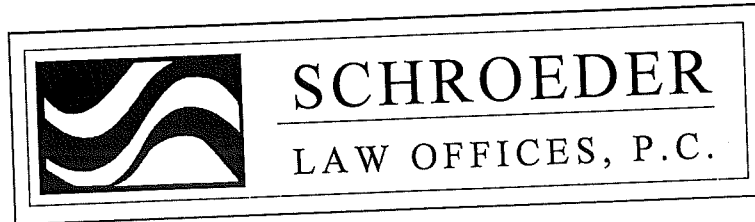


Laura A. Schroeder
Licensed in Oregon, Idaho,
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Daryl N. Cole
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Licensed in Oregon and Nevada:

Cortney D. Duke
Wyatt E. Rolfe
Therese A. Ure

Licensed in Oregon
Sarah R. Liljefelt

May 5, 2011

VIA U.S. MAIL ONLY

Oregon Water Resources Department
Patricia McCarty
725 Summer St. NE, Suite A
Salem, Oregon 97301

**RE: *In the Matter of the Proposed Partial Cancellation of Water Right Evidenced by
Certificates 9451, 22209 and 45409***
OAH Ref No. WR-10-001; OWRD Case No. PC 05-09

Dear Ms. McCarty:

Enclosed for filing please find *Proponents' Exceptions to Corrected Proposed Order*.

Upon receipt of the referenced document, please have an Oregon Water Resources Department staff member execute and return the enclosed postage prepaid confirmation card.

Thank you for your assistance with this matter. Should you have any questions, please contact the undersigned at (503) 281-4100.

Very truly yours,

SCHROEDER LAW OFFICES, P.C.

Briana M. Witt, Paralegal for
Laura A. Schroeder

BMW:srl

Enclosures

cc: Client
Service List

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**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

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

Jesse Laird and Warren C. Laird
Proponents

**Bureau of Land Management, Department
of Interior**
Protestant

OWRD Case No.: PC 05-09

OAH Ref. No.: WR-10-001

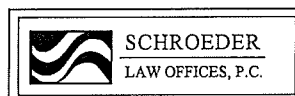
**PROPONENTS' EXCEPTIONS TO
CORRECTED PROPOSED ORDER¹**

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 Pursuant to OAR 137-003-0655(1), the Proposed Order issued March 31, 2011 is hereby withdrawn.



Proponents, Warren C. Laird (hereinafter "Proponent Cook Laird") and Jesse E. Laird (hereinafter "Proponent Jesse Laird") (collectively hereinafter "Laird Ranch"), by and through their attorney of record, Schroeder Law Offices P.C. and its attorneys, hereby submit the following exceptions to the Corrected Proposed Order issued April 5, 2011, in the above referenced contested case.

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Laird Ranch organized its exceptions by striking through existing text and adding underlined text to the Corrected Proposed Order. These modifications represent the provisions to which Laird Ranch takes exception. The text of the order has not otherwise been changed in any way (other than omission of the signature line and notices). Subsequent to the revised Corrected Proposed Order, Laird Ranch additionally submits arguments in support of selected exceptions.

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The arguments below do not reflect all arguments made by Laird Ranch throughout these proceedings. Absence of such arguments below should not be construed as concession, and all arguments advanced by Laird Ranch during the pendency of this matter are hereby preserved.

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 Certificates 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 Cortney 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

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



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*.

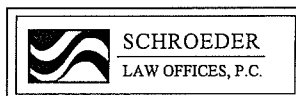
On November 8, 2010, the parties filed exhibit lists and exhibits, as well as witness lists and time estimates for each witness. A prehearing conference was held on November 10, 2010. At the conference, the parties agreed to a schedule for presenting witnesses at the hearing. On this date, the parties 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 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 Office of Administrative Hearings. 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, Attorneys 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.

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.

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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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.

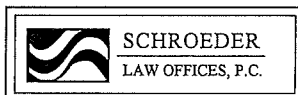
Exhibits LAIRD 4 through LAIRD 7, LAIRD 9, LAIRD 23 through LAIRD 25, LAIRD 27, LAIRD 29 through LAIRD 30, LAIRD 32, LAIRD 53 through LAIRD 69, LAIRD 75, and LAIRD 77, offered by Proponents, were admitted into evidence without objection. BLM objected to Exhibits LAIRD 40, LAIRD 70, LAIRD 71, and LAIRD 72 through LAIRD 74 on various 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.

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.



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FINDINGS OF FACT

1. The United States Bureau of Land Management is the owner of real property with appurtenant water rights holder of certificated water rights identified by Certificates 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~~ Certificate 9451 designates the authorized places of use as Tracts 1 through 4, identifiable by reference to township-range descriptions provided therein. ~~The certificate~~ Certificate 9451 identifies the authorized water sources as Honey Creek, DeGarmo Creek, Norton Creek, and Hart Lake. The priority dates for Tracts 1 through 4, as set out in Certificate 9451, are 1867, 1877, 1882, and 1892, respectively. (Ex. LAIRD 24.) Certificate 9451 is the primary water right associated with the following two supplemental irrigation rights. (Ex. LAIRD 64.)

3. Certificate 22209 authorizes use of a specified quantity of water for supplemental irrigation on lands specified therein. ~~The certificate~~ Certificate 22209 designates the authorized places of use identifiable by reference to township-range descriptions provided therein. ~~The certificate~~ Certificate 22209 identifies the authorized water source as Hart Lake. The priority date for Certificate 22209 this water right is identified as March 15, 1951. (Ex. LAIRD 25.) Certificate 22209 is a pumping right. (Ex. LAIRD 64 at 8, 40, 44 and 60.)

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

5. The Warner Lakes Decree set out findings of fact and conclusions of law directly relevant to water use and management in Warner Valley and Certificate 9451.⁸ The decree establishes that the minimum pool of Hart Lake, from which water is legally available for diversion, is 4,466 feet. (Ex. LAIRD 53 at 25 through 28; Tr. vol. V at 1046 through 1049.)

6. Between March, 2001 and August, 2009 (the period in issue), when BLM irrigated diverted water to the lands specified in the certificates at issue, it did so 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

⁸ Certificates 22209 and 45409 are subject to the same conditions as Certificate 9451 because they are supplemental water rights to Certificate 9451, which is the primary water right. See, Tr. vol. V at 1046 through 1049.



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BLM 26 at 2.) POD 8 is located along the northern bank of Hart Lake in Township 36 South, Range 25 East, Section 18, Lot 12.⁹ PODs 9 and 10 are also located along the northern bank of Hart Lake in T36S, R25E, S19, Lot 8. (Tr. vol. I at 53 through 54; Exs. BLM 2 at 7 and BLM 9 at 5.)

7. POD 8 is an authorized point of diversion for Certificate 45409. (Ex. LAIRD 64 at 80 through 82.) POD 9 is an authorized point of diversion for Certificates 9451 and 45409. (Exs. LAIRD 24 at 10 through 11 and LAIRD 64 at 80 through 82.) POD 10 is an authorized point of diversion for Certificate 45409. (Ex. LAIRD 64 at 80 through 82.) None of BLM's identified PODs are authorized points of diversion for Certificate 22209.¹⁰ (Ex. LAIRD 64 at 24 through 25, evidencing that the authorized points of diversion for Certificate 22209 are in T36S, R25E, S14 or S18 Lot 9. None of BLM's identified points of diversion meet the legal description for authorized diversion outlined in Certificate 22209.)

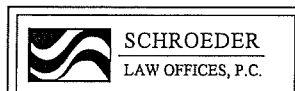
8. POD 8 is a constructed ditch, in excess of 10 feet wide. The mouth of the ditch consists of a concrete sill at the base and stone walls on either side. The concrete sill is set at 4,472.25+ feet and accommodates wood planks across the width to control the flow of water into the main irrigation ditch. (Tr. vol. I at 55 through 59; Ex. BLM 9 at 1 through 4; see also, Protestant's Motion for Summary Determination at 4.) The pump at POD 8 is situated at 4,460 4,470 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.¹¹ (Tr. vol. II at 261 and 263; Ex. BLM 26 at 2.)

9. 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 (with the boards in at POD 10) are approximately 4,471.25 4,473.25+ ft. (Tr. vol. II at 274; Exs. BLM 20 at 3 at and A7 at 131; see also, Protestant's Motion for Summary

⁹ All Township and Range designations in Oregon are measured from the Willamette Meridian.

¹⁰ OWRD and BLM have argued that because a map designates POD 8 as a point of diversion for Certificate 22209, POD 8 is an authorized point of diversion under the certificate. (OWRD Response to Proponents' Closing Brief at 8 through 9, citing Ex. OWRD A6; Protestant's Response to Proponents' Closing Brief at 9.) However, the argument is not persuasive because the map was created in 1950 and was superseded by the certificate, which was issued in 1957. (Ex. LAIRD 64 at 24 through 25.) Moreover, the description in the map is erroneous because it states that POD 8 is located 8,745 feet from Section 14 in T36S, R25E, but in fact POD 8 is located near the corner of Section 13. Finally, BLM's response argues that Lot 12, where POD 8 is located, is close enough to Lot 9 and should be considered the same location. This is simply not true. Because of the inaccuracies contained in the map, and because the map was superseded by the legal description in Certificate 22209, Proponents have shown that there is no authorized point of diversion for Certificate 22209.

¹¹ 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. The winds allow the pump to operate at an elevation no lower than 4469.5 ft. See also, Ex. BLM 26 at 2.



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Determination at 4.) 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.) For approximately one-third of its distance, the main spillway ditch is not a ditch at all, but rather a large swale. (Tr. vol. II at 446 through 449 and 457; testimony by BLM witness James Elvin stating that the area between locations B and D on Ex. BLM 30A is a large swale area, and not a defined or constructed ditch.)

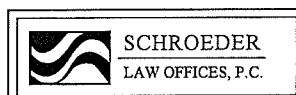
10. Water from Hart Lake travels through POD 8 via direct diversion (gravity flow) as well as pump driven diversions. Water from Hart Lake enters PODs 9 and 10 through direct diversion only. Generally, BLM's irrigation season begins March 1 and continues through October 1 of each year. (Ex. BLM 5 at 2; LAIRD 24 at 36; OAR 690-250-0070.)

11. 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.)

12. 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.) However, once established, wetland plants can survive without irrigation. (Tr. vol. I at 129 through 130.) Tules and swamp grasses grow naturally on the Warner Wetlands and have been present in the area since at least 1923. (Warner Lakes Decree at 25, Ex. LAIRD 24 at 34.) Upland species of plants are also found throughout the Warner Wetlands, which cannot survive in saturated soils. (Tr. vol. II at 392 through 394, and 406, and vol. IV at 926 through 927.)

13. 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.)

14. 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 4,469 ft. (Tr. vol. II at 448



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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.)

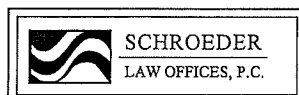
15. The Northern Contested Area (NCA)¹² consists of 562.44 acres in T35S, R24E, Sections 24, 25, and 36. (Exs. A 2 at 5, A5 at 4, and A8 at 5 through 6; BLM 2 at 7.) The elevation of the southernmost edge of the NCA sits at an approximate elevation of 4,465 ~~4,466~~ ft. The northernmost end of the NCA sits at approximately ~~4,459~~ 4,465 ft. (Ex. BLM 30 at 1; Tr. vol. III at 499 through 500.) 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.)

16. 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.) The intensely managed acres are not subject to cancellation in this proceeding.

17. Water diverted from POD 8 enters BLM's main irrigation ditch. Several yards ~~south~~ north of POD 8, the main irrigation ditch branches off to the ~~southeast~~ southwest 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. at 101 through 103; Ex. BLM 9 at 5.) The intensely managed acres are not subject to cancellation in this proceeding.

18. 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

¹² The Northern and Southern Contested Areas are referred to collectively in this proposed order as "the contested areas."



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water evenly to ensure each area gets some water. BLM irrigates from ~~north to south~~ south to north in order to take advantage of gravity flow throughout the Warner Wetlands. (Tr. vol. I at 103 through 105; 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 105 through 106.)

19. ~~If Once~~ water is delivered ~~diverted~~ to the NCA, BLM would employ 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.)

20. The combination of ~~levees, ditches, and a swales throughout in the southern half of the NCA and a levee and a ditch on~~ 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 479 and vol. III at 490 through 499; Ex. BLM 30 at 1.)

21. 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 parts of the~~ SCA using a series of ditches and swales so long as sufficient water is available. (Tr. vol. I at 110 through ~~113~~ 114; Ex. BLM 30 at 2.) There are several high spots in the topography of the SCA which are not able to be irrigated by BLM's irrigation method. (Tr. vol. I at 114.) Customarily, irrigators in the Warner Valley use irrigation methods that divert water over high spots by means of culverts, checks and dams in order to make sure all acreage is fully irrigated. (Tr. vol. IV 799 through 813 and vol. V 1027 through 1028.) These methods are not utilized by the BLM. (Tr. vol. IV 927 through 935.)

22. The combination of levees, ditches, channels and swales throughout the SCA are capable of distributing water throughout ~~the entirety parts~~ 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.)

23. In 2001, the contested areas were saturated with water from a particularly wet irrigation season the previous year. ~~Some of BLM's irrigation ditches in the contested areas were nearly filled with water were either wet or had some amount of standing water in them.~~ (Tr. vol. II at 263 through 264; Ex. BLM 1 at 1.) ~~In March and early April, the water level in Hart Lake exceeded reached~~ reached 4471 ft. at PODs 8, 9, and 10. BLM diverted water through direct and pump diversion at ~~all PODs~~ POD 8 for a limited amount of time. The pump diverted water at a rate of 5 to 10 cfs. (Ex. BLM 1 at 1.) BLM also ran the pump at POD 8 during this period. BLM was able to deliver apply a limited amount of water to the ~~contested areas~~ NCA during this period. (Tr. vol. II at 267 through 270 and 274; Exs. BLM 1 at 1 and A12 at 1.) BLM estimates that water did not reach the north half of the NCA in 2001.¹³ (Tr. vol. II at 338 through 339.) The water level in

¹³ The NCA is bisected into the north half and south half by a fence which is located, as shown in BLM Exhibit 2 at 8, from the point of land that juts into the NCA near the "25" designation for Section 25 on the west side of the
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Hart Lake never exceeded the sill heights at PODs 9 and 10 anytime during the 2001 irrigation season, and thus no water was applied to the SCA. (Tr. vol. II at 267 through 275.)

24. During the 2002 irrigation season, the water level of Hart Lake did not reach the diversion threshold BLM's points of diversion. 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.) BLM estimates that its pumping threshold was not met and that water did not reach the north half of the NCA in 2002. (Ex. BLM 1 at 1; Tr. vol. II at 281 through 282 and 336 through 337.) The waters of Hart Lake did not exceed the sill heights for PODs 9 or 10 anytime during the 2002 irrigation season, and thus no water was applied to the SCA. (Tr. vol. II at 283.)

25. During the 2003 irrigation season, the water level of Hart Lake never reached the diversion threshold BLM's points of diversion at PODs 8, 9, or 10. As such, BLM was unable to did not 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.)

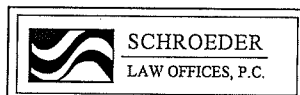
26. Likewise, during the 2004 irrigation season, the water level of Hart Lake never reached the diversion threshold BLM's points of diversion at PODs 8, 9, or 10. As such, BLM did not was unable to divert water through either direct or pump diversion to the contested areas. (Tr. vol. II at 285; Exs. BLM 1 at 2 and A12 at 1.)

27. In 2005, the water level of Hart Lake did not reach the 4,470 ft. diversion threshold for BLM's point of diversion at 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.) BLM estimates that water did not reach the north half of the NCA in 2005. (Tr. vol. II at 287 through 288 and 334.) BLM did not pump water to the NCA after June 6. (Ex. BLM 1 at 2.)

28. In late June 2005, the water level of Hart Lake rose rapidly. By June 27, 2005, the water level exceeded the elevation of 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 but did not exceed the concrete sill heights at PODs 9 or 10. BLM has no record of pumping from POD 8 after June 6, 2005. (Ex. BLM 1 at 2.) 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 A 12 at 1.) Water was not applied to the SCA in 2005.

(Cont.)

NCA, and travels in a slight northeasterly direction to the closest point on the east side of the NCA. (Tr. vol. II 292 through 293.)



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29. In 2006, the Warner Valley experienced a natural flood event. Beginning in January 2006, the water levels of Hart Lake exceeded ~~4470~~ 4,473 ft. and remained above 4,473 ft. ~~for most of the irrigation season at least through April.~~ (Exs. BLM 1 at 2 through 3 and A 12 at 1.) ~~BLM diverted water from~~ Water poured into the Warner Wetlands over the sills at 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 an estimated 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.)

30. During the 2007 irrigation season, the contested areas remained saturated from natural flooding the previous year. In addition, ~~all BLM irrigation ditches on the contested areas were filled with water~~ were saturated or had standing water. (Ex. BLM 1 at 3 through 4.) Beginning April 18, 2007, BLM operated its pump at POD 8 and diverted ~~approximately water~~ at a rate of 25 to 30 cfs until July 11, 2007. On July 11, the water level of Hart Lake dropped below the 4,470 ft. diversion threshold operating level for the pump at POD 8 and remained below that level for the remainder of the season. The water level of Hart Lake never reached the diversion threshold sill heights of PODs 9 or 10 during this irrigation season, and thus water was not applied to the SCA in 2007. (Tr. vol. II at 302 through 305; Ex. BLM 1 at 3 through 4.)

31. During the 2008 irrigation season, the water level of Hart Lake did not reach the 4,470 ft. diversion threshold operating level for the pump 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 at a rate of 25 to 36 cfs. 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.)

32. On May 30, 2008, Proponents contacted BLM and indicated ~~their belief that BLM had exceeded its allocated water rights under the certificates at issue was flooding Proponents' private lands south of the NCA.~~ (Tr. vol. III at 894 through 895.) BLM made an internal decision to shut the water off at POD 8 without first consulting with the local watermaster. (Tr. vol. II at 307 through 308.) BLM was unable to verify the total amount diverted at that time but did observe approximately 95 percent of the ~~contested areas~~ NCA had been irrigated. Therefore, BLM discontinued use of the POD 8 pump on June 2, 2008. (Ex. BLM 1 at 4; Tr. vol. II at 308.) The water level of Hart Lake did not reach the diversion threshold sill heights of PODs 9 or 10 during this irrigation season, and thus water was not applied to the SCA in 2008. (Tr. vol. II at 306 through 309; Ex. BLM 1 at 4.)

33. ~~Sometime between July and~~ On December 12, 2008, BLM filed an application to change transfer the location of the POD 8 pump and point of diversion. (Ex. BLM 33 at 2.) ~~Between November~~ December, 2008 and March, 2009, BLM installed a new pump at a new



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POD 8 location. 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.)

34. During the 2009 irrigation season, the water level of Hart Lake never reached the diversion threshold pump or sill heights at PODs 8, 9, or 10. As such, BLM was unable to did not 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.)

35. 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 or more years. (Tr. vol. III at 570; Exs. LAIRD 4 and LAIRD 5.)

36. 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 north of Laird Ranch. (Tr. vol. III at 549 and 552.) Proponents use Bluejoint Ranch primarily as pastureland for cattle. (Tr. vol. III at 556.) Proponents have the opportunity to view the contested acres throughout the irrigation season each year.

CONCLUSIONS OF LAW

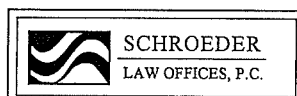
1. No The portion of the water right evidenced by Certificate 9451 which is associated with the SCA and the north half of the NCA has been forfeited due to non-use of water for irrigation on the subject lands for a period of five years or more during the period in at issue.

2. No The portion of the water right evidenced by Certificate 22209 which is associated with the SCA and the north half of the NCA 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 at issue.

3. No The portion of the water right evidenced by Certificate 45409 which is associated with the SCA and the north half of the NCA 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 at 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.)

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."¹⁴ 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. Warren 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 of five or more 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

¹⁴ 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 an onto the subject lands, from irrigation water into flood water. The proposed distinction is both illogical and implausible.



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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~~ Each argument put forth by the Lairds hinges on interpretation of statutes and administrative rules promulgated by the Oregon Water Resources Commission or 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~~ succeeded in meeting their burden.

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:

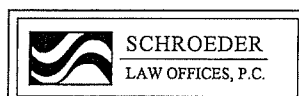
* * * * *

(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 non-use 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 non-use occurred during a period of time within which the water was included in a transfer application pending before the Water Resources Department.



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* * * * *

(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.)

A. Presumption of Forfeiture

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, this court has ruled that Proponents must satisfy their burden of proof for non-use.¹⁵ See, ORS 540.610(2).

Proponents have shown by a preponderance of the evidence that BLM did not apply water to the entire SCA nor to the north half of the NCA from 2001 through 2005. Although Proponents did not keep records and the court found their testimony to be convoluted at times, BLM admitted non-application of water to these tracts of land for at least the five year period between 2001 and 2005. Therefore, a presumption of forfeiture has been established, and it is unnecessary to discuss the years 2006 through 2009.

¹⁵ Proponents continue to assert that their burden of proof is satisfied when OWRD issues notices of proposed cancellation of water rights. OAR 690-017-0400(1) provides: "The Department shall initiate proceedings to cancel a perfected water right...whenever it appears that a right has been forfeited as provided in ORS 540.610. The decision to initiate cancellation proceedings shall be based on evidence submitted to the Department, by any person, that alleges five or more years of nonuse so as to create a presumption of forfeiture, and from which evidence it further appears the presumption of forfeiture would not likely be rebutted under OAR 690-017-0800(2)(a), (d) or (e). (Emphasis added.) Upon receiving notice of non-use, the Department is directed to provide the owner of the land with notice that a) the water right is subject to cancellation, and b) "...information before the Director creates a rebuttal presumption of forfeiture." (OAR 690-017-0400(6)(b).) The notice also provides that the presumption may be rebutted by evidence submitted in a protest. (OAR 690-017-0400(6)(c).) If a protest is received, the Department is required to review all evidence and make a determination about whether the presumption has been rebutted. (OAR 690-017-0600(3)(a).) If rebutted, the matter is closed and the water right will not be cancelled. (OAR 690-017-0600(3)(b).) However, if the presumption is not rebutted, the Department is instructed to initiate proceedings for cancellation. (OAR 690-017-0600(3)(c).) Therefore, Proponents argue that their burden is met upon OWRD's determination to issue notices of cancellation. Notwithstanding this argument, it was ordered in the present case that Proponents meet their burden at hearing by showing non-use for a period of five or more years by a preponderance of the evidence. Proponents assert that this order was in error.



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Proponents have also shown that any use by BLM does not constitute beneficial use. The Warner Lakes Decree, which lays out specific requirements for the water rights at issue, held that reliance on overflow alone of Hart Lake for diversion is a wasteful practice and no longer permitted. (Warner Valley Stock Company v. Lynch, Findings of Fact and Conclusions of Law, Ex. LAIRD 24 at 75 through 76, citing Warner Lakes Decree, Ex. LAIRD 24 at 29. Warner Valley Stock Company was upheld by the Oregon Supreme Court, 215 Or. 523 (1959).) BLM relies solely on overflow of Hart Lake to divert water through PODs 9 and 10 to the SCA. Without natural overflow, no water reaches any of BLM's points of diversion because BLM makes no effort to direct water to its points of diversion. Such a method of diversion has been affirmed by the Oregon Supreme Court to be wasteful, and thus cannot constitute beneficial use. (OAR 690-250-0010(3).)

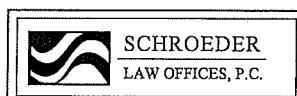
In addition, BLM's water use constitutes illegal water use in several ways. First, BLM does not use an authorized point of diversion for Certificate 22209. Second, Certificate 22209 is a pumping right, but BLM does not operate a pump at an authorized point of diversion to exercise its water right, and thus has failed to satisfy a condition of water use. Third, Certificate 9451 is the primary water right associated with the other two rights, and therefore must be used before the supplemental water rights. (OAR 690-330-0040(3).) However, BLM's authorized points of diversion under Certificate 9451 are PODs 9 and 10. In the majority of the years at issue, BLM has used supplemental water pumped out of POD 8 under Certificate 45409 before exercising its primary right under Certificate 9451. Although a water right is not forfeited under ORS 540.610 for use from an unauthorized point of diversion,¹⁶ BLM's illegal water use does show that it is not ready, willing and able to use the water as required by the water right certificates, as is relevant for the statutory exceptions for non-use.

B. Excuses for Non-use

Proponents have shown a failure to use the water beneficially for five successive years, and thus BLM has the burden of rebutting the presumption of forfeiture by establishing one or more of the statutory excuses for non-use. BLM must prove its position by a preponderance of the evidence. Because BLM has not borne its burden, the water rights evidenced by Certificates 9451, 22209 and 45409 must be cancelled in part for the acreage associated with the SCA and the northern half of the NCA.

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

¹⁶ Russell-Smith v. Water Resources Department, 152 Or.App. 88 (1998).



~~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.*~~

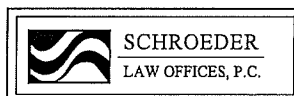
~~Proponents' initial burden in this matter is to establish that BLM failed to make beneficial use of a portion of the water rights at issue for a period of at least five consecutive years. The certificated water rights at issue serve the Warner Wetlands. Proponents assert BLM failed to make beneficial 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.~~

~~*1. Availability of Water at BLM's points of diversion.*~~

~~At the hearing, Proponents argued showed that 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, pursuant to the Warner Lakes Decree. Each of BLM's PODs was are situated at an elevation at or above 4,470 ft., a distance of four or more feet above the minimum pool level and diversion threshold of Hart Lake. 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 Oregon State Legislature enacted ORS 540.610(2)(j), which states that non-use does not constitute forfeiture if water is not "available," and the appropriator is otherwise ready, willing and able to use the water if available. The term "available" is not defined by statute. Although OWRD has the authority to define the term by administrative rule, OWRD has not done so.~~

~~This court finds that the term "available" is a delegative term, by which the legislature intended to confer discretion on the agency to refine and execute legislative policy (J.R. Simplot Co. v Department of Agriculture, 340 Or. 188 (2006)). If OWRD promulgated a rule refining ORS 540.610(2)(j), OWRD's reasonable interpretation of such a rule would be entitled to this tribunal's deference. (Friends of the Columbia Gorge, Inc. v. Columbia Riverkeeper et al., 346~~



Or. 366, 410 (2009); Auer v. Robbins, 519 U.S. 452, 456-457 (1997).) However, OWRD has not yet defined the term "available," and thus no deference is warranted nor may be granted. OWRD's pleadings on the matter do not constitute an official agency interpretation. If OWRD decides to issue an interpretive rule, it must comply with the mandates of the Administrative Procedure Act.

Furthermore, OWRD's argument that water is not "available" for diversion unless it reaches the appropriator's point of diversion is illogical and contrary to its own rules, prior appropriation water policy in general, and the facts of this particular case. OAR 690-250-0030 states that appropriators are "obliged to maintain a functional point of diversion," and that appropriators are "responsible for diversion and conveyance of water from the natural source to the place of use." OWRD's briefing in this case is inconsistent with these traditional standards. Moreover, the facts of this case show that prior to BLM's management of the PODs at issue, diversion ditches extended from the PODs to Hart Lake to allow diversion down to the minimum pool level, but BLM failed to maintain those ditches as other water users on Hart Lake have done. (Exs. LAIRD 32 at 3, LAIRD 24 at 81, LAIRD 53 at 27, and LAIRD 77; Ex. BLM 15 at 20; Tr. vol. IV at 906 through 920.) Finally, OWRD's interpretation is against the public policy requiring efficient use of water resources because its interpretation would allow appropriators to maintain ineffective diversion facilities which do not actually divert water, while keeping the water from being used beneficially by others. This interpretation goes against the purpose of ORS 540.610 and Oregon's policy of forfeiture for non-use.

The Warner Lakes Decree determined that water is legally available for appropriation at an elevation of 4,466 ft. or above. OWRD's records indicate that water exceeded the minimum pool level each irrigation season from the year 2001 through 2009. (Ex. A12 at 1.) Therefore, water was available during the disputed period, and any non-use by BLM cannot be excused on the grounds that water was not available, regardless of whether water reached BLM's points of diversion.

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 therein.¹⁷ 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

¹⁷ 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.



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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 ditch maintenance, piping water, adding a pump at PODs 9 and 10, or digging new trenches from the 4,466 ft elevation to PODs 8, 9, and 10. BLM could have also changed its points of diversion or manner of use in order to comply with the certificates' requirements. BLM admitted that it could have engaged in such activities, but failed to do so. (Tr. vol. II at 365 through 367.) Appropriators are obligated to construct and maintain functional points of diversion in order to use the waters of this state. BLM took no action to comply, and thus cannot now argue that water was not available. 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 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.



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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. Climatic Conditions

It is unnecessary for the court to determine the effect of the 2006 flood on BLM's duty to beneficially use water. Proponents have established non-use for a period of five years from 2001 through 2005, and thus any excuse available to BLM in 2006 is irrelevant. Therefore, BLM cannot use ORS 540.610(2)(L) as an excuse to avoid forfeiture.

3. Transfer Application

It is unnecessary for the court to determine the effect of BLM's application to change its point of diversion, submitted on December 12, 2008, on BLM's duty to beneficially use water. Proponents have established non-use for a period of five years from 2001 through 2005, and thus any excuse available to BLM during the 2009 irrigation season is irrelevant. Therefore, BLM cannot use ORS 540.610(2)(m) as an excuse to avoid forfeiture.



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4. Use of Less Water

Because BLM does not utilize a flow meter or other measuring device from 2001 through 2009, it is impossible to determine whether BLM used its entire rate and duty of water. However, this determination is unnecessary because it has already been established that BLM did not apply water to the SCA or northern half of the NCA from 2001 through 2005. Additionally, it has already been established that BLM was not ready, willing or able to make full use of its water rights. Therefore, BLM cannot use ORS 540.610(3) as an excuse to avoid forfeiture.

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 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~~



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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.

C. Conclusion

Proponents Warren and Jesse Laird failed to have established that 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, the portions of the water rights associated with the SCA and northern part of the NCA are no portion of the water rights evidenced by the enumerated certificates is subject to cancellation due to forfeiture.

BLM has failed to establish that any statutory excuse for non-use excused its non-use of water on the SCA and northern half of the NCA from 2001 through 2005. Therefore, the water rights associated with those tracts of land are 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.

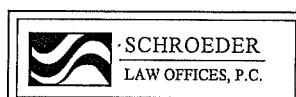
ORDER

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 a portion of the contested acres for a period of five or more years during the period in issue.
2. The portions of the water rights No portion of the water rights evidenced by Certificates 9451, 22209, and 45409, associated with the SCA and the northern half of the NCA, have been forfeited due to non-use during the period in issue.

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ARGUMENTS IN SUPPORT OF SELECTED EXCEPTIONS

Laird Ranch submits its arguments in support of selected exceptions in addition to Laird Ranch's complete exceptions, noted above. Not every exception is addressed by this section.

The numbers listed below are in accordance with Laird Ranch's revisions to the Corrected Proposed Order, as laid out above.

Finding of Fact No. 1

Finding of Fact No. 1 of the Corrected Proposed Order states:

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.)

Laird Ranch takes exception to this finding of fact because BLM is not the holder of the identified water rights. BLM merely owns the real property to which a portion of these water rights are appurtenant. (Exs. LAIRD 23, 25 and 27.) The record holder for each water right at issue is as follows: Certificate 9451 is in the name of Lake County Land & Livestock Co.; Certificate 22209 is in the name of Con Lynch; and Certificate 45409 is in the name of Hart Lake Water Users Association.

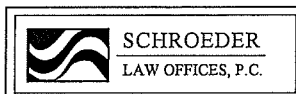
Suggested Correction: The United States Bureau of Land Management is the owner of real property with appurtenant water rights ~~holder of certificated water rights~~ identified by Certificates certificate numbers 9451, 22209, and 45409, issued by OWRD. (Notices.)

Finding of Fact No. 2

Finding of Fact No. 2 of the Corrected Proposed Order states:

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.)

Laird Ranch takes exception to this finding of fact because it does not fully describe the water right evidenced by Certificate 9451, and omits a critical fact: that Certificate 9451 is the primary water right associated with Certificates 22209 and 45409, which are supplemental rights.



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Suggested Correction: Certificate 9451 authorizes use of a specified quantity of water for irrigation and livestock watering on lands specified therein. ~~The certificate~~ Certificate 9451 designates the authorized places of use as Tracts 1 through 4, identifiable by reference to township-range descriptions provided therein. ~~The certificate~~ Certificate 9451 identifies the authorized water sources as Honey Creek, DeGarmo Creek, Norton Creek, and Hart Lake. The priority dates for Tracts 1 through 4, as set out in Certificate 9451, are 1867, 1877, 1882, and 1892, respectively. (Ex. LAIRD 24.) Certificate 9451 is the primary water right associated with the following two supplemental irrigation rights. (Ex. LAIRD 64.)

Finding of Fact No. 3

Finding of Fact No. 3 of the Corrected Proposed Order states:

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.)

Laird Ranch takes exception to this finding of fact because it does not fully describe the water right evidenced by Certificate 22209, and omits a critical fact: that Certificate 22209 authorizes a supplemental *pumping* right.

Suggested Correction: Certificate 22209 authorizes use of a specified quantity of water for supplemental irrigation on lands specified therein. ~~The certificate~~ Certificate 22209 designates the authorized places of use identifiable by reference to township-range descriptions provided therein. ~~The certificate~~ Certificate 22209 identifies the authorized water source as Hart Lake. The priority date for Certificate 22209 ~~this water right~~ is identified as March 15, 1951. (Ex. LAIRD 25.) Certificate 22209 is a pumping right. (Ex. LAIRD 64 at 8, 40, 44 and 60.)

Finding of Fact No. 5

Laird Ranch takes exception to the exclusion of information now included in the revised Finding of Fact No. 5, as follows:

The Warner Lakes Decree set out findings of fact and conclusions of law directly relevant to water use and management in Warner Valley and Certificate 9451.⁸ The decree establishes that the minimum pool of Hart Lake, from which water is legally available for

⁸ Certificates 22209 and 45409 are subject to the same conditions as Certificate 9451 because they are supplemental water rights to Certificate 9451, which is the primary water right. *See*, Tr. vol. V at 1046 through 1049.



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diversion, is 4,466 feet. (Ex. LAIRD 53 at 25 through 28; Tr. vol. V at 1046 through 1049.)

These facts have been shown by substantial evidence on the record and are essential to any determination regarding the water rights at issue in the present case. The Warner Lakes Decree directly effects the terms of the water rights at issue, and thus applicable holdings should be recited and considered on the record.

Finding of Fact No. 7

Laird Ranch takes exception to the exclusion of information now included in the revised Finding of Fact No. 7, as follows:

POD 8 is an authorized point of diversion for Certificate 45409. (Ex. LAIRD 64 at 80 through 82.) POD 9 is an authorized point of diversion for Certificates 9451 and 45409. (Exs. LAIRD 24 at 10 through 11 and LAIRD 64 at 80 through 82.) POD 10 is an authorized point of diversion for Certificate 45409. (Ex. LAIRD 64 at 80 through 82.) None of BLM's identified PODs are authorized points of diversion for Certificate 22209.¹⁰ (Ex. LAIRD 64 at 24 through 25, evidencing that the authorized points of diversion for Certificate 22209 are in T36S, R25E, S14 or S18 Lot 9. None of BLM's identified points of diversion meet the legal description for authorized diversion outlined in Certificate 22209.)

These facts have been shown by substantial evidence on the record and are directly relevant to whether BLM's water use complies with the terms of the Certificates at issue, and whether BLM may be determined to be ready, willing and able to use water under the Certificates. "A POD is a recognized attribute of a water right." (Oregon Water Resources Department's Closing Argument at 7.) Therefore, information about authorized points of diversion should be recited and considered on the record.

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¹⁰ OWRD and BLM have argued that because a map designates POD 8 as a point of diversion for Certificate 22209, POD 8 is an authorized point of diversion under the certificate. (OWRD Response to Proponents' Closing Brief at 8 through 9, citing Ex. OWRD A6; Protestant's Response to Proponents' Closing Brief at 9.) However, the argument is not persuasive because the map was created in 1950 and was superseded by the certificate, which was issued in 1957. (Ex. LAIRD 64 at 24 through 25.) Moreover, the description in the map is erroneous because it states that POD 8 is located 8,745 feet from Section 14 in T36S, R25E, but in fact POD 8 is located near the corner of Section 13. Finally, BLM's response argues that Lot 12, where POD 8 is located, is close enough to Lot 9 and should be considered the same location. This is simply not true. Because of the inaccuracies contained in the map, and because the map was superseded by the legal description in Certificate 22209, Proponents have shown that there is no authorized point of diversion for Certificate 22209.



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Finding of Fact No. 9

Finding of Fact No. 9 of the Corrected Proposed Order states:

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.)

Laird Ranch takes exception to this finding of fact because it misstates the sill heights for PODs 9 and 10 as supported by the evidence in the record; the current finding of fact states the height of the floor of the main spillway ditch. Additionally, this finding of fact misrepresents that the main spillway ditch runs along the entire western border of the SCA, when in fact the ditch runs for about one-third of the distance, empties into a large swale area, and then reforms for the last one-third of the distance.

Suggested Correction: 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 (with the boards in at POD 10) are approximately 4,471.25 4,473.25+ ft. (Tr. vol. II at 274; Exs. BLM 20 at 3 at and A7 at 131; see also, Protestant's Motion for Summary Determination at 4.) 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.) For approximately one-third of its distance, the main spillway ditch is not a ditch at all, but rather a large swale. (Tr. vol. II at 446 through 449 and 457; testimony by BLM witness James Elvin stating that the area between locations B and D on Ex. BLM 30A is a large swale area, and not a defined nor constructed ditch.)

Finding of Fact No. 12

Finding of Fact No. 12 of the Corrected Proposed Order states:

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.



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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.)

Laird Ranch takes exception to this finding of fact because it improperly characterizes the nature of the Warner Wetlands ACEC. BLM's own testimony evidence proved that wetland plants survive without irrigation once established, and that upland species of plants, which cannot survive in inundated soils, are found in the Warner Wetlands ACEC, most notably in irrigation ditches. Moreover, the Warner Lakes Decree provides evidence that wetland species of plants have grown naturally in the area since at least 1923. This information should be recited and considered on the record.

Suggested Correction: 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.) However, once established, wetland plants can survive without irrigation. (Tr. vol. I at 129 through 130.) Tules and swamp grasses grow naturally on the Warner Wetlands and have been present in the area since at least 1923. (Warner Lakes Decree at 25, Ex. LAIRD 24 at 34.) Upland species of plants are also found throughout the Warner Wetlands, which cannot survive in saturated soils. (Tr. vol. II at 392 through 394, and 406, and vol. IV at 926 through 927.)

Findings of Fact No. 14 & 15

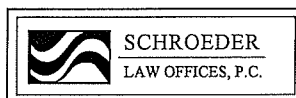
Finding of Fact No. 14 states that the elevation of the northernmost end of the SCA is 4,464 feet. In fact, the elevation is 4,469 feet. Finding of Fact No. 15 states that the elevation of the NCA at the southernmost end is 4,465 feet and at the northernmost end is 4,459 feet. In fact, the elevation at the southernmost end is 4,466 feet and at the northernmost end is 4,465 feet.

Laird Ranch takes exception to these findings of fact, and requests that the findings be modified to conform to the evidence in the record, as corrected above.

Finding of Fact No. 20

Finding of Fact No. 20 of the Corrected Proposed Order states:

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



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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.)

Laird Ranch takes exception to this finding of fact because it misrepresents the evidence on the record. Specifically, the finding overstates the extent of BLM and natural irrigation structures within and around the NCA. Additionally, the cited transcript excerpts and exhibit do not support the assertion that these structures “achieve the irrigation goals of the BLM.”

Suggested Correction: The combination of levees, ditches, and a swales throughout in the southern half of the NCA and a levee and a ditch on 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 479 and vol. III at 490 through 499; Ex. BLM 30 at 1.)

Finding of Fact No. 21

Finding of Fact No. 21 of the Corrected Proposed Order states:

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.)

Laird Ranch takes exception to this finding of fact because BLM admitted that certain high portions of the SCA are incapable of irrigation by BLM’s irrigation methods, as evidenced by the fact that water did not irrigate the high spots even during the 2006 natural flood event. Additionally, uncontroverted testimony evidence regarding customary methods that are utilized by other irrigators to irrigate high spots should be recited and considered on the record.

Suggested Correction: 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 parts of the SCA using a series of ditches and swales so long as sufficient water is available. (Tr. vol. I at 110 through ~~113~~ 114; Ex. BLM 30 at 2.) There are several high spots in the topography of the SCA which are not able to be irrigated by BLM’s irrigation method. (Tr. vol. I at 114.) Customarily, irrigators in the Warner Valley use irrigation methods that divert water over high spots by means of culverts, checks and dams in order to make sure all acreage is fully irrigated. (Tr. vol. IV 799 through 813 and vol. V 1027 through 1028.) These methods are not utilized by the BLM. (Tr. vol. IV 927 through 935.)

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Finding of Fact No. 22

Finding of Fact No. 22 of the Corrected Proposed Order states:

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.)

Laird Ranch takes exception to this finding of fact because BLM cannot irrigate certain high portions of the SCA, as shown in Laird Ranch's exception to Finding of Fact No. 21. Additionally, the cited transcript excerpts and exhibit do not support the assertion that the structures "achieve the irrigation goals of BLM."

Suggested Correction: The combination of levees, ditches, channels and swales throughout the SCA are capable of distributing water throughout ~~the entirety~~ parts 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.)

Finding of Fact No. 23

Finding of Fact No. 23 of the Corrected Proposed Order states:

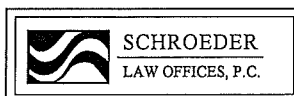
In 2001, the contested areas were saturated with water from a particularly wet irrigation season the previous year. BLM's irrigation ditches in the contested areas were nearly filled with water. (Tr. vol. II at 263 through 264; Ex. BLM 1 at 1.) In March and early April, the water level in Hart Lake exceeded 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.)

Laird Ranch takes exception to this finding of fact because it misstates the evidence in the record regarding the extent of water carryover, the level of Hart Lake in 2001, diversion (or lack thereof) at BLM's points of diversion and application (or lack thereof) of water to the contested areas. Laird Ranch's corrections are stated below.

Suggested Correction: In 2001, the contested areas were saturated with water from a particularly wet irrigation season the previous year. Some of BLM's irrigation ditches in the contested areas were nearly filled with water were either wet or had some amount of standing water in them. (Tr. vol. II at 263 through 264; Ex. BLM 1 at 1.) In March and early April, the water level in Hart Lake ~~exceeded~~ reached 4471 ft. at PODs 8, 9, and 10. BLM diverted water

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through direct and pump diversion at all PODs POD 8 for a limited amount of time. The pump diverted water at a rate of 5 to 10 cfs. (Ex. BLM 1 at 1.) BLM also ran the pump at POD 8 during this period. BLM was able to deliver apply a limited amount of water to the eontested areas NCA during this period. (Tr. vol. II at 267 through 270 and 274; Exs. BLM 1 at 1 and A12 at 1.) BLM estimates that water did not reach the north half of the NCA in 2001.¹⁸ (Tr. vol. II at 338 through 339.) The water level in Hart Lake never exceeded the sill heights at PODs 9 and 10 anytime during the 2001 irrigation season, and thus no water was applied to the SCA. (Tr. vol. II at 267 through 275.)

Finding of Fact No. 24

Finding of Fact No. 24 of the Corrected Proposed Order states:

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.)

Laird Ranch takes exception to this finding of fact because the “diversion threshold” for Hart Lake has been established as 4,466 feet in the Warner Lakes Decree. A separate issue is the height of BLM’s points of diversion. Therefore, the two terms should not be confused. Laird Ranch requests that the minimum pool of Hart Lake be referred to as the “diversion threshold,” and that the height of BLM’s points of diversion be referenced as the “sill heights” or “elevation” at BLM’s points of diversion. Moreover, it is improper to make a legal determination regarding the diversion threshold in the findings of fact, other than to report the findings in the Warner Lakes Decree.

In addition, Laird Ranch takes exception to this finding of fact because it misstates the extent of irrigation by the BLM in 2002.

Suggested Correction: During the 2002 irrigation season, the water level of Hart Lake did not reach ~~the diversion threshold~~ BLM’s points of diversion. 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.) BLM estimates that its pumping threshold was not met and that water did not reach the north half of the NCA in 2002. (Ex. BLM 1 at 1; Tr. vol. II at 281

¹⁸ The NCA is bisected into the north half and south half by a fence which is located, as shown in BLM Exhibit 2 at 8, from the point of land that juts into the NCA near the “25” designation for Section 25 on the west side of the NCA, and travels in a slight northeasterly direction to the closest point on the east side of the NCA. (Tr. vol. II 292 through 293.)



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through 282 and 336 through 337.) The waters of Hart Lake did not exceed the sill heights for PODs 9 or 10 anytime during the 2002 irrigation season, and thus no water was applied to the SCA. (Tr. vol. II at 283.)

Finding of Fact No. 25

Finding of Fact No. 25 of the Corrected Proposed Order states:

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.)

Laird Ranch takes exception to this finding of fact because the “diversion threshold” for Hart Lake has been established as 4,466 feet in the Warner Lakes Decree (*see* Laird Ranch exception to Finding of Fact No. 24), and because the finding of fact makes a legal determination about BLM’s ability to divert water.

Suggested Correction: During the 2003 irrigation season, the water level of Hart Lake never reached the diversion threshold BLM’s points of diversion at PODs 8, 9, or 10. As such, BLM was ~~unable to~~ did not 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.)

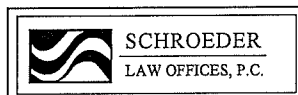
Finding of Fact No. 26

Finding of Fact No. 26 of the Corrected Proposed Order states:

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.)

Laird Ranch takes exception to this finding of fact because the “diversion threshold” for Hart Lake has been established as 4,466 feet in the Warner Lakes Decree (*see* Laird Ranch exception to Finding of Fact No. 24), and because the finding of fact makes a legal determination about BLM’s ability to divert water.

Suggested Correction: Likewise, during the 2004 irrigation season, the water level of Hart Lake never reached the diversion threshold BLM’s points of diversion at PODs 8, 9, or 10. As such, BLM did not ~~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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Finding of Fact No. 27

Finding of Fact No. 27 of the Corrected Proposed Order states:

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.)

Laird Ranch takes exception to this finding of fact because the “diversion threshold” for Hart Lake has been established as 4,466 feet in the Warner Lakes Decree (*see* Laird Ranch exception to Finding of Fact No. 24), and because the finding of fact overstates the extent of BLM’s irrigation in 2005.

Suggested Correction: In 2005, the water level of Hart Lake did not reach ~~the 4,470 ft. diversion threshold for BLM’s point of diversion at~~ 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.) BLM estimates that water did not reach the north half of the NCA in 2005. (Tr. vol. II at 287 through 288 and 334.) BLM did not pump water to the NCA after June 6. (Ex. BLM 1 at 2.)

Finding of Fact No. 28

Finding of Fact No. 28 of the Corrected Proposed Order states:

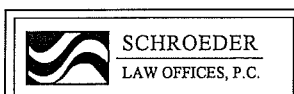
In late June 2005, the water level of Hart Lake rose rapidly. By June 27, 2005, the water level exceeded the diversion threshold at PODs 8, 9, and 10 by more than two feet and remained at such levels for the remainder of the irrigation season. BLM was able to divert water to all contested acres through 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 A 12 at 1.)

Laird Ranch takes exception to this finding of fact because it misstates the elevation of Hart Lake water levels in relation to BLM points of diversion, and overstates the extent of BLM irrigation, as shown by the record.

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Laird Ranch also takes exception to this finding of fact because the “diversion threshold” for Hart Lake has been established as 4,466 feet in the Warner Lakes Decree (*see* Laird Ranch exception to Finding of Fact No. 24). Thus the term “diversion threshold” should be replaced by the term “elevation” or “sill height” when referencing points of diversion.

Suggested Correction: In late June 2005, the water level of Hart Lake rose rapidly. By June 27, 2005, the water level exceeded the elevation of 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 but did not exceed the concrete sill heights at PODs 9 or 10. BLM has no record of pumping from POD 8 after June 6, 2005. (Ex. BLM 1 at 2.) 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 A 12 at 1.) Water was not applied to the SCA in 2005.

Finding of Fact No. 29

Finding of Fact No. 29 of the Corrected Proposed Order states:

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 A 12 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.)

Laird Ranch takes exception to this finding of fact because it misstates the elevation and duration of Hart Lake water levels as shown by the record. In addition, the finding of fact makes a legal conclusion that BLM was “diverting” water when the water was pouring over BLM’s points of diversion, as well as many other locations, due to flooding. Finally, the finding of fact overstates the degree of certainty afforded to BLM’s estimation of water flow levels, which were made by visual approximation without use of a flow meter or other measuring device.

Suggested Correction: In 2006, the Warner Valley experienced a natural flood event. Beginning in January 2006, the water levels of Hart Lake exceeded ~~4470~~ 4,473 ft. and remained above 4,473 ft. ~~for most of the irrigation season at least through April.~~ (Exs. BLM 1 at 2 through 3 and A 12 at 1.) ~~BLM diverted water from~~ Water poured into the Warner Wetlands over the sills at 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 an estimated 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.)

Finding of Fact No. 30

Finding of Fact No. 30 of the Corrected Proposed Order states:

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.)

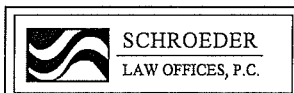
Laird Ranch takes exception to this finding of fact because it overstates the extent of water carryover from the previous year and overstates BLM pumping rates in 2007. In addition, Laird Ranch takes exception because the “diversion threshold” for Hart Lake has been established as 4,466 feet in the Warner Lakes Decree (*see* Laird Ranch exception to Finding of Fact No. 24), and because the finding of fact makes a legal determination about BLM’s ability to divert water.

Suggested Correction: During the 2007 irrigation season, the contested areas remained saturated from natural flooding the previous year. In addition, ~~all BLM irrigation ditches on the contested areas were filled with water~~ were saturated or had standing water. (Ex. BLM 1 at 3 through 4.) Beginning April 18, 2007, BLM operated its pump at POD 8 and diverted approximately water at a rate of 25 to 30 cfs until July 11, 2007. On July 11, the water level of Hart Lake dropped below the 4,470 ft. ~~diversion threshold~~ operating level for the pump at POD 8 and remained below that level for the remainder of the season. The water level of Hart Lake never reached the ~~diversion threshold~~ sill heights of PODs 9 or 10 during this irrigation season, and thus water was not applied to the SCA in 2007. (Tr. vol. II at 302 through 305; Ex. BLM 1 at 3 through 4.)

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Finding of Fact No. 31

Finding of Fact No. 31 of the Corrected Proposed Order states:

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.)

Laird Ranch takes exception to this finding of fact because the “diversion threshold” for Hart Lake has been established as 4,466 feet in the Warner Lakes Decree (*see* Laird Ranch exception to Finding of Fact No. 24), and because the finding of fact makes a legal determination about BLM’s ability to divert water. In addition, the cited transcript excerpt and exhibit do not support the assertion that “the southern units had received sufficient water to fulfill the irrigation purposes.”

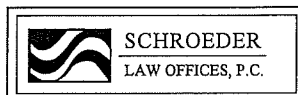
Suggested Correction: During the 2008 irrigation season, the water level of Hart Lake did not reach the 4,470 ft. ~~diversion threshold~~ operating level for the pump at POD 8 until on or about April 1. However, BLM was able to begin pumping on March 10, due to strong sustained south winds, which drove sufficient water to POD 8 to allow the pump to operate at a rate of 25 to 36 cfs. 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.)

Finding of Fact No. 32

Finding of Fact No. 32 of the Corrected Proposed Order states:

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.)

Laird Ranch takes exception to this finding of fact because it misconstrues the events that transpired in 2008, including the reason for the Lairds’ complaint, the area of the lands affected by BLM’s flooding, and the BLM’s internal decision to shut off the water without instruction by the local watermaster.



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Laird Ranch also takes exception to this finding of fact because the “diversion threshold” for Hart Lake has been established as 4,466 feet in the Warner Lakes Decree (*see* Laird Ranch exception to Finding of Fact No. 24), and because the finding of fact makes a legal determination about BLM’s ability to divert water.

Suggested Correction: On May 30, 2008, Proponents contacted BLM and indicated their belief that BLM had exceeded its allocated water rights under the certificates at issue was flooding Proponents’ private lands south of the NCA. (Tr. vol. III at 894 through 895.) BLM made an internal decision to shut the water off at POD 8 without first consulting with the local watermaster. (Tr. vol. II at 307 through 308.) BLM was unable to verify the total amount diverted at that time but did observe approximately 95 percent of the contested areas NCA had been irrigated. Therefore, BLM discontinued use of the POD 8 pump on June 2, 2008. (Ex. BLM 1 at 4; Tr. vol. II at 308.) The water level of Hart Lake did not reach the diversion threshold sill heights of PODs 9 or 10 during this irrigation season, and thus water was not applied to the SCA in 2008. (Tr. vol. II at 306 through 309; Ex. BLM 1 at 4.)

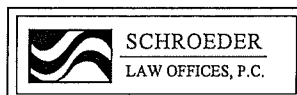
Finding of Fact No. 33

Finding of Fact No. 33 of the Corrected Proposed Order states:

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.)

Laird Ranch takes exception to this finding of fact because it misstates the date of the BLM’s transfer application, relying on uncertain BLM testimony rather than the evidence in the record, including exhibits submitted by the BLM. Additionally, the finding of fact confuses an application to transfer the location of a pump with an application to transfer a point of diversion, which is an important distinction.

Suggested Correction: ~~Sometime between July and~~ On December 12, 2008, BLM filed an application to change transfer the location of the POD 8 pump and point of diversion. (Ex. BLM 33 at 2.) ~~Between November~~ December, 2008 and March, 2009, BLM installed a new pump at a new POD 8 location. 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.)



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Finding of Fact No. 34

Finding of Fact No. 34 of the Corrected Proposed Order states:

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.)

Laird Ranch takes exception to this finding of fact because the “diversion threshold” for Hart Lake has been established as 4,466 feet in the Warner Lakes Decree (*see* Laird Ranch exception to Finding of Fact No. 24), and because the finding of fact makes a legal determination about BLM’s ability to divert water.

Suggested Correction: During the 2009 irrigation season, the water level of Hart Lake never reached the ~~diversion threshold~~ pump or sill heights at PODs 8, 9, or 10. As such, BLM ~~was unable to~~ did not 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.)

Conclusions of Law No. 1 through 3

Conclusions of Law No. 1 through 3 of the Corrected Proposed Order state:

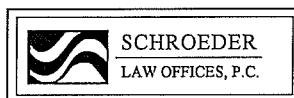
No portion of the water right[s] evidenced by Certificate[s] [9451, 22209 and 45409] has been forfeited due to non-use of water for irrigation on the subject lands for a period of five years or more during the period in issue.

Laird Ranch takes exception to these conclusions of law because they are not supported by substantial evidence on the record. The evidence clearly indicates that the BLM failed to apply water at least to the SCA and northern half of the NCA for five or more years. Further, BLM cannot rebut the presumption of forfeiture. Therefore, the conclusions of law should be revised to reflect that portions of the water rights evidenced by Certificates 9451, 22209 and 45409 have been forfeited due to non-use.

Credibility

Footnote No. 11 of the Corrected Proposed Order states:

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



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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 an onto the subject lands, from irrigation water into flood water. The proposed distinction is both illogical and implausible.

Laird Ranch takes exception to this footnote because the footnote states that there is not a legal difference between water flowing into an area due to flooding and water flowing into an area by means of controlled irrigation. The Warner Lakes Decree states that diversion by flooding is wasteful and does not constitute beneficial use. (Ex. LAIRD 24 at 75 through 76.) Therefore, there is a legal difference between flood water and irrigation water, and any legal conclusion to the contrary is not based upon substantial evidence on the record. The footnote should be removed in its entirety.

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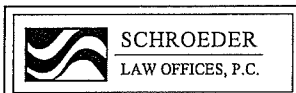
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Opinion

Laird Ranch takes exception to the portions of the Opinion identified in Laird Ranch's revisions to the Corrected Proposed Order above. The revisions are supported by the revised findings of fact and are based on substantial evidence on the record.

Laird Ranch has reorganized the Opinion section of the Corrected Proposed Order to reflect the correct legal standards. Specifically, proving lack of "availability" of water is not part of Proponents' initial burden for showing non-use. Rather, availability (or lack thereof) constitutes part of a statutory excuse to avoid forfeiture due to non-use. Therefore, BLM has the burden to prove lack of availability by a preponderance of the evidence, in addition to other statutory requirements for that excuse, and other named excuses.

Because the record shows that BLM did not apply water to the SCA or northern half of the NCA for five or more years, Laird Ranch has met its burden to establish a presumption of forfeiture due to non-use. Therefore, Laird Ranch has added text to the Opinion section that addresses the statutory excuses from forfeiture.

Submitted this 5th day of May, 2011.

Respectfully submitted,

SCHROEDER LAW OFFICES, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2011 I caused to be served a true copy of the foregoing:

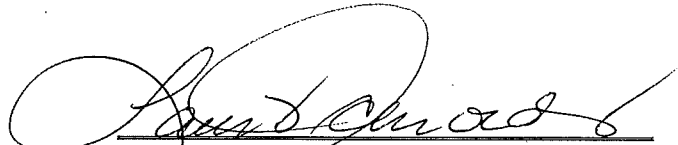
Proponents' Exceptions to Corrected Proposed Order on the following people named below by electronic and U.S. first class mail.

Brad Grenham
Office of the Regional Solicitor
805 SW Broadway, Suite 600
Portland, OR 97205
Email: Brad.Grenham@sol.doi.gov

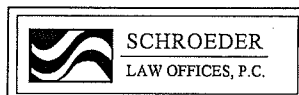
Juno Pandian
Oregon Water Resources Department
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Salem, OR 97301-4172
Juno.G.Pandian@wrd.state.or.us

Jesse D. Ratcliffe
Assistant Attorney General
1162 Court Street NE
Salem, OR 97301-4096
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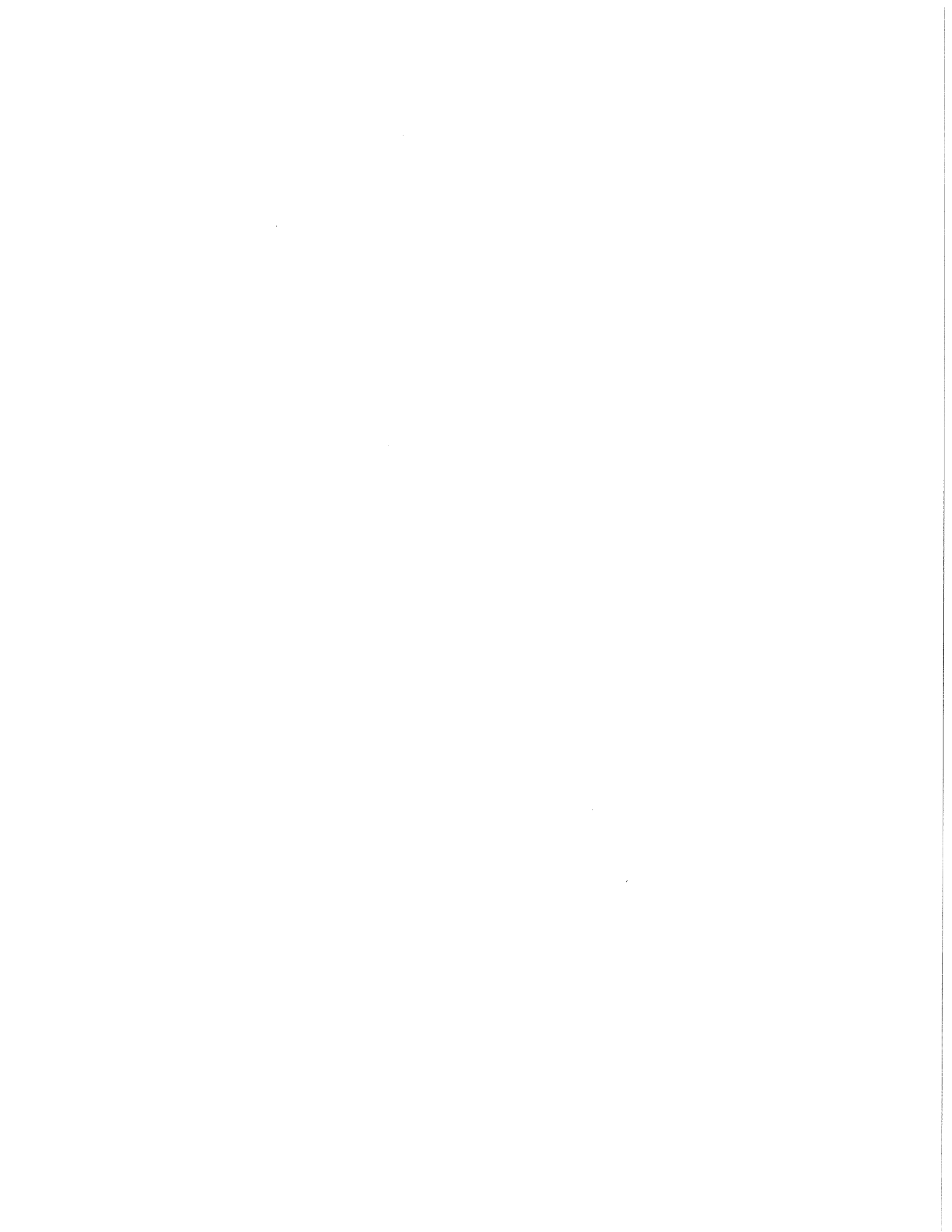
Dated this 5th day of May 2011.



Laura A. Schroeder, OSB 87339
counsel@water-law.com



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**BEFORE THE
STATE OF 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)

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)

OWRD PC 05-09
OAH WR-10-001

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)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I served a true copy of the PROTESTANT'S RESPONSE TO PROPONENTS' EXCEPTIONS to:

(By Regular Mail)

Oregon Water Resources Department
Attn: Patricia McCarty
725 NE Summer Street
Suite A
Salem, Oregon 97301-1266
FAX: 503-986-0904

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(By Regular Mail and Email)

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Jesse D. Ratcliffe
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Dated: 5/18/11


Kelly Vardiman
Assistant
Pacific Northwest Region

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**BEFORE THE STATE OF 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

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 Department of the Interior
Protestant

**PROTESTANT'S RESPONSE
TO PROPONENTS'
EXCEPTIONS TO PROPOSED
ORDER**

OAH Ref. No. WR-10-001
OWRD Case No. PC 05-09

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SALEM, OREGON

Warren C. Laird
Proponent

Jesse Laird
Proponent

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SALEM, OREGON

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I. INTRODUCTION

Protestant responds below to Proponents' Exceptions ("Laird Exc.") to Senior Administrative Law Judge (ALJ) Joe L. Allen's Corrected Proposed Order ("Proposed Order"). The Office of Administrative Hearings served this Corrected Proposed Order on April 5, 2011. Protestant has already comprehensively briefed the issues and summarized the factual record in this matter in Protestant's Opening Post-Hearing Brief (January 26, 2011), Protestant's Response to Proponents' Closing Brief (February 9, 2011), and Protestant's Response to Proponents' Supplemental Closing Brief and to OWRD Closing Brief (February 16, 2011). For sake of brevity, Protestant will not repeat the contents of those briefs but respectfully refers the Oregon Water Resources Department to those briefs (each of which includes a table of contents) for more detailed discussion of specific issues and the hearing record.

Protestant addresses the Proponents' exceptions below in the order they arise in Proponents' "Arguments in Support of Selected Exceptions" (Laird Exc. at pp. 23-39) and by referring to the numbers Proponents apply to the Findings of Fact. (Proponents have changed the numbering of some findings in the Corrected Proposed Order.) At the end of this response, Protestant addresses Proponents' more general edits to the Proposed Order (Laird Exc. at 2-22) for which Proponents have offered no rationale but which largely rely on Proponents' Arguments in Support of Selected Exceptions. In those few instances in which Protestant agrees a minor clarification could be made to the Proposed Order, Protestant has underlined the language, but these clarifications do not affect the outcome on the merits.

II. RESPONSE TO PROPONENTS' EXCEPTIONS

A. Response to Proponent "Arguments in Support of Selected Exceptions"

1. Finding of Fact No. 1

Proponents argue that the United States is not the holder of the water rights at issue. Under Proponents' argument, parties that held the water rights over 100 years ago and no longer exist, such as Lake County Land & Livestock, Co.,¹ are still the holder. The water rights transferred with the appurtenant property and, consequently, the United States is now the owner. ORS 540.510(1) provides that "[e]xcept as provided in subsections (2) to (8) of this section, all water used in this state for any purpose shall remain appurtenant to the premises upon which it is used." The conveyance documents that are in the record expressly transfer the water rights. BLM Ex. 25 at 2 (Lynch to the Nature Conservancy); BLM Ex. 40 at 2 (the Nature Conservancy to United States).

¹ A review of the Oregon Secretary of State's Business Registry Database shows no registration for Lake County Land & Livestock, Co. See http://egov.sos.state.or.us/br/pkg_web_name_srch_inq.login (accessed May 12, 2011).

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2. Finding of Fact No. 2

The Laird exception is based on a stated desire to clarify that water rights certificated as 22209 and 45409 are supplemental rights. Laird Exc. at 23-24. The exception should be rejected because Findings of Fact 3 and 4 already discuss water rights certificated as 22209 and 45409 and their use for supplemental irrigation. All certificates are properly described for purposes of this forfeiture action and, to the extent the certificates contain more detailed provisions, the certificates speak for themselves and need not be further summarized to address the alleged forfeiture.

3. Finding of Fact No. 3

The Laird exception claims that Certificate 22209 is only a pumping right. Laird Exc. at 24. Certificate 22209 contains no such restriction, so the exception should be rejected. BLM Ex. 39 at 18-19. The Lairds also provide no citation that they raised this assertion at hearing.

4. Laird Finding of Fact No. 5 (new)

The Lairds propose to add language that water is “legally available” for diversion at Hart Lake elevations of 4,466 feet and above. Laird Exc. at 24-25. This exception should be rejected because it is contrary to the ALJ’s careful determination accepting OWRD’s interpretation of when water is “available” pursuant to ORS § 540.610(j). *See* Proposed Order at pages 12-13. The ALJ properly rejected the Lairds’ contention that water is legally “available” at 4,466 elevation in Hart Lake and, instead, held that water is available for diversion “when it can be accessed at a water user’s authorized POD.” Proposed Order at 13. As the facts show, BLM’s PODs are not at 4,466 elevation and to now hold that water is legally available at 4,466 elevation would nonsensically require users to engage in unauthorized changes in points of diversion. *See* Proposed Order at 12-13. Moreover, the Lairds’ position is inconsistent with the fact that the POD is a recognized attribute of a water right. *Id.*

The Lairds reargue their incorrect argument (previously presented to the ALJ) that Certificates 22209 and 45409 are subject to the same conditions as Certificate 9451. Through a proposed footnote, the Lairds seek to add language to the Proposed Order stating exactly this incorrect point. Laird Exc. at 24 n. 8. Water Right Certificate 22209 authorizes the use of water from Hart Lake for supplemental irrigation of 4,276.54 acres. BLM Ex. 39 at 18-19. The right authorizes, together with the amount secured under other rights for the same lands, water use at a rate of one-fortieth of a CFS per acre of land each year with a total limitation during each irrigation season of three acre feet per acre. *Id.* The Proponents’ argument that the supplemental rights are subject to the same terms as Certificate 9451 does not make sense because Certificate 22209 expressly authorizes a higher rate of application of one-fortieth of a CFS per acre rather than the one-eightieth of a CFS per acre of land irrigated after June 15th of each year under Certificate 9451. BLM Ex. 39 at 9. Water Right Certificate 45409 authorizes the use of water from Hart Lake Reservoir, together with the amount secured under other rights for the same lands, up to a duty not to exceed three acre feet per acre during each irrigation season. BLM Ex. 39 at 28. The right provides no limit on the rate of application. *Id.* Again, Proponents’ argument that the supplemental rights are subject to the same terms as Certificate 9451 does not make sense since Certificate 45409 contains no limit on the rate of application. Thus, to say that

Certificate 45409 is subject to identical provisions as 9451 is incorrect. *See also* Tr. at 1045, 1047 (testimony of Kyle Gorman of OWRD). The Lairds cite to Kyle Gorman's testimony, Laird Exc. at 24 *citing* Tr. at 1046-1049, but Mr. Gorman did not reach a conclusion that all certificates are subject to the same conditions. Tr. at 1047 (Mr. Gorman stating that the "decree sets the season of use and other factors in this area, but I'd have to do more of a study to make a determination about its effect on the use of this water right.") The exception should be rejected because it is incorrect. The certificates and decree speak for themselves and the Lairds' overly broad and inaccurate language should be rejected.

For the reasons stated above, the Lairds' exceptions suggesting adding language in a new Finding of Fact 5 are erroneous and unfounded and should be rejected.

5. Laird Finding of Fact No. 7 (new)

Proponents add language based on their assertion that Points of Diversion 8, 9, and 10 are not authorized points of diversion for Certificate 22209. Laird Exc. at 25. To the contrary, POD 8 is listed on Certificate 22209 as "#3 Lot 9 (SW1/4SW1/4), Section 18, T 36S, R 25 E." POD 8 is similarly described in the application for Certificate 45409 as being in the SW1/4SW1/4 of Section 18 and this application expressly refers to Certificate 22209. BLM Ex. 20 at 3.² Further, BLM Ex. 30A shows POD 8 to be in the SW1/4SW1/4 of Section 18. Thus, POD 8 is an authorized POD for Certificate 22209.

In their proposed new finding of fact 7, Proponents fail to include POD 10 as a point of diversion for Certificate 9451. As Proponents know, PODs 9 and 10 are adjacent to each other and both feed into the main spillway ditch. Tr. at 54, 60; BLM Ex. 9 at 5. Certificate 9451 does not list a point of diversion. BLM Ex. 39 at 9-10. Concerning Certificate 9451, the State Engineer's Findings and Order provide an 1892 water right for Lake County Land and Livestock Company, BLM's predecessor in interest, for use of waters from Hart Lake through "overflow" and "east side ditch" for irrigation and stock use. Laird Ex. 24 at 65. The Lairds offer no evidence to support their assertion that POD 10 is not an authorized point of diversion to feed this ditch under Certificate 9451. In any case, the Lairds later admit in their exceptions that "BLM's authorized points of diversion under Certificate 9451 are PODs 9 and 10." Laird Exc. at 16. For the reasons above, Proponents' new proposed Finding of Fact No. 7 is based on incorrect assertions and should be rejected.

Moreover, even if none of BLM's PODs were authorized under Certificate 22209, caselaw is clear that utilizing an incorrect point of diversion from the correct source is not a basis for forfeiture. *Russell-Smith v. Water Resources Dep't*, 152 Ore. App. 88, 100 (Or. Ct. App. 1998).

² The application for Certificate 45409 places POD 8 in Lot 12 rather than Lot 9 (as described in Certificate 22209) but, when one compares the legal description for POD 8 in the application for Certificate 45409 and the legal description for POD 8 under Certificate 22209 on the OWRD website, they are the same location. *Compare* BLM Ex. 20 at 3 (providing POD 8 location for Certificate 45409 as "Located N. 77° 18' East, 8745 ft. from the SW corner of Sec. 14 T. 36 S., R. 24 E. W.M.") and OWRD Water Right Information Query Results for Certificate 22209 (providing Location Description as "NORTH 77 DEGREES 18 MINUTES EAST, 8745.1 FEET FROM SW CORNER, SECTION 14, T36S, R24E")(available at http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp_id=74599). Indeed, surveys have confirmed this location of POD 8 and Proponents offer no evidence to the contrary.

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6. Finding of Fact No. 9 (ALJ's # 7)

Proponents assert that the sill heights at PODs 9 and 10 should be clarified in the ALJ's finding of fact 7. Laird Exc. at 26. As noted in BLM Ex. 20 at 3, the floor of the spillway at POD No. 10 is 4471.25 feet, so the Proposed Order is correct concerning the sill height at POD No. 10 and no change should be made. Proponents suggest adding language that confuses sill height with the height of boards — this confusing addition should be rejected. Regarding POD 9, Protestant agrees that the sill height is best described as "4473.25+" feet as noted in BLM Ex. 20 at 3. This clarification could be made by editing the ALJ's original sentence to state: "The sill heights of PODs 9 and 10 are, respectively, approximately 4,473.25+ and 4,471.25 feet."

Proponents' suggested overly broad additional sentence describing the main spillway ditch as "not a ditch at all" for a third of its distance, Laird Exc. at 26, should be rejected because the ALJ's Finding of Fact 19 (ALJ's numbering) more carefully describes the existence of swales in some locations along the main spillway ditch. Proposed Order at 7. Proponents incorrectly state that the area between Locations B and D on BLM Ex. 30A is a large swale without a ditch. Laird Exc. at 26. Even a cursory review of BLM Ex. 30A shows that this is not the case for the entire length between Locations B and D. Mr. Elvin explained that, at Location C, the swale narrows and reforms a V-shaped channel as it progresses in a northerly direction. Tr. at 450-451. The Lairds also ignore the constructed levee to the west along the entire length of the ditch. See BLM Ex. 30A (red marking for levee). There is no need to add the Lairds' overbroad and inaccurate generalization.

7. Finding of Fact No. 12 (ALJ's # 10)

Proponents rehash their erroneous argument (presented to the ALJ) that wetland plants grow without irrigation in the Warner Wetlands ACEC and that tules and swamp grasses have grown there naturally since 1923. Laird Exc. at 27 *citing* Laird Ex. 24 at 25 (State Engineer's Findings and Order and Decree). Protestant thoroughly debunked this assertion in Protestant's Response to Proponents' Opening Post-Hearing Brief at §§ I-J (pp. 10-11). In short, the cited State Engineer's Findings and Order actually explain that tules and swamp grasses grew naturally *in the late 1800s* when Hart Lake regularly overflowed and inundated natural wetlands *prior to* artificial works that drained the area. Mr. Stofleth further explained:

Q. ...what are the effects of lack of water for a season or two or three on tules and cattails? What would the plant do?

A. Cattails and tules require a lot of water, total soil saturation, some inundation. And what the inundation does is it allows the saturation to stay there longer. And when the plants don't have total saturation they are in survival mode. They are not producing seed. They are not producing those little cattail fluffs. But they are surviving, and they will survive the wet-dry cycles, but in survival mode.

Thus, tules and cattails can survive for a number of seasons without irrigation, but Mr. Stofleth never said they would persist indefinitely. Mr. Stofleth explained that, even with normal rainfall, the necessary soil saturation would not be provided for the persistence of cattails and tules over

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time. Tr. at 320. Wetland plants like tules and cattails are wetland obligates that could not grow without BLM's irrigation in the contested areas because they need for soil to be saturated with water for several months a year. BLM Exhibit 26 at ¶ 4. Cook Laird agrees that the presence of tules on the land in the Warner Wetlands ACEC indicates that the land has had a lot of water standing on it for long periods of time. Tr. at 783. Similarly, he agrees that the presence of cattails indicates the presence of a lot of water in the ACEC. Tr. at 783.

Proponents assert that upland species of plants are found in irrigation ditches on the Contested Acres and elsewhere on the Contested Acres. Laird Exc. at 27. Actually, Mr. Stofleth explained that in disturbed areas, such as those recently scoured by water, some upland plants can establish more quickly than wetland plants and may be present in those scoured areas for a period of time. Tr. at 404-405. Then, when water saturates the area, upland plants will give way to wetland plants. Tr. at 406. It is not uncommon to find some upland grasses "mixed in with" wetland plants. Tr. at 406. Mr. Stofleth has observed grasses like foxtail or Si-Hy on the lake shores included in delineated wetlands, such as Mugwump Lake (which is outside the contested area). Tr. at 393, 409-410. But Mr. Stofleth did not testify that any area of the contested acres had a substantial amount of upland plants or that any area of the contested acres lacked wetland plants.

For these reasons, all of Proponents' exceptions proposing changes should be rejected.

8. Findings of Fact No. 14 & 15 (ALJ's # 12 & 13)

Proponents assert that the elevation of the northernmost end of the Southern Contested Area (SCA) is 4,469 feet rather than the 4,464 feet in the Proposed Order. Laird Exc. at 27. Proponents provide no citations for their assertion. BLM Ex. 30A (and BLM Ex. 30 at 2) include contour lines showing elevations of 4,464 feet at the northern end of the SCA, so the Proposed Order is correct and the exception without merit. Proponents appear to confuse elevations at the main spillway ditch bottom with lower elevations on the surrounding land.

Proponents assert that the elevation of the southernmost end of the Northern Contested Area (NCA) is 4,466 feet rather than the approximate 4,465 feet in the Proposed Order and, at the northernmost end of the NCA, it is 4,465 rather than the approximate 4,459 feet in the Proposed Order. Laird Exc. at 27. Proponents provide no citations for their assertions. BLM Ex. 30 at 1 includes contour lines showing elevations of 4,465 feet at the southern end of the NCA and elevations of 4,460 at the northernmost end of the NCA, so the Proposed Order is correct in noting these "approximate" elevations and the exception is generally without merit. To be even more precise, Finding of Fact 13 in the ALJ's Proposed Order could be clarified so that the third sentence states: "The northernmost end of the NCA sits at approximately 4,460 feet." Through this change, the elevation of 4,460 would be substituted for 4,459 at the northernmost end of the NCA. Mr. Elvin explained at hearing that, at the very northeast corner of the north contested area on BLM Ex. 30 at 1, the yellow topographic lines are correctly placed but that there are four lines which are incorrectly all labeled as "4459" when they should be labeled, from left to right, as 4464, 4463, 4462, and 4461. Tr. at 500. The green elevation lines on either side are correctly labeled as 4465 and 4460 (from left to right). Tr. at 500. Thus, 4460 would reference the green contour line to the right or east.

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9. Finding of Fact No. 20 (ALJ's # 18)

Proponents assert, without any supporting citations, that the ALJ overstated the extent of BLM's irrigation structures achieving BLM's irrigation goals in the northern contested area. Laird Exc. at 27-28. The Lairds' unsupported assertion is without merit as the record provides comprehensive support for the ALJ's finding. *See* Protestant's Opening Post-Hearing Brief at § VII.D-VII.E (pp. 40-42)(citations to record evidence of levees, ditches, and swales serving NCA) and § VI. B-VI.C. (pp. 32-34)(photographs of widespread distribution of wetland plants irrigated in NCA). Consequently, the Lairds' exception should be rejected. One minor typographical correction is that the ALJ likely meant to cite to pages "Tr. vol. II at 473 to 479" rather than "Tr. vol. II at 473-4479" because there is not a page 4479.

10. Finding of Fact No. 21 (ALJ's # 19)

Proponents assert that BLM does not use methods customarily employed by others to irrigate high spots in the south contested area. Laird Exc. at 28. For this assertion, Proponents cite to Mr. Stofleth's statement that "in 2006 there was actually a couple of high spots out there, you could see where willows were colonizing in a couple of sand dunes. But other than that, I saw water on that entire southern contested area." Tr. at 114. The fact that Mr. Stofleth noticed a few high spots at one point in 2006 does not change the fact that BLM irrigated all of the areas covered by the water rights at issue. There was no evidence presented showing a failure to irrigate land subject to the water rights. Further, Mr. Stofleth noted the use of artificial water spreading dams and dikes to direct water through the south contested area. *See* Protestant's Opening Brief at § VII.C (pp. 39-40). The fact that water may not have reached the top of a water spreading dam or dike does not mean BLM was not ready, willing, and able to deliver water to the irrigated lands. Proponents even noted that they too build up the sides of ditches to hold back water and then use cuts in the sides of ditches to distribute water. *See* Protestant's Opening Brief at § VIII.E (pp. 48-51). Proponents never contended that they immerse all of their ditch tops and, indeed, there was no testimony that irrigators customarily immerse all of their irrigation structures. The Proponents' edits should be rejected.

11. Finding of Fact No. 22 (ALJ's # 20)

Proponents largely repeat the contention from their exception above concerning Finding of Fact No. 21 (ALJ's #19). Laird Exc. at 29. For the reasons stated above, this contention is without merit and the exception should be rejected. Proponents also argue that the transcript pages and exhibit cited by the ALJ do not support the finding that BLM's irrigation structures are capable of delivering water to meet BLM's irrigation goals in the SCA. Laird Exc. at 28. Mr. Stofleth explained that BLM irrigates the contested areas to provide for wetland plant species perpetuation. Tr. at 97; BLM Ex. 5 at 2. Thus, Mr. Elvin's testimony and topographic mapping cited by the ALJ, which explains in great detail how the BLM's system delivers water throughout the SCA to perpetuate wetland plant species, does indeed support the ALJ's finding. In combination with Mr. Stofleth's testimony concerning wetland plant species and his narrative of the photographs of these plants throughout the SCA, *see* Protestant's Opening Brief at § VI (pp. 31-32), the record is clear that BLM has an irrigation system capable of meeting its irrigation goals. Regarding the pinpoint transcript cite with which Proponents are concerned, the citation to Mr. Elvin's testimony could be clarified to read: "Tr. vol. II at 436 through 472; BLM

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Ex. 30 at 2 and BLM Ex. 30A.” This clarification would simply substitute “436” for “463” which could have been a typographical error; the clarification would encompass more of Mr. Elvin’s testimony. Other than this page correction, the edits should be rejected.

12. Finding of Fact No. 23 (ALJ’s # 21)

Proponents propose a host of erroneous edits to this finding of fact. Laird Exc. at 29. First, Proponents object to the ALJ’s finding that BLM’s irrigation ditches in the contested areas were nearly filled with water. *Id.* In fact, the record supports the ALJ’s finding, with Mr. Stofleth’s journal noting “Ditches near full from lake spill early this year and carryover from previous years irrigation.” BLM Ex. 1 at 1. Next, Proponents object to the ALJ’s finding that, in March, 2001, Hart Lake water levels exceeded 4471 feet at PODs 8, 9, and 10 and that BLM undertook direct diversion at all PODs. To the contrary, the record supports the ALJ’s finding, with Mr. Stofleth’s journal noting approximate March, 2001 water levels over 4473 feet. BLM Ex. 1 at 1. Indeed, BLM photographed direct diversion over the sill at POD 8 in March, 2001. BLM Ex. 9 at 3 and Tr. at 55-56. BLM filled its irrigation ditches early in the season. BLM Ex. 1 at 1. The early season Hart Lake levels in March, 2001 at PODs 9 and 10 filled the main spillway ditch by flowing over the sills. Tr. at 263-264.

Proponents contend BLM did not divert water to the SCA during the 2001 irrigation season. To the contrary, while Mr. Stofleth could not quantify how much water BLM delivered to the southern contested area from March 2001 flows, he does know that, based on the 2000 carryover and early 2001 Hart Lake elevations, BLM would have delivered some water to the southern contested area. Tr. at 274-275. Proponents contend that BLM estimates that BLM did not irrigate the north half of the NCA. Laird Exc. at 30. To the contrary, Mr. Stofleth could not quantify how much water BLM delivered to the northern contested area but he did know that BLM diverted water into the northern contested area. Tr. at 273-274. Proponents claim BLM only pumped water at 5 to 10 CFS. Laird Exc. at 30. Proponents misread the BLM irrigation chronology which clearly states that the 5-10 cfs was direct “natural water flow” from Hart Lake; thus the 5-10 CFS was direct flow *in addition to* BLM’s pumping. BLM Ex. 1 at 1; Tr. at 267-268.

Proponents provide no contrary evidence to support their contentions since they were thoroughly confused as to events of 2001 and could not confirm being present during key time periods. *See* Protestant’s Opening Post-Hearing Brief at § V.A.1 (pp. 14-16). For example, Cook Laird did not know that BLM was diverting water through direct diversion at POD 8, but, in fact, BLM proved this diversion with photographic evidence. Tr. at 613, BLM Ex. 9 at 3 and Tr. at 55-56. For the reasons above, all of Proponents’ proposed changes should be rejected.

13. Finding of Fact No. 24 (ALJ’s # 22)

Proponents claim that the ALJ erred by using “diversion threshold” as a term to describe the level at which water reached BLM’s points of diversion. Laird Exc. at 30. The exception should be rejected since “diversion threshold” in the Order is logically the stage at which water has reached the point of diversion because it would be illegal to move the point of diversion without authorization. Moreover, the legal/technical obstacles to moving a POD into Hart Lake and the fallacies behind the Lairds’ “water chasing” arguments are described in Protestant’s Opening

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Brief at § VIII.F (pp. 51-58); Protestant's Response to Proponents' Closing Brief at § D (pp. 4-6) and Protestant's Response to Proponents' Supplemental Closing Brief at § F (pp. 6-7). In any case, the Proposed Order makes sense in its use of the term since the Order is clearly referring the presence of water at the BLM points of diversion. Proponents claim that the Proposed Order overstates the extent of BLM's irrigation, Laird Exc. at 30, but this is without merit as the finding of fact (ALJ #22) does not state the extent of irrigation, so Proponents' exceptions and proposed edits are without merit.

14. Finding of Fact No. 25 (ALJ's # 23)

As above, Proponents again claim that the ALJ erred by using "diversion threshold" as a term to describe the level at which water reached BLM's points of diversion. Laird Exc. at 31. For the reasons stated above, this exception should be rejected. Proponents also, without explanation, change "was unable to" to "did not" divert. There is no error in the ALJ's saying BLM "was unable to" divert since water had to be at the legal point of diversion to divert it. This exception should be rejected.

15. Finding of Fact No. 26 (ALJ's # 24)

As above, Proponents again claim that the ALJ erred by using "diversion threshold" as a term to describe the level at which water reached BLM's points of diversion. Laird Exc. at 31. For the reasons stated above concerning findings of fact 24 and 25 (ALJ's # 22 and 23), this exception and the associated edits should be rejected.

16. Finding of Fact No. 27 (ALJ's # 25)

As above, Proponents again claim that the ALJ erred by using "diversion threshold" as a term to describe the level at which water reached BLM's points of diversion. Laird Exc. at 32. For the reasons stated above, this exception should be rejected.

Proponents argue that the Order should state that BLM estimated water did not reach the north half of the NCA in 2005. Laird Exc. at 32. To the contrary, watermaster measurements for 2005 indicate late-irrigation-season increasing Hart Lake elevations. BLM Ex. 1 at 2. BLM would have taken advantage of any water available through this increase to irrigate because BLM remained ready, willing, and able to irrigate at POD 8. Tr. at 288. At this point in the irrigation season, BLM had headgates A and B open and, accordingly, based on the watermaster elevations, BLM would have delivered additional late season water to the northern contested area. Tr. at 288-289. Proponents have no evidence to support their contentions concerning BLM's pumping. Cook Laird has no recollection or record (other than the OWRD and Dennis Glender Hart Lake elevation readings in the exhibits) of where water was in Hart Lake in relation to BLM's PODs in 2005. Tr. at 697-699. Cook Laird testified that he does not know if BLM was running its POD 8 pump in 2005 nor does he know if water was flowing through direct diversion without pumping at POD 8. Tr. at 626. Jesse Laird does not know which exact dates he viewed the north contested acreage during the irrigation season. Tr. at 997. Jesse Laird has no record of specifically when BLM filled certain irrigation ditches related to the contested areas. Tr. at 997-998. The exception should be rejected.

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17. Finding of Fact No. 28 (ALJ's # 26)

As above, Proponents again claim that the ALJ erred by using "diversion threshold" as a term to describe the level at which water reached BLM's points of diversion. Laird Exc. at 33. For the reasons stated above, this exception should be rejected.

Proponents also contend the Proposed Order overstates lake elevations and BLM irrigation. Laird Exc. at 32-33. But OWRD's own lake level readings support the Proposed Order's finding that lake levels rising in 2005 would have exceeded the heights necessary to irrigate both the north and south contested areas. BLM Ex. 14 at 6. BLM would have taken advantage of any available water through this increase to irrigate as BLM remained ready, willing, and able to irrigate at POD 8. Tr. at 288. At this point in the irrigation season, BLM had headgates A and B open and, accordingly, based on the watermaster elevations, BLM would have delivered additional late season water to the northern contested area. Tr. at 288-289. Similarly, at the elevations stated by the watermaster, BLM also would have irrigated when water was available at PODs 9 and 10 into the southern contested area. Tr. at 288-289. As discussed above concerning ALJ's #25, Proponents have no evidence to support their contentions due to their general lack of any detailed recollection concerning BLM's 2005 irrigation. Due to the higher sill height on POD 9, as compared to PODs 8 and 10, one minor clarification would be to substitute "as much as" for "more than" in the second sentence of this finding of fact.

18. Finding of Fact No. 29 (ALJ's # 27)

Proponents claim the Proposed Order misstates elevation and duration of Hart Lake levels. Laird Exc. at 33. The Order, however, accurately tracks OWRD's own water level readings which stated that 2006 levels were above 4473 feet and "spilling." BLM Ex. 14 at 6. BLM's estimates also exceed 4473 at least until August 1. BLM Ex. 1 at 2-3. As of May 1, water was flowing through direct diversion, without need for pumping, at a rate of 30-50 CFS through the POD 8 by the BLM pump and at a rate of 300-400 CFS through the Hart Lake spillway PODs 9 and 10. BLM Ex. 1 at 3; Tr. at 297. Proponents have no better information of their own and, in fact, Jesse and Cook Laird contradicted each other in their accounts of the extent of water flow on the contested areas in 2006. Cook Laird claimed there was no water in main ditch 1 where it meets the north contested area and Jesse Laird acknowledged that this area was "inundated with water." Tr. at 748; Tr. at 886-887.

Proponents claim the Proposed Order should not state that BLM was "diverting" water because water was allegedly "pouring" over BLM's points of diversion. Laird Exc. at 33. This is a classic example of what the ALJ meant when he aptly noted that "[t]he arguments put forth by the Lairds are convoluted, at best." Proposed Order at 10. Here, the Lairds impart their own definition of irrigation to, at some level of water flow, instantaneously convert direct diversion water into "poured" water. The ALJ appropriately rejected the Laird argument that water transforms from irrigation into flood water at some unspecified level of flow. The Proposed Order soundly explains:

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

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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.

Proposed Order at 10, n. 11. The ALJ's reasoning is sound and, for the reasons stated above, all of the exceptions should be rejected.

19. Finding of Fact No. 30 (ALJ's # 28)

Proponents again claim that the ALJ erred by using "diversion threshold" as a term to describe the level at which water reached BLM's points of diversion. Laird Exc. at 34. For the same reasons discussed above in response to Finding of Fact No. 24 (ALJ's # 22), the exception should be rejected.

Proponents claim that the Proposed Order overstates the extent of water carryover in BLM's ditches from 2006 to 2007. Laird Exc. at 34. This is without merit as the finding of fact (ALJ #28) cites BLM Ex. 1 at 3-4 which indeed documents that "[a]ll ditches are full...from 2006." Proponents have no contrary evidence of their own since Cook Laird, when asked about BLM's pumping in 2007, said "I don't remember what -- years don't make much difference to me anymore. And I'm sorry I can't remember those." Tr. at 634-635. Jesse Laird has no record of specifically when BLM filled certain irrigation ditches related to the contested areas. Tr. at 997-998.

Proponents seek to insert "natural" before "flooding" to suggest that any saturation of the contested areas from 2006 was just a natural event and not irrigation. Laird Exc. at 34. This is clearly erroneous as BLM documented its pumping and direct diversion during the 2006 irrigation season. BLM Ex. 1 at 2-3; see also *See* Protestant's Opening Post-Hearing Brief at § V.A.6 (pp. 24-26).

20. Finding of Fact No. 31 (ALJ's # 29)

Proponents again claim that the ALJ erred by using "diversion threshold" as a term to describe the level at which water reached BLM's points of diversion. Laird Exc. at 35. For the same reasons discussed above in response to Finding of Fact No. 24 (ALJ's # 22), the exception should be rejected.

Proponents assert the ALJ's citation does not support the finding that "the southern units had received sufficient water to fulfill the irrigation purposes." Laird Exc. at 35 *citing* Proposed Order at page 8. In fact, BLM's irrigation chronology states: "May 14 shifted water to north units, south units full." BLM Ex. 1 at 4. Since the units were full, there was indeed sufficient water to fulfill BLM's irrigation purpose of perpetuating wetland plants through saturating the soil. *See e.g.* Tr. at 96-97. Consequently, the Proposed Order is correct and should not be changed. The Lairds have no contrary evidence and, as usual, have no good recollection of

BLM's irrigation. Cook Laird first stated that BLM never ran its POD 8 pump in 2008 but then said he was not certain of this and that "I just don't keep track of everybody's water and everything else." Tr. at 703. Cook Laird's recollection is indeed faulty since Laird Photos 53-56 are the Lairds' depiction of BLM's running water up main ditch 1 during the 2008 irrigation season. Tr. at 915-916; Laird Ex. 70. In fact, BLM was running enough water up into main ditch 1 in 2008 that the Lairds complained about it to the watermaster. Tr. at 893.

21. Finding of Fact No. 32 (ALJ's # 30)

Proponents again claim that the ALJ erred by using "diversion threshold" as a term to describe the level at which water reached BLM's points of diversion. Laird Ex. at 36. For the same reasons discussed above in response to Finding of Fact No. 24 (ALJ's # 22), the exception should be rejected.

Proponents claim that this finding of fact misconstrues the events of 2008 regarding complaints from the Lairds and conferral with the watermaster. Laird Ex. at 35-36. In fact, the record supports the finding of fact. BLM shut off its pumping diversion of water at POD 8 after contact from Laird Ranch and conferral with the watermaster due to complaints from Warren Laird about BLM using too much water. BLM Ex. 1 at 4; BLM Ex. 13 at 10 (watermaster notes reflecting complaint from Cook Laird about BLM water use); Tr. at 306-308. Thus, these exceptions should be rejected. One clarification would be to substitute "95 percent of the NCA" for "95 percent of the contested areas" in the second sentence since the ALJ was referring to the NCA in this sentence.

22. Finding of Fact No. 33 (ALJ's # 31)

Proponents seek to change the date of BLM's POD transfer application, in the finding of fact, to December 12, 2008. Laird Ex. at 36. The finding of fact states that BLM filed the application "[s]ometime between July and December 2008." Mr. Stofleth recalled initiating the transfer process prior to December, 2008, Tr. at 62-63, but the OWRD "Withdrawal of Preliminary Determination" states that the application was officially filed on December 12, 2008. BLM Ex. 33 at 2. Thus, the finding of fact accurately summarizes the information in the record.

23. Finding of Fact No. 34 (ALJ's # 32)

Proponents again claim that the ALJ erred by using "diversion threshold" as a term to describe the level at which water reached BLM's points of diversion. Laird Ex. at 37. Proponents also edit "was unable to" out of the Order. For the same reasons discussed above in response to Findings of Fact No. 24 and 25 (ALJ's # 22 and #23), the exception should be rejected.

24. Conclusions of Law Nos. 1 through 3

Proponents object to these conclusions but offer no support in the record for their exceptions because no such support exists. The ALJ's careful findings support the conclusions of law and the Proponents' exceptions should be rejected. As explained in Protestant's briefs to the ALJ, the record fully supports the conclusions in the Proposed Order.

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25. Credibility

Proponents object to and seek to remove the footnote in the ALJ's credibility finding in the Proposed Order at page 10, fn. 11. Laird Exc. at 37-38. The footnote is, in fact, a good example of the Lairds' convoluted and evasive testimony and should be retained. Proponents ignore the specific text in the ALJ's careful footnote and, instead, create a straw man in which the ALJ allegedly does not recognize any difference between flooding and irrigation. The ALJ stated:

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.

Proposed Order at page 10, fn. 11. The ALJ did not globally equate all flooding with irrigation, but explained that, in the circumstances described in the footnote (e.g. water flowing through identified points of diversion into ditches), the Lairds' distinction makes no sense. The Laird distinction indeed makes no sense and the exception should be rejected.

Proponents also rehash their argument that the BLM's irrigation is wasteful flooding under the Warner Lakes Decree. Laird Exc. at 38. This meritless argument is fully addressed in Protestant's Response to Proponents' Closing Brief at § C (pages 2-4). In short, Proponents improperly equate the uncontrolled natural overflow discussed in the Decree with BLM's artificial and controlled direct diversion through concrete PODs and constructed ditches. BLM's use of direct diversion through constructed concrete PODs and excavated ditches is not the same as the natural overflow described as wasteful in the State Engineer's Findings and Order of Determination and the Decree. BLM's PODs 8, 9, and 10 all have boards to hold back water in Hart Lake until it is time to release the water in a controlled manner for irrigation. During the 2001 to 2009 time period, BLM removed these head boards at appropriate times to purposefully direct water into its irrigation ditches; this is different from the seasonal uncontrolled overflow described in the Decree. The exception should be rejected.

B. Response to Proponent General Rewrite of Opinion

With no support or argument, Proponents unilaterally rewrite the ALJ's Opinion. The ALJ's Opinion is based on careful analysis of the record and applicable law and the Proponents' rewrite should be rejected. To the extent the rewrite is based on the exceptions above, Protestant's response shows these exceptions to be without merit.³ Proponents have no basis to rewrite the Proposed Order as it is the Proponents who the ALJ found to be "evasive," "inconsistent," and "implausible." Proposed Order at 10. Moreover, the ALJ correctly found the Proponents' arguments to be "convoluted, at best." *Id.* Where evidence from a witness is inconclusive, inconsistent, or confusing, deference must be given to the ALJ who presides at hearing and "had an opportunity to observe the witnesses and develop a more complete frame of reference." *In the Matter of the Partial Cancellation of Water Right Certificate 38668*, PC 87-10, Vol. 45 page 87

³ Protestant does not object to the few factual clarifications expressly agreed to above (and underlined) by Protestant under individual findings of fact but these clarifications in no way affect the substance of the Order or the conclusions.

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(Feb. 5, 1991). The ALJ properly found that BLM's evidence was "consistent and plausible" and the ALJ properly allocated greater probative value to BLM's evidence. *See* Proposed Order at page 10.

Proponents' arguments are largely addressed above in response to Proponents' "Arguments in Support of Selected Exceptions." To the extent they arise only in the Proponents' rewrite of the Proposed Order without further argument by Proponents, they are addressed below.

Proponents' edits suggest that ALJ Finding of Fact 34 (Laird #36; Laird Exc. at 12) should include the sentence: "Proponents have the opportunity to view the contested areas throughout the irrigation season each year." This should not be added because the evidence established that Proponents are, in fact, often away from the contested areas during key parts of the irrigation season and their alleged observations are unreliable. *See* Protestant's Opening Post-Hearing Brief at § VIII.B (pp. 43-47)(summarizing record concerning unreliability of Proponents).

Proponents suggest an edit stating that water under Certificate 9451 must be used before water under supplemental rights. Laird Exc. at 16. There is no support in the certificates or law for this proposition. *See* Protestant's Response to Proponents' Closing Brief at § A (pp. 1-2).

Proponents rehash their argument that water is "available" under ORS § 540.610(2)(j) so long as Hart Lake is above 4,466 feet; Proponents thus assert that irrigators must dredge out into the lake. Laird Exc. at 18. The ALJ's reasoning rejecting this argument is sound. *See* Proposed Order at pages 12-13. Proponents argue that OWRD cannot interpret the term "available" in a pleading. Laird Exc. at 18. Regardless, OWRD can adopt the Proposed Order's definition of "available" through its Director's ruling on this matter. Putting aside delegation issues, the ALJ supported the interpretation of "available" in the Proposed Order by pointing out that Proponents' suggested interpretation is implausible and would impose on Hart Lake users an obligation to engage in unauthorized changes in their points of diversion as they moved their points of diversion out into the lake. Proposed Order at 13. Protestant has thoroughly debunked Proponents' convoluted theories that irrigators must "chase" water out into the lake. *See* Protestant's Opening Post-Hearing Brief at § 8.F (pp. 51-58); Protestant's Response to Proponents' Closing Brief at § D (pp. 4-6) and Protestant's Response to Proponents' Supplemental Closing Brief at § F (pp. 6-7).

Proponents argue that BLM, rather than Proponents, must prove lack of availability of water as part of the ORS § 540.610(2)(j) statutory excuse to non-use. Laird Exc. at 39. The proponents of cancellation have the burden to prove by reliable, probative and substantial evidence that protestant failed to use the water appropriated for a period of five successive years. *Rencken v. Young*, 300 Ore. 352, 364-365 (1985). The Proposed Order, as a whole, properly finds that Proponents failed to meet this burden. *See* Proposed Order at 10.

C. Acceptable Minor Clarifications

In addition to the minor clarifications noted above under specific findings of fact (and underlined), Protestant does not object to the following minor corrections or additions noted in underlining:

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Evidentiary Rulings. (Laird Exc. at page 4.) Laird 75 was admitted into evidence.

ALJ Finding of Fact 6 (Laird #8, Laird Exc. at page 6). add: The concrete sill elevation at POD 8 is 4,472.25+ feet. BLM Ex. 20 at 3. The pump at POD 8 is situated at a working elevation of 4,470 feet. BLM Ex. 26 at 2-3. (The Order, in one place, says the pump is at 4,460).

ALJ Finding of Fact 15 (Laird #17, Laird Exc. at page 8). Change second sentence to read: "Several yards north of POD 8, the main irrigation ditch branches off to the northwest and forms a distribution ditch." BLM Ex. 9 at 5. (Note that Proponents erroneously suggest southwest instead of northwest).

ALJ Finding of Fact 16 (Laird #18, Laird Exc. at page 8-9). Change fourth sentence to read: "BLM irrigates from south to north in order to take advantage of gravity flow throughout the Warner Wetlands." BLM Ex. 9 at 5.

III. CONCLUSION

The proponents of cancellation have the burden to prove by reliable, probative and substantial evidence that protestant failed to use the water appropriated for a period of five successive years. *Rencken v. Young*, 300 Ore. 352, 364-365 (1985). The record in this matter demonstrates that Proponents have not come close to meeting this burden.

OWRD has explained that:

The Protestant's application of water by diversion through its authorized PODs to promote the growth of plants constitutes "irrigation" within the meaning of OAR 690-300-00010(26). The Protestant has established that any non-use during the 2001 through 2009 time period that occurred due to water not physically being accessible at the Protestant's authorized PODs may not serve as the basis for forfeiture, because water was not "available" at the Protestant's authorized PODs during periods of non-use, and because the Protestant was "ready, willing and able" to use "available" water throughout the time period. In addition, the Protestant has separately established that any non-use during the 2006 irrigation may not serve as a basis for forfeiture as a result of "climatic conditions," and that any non-use during the 2009 irrigation season may not serve as the basis for forfeiture as a result of a pending transfer application.

OWRD Closing Argument at 12-13; *see also* OWRD Response to Proponents' Closing Brief at 9-10 (stating 2006 flooding of contested area would qualify for climatic conditions defense).

For the reasons stated in Protestant's prior briefs and herein, the Proponents' exceptions should be rejected (other than the minor clarifications agreed to herein).

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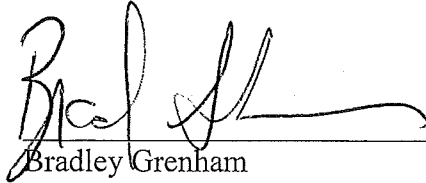
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Dated:

5/18/2011

For the Regional Solicitor,



Bradley Grenham
Attorney for Protestant

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