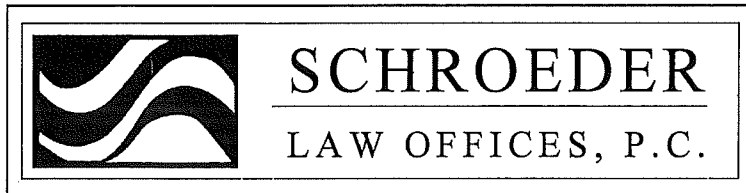


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Oregon, Nevada

December 14, 2011

VIA U.S. MAIL, FACSIMILE, and ELECTRONIC MAIL

Oregon Water Resources Department
c/o Juno Pandian
725 Summer St. NE, Suite A
Salem, OR 97301
Facsimile: (503) 986-0902
Email: juno.g.pandian@state.or.us

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

Dear Ms. Pandian:

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

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

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

Very truly yours,

SCHROEDER LAW OFFICES, P.C.


Cortney D. Duke

CDD:bmw

Enclosures

cc: Client
Service List

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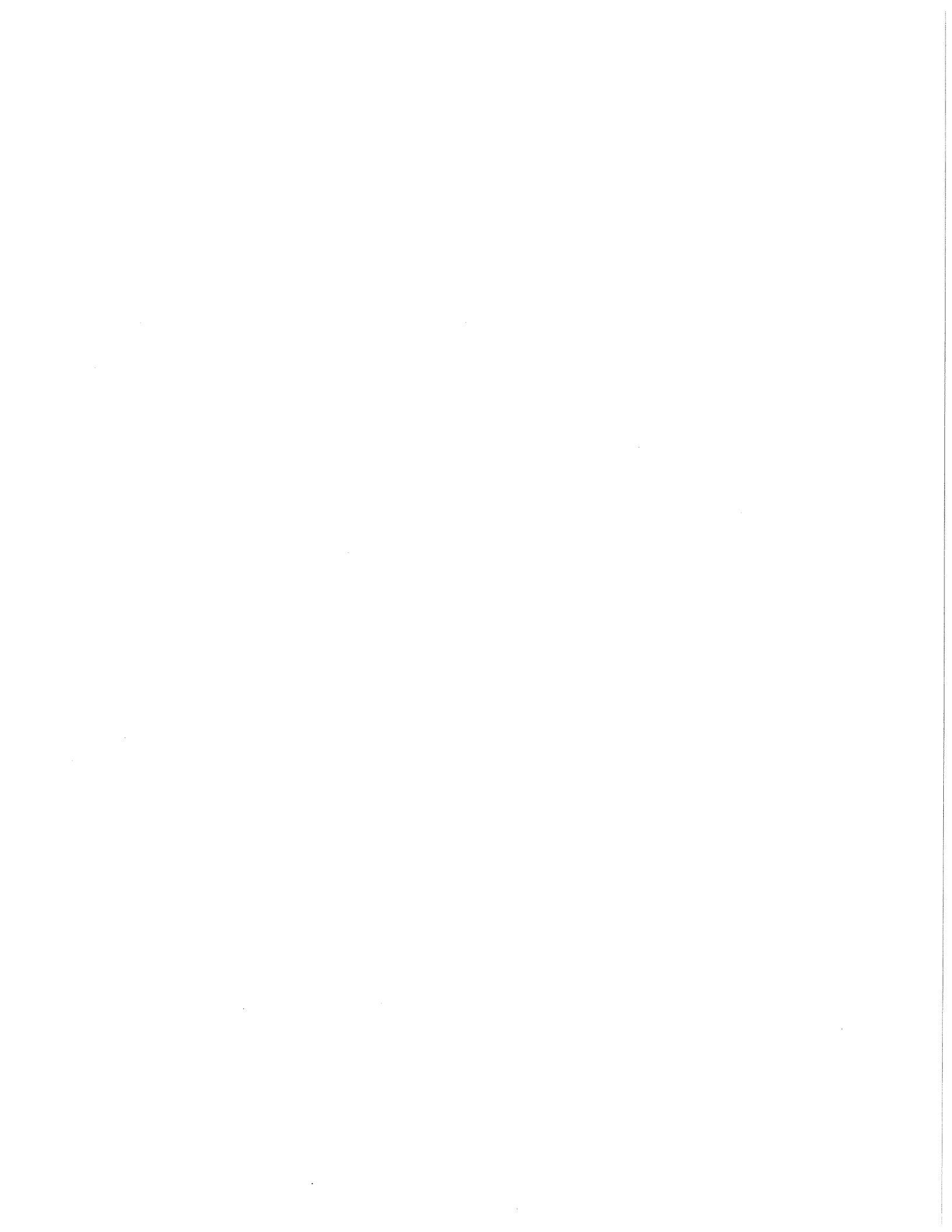
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**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
FOR THE
OREGON WATER RESOURCES DEPARTMENT**

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

AND

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

AND

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

Jesse Laird and Warren C. Laird
Proponents

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

OWRD Case No.: PC 05-09

OAH Ref. No.: WR-10-001

**PROPONENTS' EXCEPTIONS TO
AMENDED CORRECTED PROPOSED
ORDER**

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Proponents, Warren C. Laird and Jesse E. Laird (hereinafter collectively "Laird Ranch") by and through their attorney of record, Schroeder Law Offices P.C. and its attorneys, hereby submit the following exceptions to the Oregon Water Resources Department's (hereinafter "the Department") Amended Corrected Proposed Order (hereinafter "Amended Proposed Order"). The Amended Proposed Order, which is accompanied by the Department's Responses to Exceptions to the Corrected Proposed Order, makes certain modifications to the Corrected Proposed Order issued in this matter on April 5, 2011.

Introduction

The Department's Amended Proposed Order makes modifications to the "Order," "Evidentiary Rulings," "Findings of Fact" and "Opinion" sections of the Corrected Proposed Order. The Department's modifications to the "Evidentiary Rulings" and "Order" sections are nominal. Laird Ranch agrees with the Department's modification to the "Evidentiary Rulings" section. Laird Ranch, while specifically disagreeing with the directive¹ of the Order section, does not otherwise object to the Department's modifications to (1) specify the Amended Proposed Order is issued by the Department; and (2) include "successive" to paragraph 1.

On May 5, 2011 Laird Ranch submitted Exceptions to Administrative Law Judge ("ALJ") Allen's Corrected Proposed Order. Laird Ranch will not repeat all of those exceptions here but specifically reserves, relies on and incorporates its initial exceptions, as well as the arguments raised in each of its closing briefs², related to these exceptions. Specifically, Laird Ranch reserves and incorporates its exceptions to the "Procedural History," "Issues," "Findings of Fact", "Conclusions of Law" and "Credibility" sections herein. The failure of Laird Ranch to address or respond to each factual finding modification made by the Department in the Amended Proposed Order is not Laird Ranch's acquiescence thereto.

In the present exceptions, Laird Ranch will only respond to the Department's modified "Opinion" section. In the modified "Opinion" section the Department makes two major revisions. First, the Department modifies the Corrected Proposed Order to provide that Laird Ranch has failed to meet its burden of proof to sufficiently establish the location of any un-irrigated acres or to show "failure to use beneficially for five successive years" during the 2001 to 2009 time period. Amended Proposed Order, Page 6. Second, the Department modifies the Corrected Proposed Order to provide "...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 diversions at the locations of PODs 8, 9, and 10." *Id.*, Page 7. The Department attempts to limit its interpretation of "available" to the facts in this case alone. *Id.*, at Page 8. Laird Ranch takes exception to these modifications of the Amended Proposed Order.

¹ Specifically, Laird Ranch continues to assert that the Protestant United States Bureau of Land Management (hereinafter "BLM") has failed to beneficially use water on a portion of the contested acres for a period of five or more successive years during the period at issue and accordingly, portions of the water rights have been forfeited due to non-use. See Proponents' Exceptions to Corrected Proposed Order, page 22.

² Proponents' closing briefs include: (i) Proponents' Closing Brief; (ii) Proponents' Response to Oregon Water Resources Department's Closing Argument; (iii) Proponents' Reply to Oregon Water Resources Department's Response to Proponents' Closing Brief; (iv) Proponents' Supplemental Closing Brief; and (v) Proponents' Reply to Protestant's Response to Proponents' Closing Brief.



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Exceptions to "Opinion" Section of Amended Proposed Order

1. Laird Ranch has sufficiently established non-use for at least five successive years.

The Bureau of Land Management ("BLM") failed to apply water to the South Contested Acres ("SCA") or north half of the North Contested Acres ("NCA") in 2001 through 2009. See Proponents' Closing Brief, pages 23-25 and pages 26-28. Water was not applied to the south half of the NCA for irrigation in 2001 to 2005. *Id.*, pages 28-29. The non-use occurred on the SCA and NCA for five successive years between 2001 and 2005. Accordingly, the un-irrigated lands should be cancelled unless a statutory excuse permitting non-use is applicable.

The Amended Corrected Proposed Order makes clear that no irrigation occurred in the SCA or NCA in 2002, 2003 or 2004. Amended Proposed Order, Findings of Fact 22, 23, and 24. Additionally, the Department agrees the evidence "suggests" that water was not applied to the entirety of the northern contested and southern contested areas in 2001 and 2005, but concludes the record is insufficient to establish the location of any un-irrigated acres. *Id.*, page 6 and Findings of Fact 21, 25 and 26. Laird Ranch has sufficiently shown, by a preponderance of evidence, non-use in the NCA and SCA in 2001 and 2005 as set out below.

a. Modification of Historical Facts

"An agency conducting a contested case hearing may modify a finding of historical fact made by the administrative law judge...only if the agency determines that there is clear and convincing evidence in the record that the finding was wrong. For the purposes of this section, an administrative law judge makes a finding of historical fact if the administrative law judge determines 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." ORS 183.650(3). ALJ Allen's findings related to the occurrence or extent of irrigation by BLM during 2001 to 2009 are historical facts.

"Clear" describes the character of unambiguous evidence. "Convincing" describes the effect of evidence on the observer. *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or. 390, 397 (1987). To be "clear and convincing" the evidence must establish that the truth of the facts asserted is "highly probable." *Id.*, at 402; *State v. M.J.*, 174 Or.App. 72, 78 (2001). Put another way, evidence is clear and convincing if it is of extraordinary persuasiveness. *State ex. rel. Dept. of Human Services v. Hinds*, 191 Or.App. 78, 84 (2003).

Because the record shows that it is highly probable that irrigation did not occur on portions of the contested acres for five successive years during the contested time period, the Department should modify the ALJ's historical facts.

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- b. Evidence of Non-Use
i. Non-use in 2001: SCA

Vern Stofleth, witness for BLM, testified that water did not flow over the concrete sills at POD 9 and POD 10 in 2001. Direct Testimony of Vern Stofleth, Hearing Transcript (“HT”), page 274, lines 13 – 16; Oregon Water Resources Department (“OWRD”) Exhibit A12, page 1. Consideration of the entire record, including testimony from Laird Ranch of the lack of control and diversion structures, Mr. Stofleth’s unquantified belief and recollection, Mr. Elvin’s testimony regarding the diversion capacity of the Lynch Bypass Canal and the head of water necessary to overcome the topography of the SCA, and the Department’s own records on Hart Lake water levels in 2001, establishes by a preponderance of the evidence that no irrigation of the SCA occurred in 2001. OWRD Exhibit A12, page 1; Proponents’ Closing Brief, Findings of Fact 35, pages 20 and 21. Because BLM did not physically divert and control sufficient water to irrigate the SCA it is highly probable that no irrigation occurred on the SCA in 2001.

Despite the documentary evidence to the contrary, Mr. Stofleth testified that he believed some water naturally spilled over the boards at POD 10, though he could not quantify how much. Direct Testimony of Vern Stofleth, HT, page 274, lines 17 – 24. Mr. Stofleth guessed that overflow water, which is not physically diverted or controlled, would have filled the “low-lying swales” in the SCA. Direct Testimony of Vern Stofleth, HT, page 275, lines 12 – 19. Even if the documentary evidence is ignored in favor of a witness’s “guesses,” the record shows it is highly probable that no acres in the SCA were irrigated, despite the fact that water may have naturally flowed in an uncontrolled manner to the low lying areas.

The SCA have been sufficiently identified as those 505 acres in Township 36 South, Range 25 East, Sections 6, 7, 8, 18 and 19 and depicted on BLM Exhibit 30. Further, even though the Department has found that the uncontrolled natural wetting of the “low lying swales” is the equivalent of irrigation, the remaining portions, not including low lying swales, of the SCA have been sufficiently identified. Bureau of Land Management (“BLM”) Exhibit 30; Direct Testimony and Cross Examination of James Elvin, HT, pages 431 – 506 generally.

- ii. Non-use in 2001: North half of NCA

Vern Stofleth, witness for BLM, testified that water did not reach the north half of the NCA in 2001. Cross Examination of Vern Stofleth, HT, pages 338 -39, beginning at line 22; OWRD Exhibit A12, page 1. Mr. Stofleth was unable to quantify the amount of water that was delivered to gates A and B on the main ditch. Id. Consideration of the entire record, including testimony from Laird Ranch of the lack of diversion structures, Mr. Stofleth’s unquantified belief and recollection, Mr. Elvin’s testimony regarding the diversion capacity of Main Ditch 1 and the head of water necessary to overcome the topography of the NCA, and the Department’s own records on Hart Lake water levels, establishes by a preponderance of evidence that no irrigation occurred in the north half of the NCA in 2001. Id.; Proponents’ Closing Brief, Finding of Fact 36, page 21. Because BLM did not physically divert and control sufficient water to irrigate the north half of the NCA, it is highly probable that no irrigation occurred on the north half of the NCA in 2001.



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The north half of the NCA has been sufficiently identified. The NCA were identified as the 562.44 acres in Township 36 South, Range 24 East, Sections 24, 25 and 36. All the factual witnesses agreed and testified that the north half of the NCA acres are those acres north of the fence on BLM Exhibit 2, page 8, from the point of land that juts into the NCA near the "25" designation for Section 25 on the west side of the NCA and travels in a slight northeasterly direction to the closest point on the east side of the NCA. Direct Testimony of Vern Stofleth, HT, pages 292-93, beginning at line 23.

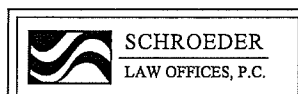
iii. Non-use in 2001: South half of NCA

Vern Stofleth, witness for BLM, testified that water did not reach all of the south half of the North Contested Acres in 2001. Direct Testimony of Vern Stofleth, HT, page 274, lines 5 – 11; Cross Examination of Vern Stofleth, HT, pages 229-40, beginning at line 24. Consideration of the entire record, including testimony from Laird Ranch, Mr. Stofleth's unquantified belief and recollection, Mr. Elvin's testimony regarding the diversion capacity of Main Ditch 1 and the head of water necessary to overcome the topography of the NCA, and the Department's own records on Hart Lake water levels, establishes by a preponderance of the evidence that limited water delivery was made to the south half of the NCA in 2001. *Id.*; Proponents' Closing Brief, Finding of Fact 36, page 21. Because BLM did not physically divert and control sufficient water to irrigate the south half of the NCA, it is highly probable that no irrigation occurred on a portion of the south half of the NCA in 2001.

The south half of the NCA has been sufficiently identified. All the factual witnesses agreed and testified that the south half of the NCA is those acres south of the north half of the south contested acres. Further, the un-irrigated portions of the south half of the NCA have been sufficiently identified as those areas whose elevation and topography required significant head of water to apply irrigation to. BLM Exhibit 30; Direct Testimony and Cross Examination of James Elvin, HT, pages 431 – 506 generally.

iv. Non-use in 2005: SCA

Vern Stofleth, witness for BLM, testified that water did not flow over the concrete sills at POD 9 and POD 10 in 2005. Cross Examination of Vern Stofleth, HT, page 334, lines 9 – 25; OWRD Exhibit A12, page 1. Mr. Stofleth clearly testified that no irrigation occurred on the SCA in 2005. Cross Examination of Vern Stofleth, HT, page 335, lines 1 – 4. Consideration of the entire record, including the testimony from Laird Ranch of the lack of diversion structures, Mr. Stofleth's unambiguous testimony, Mr. Elvin's testimony regarding the diversion capacity of the Lynch Bypass canal and the head of water necessary to overcome the topography of the SCA, and the Department's own records on Hart Lake water levels, establishes by a preponderance of the evidence that no irrigation occurred on the SCA in 2005. OWRD Exhibit A12, page 1; Proponents' Closing Brief, Finding of Fact 35, pages 20 and 21. Because BLM did not physically divert or control the available water in Hart Lake at PODs 9 and 10, it is highly probable that no irrigation occurred on the SCA in 2005.



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The SCA have been sufficiently identified as those 505 acres in Township 36 South, Range 25 East, Sections 6, 7, 8, 18 and 19 and depicted on BLM Exhibit 30.

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v. Non-use in 2005: North half of NCA

Vern Stofleth, witness for BLM, testified that water did not reach the north half of the NCA in 2005. Direct Examination of Vern Stofleth, HT, pages 287-88, beginning at line 19; Cross Examination of Vern Stofleth, HT, page 333, lines 24 – 25 and page 334, lines 3-8; OWRD Exhibit A12, page 1. Consideration of the entire record, including testimony from Laird Ranch regarding the lack of diversion structures, Mr. Stofleth's unquantified belief and recollection, Mr. Elvin's testimony regarding diversion capacity of Main Ditch 1 and the head of water necessary to overcome the topography of the NCA and the Department's own records on Hart Lake water levels, establishes that no irrigation occurred on the north half of the NCA. *Id.*; Proponents' Closing Brief, Finding of Fact 36, page 21. Because BLM did not physically divert or control the available water from Hart Lake to irrigate the north half of the NCA, it is highly probable that no irrigation occurred on the NCA in 2005.

The north half of the NCA has been sufficiently identified. The NCA were identified as the 562.44 acres in Township 36 South, Range 24 East, Sections 24, 25 and 36. All the factual witnesses agreed and testified that the north half of the NCA acres are those acres north of the fence on BLM Exhibit 2, page 8, from the point of land that juts into the NCA near the "25" designation for Section 25 on the west side of the NCA and travels in a slight northeasterly direction to the closest point on the east side of the NCA. Direct Testimony of Vern Stofleth, HT, pages 292-93, beginning at line 23.

vi. Non-use in 2005: South half of NCA

Vern Stofleth, witness for BLM, testified that water did not reach all of the south half of the NCA in 2005. Mr. Stofleth, who could not quantify the amount of water in the main ditch or the acres that received water, only estimated that water reached "low-lying swales". Direct Testimony of Vern Stofleth, HT, pages 287-88, beginning at line 19; OWRD Exhibit A12, page 1. Consideration of the entire record, including testimony of Laird Ranch regarding lack of diversion structures, Mr. Stofleth's unquantified belief and recollection, Mr. Elvin's testimony regarding the capacity of Main Ditch 1 and the head of water necessary to overcome the topography of the NCA, and the Department's own records on Hart Lake water levels, establishes no irrigation occurred in the south half of the NCA except those "low-lying swales" in 2005. *Id.*; Proponents' Closing Brief, Finding of Fact 36, page 21. Because BLM did not physically divert and control sufficient water from Hart Lake to irrigate the entire south half of the NCA, it is highly probable that the high lying areas of the south half of the NCA were not irrigated in 2005.

The south half of the NCA has been sufficiently identified. All the factual witnesses agreed and testified that the south half of the NCA is those acres south of the north half of the south contested acres. Further, the un-irrigated portions of the south half of the NCA have been sufficiently identified as those areas whose elevation and topography required significant head of



water to apply irrigation to. BLM Exhibit 30; Direct Testimony and Cross Examination of James Elvin, HT, pages 431 – 506 generally.

The record shows, by a preponderance of evidence that a presumption of non-use on the identified portions of the SCA and NCA for five successive years was established. The Department should further modify the Amended Proposed Order to include Proponents' Findings of Fact 45(a), 45(e), 49(a), 49(e), 50(a) and 50(e). See Proponents' Closing Brief, pages 23- 29.

2. The Department's interpretation of "available" is an abuse of discretion.

The presumption of forfeiture established may be rebutted by showing the applicability of a statutory excuse justifying the non-use. ORS 540.610(2). Among the statutory excuses offered by BLM justifying non-use was that water was unavailable for diversion from Hart Lake. OWRD Exhibit A11 / Exhibit LAIRD 29.

a. Relevance of Hart Lake Elevation

Laird Ranch has asserted and maintained throughout this proceeding that water is available for diversion from Hart Lake when water is above the minimal pool of 4,466 feet. See Proponents' Closing Brief, page 13. Laird Ranch's position is fully briefed in its previous exceptions and closing briefs and while not repeated here is specifically incorporated herein.

In the Amended Proposed Order the Department has also asserted that the minimal pool of Hart Lake is relevant to legal diversion of water from Hart Lake. Concerning the 4,466 foot elevation mark, the Department provides:

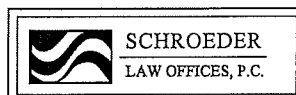
"... (1) it is the elevation below which water must be delivered to Hart Lake from the Greaser Lake Reservoir, [when hydraulic connection conditions exist] and (2) it is the minimum elevation for which there is a storage right in Hart Lake. To state (2) differently, to the extent water may be diverted 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."

Amended Proposed Order, Attachment 2: Response to Exceptions to the Corrected Proposed Order, Page 3.

However, the Department concludes the elevation of Hart Lake is not relevant to the determination of "available" water within the meaning of ORS 540.610(2)(j) through its interpretation of the term. The Department provides:

"Given these facts³, 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

³ Concerning the frequent changes in elevation of Hart Lake.



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8, 9, and 10. This interpretation of "available" is a narrow one, based on the facts of this case alone."

Amended Proposed Order, Pages 7-8.

b. The Department's determination of "available" is an abuse of discretion.

The Department has decided the term "available" is a delegative term. Amended Proposed Order, Page 6, Footnote ("FN") 2. For the purposes of these exceptions, Laird Ranch assumes, without agreeing⁴, that the Department is correct that the term "available" in ORS 540.610(2)(j) is a delegative term that legislature intended to confer discretion on the Department to interpret and apply. *Springfield Educ. Ass'n v. Springfield School District No. 19*, 290 Or. 217, 228 (1980).

The Department's application of a delegative term is not automatic or absolute. The application of a delegative term to a particular situation must (1) refine and execute the generally expressed legislative policy embodied in the statute (*Id.*; Amended Proposed Order, page 6, FN 2); and (2) must be within the range of discretion allowed by the more general policy of the statute. *Springfield Educ. Assn'n.*, at 229; *J.R. Simplot v. Department of Agriculture*, 340 Or. 188, 197 (2006).

An agency abuses its delegated discretion when its action is (1) outside the range of discretion delegated to the agency by law, (2) inconsistent with an agency rule or an officially stated agency position, or (3) otherwise in violation of a constitutional or statutory provision. ORS 183.482(8). *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or.App. 195, 202 (2006). "Administrative discretion is not a magic word. It is only a range of responsible choice in pursuing one or several objectives more or less broadly indicated by the legislature under various circumstances pertinent to those objectives." *Dickinson v. Davis*, 277 Or. 665, 673 (1977). "When considering whether an agency has abused its discretion, the essential question is whether the choice made is consistent with one or several objections to be served by vesting discretion in the decision maker, under circumstances pertinent to the decision to be made." *Liberty Northwest Ins. Corp. v. Jacobson*, 164 Or.App. 37 (1999).

The Department's interpretation and application of the term "available" under ORS 540.610(2)(j) is an abuse of discretion because the Department acted in one or more of the following ways: (1) outside the range of discretion delegated to the agency by law and failed to refine and execute the generally expressed legislative policy embodied in the statute; (2) outside the range of discretion delegated to it by attempting to limit its interpretation to PODs 8, 9, and 10 only; or (3) interpreted the term "available" inconsistently with Department rules.

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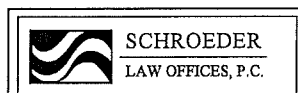
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⁴ Laird Ranch reserves the right to object to the designation of "available" in ORS 540.610(2)(j) as a delegative term.



i. Failure to refine or execute the generally expressed legislative policy

The Department did not attempt to explain or discuss what legislative policy it is refining or executing with its interpretation and application of the term “available” within ORS 540.610(2)(j). It is telling that the Department has provided absolutely no discussion of the text or context of the forfeiture statute or the general Water Rights Act, nor any discussion of the legislative history or policy of these legislative schemes before concluding that water is available for use in Hart Lake within the meaning of ORS 540.610(2)(j) when it can be accessed at PODs 8, 9, and 10. The Department failed to adequately show the premises of the policy its statutory interpretation refines or factual efficacy upon which the Department has exercised its discretion. Accordingly, the Department’s interpretation is not entitled to deference. *Dickinson v. Davis*, 277 Or. 665, 674 (1977).

The Department provided no basis to explain how its interpretation of “available” within the meaning of ORS 540.610(2)(j) refines or executes the purposes of the corollary doctrines of beneficial use, waste and forfeiture as part of the general Water Rights Act and its stated policies. ORS 537.010; ORS 536.220. Instead of explaining how its interpretation of the term “available” in ORS 540.610(2)(j) refines and executes the purposes and the policies of ORS 536.220, the Department’s interpretation in fact undercuts these general policies of (1) avoiding speculation and monopoly of the resource; (2) maximizing the use of a scarce resource for all; and (3) providing flexibility to the water user to determine appropriate improvements in water use practices. See Janet Neuman, *Beneficial Use, Waste and Forfeiture: The Inefficient Search for Efficient Western Water Use*, 28 ENVTL 919, 962 – 62 (1998); Proponents’ Response to Oregon Water Resources Department’s Closing Argument, pages 7 - 8. The Department has acted outside its range of discretion.

ii. Improper Limitation of Interpretation

The Department’s interpretation and application of the term “available” within the meaning of ORS 540.610(2)(j) is not within the range of discretion afforded the Department. The Department has attempted to limit its interpretation of “available” within the meaning of ORS 540.610(2)(j) to only PODs 8, 9, and 10 on Hart Lake. The attempted limitation is an abuse of discretion.

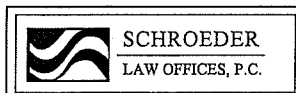
“The task of the agency administering such a statute [with a delegative term] is to complete the general policy decision by specifically applying it at retail to various individual fact situations.” *Springfield Educational Ass’n*, 290 Or. at 228 – 229. However, in the present circumstances it is unclear if the Department’s interpretation also applies to the other seven diversions on Hart Lake. It is even less clear if the Department’s interpretation applies to water users who divert from sources other than Hart Lake. While the Department’s interpretation may lead to different results in different factual scenarios, the Department is not delegated the authority to interpret the term “available” pursuant to ORS 540.610(2)(j) to only PODs 8, 9, and 10. The Department has acted outside its range of discretion.

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iii. Inconsistent with other rules

Finally, the Department's interpretation of "available" within the meaning of ORS 540.610(2)(j) is inconsistent with other provisions of the Oregon Water Rights Act and the rules administrating the water rights act. The inconsistencies are detailed by Laird Ranch in its closing arguments. See Proponents' Closing Brief, Pages 7 – 8; *Proponents' Reply to Oregon Water Resources Department's Response to the Proponents' Closing Brief*, pages 3 – 4. The Department has acted outside its range of discretion.

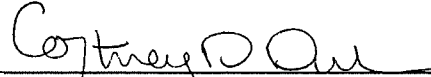
Conclusion

Laird Ranch respectfully requests the Amended Corrected Proposed Order be further modified to reflect these and Laird Ranch's initial exceptions.

Submitted this 14th day of December, 2011.

Respectfully submitted,

SCHROEDER LAW OFFICES, P.C.



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Of Attorneys for Proponents

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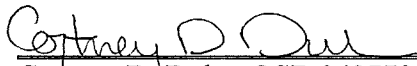
CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2011 I caused to be served a true copy of the foregoing: *Proponents' Exceptions to Amended Corrected Proposed Order* on the following people named below by electronic and U.S. first class mail.

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Office of the Regional Solicitor
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Portland, OR 97205
Email: Brad.Grenham@sol.doi.gov

Jesse D. Ratcliffe
Assistant Attorney General
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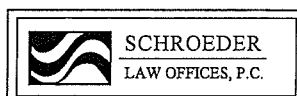
Dated this 14th day of December 2011.

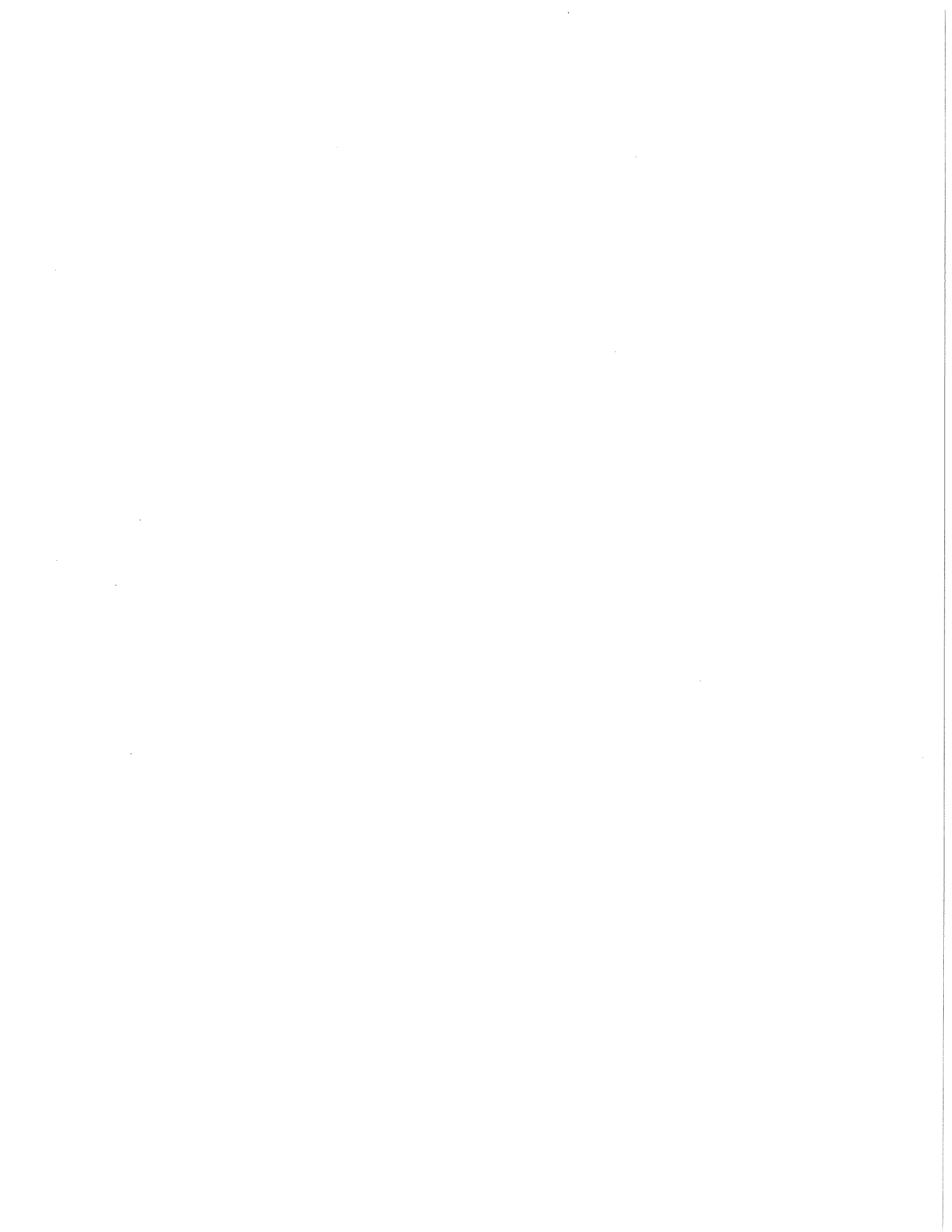

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**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
FOR THE
OREGON WATER RESOURCES DEPARTMENT**

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

AND

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

AND

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

Jesse Laird and Warren C. Laird
Proponents

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

OWRD Case No.: PC 05-09

OAH Ref. No.: WR-10-001

**PROPONENTS' EXCEPTIONS TO
AMENDED CORRECTED PROPOSED
ORDER**

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Proponents, Warren C. Laird and Jesse E. Laird (hereinafter collectively "Laird Ranch"), by and through their attorney of record, Schroeder Law Offices P.C. and its attorneys, hereby submit the following exceptions to the Oregon Water Resources Department's (hereinafter "the Department") Amended Corrected Proposed Order (hereinafter "Amended Proposed Order"). The Amended Proposed Order, which is accompanied by the Department's Responses to Exceptions to the Corrected Proposed Order, makes certain modifications to the Corrected Proposed Order issued in this matter on April 5, 2011.

Introduction

The Department's Amended Proposed Order makes modifications to the "Order," "Evidentiary Rulings," "Findings of Fact" and "Opinion" sections of the Corrected Proposed Order. The Department's modifications to the "Evidentiary Rulings" and "Order" sections are nominal. Laird Ranch agrees with the Department's modification to the "Evidentiary Rulings" section. Laird Ranch, while specifically disagreeing with the directive¹ of the Order section, does not otherwise object to the Department's modifications to (1) specify the Amended Proposed Order is issued by the Department; and (2) include "successive" to paragraph 1.

On May 5, 2011 Laird Ranch submitted Exceptions to Administrative Law Judge ("ALJ") Allen's Corrected Proposed Order. Laird Ranch will not repeat all of those exceptions here but specifically reserves, relies on and incorporates its initial exceptions, as well as the arguments raised in each of its closing briefs², related to these exceptions. Specifically, Laird Ranch reserves and incorporates its exceptions to the "Procedural History," "Issues," "Findings of Fact," "Conclusions of Law" and "Credibility" sections herein. The failure of Laird Ranch to address or respond to each factual finding modification made by the Department in the Amended Proposed Order is not Laird Ranch's acquiescence thereto.

In the present exceptions, Laird Ranch will only respond to the Department's modified "Opinion" section. In the modified "Opinion" section the Department makes two major revisions. First, the Department modifies the Corrected Proposed Order to provide that Laird Ranch has failed to meet its burden of proof to sufficiently establish the location of any un-irrigated acres or to show "failure to use beneficially for five successive years" during the 2001 to 2009 time period. Amended Proposed Order, Page 6. Second, the Department modifies the Corrected Proposed Order to provide "...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 diversions at the locations of PODs 8, 9, and 10." *Id.*, Page 7. The Department attempts to limit its interpretation of "available" to the facts in this case alone. *Id.*, at Page 8. Laird Ranch takes exception to these modifications of the Amended Proposed Order.

¹ Specifically, Laird Ranch continues to assert that the Protestant United States Bureau of Land Management (hereinafter "BLM") has failed to beneficially use water on a portion of the contested acres for a period of five or more successive years during the period at issue and accordingly, portions of the water rights have been forfeited due to non-use. See Proponents' Exceptions to Corrected Proposed Order, page 22.

² Proponents' closing briefs include: (i) Proponents' Closing Brief; (ii) Proponents' Response to Oregon Water Resources Department's Closing Argument; (iii) Proponents' Reply to Oregon Water Resources Department's Response to Proponents' Closing Brief; (iv) Proponents' Supplemental Closing Brief; and (v) Proponents' Reply to Protestant's Response to Proponents' Closing Brief.



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Exceptions to "Opinion" Section of Amended Proposed Order

1. Laird Ranch has sufficiently established non-use for at least five successive years.

The Bureau of Land Management ("BLM") failed to apply water to the South Contested Acres ("SCA") or north half of the North Contested Acres ("NCA") in 2001 through 2009. See Proponents' Closing Brief, pages 23-25 and pages 26-28. Water was not applied to the south half of the NCA for irrigation in 2001 to 2005. *Id.*, pages 28-29. The non-use occurred on the SCA and NCA for five successive years between 2001 and 2005. Accordingly, the un-irrigated lands should be cancelled unless a statutory excuse permitting non-use is applicable.

The Amended Corrected Proposed Order makes clear that no irrigation occurred in the SCA or NCA in 2002, 2003 or 2004. Amended Proposed Order, Findings of Fact 22, 23, and 24. Additionally, the Department agrees the evidence "suggests" that water was not applied to the entirety of the northern contested and southern contested areas in 2001 and 2005, but concludes the record is insufficient to establish the location of any un-irrigated acres. *Id.*, page 6 and Findings of Fact 21, 25 and 26. Laird Ranch has sufficiently shown, by a preponderance of evidence, non-use in the NCA and SCA in 2001 and 2005 as set out below.

a. Modification of Historical Facts

"An agency conducting a contested case hearing may modify a finding of historical fact made by the administrative law judge...only if the agency determines that there is clear and convincing evidence in the record that the finding was wrong. For the purposes of this section, an administrative law judge makes a finding of historical fact if the administrative law judge determines 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." ORS 183.650(3). ALJ Allen's findings related to the occurrence or extent of irrigation by BLM during 2001 to 2009 are historical facts.

"Clear" describes the character of unambiguous evidence. "Convincing" describes the effect of evidence on the observer. *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or. 390, 397 (1987). To be "clear and convincing" the evidence must establish that the truth of the facts asserted is "highly probable." *Id.*, at 402; *State v. M.J.*, 174 Or.App. 72, 78 (2001). Put another way, evidence is clear and convincing if it is of extraordinary persuasiveness. *State ex. rel. Dept. of Human Services v. Hinds*, 191 Or.App. 78, 84 (2003).

Because the record shows that it is highly probable that irrigation did not occur on portions of the contested acres for five successive years during the contested time period, the Department should modify the ALJ's historical facts.

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b. Evidence of Non-Use

i. Non-use in 2001: SCA

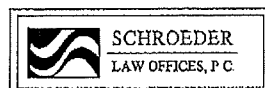
Vern Stofleth, witness for BLM, testified that water did not flow over the concrete sills at POD 9 and POD 10 in 2001. Direct Testimony of Vern Stofleth, Hearing Transcript ("HT"), page 274, lines 13 – 16; Oregon Water Resources Department ("OWRD") Exhibit A12, page 1. Consideration of the entire record, including testimony from Laird Ranch of the lack of control and diversion structures, Mr. Stofleth's unquantified belief and recollection, Mr. Elvin's testimony regarding the diversion capacity of the Lynch Bypass Canal and the head of water necessary to overcome the topography of the SCA, and the Department's own records on Hart Lake water levels in 2001, establishes by a preponderance of the evidence that no irrigation of the SCA occurred in 2001. OWRD Exhibit A12, page 1; Proponents' Closing Brief, Findings of Fact 35, pages 20 and 21. Because BLM did not physically divert and control sufficient water to irrigate the SCA it is highly probable that no irrigation occurred on the SCA in 2001.

Despite the documentary evidence to the contrary, Mr. Stofleth testified that he believed some water naturally spilled over the boards at POD 10, though he could not quantify how much. Direct Testimony of Vern Stofleth, HT, page 274, lines 17 – 24. Mr. Stofleth guessed that overflow water, which is not physically diverted or controlled, would have filled the "low-lying swales" in the SCA. Direct Testimony of Vern Stofleth, HT, page 275, lines 12 – 19. Even if the documentary evidence is ignored in favor of a witness's "guesses," the record shows it is highly probable that no acres in the SCA were irrigated, despite the fact that water may have naturally flowed in an uncontrolled manner to the low lying areas.

The SCA have been sufficiently identified as those 505 acres in Township 36 South, Range 25 East, Sections 6, 7, 8, 18 and 19 and depicted on BLM Exhibit 30. Further, even though the Department has found that the uncontrolled natural wetting of the "low lying swales" is the equivalent of irrigation, the remaining portions, not including low lying swales, of the SCA have been sufficiently identified. Bureau of Land Management ("BLM") Exhibit 30; Direct Testimony and Cross Examination of James Elvin, HT, pages 431 – 506 generally.

ii. Non-use in 2001: North half of NCA

Vern Stofleth, witness for BLM, testified that water did not reach the north half of the NCA in 2001. Cross Examination of Vern Stofleth, HT, pages 338 -39, beginning at line 22; OWRD Exhibit A12, page 1. Mr. Stofleth was unable to quantify the amount of water that was delivered to gates A and B on the main ditch. *Id.* Consideration of the entire record, including testimony from Laird Ranch of the lack of diversion structures, Mr. Stofleth's unquantified belief and recollection, Mr. Elvin's testimony regarding the diversion capacity of Main Ditch 1 and the head of water necessary to overcome the topography of the NCA, and the Department's own records on Hart Lake water levels, establishes by a preponderance of evidence that no irrigation occurred in the north half of the NCA in 2001. *Id.*; Proponents' Closing Brief, Finding of Fact 36, page 21. Because BLM did not physically divert and control sufficient water to irrigate the north half of the NCA, it is highly probable that no irrigation occurred on the north half of the NCA in 2001.



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The north half of the NCA has been sufficiently identified. The NCA were identified as the 562.44 acres in Township 36 South, Range 24 East, Sections 24, 25 and 36. All the factual witnesses agreed and testified that the north half of the NCA acres are those acres north of the fence on BLM Exhibit 2, page 8, from the point of land that juts into the NCA near the "25" designation for Section 25 on the west side of the NCA and travels in a slight northeasterly direction to the closest point on the east side of the NCA. Direct Testimony of Vern Stofleth, HT, pages 292-93, beginning at line 23.

iii. Non-use in 2001: South half of NCA

Vern Stofleth, witness for BLM, testified that water did not reach all of the south half of the North Contested Acres in 2001. Direct Testimony of Vern Stofleth, HT, page 274, lines 5 – 11; Cross Examination of Vern Stofleth, HT, pages 229-40, beginning at line 24. Consideration of the entire record, including testimony from Laird Ranch, Mr. Stofleth's unquantified belief and recollection, Mr. Elvin's testimony regarding the diversion capacity of Main Ditch 1 and the head of water necessary to overcome the topography of the NCA, and the Department's own records on Hart Lake water levels, establishes by a preponderance of the evidence that limited water delivery was made to the south half of the NCA in 2001. *Id.*; Proponents' Closing Brief, Finding of Fact 36, page 21. Because BLM did not physically divert and control sufficient water to irrigate the south half of the NCA, it is highly probable that no irrigation occurred on a portion of the south half of the NCA in 2001.

The south half of the NCA has been sufficiently identified. All the factual witnesses agreed and testified that the south half of the NCA is those acres south of the north half of the south contested acres. Further, the un-irrigated portions of the south half of the NCA have been sufficiently identified as those areas whose elevation and topography required significant head of water to apply irrigation to. BLM Exhibit 30; Direct Testimony and Cross Examination of James Elvin, HT, pages 431 – 506 generally.

iv. Non-use in 2005: SCA

Vern Stofleth, witness for BLM, testified that water did not flow over the concrete sills at POD 9 and POD 10 in 2005. Cross Examination of Vern Stofleth, HT, page 334, lines 9 – 25; OWRD Exhibit A12, page 1. Mr. Stofleth clearly testified that no irrigation occurred on the SCA in 2005. Cross Examination of Vern Stofleth, HT, page 335, lines 1 – 4. Consideration of the entire record, including the testimony from Laird Ranch of the lack of diversion structures, Mr. Stofleth's unambiguous testimony, Mr. Elvin's testimony regarding the diversion capacity of the Lynch Bypass canal and the head of water necessary to overcome the topography of the SCA, and the Department's own records on Hart Lake water levels, establishes by a preponderance of the evidence that no irrigation occurred on the SCA in 2005. OWRD Exhibit A12, page 1; Proponents' Closing Brief, Finding of Fact 35, pages 20 and 21. Because BLM did not physically divert or control the available water in Hart Lake at PODs 9 and 10, it is highly probable that no irrigation occurred on the SCA in 2005.



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The SCA have been sufficiently identified as those 505 acres in Township 36 South, Range 25 East, Sections 6, 7, 8, 18 and 19 and depicted on BLM Exhibit 30.

v. Non-use in 2005: North half of NCA

Vern Stofleth, witness for BLM, testified that water did not reach the north half of the NCA in 2005. Direct Examination of Vern Stofleth, HT, pages 287-88, beginning at line 19; Cross Examination of Vern Stofleth, HT, page 333, lines 24 – 25 and page 334, lines 3-8; OWRD Exhibit A12, page 1. Consideration of the entire record, including testimony from Laird Ranch regarding the lack of diversion structures, Mr. Stofleth's unquantified belief and recollection, Mr. Elvin's testimony regarding diversion capacity of Main Ditch 1 and the head of water necessary to overcome the topography of the NCA and the Department's own records on Hart Lake water levels, establishes that no irrigation occurred on the north half of the NCA. *Id.*; Proponents' Closing Brief, Finding of Fact 36, page 21. Because BLM did not physically divert or control the available water from Hart Lake to irrigate the north half of the NCA, it is highly probable that no irrigation occurred on the NCA in 2005.

The north half of the NCA has been sufficiently identified. The NCA were identified as the 562.44 acres in Township 36 South, Range 24 East, Sections 24, 25 and 36. All the factual witnesses agreed and testified that the north half of the NCA acres are those acres north of the fence on BLM Exhibit 2, page 8, from the point of land that juts into the NCA near the "25" designation for Section 25 on the west side of the NCA and travels in a slight northeasterly direction to the closest point on the east side of the NCA. Direct Testimony of Vern Stofleth, HT, pages 292-93, beginning at line 23.

vi. Non-use in 2005: South half of NCA

Vern Stofleth, witness for BLM, testified that water did not reach all of the south half of the NCA in 2005. Mr. Stofleth, who could not quantify the amount of water in the main ditch or the acres that received water, only estimated that water reached "low-lying swales". Direct Testimony of Vern Stofleth, HT, pages 287-88, beginning at line 19; OWRD Exhibit A12, page 1. Consideration of the entire record, including testimony of Laird Ranch regarding lack of diversion structures, Mr. Stofleth's unquantified belief and recollection, Mr. Elvin's testimony regarding the capacity of Main Ditch 1 and the head of water necessary to overcome the topography of the NCA, and the Department's own records on Hart Lake water levels, establishes no irrigation occurred in the south half of the NCA except those "low-lying swales" in 2005. *Id.*; Proponents' Closing Brief, Finding of Fact 36, page 21. Because BLM did not physically divert and control sufficient water from Hart Lake to irrigate the entire south half of the NCA, it is highly probable that the high lying areas of the south half of the NCA were not irrigated in 2005.

The south half of the NCA has been sufficiently identified. All the factual witnesses agreed and testified that the south half of the NCA is those acres south of the north half of the south contested acres. Further, the un-irrigated portions of the south half of the NCA have been sufficiently identified as those areas whose elevation and topography required significant head of



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water to apply irrigation to. BLM Exhibit 30; Direct Testimony and Cross Examination of James Elvin, HT, pages 431 – 506 generally.

The record shows, by a preponderance of evidence that a presumption of non-use on the identified portions of the SCA and NCA for five successive years was established. The Department should further modify the Amended Proposed Order to include Proponents' Findings of Fact 45(a), 45(e), 49(a), 49(e), 50(a) and 50(e). See Proponents' Closing Brief, pages 23- 29.

2. The Department's interpretation of "available" is an abuse of discretion.

The presumption of forfeiture established may be rebutted by showing the applicability of a statutory excuse justifying the non-use. ORS 540.610(2). Among the statutory excuses offered by BLM justifying non-use was that water was unavailable for diversion from Hart Lake. OWRD Exhibit A11 / Exhibit LAIRD 29.

a. Relevance of Hart Lake Elevation

Laird Ranch has asserted and maintained throughout this proceeding that water is available for diversion from Hart Lake when water is above the minimal pool of 4,466 feet. See Proponents' Closing Brief, page 13. Laird Ranch's position is fully briefed in its previous exceptions and closing briefs and while not repeated here is specifically incorporated herein.

In the Amended Proposed Order the Department has also asserted that the minimal pool of Hart Lake is relevant to legal diversion of water from Hart Lake. Concerning the 4,466 foot elevation mark, the Department provides:

"... (1) it is the elevation below which water must be delivered to Hart Lake from the Greaser Lake Reservoir, [when hydraulic connection conditions exist] and (2) it is the minimum elevation for which there is a storage right in Hart Lake. To state (2) differently, to the extent 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."

Amended Proposed Order, Attachment 2: Response to Exceptions to the Corrected Proposed Order, Page 3.

However, the Department concludes the elevation of Hart Lake is not relevant to the determination of "available" water within the meaning of ORS 540.610(2)(j) through its interpretation of the term. The Department provides:

"Given these facts³, 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

³ Concerning the frequent changes in elevation of Hart Lake.



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8, 9, and 10. This interpretation of "available" is a narrow one, based on the facts of this case alone."

Amended Proposed Order, Pages 7-8.

b. The Department's determination of "available" is an abuse of discretion.

The Department has decided the term "available" is a delegative term. Amended Proposed Order, Page 6, Footnote ("FN") 2. For the purposes of these exceptions, Laird Ranch assumes, without agreeing⁴, that the Department is correct that the term "available" in ORS 540.610(2)(j) is a delegative term that legislature intended to confer discretion on the Department to interpret and apply. *Springfield Educ. Ass'n v. Springfield School District No. 19*, 290 Or. 217, 228 (1980).

The Department's application of a delegative term is not automatic or absolute. The application of a delegative term to a particular situation must (1) refine and execute the generally expressed legislative policy embodied in the statute (*Id.*; Amended Proposed Order, page 6, FN 2); and (2) must be within the range of discretion allowed by the more general policy of the statute. *Springfield Educ. Ass'n*, at 229; *J.R. Simplot v. Department of Agriculture*, 340 Or. 188, 197 (2006).

An agency abuses its delegated discretion when its action is (1) outside the range of discretion delegated to the agency by law, (2) inconsistent with an agency rule or an officially stated agency position, or (3) otherwise in violation of a constitutional or statutory provision. ORS 183.482(8). *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or.App. 195, 202 (2006). "Administrative discretion is not a magic word. It is only a range of responsible choice in pursuing one or several objectives more or less broadly indicated by the legislature under various circumstances pertinent to those objectives." *Dickinson v. Davis*, 277 Or. 665, 673 (1977). "When considering whether an agency has abused its discretion, the essential question is whether the choice made is consistent with one or several objections to be served by vesting discretion in the decision maker, under circumstances pertinent to the decision to be made." *Liberty Northwest Ins. Corp. v. Jacobson*, 164 Or.App. 37 (1999).

The Department's interpretation and application of the term "available" under ORS 540.610(2)(j) is an abuse of discretion because the Department acted in one or more of the following ways: (1) outside the range of discretion delegated to the agency by law and failed to refine and execute the generally expressed legislative policy embodied in the statute; (2) outside the range of discretion delegated to it by attempting to limit its interpretation to PODs 8, 9, and 10 only; or (3) interpreted the term "available" inconsistently with Department rules.

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⁴ Laird Ranch reserves the right to object to the designation of "available" in ORS 540.610(2)(j) as a delegative term.



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i. Failure to refine or execute the generally expressed legislative policy

The Department did not attempt to explain or discuss what legislative policy it is refining or executing with its interpretation and application of the term "available" within ORS 540.610(2)(j). It is telling that the Department has provided absolutely no discussion of the text or context of the forfeiture statute or the general Water Rights Act, nor any discussion of the legislative history or policy of these legislative schemes before concluding that water is available for use in Hart Lake within the meaning of ORS 540.610(2)(j) when it can be accessed at PODs 8, 9, and 10. The Department failed to adequately show the premises of the policy its statutory interpretation refines or factual efficacy upon which the Department has exercised its discretion. Accordingly, the Department's interpretation is not entitled to deference. *Dickinson v. Davis*, 277 Or. 665, 674 (1977).

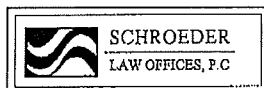
The Department provided no basis to explain how its interpretation of "available" within the meaning of ORS 540.610(2)(j) refines or executes the purposes of the corollary doctrines of beneficial use, waste and forfeiture as part of the general Water Rights Act and its stated policies. ORS 537.010; ORS 536.220. Instead of explaining how its interpretation of the term "available" in ORS 540.610(2)(j) refines and executes the purposes and the policies of ORS 536.220, the Department's interpretation in fact undercuts these general policies of (1) avoiding speculation and monopoly of the resource; (2) maximizing the use of a scarce resource for all; and (3) providing flexibility to the water user to determine appropriate improvements in water use practices. See Janet Neuman, *Beneficial Use, Waste and Forfeiture: The Inefficient Search for Efficient Western Water Use*, 28 ENVTL 919, 962 - 62 (1998); *Proponents' Response to Oregon Water Resources Department's Closing Argument*, pages 7 - 8. The Department has acted outside its range of discretion.

ii. Improper Limitation of Interpretation

The Department's interpretation and application of the term "available" within the meaning of ORS 540.610(2)(j) is not within the range of discretion afforded the Department. The Department has attempted to limit its interpretation of "available" within the meaning of ORS 540.610(2)(j) to only PODs 8, 9, and 10 on Hart Lake. The attempted limitation is an abuse of discretion.

"The task of the agency administering such a statute [with a delegative term] is to complete the general policy decision by specifically applying it at retail to various individual fact situations." *Springfield Educational Ass'n*, 290 Or. at 228 - 229. However, in the present circumstances it is unclear if the Department's interpretation also applies to the other seven diversions on Hart Lake. It is even less clear if the Department's interpretation applies to water users who divert from sources other than Hart Lake. While the Department's interpretation may lead to different results in different factual scenarios, the Department is not delegated the authority to interpret the term "available" pursuant to ORS 540.610(2)(j) to only PODs 8, 9, and 10. The Department has acted outside its range of discretion.

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iii. Inconsistent with other rules

Finally, the Department's interpretation of "available" within the meaning of ORS 540.610(2)(j) is inconsistent with other provisions of the Oregon Water Rights Act and the rules administrating the water rights act. The inconsistencies are detailed by Laird Ranch in its closing arguments. See Proponents' Closing Brief, Pages 7 – 8; *Proponents' Reply to Oregon Water Resources Department's Response to the Proponents' Closing Brief*, pages 3 – 4. The Department has acted outside its range of discretion.

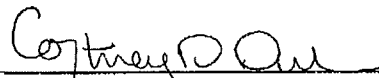
Conclusion

Laird Ranch respectfully requests the Amended Corrected Proposed Order be further modified to reflect these and Laird Ranch's initial exceptions.

Submitted this 14th day of December, 2011.

Respectfully submitted,

SCHROEDER LAW OFFICES, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2011 I caused to be served a true copy of the foregoing: *Proponents' Exceptions to Amended Corrected Proposed Order* on the following people named below by electronic and U.S. first class mail.

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Dated this 14th day of December 2011.



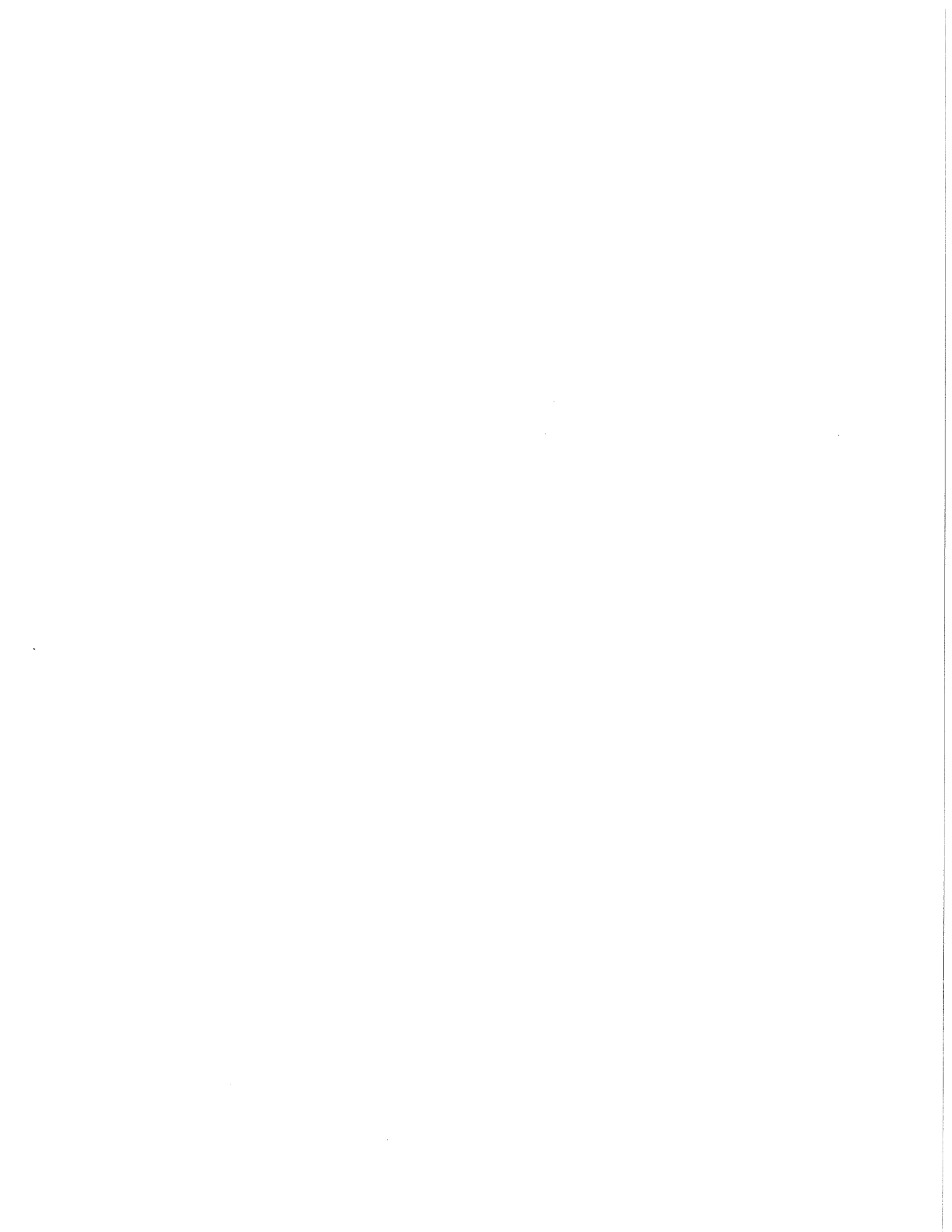
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WATER RESOURCES DEPT
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**BEFORE THE STATE OF OREGON
WATER RESOURCES DEPARTMENT**

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

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

AND

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

United States Department of the Interior

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

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

**1-PROTESTANT'S RESPONSE TO PROPONENTS' EXCEPTIONS TO AMENDED
CORRECTED PROPOSED ORDER**

Protestant

Warren C. Laird
Proponent

Jesse Laird
Proponent

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WATER RESOURCES DEPT
SALEM, OREGON

I. INTRODUCTION

Protestant responds below to Proponents' December 14, 2011 Exceptions ("Laird Exc.") to the Oregon Water Resources Department (OWRD) Amended Corrected Proposed Order of November 14, 2011. On May 18, 2011, Protestant responded to Proponents' Exceptions to Senior Administrative Law Judge (ALJ) Joe L. Allen's Corrected Proposed Order (hereafter "Protestant's May 18, 2011 Response to Exceptions to ALJ"). Protestant cites herein to Protestant's May 18, 2011 Response where Proponents have simply rehashed earlier exception arguments. Protestant has also comprehensively briefed the issues and summarized the factual record in this matter in Protestant's Opening Post-Hearing Brief (January 26, 2011), Protestant's Response to Proponents' Closing Brief (February 9, 2011), and Protestant's Response to Proponents' Supplemental Closing Brief and to OWRD Closing Brief (February 16, 2011). For sake of brevity, Protestant will not repeat the contents of those briefs but respectfully refers the Oregon Water Resources Department to those briefs (each of which includes a table of contents) for more detailed discussion of specific issues and the hearing record.

II. RESPONSE TO PROPONENTS' EXCEPTIONS

A. 2001 Irrigation

Proponents reargue that there was non-use in the South Contested Area (SCA) in 2001. Laird Exc. at 4. Proponents offer no argument beyond that already considered by the Administrative Law Judge and OWRD; thus, the exception relies on an argument that has already been rejected for good reason. *See* OWRD November 14, 2011 Responses to Exceptions to Corrected Proposed Order at 5-6. Protestant addressed the Proponents' erroneous argument that there was non-use in the SCA in 2001 in Protestant's May 18, 2011 Response to Exceptions to ALJ at page 8, Finding of Fact No. 23 (ALJ's #21); *see also* Protestant's Opening Brief at 14-16 (explaining BLM's irrigation of SCA in 2001).

Proponents reargue that there was non-use in the North Contested Area (NCA) in 2001. Laird Exc. at 4-5. Proponents offer no argument beyond that already considered by the Administrative Law Judge and OWRD, thus the exception relies on an argument that has already been rejected for good reason. *See* OWRD November 14, 2011 Responses to Exceptions to Corrected Proposed Order at 5-6. Protestant addressed the Proponents' erroneous argument in Protestant's

May 18, 2011 Response to Exceptions to ALJ at page 8, Finding of Fact No. 23 (ALJ's #21); *see also* Protestant's Opening Brief at 14-16 (explaining BLM's irrigation of NCA in 2001).

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

B. 2005 Irrigation

Proponents contend that no irrigation occurred in the SCA in 2005. Laird Exc. at 5. Proponents offer no argument beyond that already considered by the Administrative Law Judge and OWRD, thus the exception relies on an argument that has already been rejected for good reason. *See* OWRD November 14, 2011 Responses to Exceptions to Corrected Proposed Order at 7-8. Protestant has also already addressed this argument. *See* Protestant's May 18, 2011 Response to Exceptions to ALJ at page 10, Finding of Fact No. 28 (ALJ's #26); Protestant's Opening Brief at 23-24.

Proponents contend that water did not reach the north half of the NCA or all of the south half of the NCA in 2005. Laird Exc. at 6. Proponents offer no argument beyond that already considered by the Administrative Law Judge and OWRD, thus the exception relies on an argument that has already been rejected for good reason. *See* OWRD November 14, 2011 Responses to Exceptions to Corrected Proposed Order at 7-8. Protestant has also already addressed this. *See* Protestant's May 18, 2011 Response to Exceptions to ALJ at page 9, Finding of Fact No. 27 (ALJ's #25) and at page 10, Finding of Fact No. 28 (ALJ's #26); *see also* Protestant's Opening Brief at § V.A.5 (pp. 23-24). For the reasons above, all of Proponents' exceptions should be rejected.

C. Water "Available" Under ORS § 540.610(2)(j)

Proponents rehash their argument that water is "available" under ORS § 540.610(2)(j) so long as Hart Lake is above 4,466 feet; Proponents thus assert that irrigators must dredge out into the lake from their points of diversion to avoid forfeiture. Laird Exc. at 7-10. Protestant has already extensively addressed this erroneous argument. *See* Protestant's May 18, 2011 Response to Exceptions to ALJ at page 14; Protestant's Opening Post-Hearing Brief at § VIII.F (pp. 51-58); Protestant's Response to Proponents' Closing Brief at § D (pp. 4-6) and Protestant's Response to Proponents' Supplemental Closing Brief at § F (pp. 6-7).

Proponents argue that OWRD's interpretation of "available" under ORS § 540.610(2)(j) does not explain the legislative direction guiding the interpretation. To the contrary, the Amended Corrected Proposed Order explains that OWRD has determined that water is "available" for diversion "when it can be accessed at a water user's authorized POD." Amended Corrected Proposed Order at 7. OWRD then notes that several statutes describing the characteristics of a POD are context for this interpretation. *Id.* OWRD explains that these statutes provide that a

POD with a specific geographically-defined location is an element of a water right and that, by statute, one must apply for a transfer to change this POD location. *Id.* OWRD thus concludes that the statutory scheme providing for a defined point of diversion is inconsistent with the Lairds' theory that one must move their point of diversion (without permit) by trenching out into Hart Lake to "chase" water whenever water levels do not reach the POD.

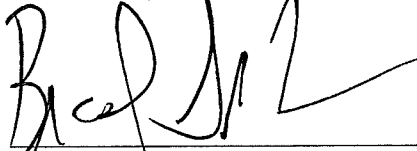
Proponents argue that the Order does not expressly apply to other PODs on Hart Lake and that this should be addressed. Laird Exc. at 9. Protestant does not object to OWRD expressly stating what is already clear: Proponents may not dredge out into Hart Lake without obtaining applicable permits including authorization to move their point of diversion.

For the reasons stated in Protestant's prior briefs and herein, the Amended Proposed Order reaches correct conclusions regarding the issues in Proponents' Exceptions.

Dated:

12/20/11

For the Regional Solicitor,



Bradley Grenham
Attorney for Protestant

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WATER RESOURCES DEPT
SALEM, OREGON

BEFORE THE
STATE OF OREGON
WATER RESOURCES DEPARTMENT

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

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

OWRD PC 05-09
OAH WR-10-001

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

CERTIFICATE OF SERVICE

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

(By Regular Mail and Email)

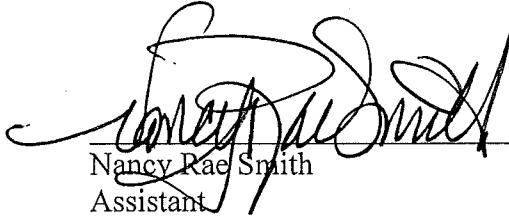
Oregon Water Resources Department
Attn: Juno Pandian
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Salem, Oregon 97301-1266

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WATER RESOURCES DEPT
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Dated: December 20, 2011



Nancy Rae Smith
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WATER RESOURCES DEPT
SALEM, OREGON

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF THE PROPOSED)
PARTIAL CANCELLATION OF THE WATER)
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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

Responses to Exceptions to Amended Corrected Proposed Order

OAH Ref No. WR 10-001

Department (OWRD) provides the following responses to the Amended Corrected Proposed Order issued in this proceeding on November 14, 2011

RESPONSES TO EXCEPTIONS TO AMENDED CORRECTED PROPOSED ORDER

I. Evidence of non-use for a period of five successive years

The Proponents contend that the United States failed to beneficially use water on the Southern Contested Acres and the southern half of the Northern Contested Acres between 2001 and 2005. OWRD's Corrected Amended Proposed Order, based on the findings of fact in the Administrative Law Judge's Proposed Order, concludes that the Proponents are unable to meet their burden of establishing non-use of any particular acres in 2001, and are therefore unable to demonstrate five successive years of non-use as required by ORS 540.610. ORS 183.650(3) requires clear and convincing evidence that the ALJ's findings of historical fact are incorrect. OWRD fully addressed this issue in its Corrected Amended Proposed Order.

II. OWRD's interpretation of the term "available" in ORS 540.610(2)(j)

The Proponents contend that OWRD's interpretation of the term "available" as it is used in ORS 540.610(2)(j) is outside of OWRD's discretion. Specifically, the Proponents argue that OWRD's interpretation (1) insufficiently addresses the statutory context and policy reasons for the interpretation, (2) provides an interpretation that is too narrowly focused on the facts in this case, and (3) is inconsistent with certain of OWRD's rules. OWRD addresses each of these contentions in turn.

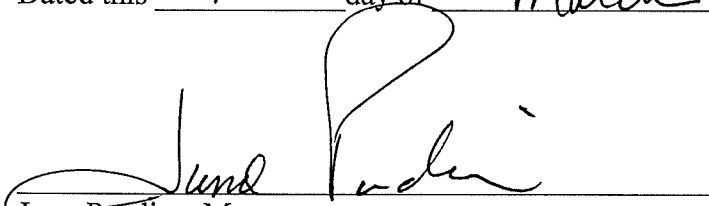
1. The Proponents contend that water is "available" if Hart Lake is above the minimum storage elevation of 4,466 feet, without reference to the locations of the points of diversion authorized by the certificates at issue in this case. As described in the Corrected Amended Proposed Order, the characteristics of an authorized point of diversion are context for the interpretation of ORS 540.610(2)(j). OWRD's interpretation of "available" gives effect to these characteristics. The certificates in this case authorize points of diversion at locations where water is sometimes, but not always physically available. As stated in the Corrected Amended Proposed Order, there is no evidence that the points of diversion were deliberately placed out of reach of the lake, or that the contours of the lake have changed so as to permanently prevent water from reaching the points of diversion. Nor is there evidence that raising or lowering the points of diversion, without changing their locations, would solve the problems created by the annual changes in the elevation of Hart Lake. Under these circumstances, when diversion is not possible because water is not physically available at the authorized point of diversion, water is not "available" within the meaning of ORS 540.610(2)(j).

2. OWRD may interpret a statutory term in a contested case proceeding without prior rulemaking where the legislature has not expressly or impliedly required that rulemaking take place. *Hale v. OWRD*, 184 Or App 36 (2002). There is no indication that the

legislature intended to require OWRD to interpret ORS 540.610(2)(j) solely through rulemaking. OWRD has determined that whether water is "available" within the meaning of the statute is a fact-dependent inquiry. OWRD has described the relevant facts that led to its determination in this case, which will guide the applicability of OWRD's interpretation to other factual situations. There is no need in this case to provide a broader interpretation of the term, encompassing factual scenarios that are not before the OWRD at this time.

3. There are no rules interpreting "availability" as that term is used in ORS 540.610(2)(j). OWRD's interpretation of availability in this case does not conflict with the requirements of any of OWRD's rules.

Dated this 1st day of March, 2012



Juno Pandian, Manager
Water Resources Department

