

BEFORE 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)

AMENDED CORRECTED
PROPOSED ORDER

OAH Ref. No: WR-10-001

AND)

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

AND)

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

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

Protestant)

WARREN C. LAIRD AND JESSE LAIRD,)

Protestants:)

Pursuant to OAR 137-003-0655, and after having considered exceptions and responses to exceptions filed by the Proponents and the Protestant, the Oregon Water Resources

Department ("OWRD") issues this Amended Corrected Proposed Order ("Amended Proposed Order") in the above-captioned proceeding. This Amended Proposed Order makes certain modifications to the Corrected Proposed Order issued in this proceeding on April 5, 2011. The modifications are fully described below.

OWRD adopts the following sections of the Corrected Proposed Order without modification: the "Procedural History" section, the "Issues" section, the "Conclusions of Law" section, and the "Credibility" section, and the "Order" section. The "Evidentiary Rulings" section is adopted with one modification: LAIRD 75 is added to the list of Proponents' exhibits that were admitted into evidence without objection. The "Order" section has been modified to reflect the fact that OWRD is proposing to issue the order, and, consistent with ORS 540.610, to add the term "successive" to Paragraph 1 of the "Order" section. Finally, the "Findings of Fact" and "Opinion" sections are modified as described below.

I. MODIFICATIONS AND ADDITIONS TO THE CORRECTED PROPOSED ORDER'S "FINDINGS OF FACT" SECTION

The following findings of fact are modified as shown below. Deletions are shown in ~~struck through~~ text; additions are shown in underlined text. The modified findings of fact are numbered in accordance with the numbering in the Corrected Proposed Order. Findings of fact that are not modified by this Amended Proposed Order are not reprinted below; however, they are adopted and incorporated as if set forth fully herein.

Finding of Fact 6 is modified as follows: POD 8 is a constructed ditch, in excess of 10 feet wide. The mouth of the ditch consists of a concrete sill at the base and stone walls on either side. The concrete sill accommodates wood planks across the width to control the flow of water into the main irrigation ditch. (Tr. vol. I at 55 through 59; Ex. BLM 9 at 1 through 4.) The 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 ~~4,460~~ feet, the lowest elevation of the three PODs along Hart Lake. (Ex. BLM 26 at 2 through 3.) During the period in issue, the pump located at POD 8 generally required a minimum lake elevation of 4,470 ft. in order to operate. (Tr. vol. II at 261 and 263; Ex. BLM 26 at 2.) **Reason for modification:** There is clear and convincing evidence in the record that the pump at POD 8 is set at 4,470 feet, not 4,460 feet. In addition, the finding pertaining to the concrete sill elevation at POD 8 is supported by a preponderance of evidence in the record.

Finding of Fact 7 is modified as follows: 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, respectively, approximately 4,473.25+ ft. and 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.) **Reason for**

modification: There is clear and convincing evidence in the record that the sill height of POD 9 is 4,473.25+ feet.

Finding of Fact 13 is modified as follows: The Northern Contested Area (NCA)¹ consists of 562.44 acres in T35S, R24E, Sections 24, 25, and 36. (Exs. A 2 at 5, A5 at 4, and A8 at 5 through 6; BLM 2 at 7.) The elevation of the southernmost edge of the NCA sits at an approximate elevation of 4,465 ft. The northernmost end of the NCA sits at approximately 4,460-4,459 ft. The southern edge of the NCA is bounded by a constructed levee that runs in a northeasterly direction and extends beyond the NCA. The main ditch from POD 8 enters the NCA at the southernmost edge and runs along this levee. (Tr. vol. II at 473 through 474; Ex. BLM 30 at 1.) To the east of the NCA, but still within the Warner Wetlands administered by BLM, is a constructed ditch capable of directing water into the northernmost units of the NCA. (Tr. vol. III at 498, Ex. BLM 30 at 1.) **Reason for modification:** There is clear and convincing evidence in the record that the northernmost end of the NCA sits at approximately 4,460 feet.

Finding of Fact 15 is modified as follows: Water diverted from POD 8 enters BLM's main irrigation ditch. Several yards north south of POD 8, the main irrigation ditch branches off to the northwest southeast and forms a distribution ditch. Several yards from this junction, along the main ditch, is a head gate designated head gate A. Water from POD 8 will travel down the distribution ditch into the intensely managed area so long as head gate A is closed. Water from this distribution ditch will service units 1 through 25 in the Warner Wetlands. Once the distribution ditch is filled, BLM will open head gate A and allow water to travel down the main ditch to head gate B in order to irrigate the remainder of the units in the intensely managed area. (Tr. vol. I at 101 through 103; Ex. BLM 9 at 5.) **Reason for modification:** There is clear and convincing evidence in the record of the location and direction of the distribution ditch described above.

Finding of Fact 16 is modified as follows: When BLM is ready to divert water to the NCA, it will open head gate B and allow water from POD 8 to travel the full length of the main ditch into the south end of the NCA. BLM makes the determination, at the beginning of each irrigation season, how many days it will apply water to each area of the Warner Wetlands. In drier seasons, BLM will try to distribute water evenly to ensure each area gets some water. BLM irrigates from ~~north to south~~ 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 106.) **Reason for modification:** There is clear and convincing evidence in the record that BLM irrigated from south to north in the NCA, and not the other way around.

Finding of Fact 19 is modified as follows: 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.) There are several high spots in the topography of the SCA which are not able to be irrigated BLM's irrigation method. (Tr. vol. I at 114)

¹ The Northern and Southern Contested Areas are referred to collectively in this order as "the contested areas."

Reason for modification: A preponderance of evidence in the record supports this addition to Finding of Fact 19.

Finding of Fact 22 is modified as follows: 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.) Water did not reach the north half of the NCA in 2002. (Tr. vol. II at 281-82m 336-37.) 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.) **Reason for modification:** A preponderance of evidence in the record supports these additions to Finding of Fact 22.

Finding of Fact 26 is modified as follows: 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 as much as more than two feet and remained at such levels for the remainder of the irrigation season. BLM was able to divert water to all contested acres through direct diversion and ~~pumping~~ during this time. Because BLM opened head gates A and B earlier in the season, much of the water diverted from POD 8 was directed to the NCA. (Tr. vol. II at 288 through 289; Exs. BLM 1 at 2 and A12 at 1.) **Reasons for modifications:** There is clear and convincing evidence in the record that the water level during the irrigation season in 2005 did not exceed the diversion threshold at POD 9, and that the water level during the irrigation season in 2005 did not exceed the diversion threshold at POD 10 by more than two feet. The elevation of the sill at POD 9 is 4,473.25+ feet, and the elevation of the sill at POD 10 is 4,471.25+ feet. Measurements by OWRD's watermaster showed a maximum lake level of 4,472.65 feet during the irrigation season in 2005. In addition, there is clear and convincing evidence in the record that BLM did not operate its pump at POD 8 after June 6th in 2005.

Finding of Fact 31 is modified as follows: ~~Sometime between July and~~ On December 12, 2008, BLM filed an application to transfer the location of the POD 8 pump and point of diversion. Between November 2008 and March 2009, BLM installed a new pump at a new POD 8 location. ~~BLM installed a 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.) **Reasons for modifications:** Clear and convincing evidence in the record supports the finding that BLM's transfer application was filed on December 12, 2008, and that the new pump was installed at a new POD 8 location.

Finding of Fact 34 is modified as follows: 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.) **Reason for modification:** Clear and convincing evidence in the record

supports the finding that Bluejoint Ranch is located approximately 10 miles north of Laird Ranch, not 10 miles south.

II. MODIFICATIONS TO THE CORRECTED PROPOSED ORDER'S "OPINION" SECTION

The "Opinion" section is modified as described below.

Paragraphs 1 through 4 of the "Opinion" section are adopted without modification. Sections 1.b. and 2 of the "Opinion" section are also adopted without modification. These Paragraphs and Sections are not reprinted below; however, they are adopted and incorporated as if set forth fully herein.

The Department has modified portions of the "Opinion" section beginning with Paragraph 5 and continuing through the end of Section 1.a. These paragraphs are reprinted in their entirety. Deletions are shown in ~~striketthrough~~ text; additions are shown in underlined text.

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

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

1. Diversion and use during period in issue.

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

a. Evidence of diversion and use, and availability of water at BLM's points of diversion.

i. Evidence of diversion and use during the period at issue

Proponents contend that BLM failed to make beneficial use of a portion of the water rights at issue between 2001 and 2009. The findings of fact demonstrate that irrigation occurred in both the northern and southern contested areas during 2001. While the evidence suggests that water may not have been applied to the entirety of the northern contested and southern contested areas, the record is insufficient to establish the location of any un-irrigated acres. Proponents have failed to meet their burden of proof in this regard. The findings of fact also demonstrate that irrigation occurred in both the northern and southern contested acres in 2006. The Proponents have therefore not met their burden of proof showing a "failure to use beneficially for five successive years" during the 2001-2009 time period. ORS 540.610(1) (Emphasis added). For the reasons described in Section 2 of this "Opinion" section, BLM's diversion and application of water in both 2001 and 2006 constitutes the beneficial use of water for irrigation. For these reasons alone, therefore, Proponents have failed to meet the initial burden required of them by ORS 540.610(1), and no part of the water rights evidenced by Certificates 9451, 22209, and 45409 has been forfeited due to non-use during the period in issue.

ii. "Availability" of water at BLM's points of diversion

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

The relevant statutes and rules do not define the term "available" for these purposes. In reviewing the text of ORS 540.610(2)(j), I find "available" to be a delegative term as used therein.² In *J. R. Simplot Co. v. Department of Agriculture*, 340 Or 188 (2006), the court defined delegative terms as:

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

² 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.*) As OWRD noted in its closing brief, whether the term is inexact or delegative, OWRD's task is to ensure that its interpretation effectuates the legislative policy embodied in the statute. Nonetheless, I find it more helpful to the parties and the reviewing agency or court to make such a determination.

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

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

~~As OWRD correctly points out, "[a] POD is a recognized attribute of water right. A description of the POD *** is a required element of an application for a right a 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.~~

The statutes describing the characteristics of a POD are context for the interpretation of ORS 540.610(2)(j). A POD is a recognized attribute of a water right. A description of the POD for use of water is a required element of an application for a right to use water. ORS 537.140. It is a term of a water use permit issued by OWRD. See ORS 537.211. Compliance with a statutory transfer process is required for changing the location of an authorized POD. See ORS 540.510 – 540.530. It is a specific, geographically identifiable location. ORS 537.140(4) (map required for application for right to use water must "be of sufficient quality and scale to establish the location of the proposed point of diversion").

The facts in this case demonstrate that the lake level in Hart Lake changes annually, and that the lake level rises to a sufficient height to serve PODs 8, 9, and 10 during the irrigation season with some frequency, even if it does not do so every year. The POD locations during the time period in question are recognized by the certificates at issue in this case. There is no evidence that the PODs were deliberately placed out of reach of the lake, or that the contours of the lake have changed in such a fashion as to permanently prevent water from reaching the PODs. There is no evidence that simply raising or lowering the elevation of the PODs, without changing their locations, would solve the problems created by the annual changes in the elevation of Hart Lake.

Given these facts, OWRD concludes that water is not "available" within the meaning of ORS 540.610(2)(j) when the elevation of Hart Lake is too low to enable diversion at the locations of PODs 8, 9, and 10. The BLM is not required to "chase" the water to avoid forfeiture by trenching out into Hart Lake to enable Hart Lake water to reach PODs 8, 9 and 10.

This interpretation of "available" is a narrow one, based on the facts in this case alone.³

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."

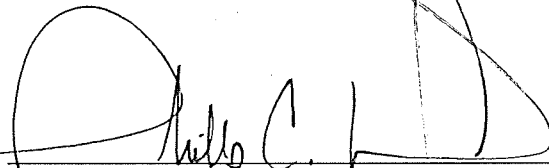
Reasons for modifications to Corrected Proposed Order's "Opinion" section: To clarify OWRD's interpretation of the term "available" as the term is used in ORS 540.610(2)(j), and to add, based on the findings of fact, an additional basis for determining that that no part of the water rights evidenced in Certificates 9451, 22209, and 45409 has been forfeited.

ORDER

The Oregon Water Resources Department proposes to issue the following order:

1. The United States Bureau of Land Management has not failed to beneficially use water on the contested acres for a period of five or more successive years during the period in issue.
2. No portion of the water rights evidenced in Certificates 9451, 22209, and 45409 has been forfeited due to non-use during the period in issue.

Dated this 14th day of November, 2011



Phillip C. Ward, Director
Water Resources Department

RIGHT TO FILE EXCEPTIONS

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

³ Proponents contend that deference is only accorded to an agency's interpretation of statutes by rule, and not through a contested case. On the contrary, state agencies are permitted to interpret statutory terms through contested case orders where the legislature did not intend that an interpretation be made solely through a rule. See Centennial Schol Dist No 28J v. BOLI, 169 OR App 489, 507-08 (2000).

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

Oregon Water Resources Department
Juno Pandian
725 Summer St. NE, Suite A
Salem, OR 97301
FAX: (503) 986-0902

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

CERTIFICATE OF SERVICE

I certify that on November 14, 2011, I mailed the attached AMENDED CORRECTED PROPOSED ORDER; Attachment 1, CORRECTED PROPOSED ORDER; Attachment 2, RESPONSES TO EXCEPTIONS TO THE CORRECTED PROPOSED ORDER; certified, return receipt requested, postage prepaid to the person(s) listed below:

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

Brad Graham
Office of Regional Solicitor
805 SW Broadway, Ste 600
Portland, OR 97205

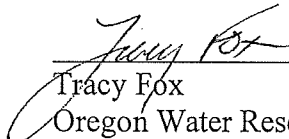
Warren Laird, Proponent
30020 Hart Mountain Rd
Plush, OR 97637

Jesse D. Ratcliff
Assistant Attorney General
Oregon Dept. of Justice
1162 Court St NE
Salem, OR 97301

Jesse Laird, Proponent
30511 Hogback Rd
Plush, OR 97637

Courtney Duke, Attorney
Schroeder Law Offices, P.C.
1915 NE Cesar E. Chavez Blvd
Portland, OR 97212-0527

Office of Administrative Hearings
Joe Allen, Administrative Law Judge
P.O. Box 14020
Salem, OR 97309-4020



Tracy Fox
Oregon Water Resources Department

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

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

CORRECTED PROPOSED ORDER¹

AND)

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

AND)

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

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

Protestant)

WARREN C. LAIRD AND JESSE LAIRD,)
Proponents)

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

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

PROCEDURAL HISTORY

On August 26, 2009, Warren and Jesse Laird (Proponents) each filed an Affidavit of Non-Use of Water Right. On October 15, 2009, Oregon Water Resources Department (OWRD) issued three Notices of Proposed Partial Cancellation of Water Rights evidenced by certificate numbers 9451, 22209, and 45409 (Notices). On December 10, 2009, the United States Bureau of Land Management (BLM or Protestant) filed a protest to all three notices. On January 5, 2010, OWRD referred this matter to the Office of Administrative Hearings (OAH) for hearing.

On January 26, 2010, OWRD issued a Notice of Hearing and Prehearing Conference. On March 12, 2010, the parties submitted a Stipulated Prehearing Statement. On March 15, 2010, a prehearing conference was held with Senior Administrative Law Judge (ALJ) Joe L. Allen presiding. Juno Pandian appeared on behalf of OWRD. Bradley Grenham, Attorney for the United States Department of the Interior, appeared on behalf of BLM. Laura Schroeder and Courtney Duke, Attorneys at law, appeared on behalf of Proponents. On March 16, 2010, ALJ Allen issued a Prehearing Order that set out a schedule of proceedings in this matter. On April 20, 2010, the parties and the ALJ met in Lakeview, Oregon and conducted a site visit. At this time, The ALJ and the parties observed points of diversion (PODs) 8, 9 and 10 along the northern bank of Hart Lake.²

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

CREDIBILITY

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

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

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

OPINION

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

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

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

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

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

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

* * * * *

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

* * * * *

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

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

* * * * *

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

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

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

(Emphasis added.)

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

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

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

1. Diversion and use during period in issue.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * * * *

(26) "Irrigation" means the artificial application of water to *crops or plants by controlled means to promote growth* or nourish crops or plants. Examples of these uses include, *but are not limited to*, watering of an agricultural crop, commercial

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

(Emphasis added.)

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

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

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

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

ORDER

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

1. The United States Bureau of Land Management has not failed to beneficially use water on the contested acres for a period of five or more years during the period in issue.
2. No portion of the water rights evidenced by Certificates 9451, 22209, and 45409 has been forfeited due to non-use during the period in issue.

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

RIGHT TO FILE EXCEPTIONS

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

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

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

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

CERTIFICATE OF MAILING

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

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

Jesse Laird
Proponent
30511 Hogback Rd
Plush, OR 97637

Brad Grenham
Office of Regional Solicitor
805 SW Broadway, Ste 600
Portland, OR 97205

Courtney, Attorney Duke
Schroeder Law Offices, P.C.
1915 NE Cesar E. Chavez Blvd.
Portland, OR 97212-0527
(503) 281-4100 Tele.
(503) 281-4600 Fax.

Warren Laird
Proponent
30020 Hart Mountain Rd
Plush, OR 97637

Juno Pandian
Oregon Water Resources Dept
725 Summer St NE, Suite "A"
Salem, OR 97301-4172

Jesse D. Ratcliff
Assistant Attorney General
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301

Misty Fragua
Hearings Coordinator

RESPONSES TO EXCEPTIONS TO THE CORRECTED PROPOSED ORDER

A. Water Right Certificates 9451, 22209 and 45409

EXCEPTION TO FINDINGS OF FACT 1:

Proponents take 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.

RESPONSE:

In this case, there is no meaningful distinction between the language used by the ALJ in the Proposed Order and the language sought by the Proponents. There is no contention in this proceeding that another entity “owns” or holds” the portions of the rights appurtenant to the land owned by BLM.

EXCEPTION TO FINDINGS OF FACT 2:

Proponents take 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.

RESPONSE:

Certificates 22209 and 45409 are already characterized as supplemental rights in Findings of Fact 3 and 4. It is unnecessary for the purposes of this proceeding to make the revisions and additions requested by the Proponents.

EXCEPTION TO FINDINGS OF FACT 3:

Proponents take 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.

RESPONSE:

The Proponents are incorrect.

The application for Water Right Certificate 22209 refers to a “supplemental right to irrigate by pumping, during periods when Hart Lake does not overflow.” LAIRD 64 at 8. However, the Certificate itself contains no such limitation on the method of diversion. In

addition, the characterization of Certificate 22209 as a “pumping” right or not is not relevant to the determination of the issues in this proceeding.

EXCEPTION TO FINDINGS OF FACT 5:

Proponents take 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. 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.)

RESPONSE:

The proposed revision to Finding of Fact Number 5 is not supported by a preponderance of the evidence in the record.

In 1954, the Lake County Circuit Court issued a decree and related findings pertaining to applications to store water in and use water from Greaser Lake Reservoir. Certain users of water from Hart Lake objected to these applications out of concern that storage in Greaser Lake Reservoir would prevent water from reaching Hart Lake.

The court ordered the State Engineer to issue permits for the Greaser Lake Reservoir applications. The court also imposed certain conditions on the applications. As relevant here, the court required the applicant to deliver water to Hart Lake in the following circumstances:

- (a) To satisfy the lands in North Warner Valley with adjudicated rights to the water overflowing Hart Lake, where the owners of the lands covered by these rights have applied for supplemental water from natural storage in Hart Lake.
- (b) Additional water to compensate for seepage and evaporation losses, and to maintain a water level in Hart Lake so that water can be delivered to the pumps without construction of ditches of excessive length and for efficient operation of the pumps.

The second of these conditions requires the Greaser Lake Reservoir applicants to deliver water to Hart Lake to “maintain a water level in Hart Lake” to facilitate the use of pumps. The court did not specify a lake level that would be sufficient to meet this requirement.¹ Instead, in 1960 the State Engineer determined 4466 feet to be an appropriate interpretation of this requirement. Neither the 1954 decree nor the original Warner Lakes decree, issued in 1929, establish a Hart Lake elevation of 4466 feet for any purpose.

¹ The original Warner Lakes decree, issued in 1929, does not make any reference to a particular Hart Lake elevation either.

A 1963 memorandum from Assistant State Engineer James W. Carver, Jr. to State Engineer Chris L. Wheeler also indicates that 4466 feet is the minimum elevation for storage of water in Hart Lake under permit R-2630.

The 4466 elevation in Hart Lake is therefore relevant for two reasons: (1) it is the elevation below which water must be delivered to Hart Lake from the Greaser Lake Reservoir,² and (2) it is the minimum elevation for which there is a storage right in Hart Lake. To state (2) differently, to the extent that water may be diverted from storage under permit R-2630, and to the extent that the means of diversion and use of water are otherwise legal, water may be diverted down to the 4466 elevation mark.

EXCEPTION TO NEW FINDINGS OF FACT 7:

Proponents take 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. (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 outline in Certificate 22209.)

RESPONSE:

The proponents are incorrect. In addition, there is case law stating that using water from the same source but an authorized point of diversion does not constitute forfeiture, so the question of whether PODs 8, 9, or 10 are authorized PODs for Certificate 22209 is irrelevant to the determination of the issues in this proceeding.

EXCEPTION TO FINDINGS OF FACT 9 (P.O. #7):

Proponents take 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 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.

RESPONSE:

The Proponents' exception concerning the sill height at POD 10 is not supported by clear and convincing evidence. The Proponents' exception concerning the sill height at POD 9 is supported by clear and convincing evidence, and is modified in the Amended Proposed Order accordingly. The record does not support the Proponents' exception that the main spillway ditch is a large swale for approximately one-third of its distance. Rather, the

² If water is below the 4466 foot level, there must also be a hydraulic connection between Hart and Crump Lakes to allow water from Greaser Lake Reservoir to ultimately reach Hart Lake. Ex. LAIRD 53 at 25.

swale narrows and reforms a V shaped channel for a portion of this distance (in the vicinity of Location C).

EXCEPTION TO FINDINGS OF FACT 12 (P.O. #10):

Proponents take 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 notable 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.

RESPONSE:

The Proponents are incorrect. Mr. Stolfeth, BLM's witness, testified that cattails and tules require a lot of water and when the plants do not have total saturation, the plants are in survival mode. Mr. Stolfeth also testified that wetland plants like tules and cattails are wetland obligates and that they could not grow without irrigation.

EXCEPTION TO FINDINGS OF FACT 14 & 15 (P.O. #12 & #13):

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

RESPONSE:

The Proponents' exception that the northernmost end of the SCA sits at approximately 4,469 feet, and not the 4,464 feet stated in the Corrected Proposed Order, is not supported by the evidence. In addition, the Proponents' exception that the northernmost end of the NCA sits at approximately 4,465 feet, and not the 4,459 feet stated in the Corrected Proposed Order, is not supported by the evidence. The testimony of Mr. Elvin indicates that at the very northeast corner of the NCA, the yellow topographic lines are correctly placed but that there are four lines which are incorrectly labeled as 4469, when they should be labeled from left to right as 4464, 4463, 4462 and 4461, with the very northernmost tip lying at 4,460 feet. Finding of Fact 13 is corrected to reflect this elevation.

EXCEPTION TO FINDINGS OF FACT 20 (P.O. #18):

Proponents take 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."

RESPONSE:

The record does not indicate the ALJ overstates BLM's irrigation goals or the nature of BLM's irrigation structures.

EXCEPTION TO FINDINGS OF FACT 21 (P.O. #19):

Proponents take 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.

RESPONSE: OWRD agrees that the following addition to the Proposed Order, requested by the Proponents, is supported by a preponderance of evidence in the record: "There are several high spots in the topography of the SCA which are not able to be irrigated BLM's irrigation method." OWRD incorporates this change into this Amended Proposed Order. However, there is no evidence in the record concerning the location or size of these few high spots. Even assuming these high spots did not receive water during the 2001 – 2009 time period, and that no exemptions to forfeiture apply specifically to these high spots, there is no way of determining what portion of the right has been forfeited. The Proponents have failed to meet their burden of proof. The Proponents' remaining requested revisions are unnecessary to the determination of this matter.

EXCEPTION TO FINDINGS OF FACT 22 (P.O. #20):

Proponents take exception to this finding of fact because BLM cannot irrigate certain high portions of the SCA, as shown in Proponents 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."

RESPONSE:

The record is clear that BLM has an irrigation system capable of meeting its irrigation goals.

EXCEPTION TO FINDINGS OF FACT 23 (P.O. #21):

Proponents take 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.

RESPONSE: The Proponents request a finding that the BLM admits that it did not apply water in the north half of the NCA in 2001. The Proponents cite to pages 338-39 of the transcript. Mr. Stofleth first stated that he ran water into the northern contested area in 2001, but was not able to quantify the amount of water. He then testified that "how much water I got there was definitely in the south half. It can't go to the north without filling the southern half of the northern contested area."

Mr. Stofleth's testimony can plausibly be read two ways. First, it may mean that he believed there was only water in the southern half of the NCA in 2001. Second, it may mean that he believed with certainty that there was water in the southern half of the NCA

in 2001, and was unable to quantify how much, if any, water reached the northern half of the NCA in 2001. The ALJ concluded the latter was more persuasive, and found that “BLM was able to apply a limited amount of water to the contested areas” in 2001.

ORS 183.650(3) provides that an agency conducting a contested case before the Office of Administrative Hearings may only modify a “finding of historical fact” when there is “clear and convincing evidence in the record that the finding was wrong.” Findings of historical fact are those that determine “that an event did or did not occur in the past or that a circumstance or status did or did not exist either before the hearing or at the time of the hearing.” “To be ‘clear and convincing,’ evidence must establish that the truth of facts asserted is ‘highly probable.’” *Riley Hill General Contractor, Inc. v. Tandy Corp.*, 303 Or 390, 402 (1987).

OWRD does not find Mr. Stofleth’s testimony sufficiently clear to conclude that it is “highly probable” that the ALJ’s finding with respect to use in the NCA in 2001 was incorrect.

With respect to the southern contested area, Mr. Stofleth testified that a “minimal” amount of water was applied in 2001, but that he couldn’t quantify which areas received water and which did not. Again, the burden lies with the proponents to establish non-use. Here, there is evidence that some use occurred during 2001, and the evidence does not establish what part of the SCA did not receive water. OWRD does not believe the evidence in the record is sufficient to find that it is “highly probable” that the ALJ’s finding with respect to use in the SCA in 2001 was incorrect.

EXCEPTION TO FINDINGS OF FACT 24 (P.O. #22):

Proponents take exception to the 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. Proponents request that the minimum pool of Hart Lake be referred to as the “diversion threshold,” and that the height of BLM’s points of Diversion is 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, Proponents take exception to this finding of fact because it misstates the extent of irrigation by the BLM in 2002.

RESPONSE:

As described in response to Proponents’ Exception to Finding of Fact 5, the 4466 elevation in Hart Lake is relevant for two reasons: (1) it is the elevation below which water must be delivered to Hart Lake from the Greaser Lake Reservoir, and (2) it is the minimum elevation for which there is a storage right in Hart Lake. To state (2) differently, to the extent that water may be diverted from storage under permit R-2630, and to the extent that the means of diversion and use of water are otherwise legal, water

may be diverted down to the 4466 elevation mark. However, the existence of the storage right, and the designation of a minimum elevation for the storage right, does not necessarily mean that the failure to divert water when the water level is above the minimum elevation is a basis for forfeiture. In any event, it is clear enough from the context that “diversion threshold,” as it is used in the Corrected Proposed Order, refers only to sill heights or elevations at BLM’s PODs 8, 9 and 10. It does not refer to the minimum elevation of the storage right, or the legal question of whether BLM is required to “chase” water to the 4466 elevation mark to avoid forfeiture.

OWRD agrees that the following changes, requested by the Proponents, are supported by a preponderance of evidence in the record: “Water did not reach the north half of the NCA in 2002.” “No water was applied to the SCA in 2002.” These changes requested by the Proponents are additions to the findings of fact, not modifications of the ALJ’s findings. OWRD incorporates these changes into this Amended Proposed Order. The Proponents also request a finding that “BLM estimates that its pumping threshold was not met” in 2002. The greater weight of the evidence establishes that BLM operated its pump at POD 8 for a period of time during 2002.

EXCEPTION TO FINDINGS OF FACT 25 (P.O. #23):

Proponents take 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* Proponents exception to Finding of Fact No. 24), and because the finding of fact makes a legal determination about BLM’s ability to diver water

RESPONSE:

Same as response to Exception to Findings of Fact 24 (P.O. #22).

EXCEPTION TO FINDINGS OF FACT 26 (P.O. #24):

Proponents take 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* Proponents exception to Finding of Fact No. 24), and because the finding of fact makes a legal determination about BLM’s ability to divert water..

RESPONSE:

Same as response to Exception to Findings of Fact 24 (P.O. #22).

EXCEPTION TO FINDINGS OF FACT 27 (P.O. #25):

Proponents take 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* Proponents exception to Finding of Fact No. 24), and because the finding of fact overstates the extent of BLM’s irrigation in 2005.

RESPONSE:

Same as response to Exception to Findings of Fact 24 (P.O. #22). In addition, with respect to the extent of irrigation, the record does not establish by a preponderance of the evidence that no water was applied to the northern half of the NCA in 2005. With respect

to the time period during which BLM pumped from POD 8 in 2005, the ALJ's finding of fact addresses the issue sufficiently.

EXCEPTION TO FINDINGS OF FACT 28 (P.O. #26):

Proponents take 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.

Proponents take 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* Proponents 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.

RESPONSE:

Same as response to Exception to Findings of Fact 24 (P.O. #22). In addition, with respect to the relationship between the sill heights of PODs 9 and 10, and the lake levels during the irrigation season in 2005, clear and convincing evidence supports certain, but not all of the changes requested by Proponents. These changes are reflected in the Amended Proposed Order. There is also clear and convincing evidence in the record that BLM did not pump from POD 8 after June 6, 2005, and the Amended Proposed Order corrects this appropriately. The remainder of Proponents requested changes are either unnecessary or not supported by the evidence in the record.

EXCEPTION TO FINDINGS OF FACT 29 (P.O. #27):

Proponents take 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.

RESPONSE:

The evidence supports Proponents' request to clarify that the 2006 flood event in Warner Valley was "natural." The Proponents also object to characterizing water flowing over the sills at PODs 8, 9, and 10 as "diversion." The evidence in the record thoroughly supports the ALJ's findings that PODs 8, 9, and 10 are structures that control the diversion of water from Hart Lake. The remainder of the Proponents' requested changes would modify findings of historical fact made by the ALJ, and there is not clear and convincing evidence in the record that these findings were wrong.

EXCEPTION TO FINDINGS OF FACT 30 (P.O. #28):

Proponents take 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,

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

RESPONSE:

Same as response to Exception to Findings of Fact 24 (P.O. #22). Proponents other requested changes are either unnecessary to the determination of the issues in this proceeding or are not supported by the evidence in the record.

EXCEPTION TO FINDINGS OF FACT 31 (P.O. #29):

Proponents take 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* Proponents 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.”

RESPONSE: Proponents requested changes are either unnecessary to the determination of the issues in this proceeding or are not supported by the evidence in the record.

EXCEPTION TO FINDINGS OF FACT 32 (P.O. #30):

Proponents take 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.

Proponents also take 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* Proponents exception to Finding of Fact No. 24), and because the finding of fact makes a legal determination about BLM’s ability to divert water.

RESPONSE:

Same as response to Exception to Findings of Fact 24 (P.O. #22). Proponents other requested changes are either unnecessary to the determination of the issues in this proceeding or are not supported by the evidence in the record.

EXCEPTION TO FINDINGS OF FACT 33 (P.O. #31):

Proponents take 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 facts confuses an application to transfer the location of a pump with an application to transfer a point of diversion, which is an important distinction.

RESPONSE:

The evidence supports Proponents' request to clarify that the BLM's transfer application for a change of the location of POD 8 was filed on December 12, 2008. The filing date is supported by numerous contemporaneous records prepared by OWRD, including a receipt for the payment of the transfer fee, and correspondence with BLM. The only evidence to the contrary is Mr. Stofleth's recollection during testimony that the application was filed "prior to December of '08." Tr. Vol. 1 at 63. The existence of contemporaneous agency records documenting the filing date makes it highly probable that the filing date was December 12, 2008, and that the ALJ's finding was incorrect. The evidence also supports the Proponents' requests for additional findings that the purpose of the transfer application was to change the location of POD 8, and that the new pump was in fact installed at the new location for POD 8. The remainder of the requested changes either does not meaningfully change the Proposed Order and are therefore unnecessary, or are not supported by the evidence in the record.

EXCEPTION TO FINDINGS OF FACT 34 (P.O. #32):

Proponents take 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* Proponents exception to Finding of Fact No. 24), and because the finding of fact makes a legal determination about BLM's ability to divert water.

RESPONSE:

Same as response to Exception to Findings of Fact 24 (P.O. #22).

EXCEPTION TO CONCLUSIONS OF LAW NO. 1 THROUGH 3

Proponents take 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.

RESPONSE: As described in the Amended Proposed Order, the conclusions of law are supported by substantial evidence in the record. Proponents have not met their burden of proving that BLM failed to apply water to the contested acres for five successive years, as required by ORS 540.610.

EXCEPTION TO "CREDIBILITY" SECTION

Proponents take exception to Footnote 11 in the Corrected Proposed Order 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.

RESPONSE: OWRD agrees that there are some circumstances in which there is a legal distinction between controlled diversions of water and the natural overflow or flooding of water. However, the ALJ's footnote states only that there is no distinction between the climatic conditions that lead to water flowing through an identified point of diversion into distribution ditches and other diversion structures and onto the contested acres. Because the ALJ's footnote refers only to climatic conditions that lead to water entering a recognized point of diversion, and not to the distinction between a recognized point of diversion and natural overflow or flooding, Proponents' exception is not well taken.