.

Parties must file their exceptions within 30 days following the date of service of the proposed order. Exceptions must be served on each of the parties and filed with the Oregon Water Resources Department as follows:

Oregon Water Resources Department
Patricia McCarty
725 Summer St. NE, Suite A
Salem, OR 97301
FAX: (503) 986-0930

Exceptions may be filed via mail, facsimile, or hand delivery. Exceptions sent through the U.S. Postal Service shall be considered filed on the date postmarked. Exceptions sent by facsimile or hand-delivered are considered filed when received by the agency. The Director must consider any exceptions to the proposed order prior to issuing a final order.

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In the Matter of the Proposed Partial Cancellation of Water Rights Evidenced by Certificate Nos. 9451, 22209, and 45409

OAH Case No. WR-10-001

Page 17 of 17

06 2011
WATER RESOURCES DEPT
SALEM, OREGON

CERTIFICATE OF MAILING

On 5th day of April 2011, I mailed **CORRECTED PROPOSED ORDER** in Reference No. WR-10-001 by depositing a copy of said document in the United States Mail at Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

Tom Rasmussen, Field Manager
BLM US Dept of Interior - Lakeview
Dist. Office
1301 South G Street
Lakeview, OR 97630

Jesse Laird
Proponent
30511 Hogback Rd
Plush, OR 97637

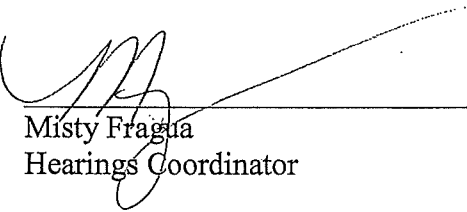
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Misty Fragua
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APR 06 2011

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