



Oregon

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MEMORANDUM

TO: Water Resources Commission

FROM: Thomas J. Paul, Acting Director

SUBJECT: Agenda Item B, August 21, 2014
Water Resources Commission Meeting

**Consideration of the Exceptions and Issuance of Final Order in
the Matter of the Proposed Partial Cancellation of the Water Right
Certificate 24625**

I. Issue Statement

The Commission is asked to consider exceptions and issuance of the Final Order in the Partial Cancellation of Water Right Certificate 24625.

II. Background

On June 18, 2012, Julia DeGraw and Alex Brown (Proponents) each filed an Affidavit Asserting Non-Use of Water Right. On August 23, 2012, the Oregon Water Resources Department (OWRD) issued a Notice of Proposed Partial Cancellation of Water Right evidenced by Water Right Certificate 24625. The Water Right Certificate is held by Oregon Department of Fish & Wildlife (ODFW or Protestant). The water rights are for operation of a salmon hatchery in Hood River County.

The portion of Water Right Certificate 24625 proposed to be canceled for non-use is for use of water from Little Herman Creek for operation of a salmon hatchery in the amount of 5.76 cfs. On October 18, 2012, ODFW filed a protest to the notice. On November 5, 2012, OWRD referred the matter to the Office of Administrative Hearings (OAH) for hearing.

On November 15, 2012, OAH issued a Notice of Hearing and Prehearing Conference. On December 12, 2012, a prehearing conference was held with Senior Administrative Law Judge (ALJ) Joe L. Allen presiding. Steve Sanders, Senior Assistant Attorney General, appeared on behalf of ODFW. Christopher Winter and Courtney Johnson of CRAG Law Center appeared on behalf of Proponents. Jesse Ratcliffe, Assistant Attorney General, appeared on behalf of OWRD with Juno Pandian. On June 26, 2013, the parties and the ALJ conducted a site visit and observed the relevant locations of each Oxbow Spring, the channel of Little Herman Creek, the surrounding topography, and all operations and structures of the Oxbow Hatchery.

A hearing was held on October 15, 2013 in Tualatin, Oregon. All parties were represented and filed closing briefs according to the established schedule. The record closed on November 12, 2013.

The issue for hearing was whether a portion of the water right evidenced by Water Right Certificate 24625 should be cancelled due to non-use. See ORS 540.610; OAR 690-017-0400.

III. Proposed Order

Administrative Law Judge (ALJ) Allen issued a Proposed Order on December 10, 2013 (Attachment 1), concluding that no part of Certificate 24625 had been forfeited due to non-use. Specifically, the ALJ held that: (1) the unauthorized points of diversion on Oxbow Springs constitute diversions of water from the same source as that permitted by the water right at issue; (2) Proponents failed to prove non-use for at least five successive years; and (3) to the extent that ODFW diverted less than the full amount of their combined water rights, this was due to the unavailability of water sufficient to fulfill the rights.

Proponents timely filed exceptions to the Proposed Order (Attachment 2).

IV. Amended Proposed Order

OWRD issued an Amended Proposed Order (Attachment 3) on May 30, 2014. The Amended Proposed Order adopts and incorporates most of the ALJ's Proposed Order, and does not change the Proposed Order's determination that no part of Certificate 24625 had been forfeited due to non-use, but it does make certain modifications to the Proposed Order's "Findings of Fact" and "Opinion" sections. Among the modifications, the Amended Proposed Order concludes that:

- ODFW did not divert the full quantity of its combined water rights during the alleged period of non-use;
- the Proponents failed to establish the amount of non-use; and
- ODFW successfully established an exemption from forfeiture: any non-use was due to the unavailability of water, and ODFW was "ready, willing, and able" to use the full measure of its rights had additional water been available. ORS 540.610(2)(j).

Proponents timely filed exceptions to the Amended Proposed Order (Attachment 4). The exceptions to the Amended Proposed Order are to certain findings of fact, certain findings of fact contained in the opinion section, and to the determination regarding the "ready, willing, and able" component of the forfeiture exemption.

V. Draft Final Order

OWRD has reviewed Proponents' exception to the Amended Proposed Order, and has prepared a Draft Final Order (Attachment 5) for the Commission's consideration. The Draft Final Order adopts and incorporates the Amended Proposed Order, and makes one modification to the Amended Proposed Order to clarify an issue raised by Proponents in their exceptions. This modification does not affect the conclusion that no part of the water right evidenced by Certificate 24625 has been forfeited.

VI. Alternatives

1. Issue a Final Order (Attachment 5) that is consistent with the Department's Amended Proposed Order and declares that no portion of the water right evidenced in Certificate 24625 has been forfeited due to non-use during the period in issue.
2. Request staff gather additional information and report back to the Commission at its next meeting.
3. Request staff modify the draft Final Order in a manner requested by the Commission.

VII. Recommendation

The Director recommends the Commission adopt Alternative 1.

Attachment 1:	Proposed Order
Attachment 2:	Exceptions to Proposed Order
Attachment 3:	Amended Proposed Order
Attachment 4:	Exceptions to Amended Proposed Order
Attachment 5:	Draft Final Order declaring that no portion of the water right evidenced in Certificate 24625 has been forfeited due to non-use during the period in issue.

Dwight French
503-986-0819

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

IN THE MATTER OF THE PROPOSED) PROPOSED ORDER
PARTIAL CANCELLATION OF THE)
WATER RIGHT EVIDENCED BY)
CERTIFICATE 24625 FOR USE OF WATER)
FROM LITTLE HERMAN CREEK FOR)
OPERATION OF A SALMON HATCHERY,)
HOOD RIVER, OREGON)
)
)
OREGON STATE FISH COMMISSION/)
OREGON DEPARTMENT OF FISH AND)
WILDLIFE,)
Protestant)
) OAH Ref. No: WR-12-009
JULIA B. DEGRAW AND ALEX P. BROWN,) OWRD Case No: PC 04-12
Proponents)

RECEIVED

DEC 11 2013

GENERAL COUNSEL
DEPT. OF JUSTICE
SALEM, OREGON

PROCEDURAL HISTORY

On August 23, 2012, Oregon Water Resources Department (OWRD or Department) issued a Notice of Proposed Partial Cancellation of Water Right Evidenced by Certificate Number 24625 (Notice) alleging non-use of at least a portion of the water right from about August 2000 until the end of 2010 (the period in issue). On October 18, 2012, the Oregon Department of Fish and Wildlife (ODFW or Protestant) filed a protest to Notice. On November 5, 2012, OWRD referred this matter to the Office of Administrative Hearings (OAH) for further proceedings.

On November 15, 2012, the OAH issued a Notice of Hearing and Prehearing Conference. On December 12, 2012, a prehearing conference was held with Senior Administrative Law Judge Joe L. Allen presiding. The following parties appeared at the conference: Steve Sanders, Senior Assistant Attorney General, representing ODFW; Christopher Winter and Courtney Johnson Attorneys at Law, representing Julia DeGraw and Alex Brown (DeGraw and/or Brown, collectively Proponents); and Jesse Ratcliffe, Assistant Attorney General, and Juno Pandian, representing OWRD. Thereafter, Senior ALJ Allen issued a Prehearing Order establishing filing deadlines for motions for summary determination (MSD). On or about February 28, 2013, ODFW filed a Motion for Extension of Time and Site Visit requesting, in part, additional time for the parties to file motion(s) for summary determination (MSD). Specifically, ODFW requested the filing date be postponed until after the parties and the ALJ conducted a site visit.¹ On March 13, 2013, Senior ALJ Allen granted ODFW's

¹ At a subsequent status conference, held March 13, 2013, the parties agreed to file MSDs before conducting the site visit.

request and extended the filing date for MSDs to April 8, 2013 and filing date for responsive briefs to April 22, 2013.² On June 26, 2013, the ALJ conducted a site visit during which the ALJ, as well as all attendees, observed the relevant locations of each Oxbow Spring, the channel of Little Herman Creek, the surrounding topography, and all operations and structures of the Oxbow Hatchery.

On or about April 8, 2013, Proponents, Protestant, and the Department each filed cross Motions for Summary Determination. On or about April 22, 2013, the parties filed responses to the cross motions. On or about June 4, 2013, Senior ALJ Allen issued a Consolidated Ruling denying the parties' motions for summary determination and preserving all issues for hearing.

An in-person hearing convened on October 15, 2013, in Tualatin, Oregon. Senior ALJ Allen presided over the hearing. Each party appeared through counsel. Duane Banks, Oxbow Hatchery Manager, and Fred Wright, Registered Professional Engineer, testified at the hearing. The evidentiary record closed at the conclusion of the hearing on October 15, 2013. On November 12, 2013, the parties filed written closing briefs. The record closed upon receipt of these briefs.

ISSUE

1. Whether a portion of the water right evidenced by Water Right Certificate 24625 shall be cancelled due to non-use. ORS 540.610; OAR 690-017-0400.

EVIDENTIARY RULINGS

Exhibits A1 through A9, offered by OWRD, were admitted into the record without objection. Exhibits A through D, offered by ODFW, were admitted into the record.³ Proponents' objection to Exhibit C as irrelevant was overruled. Exhibits R1 through R4, R6 through R10, and R13 through R41 were admitted into evidence over the objections of ODFW.⁴ Exhibits R5, R11, and R12 were excluded as irrelevant.

² Upon learning of the ALJ's availability at the March 13, 2013 status conference, ODFW rescinded its request to hold off on filing MSDs until after the site visit. Therefore, the scheduling of the site visit in this matter was left to a date to be determined after the ALJ issued rulings on MSDs.

³ At hearing, Proponents asked to preserve objection to ODFW's Exhibit A, based on the unavailability of David Sandstrom, Chief Engineer for ODFW upon whose analysis Exhibit A was purportedly based. The ALJ permitted preservation of this objection with the understanding that Proponents bore responsibility for raising the objection at the appropriate time if, after questioning ODFW's testifying engineer, they believed the objection was proper. Proponents failed to raise this objection during the hearing. As no standing objection was requested or permitted, no ruling is necessary. Ex. A is therefore admitted without objection.

⁴ ODFW objected to all exhibits offered by Proponents except Exhibits R1, R17, R18, R22 through R26, R30, and R38 through R40. With the exception of the exhibits excluded above, those objections were overruled.

FINDINGS OF FACT

1. ODFW⁵ is the holder of a certificated water right identified by Water Right Certificate 24625, issued by OWRD. This certificate grants ODFW a priority date of August 9, 1951 for the specified water right. (Notice at 1; Proponents' Exs. R1 at 1 through 3 and D at 1.)

2. Certificate 24625 authorizes the use of 10 cubic feet per second (cfs) of water from Little Herman Creek, for operation of a salmon hatchery (Oxbow Hatchery) located in Hood River County, Oregon.⁶ (Exs. R1 at 1 through 3 and D at 1.)

3. Three springs serve as the headwaters of Little Herman Creek. These springs are known as the West, Middle, and East Oxbow Springs (collectively "the springs" or Oxbow Springs). Together with runoff from rainfall, these waters make up the totality of Little Herman Creek. (Exs. B at 1 and D at 1.)

4. The Oxbow Hatchery, in its present form, was constructed in 1951 over the bed of Little Herman Creek. Specifically, the fish-rearing ponds, or "raceways," now sit on the site of the former channel of the creek. Oxbow Springs are located roughly 90 feet southwest of the raceways and the authorized point of diversion. The channel of Little Herman Creek begins west of the hatchery and merges with the springs shortly before emptying into a small reservoir constructed immediately west of the raceways. This reservoir serves as the head of a gravity fed system that supplies water to the raceways for rearing of various species of salmon. As presently constructed, all waters flowing into Little Herman Creek from precipitation runoff, the springs, or other sources above the hatchery flow into the Oxbow Hatchery and are used for fish rearing purposes.⁷ (Exs. R1 at 2, R41, A at 2, B at 1, and D at 1; test. of Banks.)

5. In addition, ODFW diverts a small quantity of water (between 0.5 and 1.3 cfs) directly from Middle and East Oxbow Springs, via gravity-fed pipe system, into the hatchery house for egg incubation and other ancillary rearing purposes. (Ex. D at 1; test. of Banks; *see also*, Ex. R41.)

6. From the reservoir, ODFW diverts water through a 24-inch intake pipe which feeds water into the head box of the raceways before distributing the water throughout the ponds. The water then exits the rearing ponds at the southeast corner where it empties into a pollution abatement pond before exiting the hatchery system and rejoining the channel of Little Herman Creek. The reservoir is also equipped with a bypass structure, which permits diversion of excess

⁵ The certificate in issue was issued in the name of the Oregon State Fish Commission, now ODFW. (Notice at 1.)

⁶ ODFW also holds Certificate 56519, which authorizes 8.82 cfs from the same source and for the same use, with a priority date of August 10, 1909. (Exs. R15 and D at 1.) This certificate, is relevant to the determination of whether Protestant is capable of beneficially using the full rate and duty of its combined water rights, which total 18.82 cfs. However, because of its senior priority date, this water right is not subject to these cancellation proceedings.

⁷ With the exception of a small amount diverted to one of the hatchery residences for domestic use. This diversion is, however, subject to its own water right and not at issue in this matter.

water, through a 30-inch outflow pipe, around the hatchery and into the channel of Little Herman Creek east of the rearing ponds. (Test. of Banks; Exs. B at 1, D at 1, and R41.)

7. The purpose of the bypass structure is to relieve pressure on the reservoir and allow water, in excess of ODFW's existing 18.82 cfs water rights, to flow into the natural channel of Little Herman Creek. (Test. of Banks and Wright.) The elevation of the bypass structure is regulated by stop-logs, which can be added or removed in order to raise or lower the maximum level of the reservoir. Adding stop-logs to the bypass structure will not increase the water level in the reservoir unless there is sufficient spring flow and precipitation runoff into the reservoir. (*Id.*)

8. The top elevation of the dam at the east end of the reservoir is 108 ft. Because the hatchery operates on a gravity fed water delivery system, the water level necessary in the reservoir to convey the full combined water right of 18.82 cfs through the intake pipe leading to the raceways is 152.7 ft. That water level can only be achieved if there is sufficient water flowing into the reservoir from Little Herman Creek. (Test. of Wright; Ex. A at 4.)

9. From at least 2007 until the date of hearing, hatchery personnel have maintained the level of stop-logs in the bypass structure at 104.21 ft. At no time during the period in issue did ODFW actively bypass water around the hatchery. During that time, the level of water in the reservoir has not reached the 104.21 ft. level at the top stop-logs in the current bypass structure. (Test. of Wright; Exs. R33 and D at 1.)

10. At all times during the period in issue, ODFW has captured the entirety of the flows of Little Herman Creek for use in salmon rearing in the raceways and hatchery house, with the exception of a minimal amount diverted from Oxbow Springs for domestic use at one of the three hatchery residences. (Test. of Banks; Exs. B and D.)

11. The authorized point of diversion (POD) stated in Certificate 24625 is on Little Herman Creek, located within Section 7, Township 2 North, Range 8 East, Willamette Meridian, NE ¼, NE ¼, (S7, T2N, R8E, W.M.). Specifically, the authorized POD is located at the present 24-inch intake pipe that runs between the reservoir and the rearing ponds. The West and Middle Oxbow Springs, as well as the hatchery reservoir, are also located within S7, T2N, R8E, W.M.⁸ East Oxbow Spring and the rearing ponds are located within NW ¼, NW ¼, S8, T2N, R8E, W.M. The earthen dam at the eastern edge of the reservoir runs roughly along the dividing line between Section 7 and Section 8 of the relevant township-range. (Ex. R1 at 1 and 2.)

12. Beginning in August 2000, ODFW diverted certain quantities of water for use at the hatchery house from two PODs not authorized in Certificate 24625, one located on the West Spring, the other located on the East Spring. ODFW continued this practice throughout the period in issue. (Exs. R2 at 5 and R4 at 5.)

⁸ The Consolidated Ruling on motions for summary determination erroneously listed the locations of all relevant features as lying within the same quarter/quarter section of the relevant township-range designation. This order corrects that error.

13. On or about August 27, 2010, ODFW filed an Application for Water Right Transfer (T11108) seeking to amend the authorized POD on Certificate 24625 to include the two unauthorized POD's on Oxbow Springs as well as the authorized POD on Little Herman Creek. (Ex. R2.)

14. On or about June 18, 2012, Proponents filed Affidavits Asserting Non-Use of Water Right. These affidavits alleged ODFW had forfeited 5.76 cfs of the water right at issue because it had drawn water from another source (Oxbow Springs) for a period in excess of five successive years. These affidavits were based upon Proponents' review of Transfer Application T11108. Proponents determined the portion of the rate forfeit by calculating the capacity of the pipe ODFW used to divert water from Oxbow Springs to the hatchery house. (Ex. A5 at 25 through 39.)

CONCLUSIONS OF LAW

No portion of the water right evidenced by Water Right Certificate 24625 shall be cancelled due to non-use.

OPINION

The proponent of a fact or position has the burden of proving that fact or position by a preponderance of the evidence. ORS 183.450(2); *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).

Proponents DeGraw and Brown assert ODFW has failed to make beneficial use of all or part of the water right granted under Certificate 24625 for a period exceeding five years. Consequently, Proponents assert a portion of the water right is forfeit and swore out affidavits seeking cancellation. As the proponents of this position, DeGraw and Brown bear the burden to prove by a preponderance of the evidence the facts necessary to demonstrate forfeiture. Assuming the Proponents are able to carry their burden and prove non-use for the statutory period, Protestant ODFW must satisfy the same evidentiary requirements as to any affirmative defenses it asserts to rebut Proponents evidence.

As identified throughout these proceedings, the burden of proof encompasses two burdens, the burden of production and the burden of persuasion. *Marvin Wood Products v. Callow*, 171 Or App 175 (2000) (Conceptually, the burden of proof encompasses two distinct burdens: the burden of producing evidence of a particular fact (*i.e.*, the burden of production), and the burden of convincing the trier of fact that the alleged fact is true (*i.e.*, the burden of persuasion)). Accordingly, any party advocating a particular position bears the burdens of production and persuasion as to that position.

In this matter, Proponents' affidavits of non-use are sufficient to make a *prima facie* showing for the purposes of initiating the cancellation proceeding. Nevertheless, such affidavits are insufficient, in and of themselves, to establish non-use by a preponderance of the evidence. This is particularly true where, as here, those affidavits are based on representations made by Protestant in a transfer application and not upon Proponents' personal knowledge or observations. Accordingly, Proponents are responsible for meeting their burdens before ODFW will be required to present evidence of affirmative defenses necessary to rebut a presumption of forfeiture. To hold otherwise would alter the burden from a preponderance of the evidence to merely a *prima facie* showing.

Beneficial use is the basis, the measure, and the limit of a water right in the State of Oregon. ORS 540.610(1). Whenever the holder of a perfected water right fails to put all or a portion of such right to beneficial use for a period of five successive years, the water right may be deemed forfeit through cancellation proceedings. *Id.* Generally, cancellation proceedings present relatively straightforward questions of proof related to non-use during the period in issue. This case, however, is complicated by the parties' varying interpretations of statutory terminology that must be resolved before a determination of non-use can be addressed. Specifically, Proponents favor a definition of the term "source" that differs from that adopted by OWRD and ODFW. If Proponents' assertions are accepted, ODFW has failed to beneficially use the full rate and duty of the water right at issue because they have used water from an alternate source and, consequently, a portion of the water right is forfeit. Central to a resolution of this argument is the interpretation of the term "source" as used in the relevant statutes and rules. Accordingly, this dispute must be resolved at the outset.

1. The unauthorized points of diversion on Oxbow Springs constitute diversions of water from the same source as that permitted by the water right at issue.

The parties and the Department all agree that ODFW has diverted water from two unauthorized PODs on the East and West Springs, during the period in issue. However, the parties disagree about whether diversion at these unauthorized POD's constitutes withdrawals from the same source of water as that authorized by the water right at issue. These disagreements center on disputes regarding the hydrological connection to the authorized POD as well as disputes over OWRD's definition of the term "source." There is no assertion that ODFW has failed to utilize water diverted from any identified source for the use specified in the water right. Instead, Proponents focus on the alteration in the diversion points and the design of the diversion structure to allege non-use.

As an initial matter, Proponents argue that, because ODFW changed the POD from the authorized diversion on Little Herman Creek to two unauthorized diversions on Middle and East Springs, it has abandoned a portion of its water right from Little Herman Creek in favor of water from Oxbow Springs. Proponents' arguments oversimplify the issue.

The term "source," as used in the relevant statutes, is not defined by statute or rule in the context of forfeiture determinations. Therefore, one must begin with the plain, ordinary meaning of the term. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611 (1993) ("[W]ords of common usage typically should be given their plain, natural, and ordinary meaning."). The usual source for determining the ordinary meaning of statutory terms is a dictionary of common usage.

State v. Murray, 340 Or 599, 604, 136 P3d 10 (2006) (“Absent a special definition, we ordinarily would resort to dictionary definitions, assuming that the legislature meant to use a word of common usage in its ordinary sense.”).

Merriam-Webster provides definitions of “source” which include, in relevant part:

1 a : The point of origin of a stream of water : FOUNTAINHEAD * * * **b** *archaic*
: a natural spring or reservoir : FOUNT[.]

(Emphasis original.) *Webster’s Third New Int’l Dictionary*, 2177 (unabridged ed 2002).

The above definition provides very little definitive guidance in the context of determining whether the two points of diversions are diversions from the same source of water. However, nothing in the above definition precludes ODFW’s interpretation that the unauthorized points of diversion draw water from the same source as the unauthorized points of diversion on Oxbow Springs. In fact, this definition tends to support, rather than contradict, a finding that waters from the origin of a stream or creek may be considered the same source of water as at other locations along the stream or creek. In this case, such a finding is also supported by the geographic proximity of the authorized and unauthorized PODs.

The authorized POD, located at the northwest end of the reservoir on Little Herman Creek, is roughly 90 ft. north of the unauthorized PODs, albeit over some rather steep and rough terrain, and still within the boundaries of the Oxbow Hatchery. In addition, the only other water rights permitting diversion from Oxbow Springs and Little Herman Creek above the authorized POD are also held by ODFW for use at the hatchery. These factors, coupled with the hydrologic reality that all water from Oxbow Springs, in their natural state, flow into the channel of Little Herman Creek, support a finding that the authorized and unauthorized PODs divert water from the same source.

ODFW’s interpretation also finds support from OWRD’s policies and interpretations. The Department’s policy for determining whether a new POD draws from the same source as an existing POD is set forth in its 2010 Technical Operations Manual, which provides in relevant part:

In determining whether a proposed point of diversion will develop the same source as the authorized diversion, the Department evaluates whether a molecule of water present at the authorized diversion could be diverted at the proposed diversion[.] * * * A proposed new diversion is NOT considered to develop the same source if water available at the old POD cannot physically make it to the new POD or if none of the water that is available at the new POD would have been present at the old POD.

(Ex. A8 at 15, Emphasis original.)

In this context, the analysis presents the simple question of whether water diverted at the unauthorized PODs would also be capable of diversion at the authorized POD. In this case, that

question can be answered in the affirmative. The water flowing from Oxbow Springs, together with seasonal precipitation runoff, provides the headwaters of Little Herman Creek. The evidence demonstrated Little Herman Creek has no other point of origin. Further, the waters emanating from Oxbow Springs, through natural flow, end up in the channel of Little Herman Creek and, consequently, in the hatchery reservoir. Those waters have no other outlet. All water originating from Oxbow Springs become waters of Little Herman Creek shortly after emerging from the surface. Therefore, the Department's interpretation of the disputed term, in the context of this case, cannot be said to be either unreasonable or not in accordance with the plain meaning of the term. As such, while it may not be a promulgated rule entitled to deference,⁹ the Department's policy provides instructive guidance.

Accordingly, the unauthorized points of diversion on Oxbow Springs divert water from the same source as the authorized point of diversion within the hatchery reservoir. The remaining issue to be determined is whether ODFW failed to beneficially use any portion of the water right for five successive years during the period in issue.

2. *Proponents failed to prove non-use for at least five successive years.*

Proponents failed to demonstrate ODFW has not used all water available from Little Herman Creek to satisfy the water right at issue. Specifically, Proponents' assertions of non-use are based on flawed theories; first, that the unauthorized PODs constitute a different source of water than that specified on Certificate 24625, and second, that ODFW's diversion structures, as built, were capable of increasing the water level in the reservoir and failed to do so. The issue of source of the waters of Little Herman Creek is adequately addressed above. Because Proponents failed to demonstrate water from Oxbow Springs is distinct from those of Little Herman Creek, the argument that ODFW has forfeited a portion of the water right at issue by favoring water from an alternate source is without merit. Thus, the remaining determination is whether Proponents have proven ODFW failed to utilize the full extent of its combined water right because it permitted a portion of the available water to flow around the hatchery via the bypass structure.

In this regard, Proponents have attempted to demonstrate non-use by drawing into question the operational capacity of the facility. Proponents' argument misinterpret the information presented on the gravity feed system in operation at the hatchery and fails to account for availability of water in Little Herman Creek as well as the fact that ODFW captured all water flowing into Little Herman Creek for use at the Oxbow Hatchery. Proponents have, at most, demonstrated that, under conditions during the period in issue, the waters available from Little Herman Creek were insufficient to satisfy the full rate and duty of ODFW's combined water rights. Proponents failed, however, to demonstrate that a specific portion of the 10 cfs authorized by Certificate 24625 was not beneficially used for salmon rearing at the Oxbow Hatchery.

⁹ See, *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994). (An agency's interpretation of its own validly promulgated administrative rule is entitled to deference unless "inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law * * *".)

Proponents argued, primarily through closing arguments, that the operational capacity at the hatchery is only capable of utilizing the combined 18.82 cfs held by ODFW if and when the reservoir level reaches 105.7 ft. or higher. The evidence submitted by ODFW supports this assertion. The evidence also supports Proponents' assertions that, since at least 2007, the stop-logs in the bypass structure have been set at 104.21 ft., approximately a foot and a half lower than the water level necessary to convey the full 18.82 cfs. From this, Proponents ask this tribunal to infer that ODFW has forfeited a portion of the water right at issue because they failed to increase the level of the stop logs in the bypass structure. This inference, however, ignores uncontroverted evidence that, without sufficient flows into the reservoir from Little Herman Creek, the level of the stop logs between 104.21 and 105.7 ft. is irrelevant. At the hearing, the evidence demonstrated that ODFW has not increased the level of the stop-logs in the bypass structure because the water level has never reached the current level of 104.21 ft. Consequently, adding stop-logs would do nothing to increase the water level in the reservoir unless, at the same time, the flows of Little Herman Creek increase in sufficient volume to raise the level in the reservoir.

Proponents did not present sufficient evidence to prove, by a preponderance of the evidence, that ODFW failed to utilize some portion of the water right through reliance on the gravity fed system or exactly what that portion equaled.¹⁰ In truth, Proponents' presentations are simply insufficient to determine whether ODFW's water usage, during the period in issue, was below the 18.82 cfs combined water right for at least five successive years. At most, Proponents demonstrated that, at times, the water available from Little Herman Creek was insufficient to satisfy the full extent of the combined water rights held by ODFW for use at the Oxbow Hatchery.

Proponents failed to prove, by a preponderance of the evidence, that a portion of the water right at issue is forfeit due to non-use. Accordingly, it is unnecessary to determine whether ODFW was excused from forfeiture through one or more affirmative defenses available in the statute. Nonetheless, a brief discussion of those available defenses follows.

3. *ODFW was "ready, willing, and able" to use the full rate or duty granted by the water right at issue.*

ODFW maintains it has beneficially used the full extent of its combined water rights from Little Herman Creek for salmon rearing. In the alternative, ODFW asserts that one or more statutory exceptions found in ORS 540.610(2) excuses any period of non-use alleged by Proponents. Specifically, ODFW argues that, to the extent Proponents have shown less than 18.82 cfs was used within the hatchery, water was unavailable from the authorized source to satisfy the full rate and duty allowed under Certificate 24625.

ORS 540.610(2) provides, in relevant part:

¹⁰ Proponents rely heavily on the Water Use Reporting forms of ODFW. However, at the hearing, Duane Banks testified that he completed these forms simply by carrying over numbers from his predecessor. Importantly, Mr. Banks testified that no actual calculations or meter readings were used in preparation of these forms because they were not meant to be an accurate measurement of the water used, in the hatchery house or the raceways, because ODFW used all water available from Little Herman Creek. Consequently, these forms lack reliability and should not be relied upon by either party as reliable, relevant evidence of water use during the period in issue.

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.

The parties dispute whether ODFW was capable of putting the full duty allotted under Certificate 24625 to beneficial use. Specifically, Proponents' argue the operational need of the Oxbow Hatchery, during the period in issue, exceeded the amount of water placed under beneficial use and that the level water maintained in the reservoir was insufficient to fulfill the combined water right. Assuming Proponents had proven such assertions, the discussion above demonstrates that the evidence does not indicate a failure to beneficially use the full extent of the water right but instead supports a finding of unavailability of the water sufficient to satisfy the combined water right. The uncontroverted evidence presented by ODFW demonstrates the current diversion structures are capable of diverting water in excess of the combined 18.82 cfs currently held by ODFW. Thus, to the extent Proponents' evidence demonstrates the current level of the reservoir pushed some quantity less than 18.82 cfs through the Oxbow Hatchery, Proponents' evidence merely supports a finding of unavailability of water in Little Herman Creek to satisfy the combined water rights held by ODFW.

Proponents misstate the evidence pertaining to the bypass structures and rely on this misstatement to support their assertions. For instance, at hearing Proponents focused a significant amount of their direct examination of Mr. White on the level of the stop-logs in the bypass system. While it is true that such structures exist in order to divert water around the hatchery in the event of a flood event, Proponents have presented no evidence showing the bypass structure was used at any time during the period at issue to carry water and, if so, what quantity.

The evidence shows that the Oxbow Hatchery is located on the bed of Little Herman Creek and that all the flows of the creek that originate above the hatchery flow into the creek for use in salmon rearing. Thereafter, this water flows back into the channel of Little Herman Creek where it flows to the creek's termination on the Columbia River. ODFW has also proven, more likely than not, that any period in which the hatchery may have used less than its combined water right of 18.82 cfs was due to non-availability of water from Little Herman Creek. Proponents' arguments to the contrary are without merit.

ORDER

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

1. The Oregon Department of Fish and Wildlife has not failed to beneficially use water, under the water right at issue, at the Oxbow Hatchery for a period of five or more years during the period in issue.
2. No portion of the water right evidenced by Certificate 24625 has been forfeited due to non-use during the period in issue.

/s/ Joe L. Allen

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

APPEAL PROCEDURE

NOTICE

This Proposed Order is issued by the administrative law judge pursuant to OAR 137-003-0645. As provided in ORS 537.445, OAR 137-003-0650 and OAR 690-002-0175, any party to this proceeding or the Department may file exceptions to this proposed order with the Oregon Water Resources Director. The exceptions must be in writing and received at the Water Resources Department no later than 30 days after the date of service (the date served according to the certificate of service) of this proposed order. You should also send a copy of your exceptions to any other party or parties to the contested case hearing. Send any exceptions to:

Oregon Water Resources Department
725 Summer Street N.E., Suite A
Salem, OR 97301

Exceptions are legal or factual arguments illustrating legal or factual error in the proposed order, as demonstrated by the record. Evidence not in the record may not be offered in exceptions. Exceptions must clearly and concisely identify the portion(s) of the proposed order excepted to, and cite to appropriate portions of the record or Commission policies to which modifications are sought in the exceptions.

If exceptions are filed, any party or the Department may respond to the exceptions. The Department must receive responses no later than 10 days after the date of service of the exceptions. An opportunity may be provided for making additional written or oral argument to the Director, at the Directors determination and discretion. After reviewing the record, the exceptions and any additional argument, the Director will issue a final order. The Director may issue a final order that differs from the proposed order or may adopt the proposed order as the final order.

If exceptions are not filed within the allowed period, the Director will issue a final order.

CERTIFICATE OF MAILING

On December 10 2013, I mailed the foregoing **Proposed Order** in OAH Reference No. **WR-12-009**.

BY FIRST CLASS MAIL:

Richard J. Kepler, Program Manager
OR State Fish Comm/ODFW
3406 Cherry Ave NE
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January 8, 2014

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Via First Class Mail

Phillip C. Ward
Oregon Water Resources Director
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, Oregon 97301

**Re: OWRD Case No. PC-04-12; In the Matter of the Proposed
Partial Cancellation of Water Rights Evidenced by Certificate
24625 for use of water from Little Herman Creek for
Operation of a Salmon Hatchery, Hood River, Oregon**

Dear Director Ward:

Please find enclosed for filing Proponents' exceptions to the Proposed Order in this matter, OWRD Case No. PC-04-12; OAH Ref. No. WR-12-009.

Thank you for your consideration in this matter.

Sincerely,

Courtney Johnson

Enclosure

Cc: Juno Pandian
Jesse Ratcliffe
Rick Kepler
Steve Sanders

“Together with runoff and other groundwater sources located above the reservoir, these waters make up the totality of Little Herman Creek.”

B. Finding of Fact Number 4.

This finding, describing the hatchery construction, states that Oxbow Springs are located roughly 90 feet southwest of the raceways and authorized point of diversion. Evidence in the record does not support this finding. No measurements were offered as to the distance between the springs, which themselves are separated by some distance, and the top of the berm where the point of diversion is located. To the contrary, site plans in the record show the lower spring (East Spring) closest to the hatchery, as being located at least 200 feet from the authorized point of diversion. Ex. R24. Proponents request that the finding as to distance between the springs and the point of diversion be removed, as there is not sufficient evidence in the record to support the finding.

C. Finding of Fact Number 5.

This finding states that ODFW diverts between 0.5 and 1.3 cfs directly from Middle and East Oxbow Springs to the hatch house. ODFW Ex. C describes the Hatch House Supply and states that, “actual water use is normally below 0.5 cfs.” ODFW Ex. C at 2. The findings do not cite to this document in support of the amount of water used in the hatch house, and erroneously state that the lowest amount used is 0.5 cfs. Proponents request that this finding be amended to reflect the evidence in the record that “actual water use is normally below 0.5 cfs.”

D. Finding of Fact Number 7.

This finding states that the elevation of the bypass structure is regulated by stop-logs. This intake to the bypass is regulated by stop-logs, whose elevation can be changed by adding or removing boards. Proponents request that this finding be amended to state: “The intake of the

bypass structure is regulated by stop-logs, which can be added or removed in order to raise or lower the maximum water level in the reservoir.”

E. Finding of Fact Number 8.

This finding of fact states that the water level necessary in the reservoir to convey the full 18.72 cubic feet per second (cfs) is 152.7 feet. This is incorrect. The required water surface elevation as calculated by Fred Wright is 105.7 feet. As testified by Mr. Wright, this is based on a required 2.5 feet difference in elevation between water surface in the reservoir and the water surface in the headbox channel, and a required water surface elevation of 103.2 feet in the headbox channel in order to feed the full 18.82 cfs through the spouts to the rearing ponds. ODFW Ex. A. Proponents request that this finding be amended to state that the required water surface elevation is 105.7 feet.

Finding of Fact Number 8 also states that the required water level “can only be achieved if there is sufficient water flowing into the reservoir from Little Herman Creek.” This is an incomplete description of what is required to reach the water level of 105.7 feet. In addition to sufficient flows, the system must be installed and operating such that the top of the stop logs at the bypass structure is higher than 105.7 feet. If the top of the stop logs is lower than 105.7 feet, the water level in the reservoir cannot reach 105.7 feet. This is because as the water level reaches the top of the stop logs, it will spill over into the bypass pipe. Testimony of Duane Banks 1:04:50. Mr. Wright confirmed that if all of the stop logs were removed from the overflow (or bypass) structure in the dam, then all of the water would drain through the bypass. Testimony of Fred Wright 1:57:50. Proponents request that this finding be amended as follows: “That water level can only be achieved if there is sufficient water flowing into the reservoir from

Little Herman Creek and if the stop-logs at the bypass structure are set at an elevation of at least 105.7 feet.”

F. Finding of Fact Number 12.

This finding of fact states that ODFW diverted water directly from West Spring and East Spring beginning in August 2000. This is incorrect. The direct diversion structures are located at Middle Spring and East Spring. The evidence does not support a finding as to precisely when these diversions began, but rather that they had been in use for at least 10 years. Exs. R2 at 5 and R4 at 5. Proponents request the findings be amended to reflect the correct springs and state that diversion from the springs has been occurring for at least 10 years.

G. Factual Findings Contained within the Opinion.

The Proposed Order does not contain a specific finding of fact as to the amount of water used by ODFW during the relevant period. The Opinion concludes that Proponents’ presentations are “simply insufficient to determine whether ODFW’s water usage, during the period in issue, was below the 18.82 cfs combined water right for at least five successive years.” Proposed Order at 9. The only analysis in support of this finding is located in footnote 10 of the Proposed Order, finding that the ODFW Water Use Reporting forms “lack reliability” and should not be relied on as evidence of water use. *Id.* n.10.

The footnote states that Mr. Banks testified the forms “were not meant to be an accurate measurement of the water used.” This is incorrect. These forms are required to be submitted under ORS 537.099(1), and are governed by the Department’s rules for means and methods for measuring and reporting water use. OAR Chapter 690, Division 85. As acknowledged by ODFW in its responses to discovery requests, “[t]he amount of water used from Little Herman Creek by ODFW can be found in it’s [*sic*] Water Usage Input Forms that were submitted to

WRD as required by ORS 527.099 and OAR 690-085-0010.” Ex. R14 at 5. Thus, even Protestant acknowledges that the water use reporting forms are evidence of the amount of water used at the hatchery.

Mr. Banks did not testify that these reports were inaccurate in any way. Instead, he testified that he followed along with what had been done before his time at the hatchery. In fact, the years in which the reports show consistent numbers, the years in which Mr. Banks stated he did not take actual measurements of water used, are generally consistent with the amounts reported for the years when actual measurements were taken. Mr. Banks testified that he first began recording water use for all 12 months of the year in 2005, and first began measuring water use in 2011. The 2011 and 2012 reports do not show water use in any month greater than the 8.0 cfs reported in previous years. From these reports, the only reasonable conclusion is that the highest amount of water used at the hatchery during the relevant period was 8.0 cfs.

The proposed order fails to apply the proper legal standard in evaluating the evidence to conclude that these reports do not prove that 8.0 cfs is the maximum amount of water used during the period of non-use. As the Proposed Order acknowledges, the standard of proof is preponderance of the evidence. Proposed Order at 5. Proof by a preponderance of the evidence means “the fact finder is convinced that the facts asserted are more likely true than false.” *Id.* (citing *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987)). It is unreasonable for the ALJ to conclude that the water use reporting forms are not more likely true than false, when: (1) no testimony was submitted that would indicate any greater amount than 8.0 cfs was used, (2) the water use reporting forms from prior years are generally consistent with more recent reports indicating actual measurements, (3) no evidence suggests that the water use reporting forms under-reported or over-reported the amount of water used, and (4) ODFW itself acknowledged in

response to discovery that the water use reporting forms show the amount of water used at the hatchery.

The Proposed Order states, “uncontroverted evidence presented by ODFW demonstrates the current diversion structures are capable of diverting water in excess of the combined 18.82 cfs currently held by ODFW.” Order at 10. To the contrary, the uncontroverted evidence presented by ODFW demonstrates that as installed, the diversion structures are *incapable* of diverting the full 18.82 cfs, due to the fact that the stop logs at the bypass structure are not high enough to maintain the required water level in the reservoir (if water is available) to maintain a flow of 18.82 cfs through the hatchery.

ODFW’s hydraulic report concludes that the “operational water surface elevation in dam to pass water rights” must be 105.70 feet. ODFW Ex A at 6. The calculations demonstrate that the difference in water surface elevation must be 2.5 feet in order for the hatchery system to carry 18.82 cfs. ODFW Ex A at 6. *See also* Testimony of Fred Wright, Hearing Record at 1:46:40. The report’s author, Mr. Fred Wright, testified that as this difference in water surface elevation between the reservoir and the head box decreases, so too does the capacity of the water delivery system. Testimony of Fred Wright, Hearing Record at 1:47:12 & 1:55:05.

The evidence demonstrates that the top of the stop logs in the bypass structure has been set at 104.21 feet for the entire period of nonuse. Exhibit R33; Testimony of Fred Wright 1:41:49-1:41:54; Exhibit R35 at 2 (“ODFW sets the stoplog boards at the bypass structure at a predetermined level, and the elevation of these boards has not been changed during the period of interest here August 2000 to present.”). Water will pass through the bypass structure and into the 30-inch pipe around (rather than into) the hatchery facility when the water surface elevation exceeds the top of the stop logs in the bypass. Testimony of Duane Banks 1:04:50 & Testimony

of Fred Wright 1:57:50. The uncontested evidence demonstrates that at all relevant times, the stop logs in the bypass structure at the reservoir berm were set at an elevation *below* that required to direct the full amount of water through the hatchery. The Final Order must, at a minimum, include a finding of fact that ODFW *did not* use the full amount of its water right because the stop log was at all times lower than the required elevation.

II. Exceptions to Conclusions of Law

The Proposed Order contains one Conclusion of Law: “No portion of the water right evidenced by Water Right Certificate 24625 shall be cancelled due to non-use.” For the reasons set forth below, Proponents respectfully take exception to this conclusion of law.

As proponents of the fact of nonuse, Brown and DeGraw have the burden of proving the non-use of the full amount of the water right by a preponderance of the evidence. ORS 183.450(2). Once Proponents demonstrate the fact of non-use establishing the presumption of forfeiture, then the burden shifts to ODFW to demonstrate its affirmative defense that water was not available and that ODFW was nevertheless ready, willing and able to use the full amount authorized. *See Rencken v. Young*, 300 Or 352, 365 (1985). The Proposed Order errs by conflating these separate elements of the legal analysis.

A. The unauthorized points of diversion

The Proposed Order concludes that the Oxbow Springs are the same source of water as Little Herman Creek, based on the dictionary definition of “source” and giving deference to the Water Resources Department’s policies regarding source. However, the Proposed Order fails to account for or discuss the WRD’s general treatment of springs as distinct from surface waters, and the historic treatment of these specific springs as distinct sources of water.

Consistent with the distinction in Oregon water law between springs and streams, WRD has previously determined that Oxbow Springs are different sources of water than Little Herman

Creek. In Water Right Certificate 56519 issued to ODFW, the authorized sources of water are “Middle & East Oxbow Springs *and* Little Herman Creek.” Ex. R15 (emphasis added). WRD previously treated the springs as distinct from Little Herman Creek by setting forth both as the source of water for Certificate 56519. *See also* Ex. R16. In comparison, each of the other water rights held by ODFW for the Oxbow Hatchery have the authorized source listed as *only* Little Herman Creek (Certificates 9765, 24625, 24628), Little Herman Creek and Ponds (Certificate 24627), or Herman Creek (Certificate 64310). *Id.* It is inconsistent with prior decisions for WRD to now find that Middle and East Oxbow Springs are considered to be the same source as Little Herman Creek.

The Oregon Administrative Procedures Act reflects a legislative policy “that decisions by administrative agencies be rational, principled, and fair, rather than *ad hoc* and arbitrary.” *Gordon v. Bd. of Parole*, 343 Or 618, 633 (2007). In the absence of an administrative rule clarifying WRD’s criteria for determining whether water has been appropriated from the authorized source (or whether a proposed water rights transfer includes the same source), WRD must ensure that its employees and decision-makers apply criteria consistently or give adequate reasons for departing from an earlier interpretation. *See Ross v. Springfield Sch. Dist.*, 300 Or 507, 519 (1986); ORS 183.355(5), 183.484(5)(b)(B). The Proposed Order fails to explain or address this departure from earlier interpretations in issuing water rights listing the springs as separate sources of water from Little Herman Creek.

B. Proof of Non-Use for at Least Five Consecutive Years

The Department is charged with reviewing the evidence and canceling all or part of the rights that have been forfeited due to nonuse. ORS 540.610. Evidence of nonuse for the period of at least five consecutive years establishes the presumption of forfeiture. ORS 540.610.

Water Use Reporting Forms submitted by ODFW to the Water Resources Department for the relevant period show that the Oxbow Hatchery used no more than 8.0 cfs of water for the beneficial use set forth in the Certificate. Exhibit R26. Protestant ODFW does not dispute that its own reporting forms show a maximum of 8.0 cfs water use during the relevant period. *See* Testimony of Duane Banks, Hearing Record at 1:06:30–1:17:30. Protestant did not provide any evidence that would demonstrate that it used the full amount of the water authorized for the relevant period. Protestant ODFW failed to use any of the water authorized by Certificate 24625 for a period of at least ten consecutive years from August 2000 to August 2010.

The Opinion states that, “Proponents failed to demonstrate ODFW has not used all water available from Little Herman Creek to satisfy the water right at issue.” Whether ODFW has used “all water available” is not the relevant legal question for establishing the presumption of forfeiture. The first question is whether proponents established that all or a portion of the water right was not used for the authorized purpose during the relevant period. Once established, the protestant may attempt to prove an affirmative defense to justify the failure to use the full amount of the water right, in this case, that water was not available. The Proposed Order errs as a matter of law in conflating the proponent’s initial burden of proving non-use with the protestant’s burden of proving an affirmative defense.¹

The Proposed Order misstates Proponents’ arguments. Proponents argue that they have carried their burden to show nonuse, because:

1. The water use reporting forms evidence the water use at the hatchery. These forms indicate that the most water used at the hatchery was 8.0 cfs. This is

¹ Regarding non-use, the Proposed Order rejects, in a footnote, the water use reporting forms as “unreliable” evidence. Proponents challenge this factual finding above.

less than the combined 18.82 cfs water rights for the hatchery. Therefore, the 10.0 cfs not used must be cancelled; and

2. Even if the water use reporting forms are discounted, the evidence demonstrates that ODFW did not use the full amount of the water right because at all relevant times the stop logs in the bypass structure were set at an elevation below that required to use the full amount of water in the hatchery. It is physically impossible for ODFW to have used the full amount of water based on the level at which the stop logs were installed.

Proponents argue that ODFW has failed to carry its burden to establish its affirmative defense, because:

3. ODFW has not shown it is otherwise ready, willing, and able to use the full amount of the water right and that water was not available. ORS 540.610(2)(j). This is because ODFW's hatchery is not installed so as to capture and use the full amount of the 18.82 cfs, as testified to by ODFW engineers and staff. Therefore, the affirmative defense does not apply, and the water right should be cancelled.

The Proposed Order confuses Proponents' arguments with respect to non-use, the Proponents' burden under the first step of the legal analysis, with Proponents' arguments regarding the "ready, willing and able" affirmative defense raised by Protestant. Proponents ask this tribunal to find from the water use reporting forms that ODFW was required by law to prepare and submit to WRD that it has not used the full amount of the water right, and therefore has forfeited that water right. In the event that the water use reporting forms are rejected, over Proponents' exceptions, the evidence demonstrates that at no time did ODFW use the full

amount of the water right, because at no time were the stop logs set at an elevation that would allow the hatchery to divert and put to beneficial use the full 18.82 cfs. Again, the uncontested evidence shows that it was physically impossible for ODFW to use the full amount of the water right based on the elevation of the stop logs.

The Proposed Order concludes that while proponents' information fails to establish that anything less than the full amount of the water right was used during the relevant period, the evidence does establish that something less than the full amount of the water right was available during that time. Proposed Order at 8 and 9. This paradoxical conclusion is not supported by the evidence. It is not possible for water that was unavailable in Little Herman Creek to have been used at the hatchery. In other words, the Proposed Order fails to explain how the ALJ could reach the conclusion that water was unavailable, but at the same time conclude that ODFW has used all of the water pursuant to its water right.

C. Rebutting the Presumption of Forfeiture

Once Proponents have successfully established the presumption of forfeiture, the Protestant "has the burden of rebutting the presumption of forfeiture" by showing, among other possible affirmative defenses, that:

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.

ORS 540.610(2)(j). Under this affirmative defense, if the water right holder can show that "water was not available" and that it was "ready, willing and able to use the water had it been available," forfeiture may be avoided.

1. Water Availability.

The Proposed Order suggests that because the water level in the reservoir never reached the elevation required to use the full amount of the water right, water must not have been available. This finding fails to account for water leakage from the reservoir and other system components. ODFW's engineer, Mr. Fred Wright testified that the reservoir is unlined and that ODFW is aware of leakage from the reservoir. Testimony of Fred Wright at 1:59:10-1:59:50. ODFW offered no evidence on the amount or rate of leakage from the unlined reservoir. In addition, ODFW Hatchery Manager Duane Banks testified that water was never bypassed around the hatchery. Mr. Banks also testified that he did not check the bypass structure every day, and that no measuring device is installed at the bypass and no records of the bypass are kept. Test. of Duane Banks at 1:02:50-1:05. Further, the record contains photographs of hatchery raceways emptied entirely of water during construction that occurred during the period of alleged non-use. Ex. R27. ODFW failed to explain how the raceways were kept empty of water without bypassing water around the hatchery. Further, the evidence in the record demonstrates that ODFW has installed water flow meters that could measure water supplied from the East and Middle Oxbow Springs to the Little Herman Creek reservoir and hatch house, but ODFW does not use those meters. Testimony of Duane Banks, Hearing Record at 58:40. Thus, there is no evidence in the record as to how much water was available from Little Herman Creek during the alleged period of nonuse, and ODFW failed to meet its burden of proof demonstrating that water was not available.

2. Ready, Willing, and Able.

In order to meet its burden of proof and persuasion on its affirmative defense, ODFW must show that it was "ready, willing and able" to use the full amount of the water right during

the period of non-use. In this context, “ready, willing, and able” is confined to the actual operational needs of the facility, and the capacity of the facility *as installed*. See *Crandall v. Water Resources Dep’t*, 45 Or App 791, 795 (1980), *aff’d* 290 Or 771 (1981). See also Koehl, Krista, *Partial Forfeiture of Water Rights: Oregon Compromises Traditional Principles to Achieve Flexibility*, 28 *Env’t. L.* 1137, 1150 (1998) (“Thus, the phrase ready, willing, and able is closely tied to the facility function and capability.”). The essential question is this: If water had been available, could the facility, as installed, have diverted and put to beneficial use the full amount of water authorized under the water rights?

Contrary to the Proposed Order’s findings, the uncontroverted evidence presented by ODFW demonstrates that as installed, the diversion structures are *incapable* of diverting the full 18.82 cfs, due to the fact that the stop logs at the bypass structure are not high enough to maintain the required water level in the reservoir (if water is available) to maintain a flow of 18.82 cfs through the hatchery.

ODFW’s hydraulic report concludes that the “operational water surface elevation in dam to pass water rights” must be 105.70 feet. ODFW Ex A at 6. The evidence demonstrates that the top of the stop logs in the bypass structure has been set at 104.21 feet for the entire period of nonuse. Exhibit R33; Testimony of Fred Wright 1:41:49-1:41:54; Exhibit R35 at 2. Water will pass through the bypass structure and into the 30-inch pipe around (rather than into) the hatchery facility when the water surface elevation exceeds the top of the stop logs in the bypass. Testimony of Duane Banks 1:04:50 & Testimony of Fred Wright 1:57:50. Mr. Wright testified that his report does not conclude that the facility can pass the full water rights with a water surface elevation of 104.21 feet at the intake structure. Testimony of Fred Wright at 1:57:50-1:57:08. Because the elevation of the stop logs, 104.21, is less than the necessary water surface

elevation to carry the full 18.82 cfs through the system, the current diversion structures are not capable of diverting water in the amount of 18.82 cfs.

Mr. Wright also testified that if the hatchery wanted to increase the water surface elevation in the reservoir above 104.21, ODFW would need to add stop logs to the bypass. *Id.* at 2:04:00. Protestant ODFW failed to provide any evidence as to the maximum possible elevation of the stop logs or whether the stop logs could be increased to reach the required elevation of 105.7 feet in the reservoir. Nor did ODFW submit evidence as to when or under what conditions ODFW would consider changing the existing elevation of the stop logs. ODFW only provided evidence on the periodic replacement to address leakage through the stop logs. Testimony of Duane Banks at 1:23:50-1:23:45. In sum, ODFW failed to present evidence that would satisfy its burden of proving that the hatchery, as installed, was capable of diverting and putting to beneficial use the full amount of the water right, had water been available.

The Proposed Order states that, “Proponents misstate the evidence pertaining to the bypass structures and rely on this misstatement to support their assertions.” Order at 10. The example provided of “misstating the evidence” refers to the bypass structure and whether the bypass structure was used to carry water. Proponents have not asserted that the bypass structure was used to carry water (although it is true that water flowing through the hatchery empties into the bypass structure before exiting the facility into Little Herman Creek). In any case, whether water has bypassed the facility is not relevant to the question of whether the facility is ready, willing and able to use the full amount of the water right.

Other than this general statement, the Proposed Order fails to describe with specificity where Proponents have misstated the evidence, and Proponents object to the generalized statement that they have been inaccurate in their statement of the facts. Proponents have

supported all assertions of fact with citations to the record and exhibits, including quotations of the description of the bypass structure from reports and hearing testimony. If the ALJ believes that facts have been misstated, the ALJ should be specific as to which statements he is rejecting and why, so that Proponents have the opportunity to address directly the issues.

III. Cancellation

During the ten-year period of August 2000 to August 2010, ODFW failed to use more than 8.0 cfs of water from Little Herman Creek at its Oxbow Hatchery and was not otherwise ready, willing, and able to use the full amount of the water rights. Because the total of the water rights for this use is 18.82 cfs, the 8.0 cfs is attributed to the senior water right, not the subject of this cancellation proceeding, Certificate 56519. ODFW has forfeited the water right evidenced by Certificate 24625 by failing to use any of the 10.0 cfs authorized by the right.

IV. Conclusion

For the reasons stated, the Proponents oppose the Proposed Order. They respectfully request that the Water Resources Department amend the factual and legal conclusions as set forth above.

Dated this 8th day of January, 2014.

Respectfully submitted,



Courtney Johnson, OSB No. 077221
Christopher Winter, OSB No. 984355
Crag Law Center
917 SW Oak Street, Suite 417
Portland, Oregon 97205
(503) 525-2728
Of Attorneys for Proponents

CERTIFICATE OF SERVICE

I certify that on January 8, 2014, I filed these Proponents' Exceptions by First Class U.S. Mail to the Oregon Water Resources Director at the address set forth below.

Oregon Water Resources Department
725 Summer Street N.E., Suite A
Salem, OR 97301

I further certify that I served a copy of the foregoing on all parties to this proceeding by E-Mail to the addresses set forth below, on January 8, 2014:

Stephen Sanders
Sr. Assistant Attorney General
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Juno.G.Pandian@state.or.us

And sent a copy of these exceptions to the ALJ in this matter:

Joe Allen
Sr. Administrative Law Judge
Office of Administrative Hearings
7995 SW Mohawk St., Entrance B
Tualatin, OR 97062

Signed this 8th day of January, 2014,



Courtney Johnson

FINDINGS OF FACT

A. Modifications to the Proposed Order's Findings of Fact

Findings of Fact 1, 2, 3, 6, 9, 10, and 11 are adopted by OWRD and incorporated into this Amended Proposed Order without modification.

Findings of Fact 4, 5, 7, 8, and 12 have been modified as shown below (additions in underline; deletions in ~~striketrough~~):

Finding of Fact 4 is modified as follows: The Oxbow Hatchery, in its present form, was constructed in 1951 over the bed of Little Herman Creek. Specifically, the fish-rearing ponds, or “raceways,” now sit on the site of the former channel of the creek. Oxbow Springs are located a short distance ~~roughly 90 feet~~ southwest of the raceways and the authorized point of diversion. The channel of Little Herman Creek begins west of the hatchery and merges with the springs shortly before emptying into a small reservoir constructed immediately west of the raceways. This reservoir serves as the head of a gravity fed system that supplies water to the raceways for rearing of various species of salmon. As presently constructed, all waters flowing into Little Herman Creek from precipitation runoff, the springs, or other sources above the hatchery flow into the Oxbow Hatchery and are used for fish rearing purposes.¹ (Exs. R1 at 2, R41, A at 2, B at 1, and D at 1; test. of Banks.)

Reasons for Modification: Proponents contend that the nearest of the three springs is at least 200 feet from the raceways and the authorized point of diversion, and that the springs are at three different locations. There is clear and convincing evidence in the record that Oxbow Springs are at three separate locations, each a different distance from the raceways and the authorized point of diversion. In addition, no precise measurement of these distances exists in the record. The record does, however, contain evidence of the rough proximity of the three springs to the raceways and authorized point of diversion.

Finding of Fact 5 is modified as follows: In addition, ODFW diverts a small quantity of water (normally below 0.5 cfs, with a normal peak demand estimate of 1.33 cfs, and a maximum capacity of 2 cfs ~~between 0.5 and 1.3 cfs~~) directly from Middle and East Oxbow Springs, via gravity-fed pipe system, into the hatchery house for egg incubation and other ancillary rearing purposes. (Ex. D at 1; Ex. B at 2; test. of Banks; *see also*, Ex. R41.)

Reasons for modification: Proponents correctly point out that the uncontroverted evidence clearly establishes that the “normal” diversion to the hatchery house is below 0.5 cfs. Similarly uncontroverted evidence clearly establishes both the “normal” peak demand and the maximum capacity of the hatchery house diversion.

¹ With the exception of a small amount diverted to one of the hatchery residences for domestic use. This diversion is, however, subject to its own water right and not at issue in this matter.

Finding of Fact 7 is modified as follows: The purpose of the bypass structure is ~~to~~ to relieve pressure on the reservoir and allow water, in excess of ODFW's existing 18.82 cfs water rights, to flow into the natural channel of Little Herman Creek. (Test. of Banks and Wright.) The elevation of the ~~intake of the~~ bypass structure is regulated by stop-logs, which can be added or removed in order to raise or lower the maximum level of the reservoir. Adding stop-logs to the bypass structure will not increase the water level in the reservoir unless there is sufficient spring flow and precipitation runoff into the reservoir. (*Id.*)

Reasons for modification: The Proponents argue that it is the elevation of the intake of the bypass structure, rather than the elevation of the structure itself, that is regulated by the stop logs. This is clearly established in the record.

Finding of Fact 8 is modified as follows: The top elevation of the dam at the east end of the reservoir is 108 ft. Because the hatchery operates on a gravity fed water delivery system, the water level necessary in the reservoir to convey the full combined water right of 18.82 cfs through the intake pipe leading to the raceways is 105.7 ~~152.7~~ ft. That water level can only be achieved if there is sufficient water flowing into the reservoir from Little Herman Creek and if the stop-logs at the bypass structure are set at an elevation of at least 105.7 feet. (Test. of Wright; Ex. A at 4.)

Reasons for modification: The elevation listed as necessary to convey the full combined water right is a typographical error, as evident both from the remainder of the Proposed Order and as clearly established in the record. The evidence also clearly establishes that the water level in the reservoir is dependent on both the inflow from Little Herman Creek and the elevation at which the bypass structure stop-logs are set.

Finding of Fact 12 is modified as follows: ~~Beginning in~~ Since at least August 2000, ODFW diverted certain quantities of water for use at the hatchery house from two PODs not authorized in Certificate 24625, one located on the ~~West~~ Middle Spring, the other located on the East Spring. ODFW continued this practice throughout the period in issue. (Exs. R2 at 3-5 and R4 at 5, and OWRD Ex. A2 at 3.)

Reasons for modification: Clear and uncontroverted evidence in the record establishes both that the two PODs not authorized in Certificate 24625 are located on Middle Spring and East Spring and that these two PODs have been in use since at least August 2000.

B. Additional Findings of Fact

OWRD has the authority, pursuant to ORS 183.650, to make findings of fact in addition to those made in the Proposed Order to the extent that the additional findings of fact are supported by a preponderance of evidence in the record. Pursuant to this authority, OWRD makes the following additional findings of fact:

Finding of Fact 13: The bypass structure is designed to allow ODFW staff to set the elevation of the stop-logs at 105.7 feet elevation, and thereby establish an operational water surface elevation in the reservoir of 105.7 feet elevation. (ODFW Ex. A at 4; Ex. B at 1-2.)

Reasons for additional finding: The Proposed Order found that an elevation of 105.7 feet is necessary for ODFW to exercise the combined quantity of its rights (18.82 cfs), and found that the maximum elevation of the reservoir is 108 feet, but made no finding as to the elevation to which the stop-logs in the bypass structure could be set. A preponderance of the evidence in the record supports the finding that the stop-logs may be set to at least 105.7 feet elevation.

Finding of Fact 14: The diversion system was designed to allow for the addition of stop-logs to the bypass structure if additional water became available (as a result, for example, of a large rainstorm), in order to increase the rate of diversion. (Test. of Wright, Hearing Recording at 2:07:22 – 2:07:32; Ex. R38.)

Reasons for additional finding: A preponderance of the evidence in the record supports the finding that the diversion system was designed to allow ODFW staff to respond to an increase in available water by adding stop-logs to the bypass structure.

Finding of Fact 15: Since January 2000, ODFW has replaced the stop-logs at the bypass structure at least a couple of times to reduce leakage due to rot or wear. (Test. of Banks, Hearing Recording at 59:18 - 1:00:35, 1:23:22 – 1:23:32.)

Reasons for additional finding: A preponderance of evidence in the record supports this additional finding.

OPINION

The five introductory paragraphs of the Opinion are adopted without modification.

Subsection 1

Subsection 1 of the Opinion is modified by inserting the following paragraph immediately prior to the final paragraph of Subsection 1. Subsection 1 is otherwise adopted without modification:

“Finally, Proponents contend that a conclusion that the points of diversion at East Spring and Middle Spring divert water from the same source as the point of diversion on Little Herman Creek is inconsistent with the issuance of water right certificates that identify East Spring and Middle Spring as separate ‘sources’ of water from Little Herman Creek. There is no inconsistency in treatment. The sources of water listed on OWRD’s permits and certificates are based on the name of the reach of water where the point of diversion is located. The authorized

point of diversion for Certificate 24625 is located on a stream of water known as Little Herman Creek, so that is the 'source' listed in Certificate 24625. If the points of diversion on East and Middle Springs were authorized under Certificate 24625, they would be separately listed as 'sources' in Certificate 24625. This is the case for Certificate 56519, which lists the sources as 'Middle & East Oxbow Springs and Little Herman Creek.' (Ex. R15.) As the Proponents point out, this is also true of any number of other water right certificates issued in the state. These names help to identify the general location of the water use, and the stream systems that may be affected by the use. Obviously, some 'sources' with different names will be viewed as different sources for the purposes of a forfeiture inquiry. As described above, however, the determination of source in forfeiture is based on hydrology, not names."

Reasons for Modification: Subsection 1 is modified to address an issue raised by the Proponents in their briefing and exceptions but not addressed in the Proposed Order.

Subsection 2

Subsection 2 of the Opinion is replaced in its entirety as follows.

The Proponents bear the burden of proving nonuse of some part or all of Certificate 24625 for a period of five successive years. The Proponents point to two categories of evidence. First, the Proponents argue that water user reporting records provided by ODFW establish that ODFW was using less than the combined total of its water rights throughout the period of alleged nonuse. The Proposed Order considered these records and concluded that they were unreliable, and do not constitute proof of the quantity of water used by a preponderance of the evidence. Reversal of this finding would require OWRD to find that the water use reporting records constitute clear and convincing evidence of the quantity of water used at the Hatchery during the periods for which the records are available. Given the testimony pertaining to the methodology of development of these records, the records do not constitute clear and convincing evidence of the amount of water used during the period at issue.²

Second, the Proponents have established that throughout the period of alleged nonuse hatchery staff maintained the elevation of the stop-logs in the bypass structure at 104.21 feet, lower than the 105.7 foot elevation required for diversion of 18.82 cfs - the full quantity of ODFW's combined water rights. (Ex. R33; Ex. R35 at 2; Test. of Wright; Ex. A at 4.)

Proponents have therefore established by a preponderance of the evidence that ODFW did not use the full quantity of its combined water rights during the period of alleged nonuse. However, there is also substantial evidence in the record that ODFW used some quantity of water throughout the alleged period of nonuse, and there is insufficient evidence in the record to

² Proponents are of course correct that standard of proof to establish non-use at the hearing is proof by a preponderance of the evidence. As described previously, however, that is not the standard of review of an agency's review of an ALJ's findings of historical fact. ORS 183.650(3); OAR 137-003-0665(4). A finding of the historical quantity of water use is a finding of historical fact.

determine how much water was used. The most that Proponents have established is that ODFW used no more than whatever quantity of water could be delivered to the hatchery with the stop-logs set at 104.21 feet elevation, plus whatever quantity was diverted directly to the hatchery from the points of diversion at East Spring and Middle Spring. OWRD need not decide whether the nonuse established by the Proponents would be sufficient to permit cancellation of any part of Certificate 24625 because ODFW has met its burden of proving an exemption to forfeiture applicable throughout the period of alleged nonuse.

Reasons for Modification: The Proposed Order treats the evidence of the stop-log elevation as irrelevant with respect to nonuse, because the evidence also establishes that no bypass of water occurred during the period, meaning that water was not available in sufficient quantities to allow diversion of water in an amount greater than that allowed with the stop-logs set at 104.21 feet.

The unavailability of water for use is an affirmative defense to nonuse, not a factor to be considered in weighting whether nonuse has or has not occurred. In other words, a Proponent of forfeiture does not have the burden of proving the availability of water during the alleged period of nonuse in order to establish nonuse. OWRD concludes that there is clear and convincing evidence in the record that, for at least a portion of the period in question, ODFW did not use the full quantity of the combined amount of its two water rights.

Subsection 3:

Subsection 3 of the Opinion is replaced in its entirety as follows:

ODFW asserts that, notwithstanding any nonuse that may have occurred under Certificate 24625, no part of Certificate 24625 is subject to forfeiture because any nonuse during the alleged period is subject to the exemption from forfeiture provided by ORS 540.610(2)(j). Specifically, ODFW asserts that, during the period of alleged nonuse, ODFW beneficially used all the available flow of Little Herman Creek, and was ready, willing and able to beneficially use the full quantity of its combined water rights had additional water been available. ORS 540.610(2) provides, in relevant part:

(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.

ORS 540.610(2)(j) is an affirmative defense to forfeiture, meaning that ODFW carries the burden of establishing the elements of the exemption. ODFW has met this burden and established the exemption as described below.

There are two components to the exemption. First, the water user must establish that water was not available during period claimed to be covered by the defense. Second, the water user must establish that the user was ready, willing and able to use the water during that period if water had been available.

Availability

ODFW has established that it beneficially used all of the available water in Little Herman Creek throughout the period of nonuse. The entire quantity of water flowing in Little Herman Creek entered ODFW's diversion works, and water never overtopped the intake of the bypass structure (as set by stop-logs at 104.21 feet elevation), during the period of alleged nonuse.

The Proponents contend that there might have been more water available, and in fact sufficient water for ODFW to use the full quantity of its combined water rights, but for alleged losses due to ODFW's unlined reservoir and leaking bypass structure. The Proponents further argue that, because ODFW cannot establish the rate of loss from the reservoir or bypass structure, ODFW has failed to establish that water was not available during the alleged period of nonuse.

The Proponents' argument is unpersuasive because it goes to the use or nonuse of water, and not to the availability of water. The issue raised by the leakage from the stop-logs and the unlined reservoir is whether ODFW used all of the water that it exercised control over. The Proponents bear the burden of proof of establishing that ODFW did not, and they have failed to meet this burden. First, as the Proponents themselves point out, there is no evidence of a particular quantity of loss. Even if these losses constituted nonuse for the purpose of forfeiture, the quantity subject to forfeiture would not have been established. Second, in order for the losses to be considered nonuse of water, they must be significant enough to constitute the "waste" of water. The principle of the beneficial use of water, which underpins the prior appropriation doctrine, encompasses an allowance for reasonable losses in the diversion and transmission of water. Beck, *Water and Water Rights*, § 12.03(c)(2) (Vol 2, 1991). The Proponents have not established that the losses incurred through the unlined reservoir or the stop-logs are large enough to constitute waste (and therefore nonuse). The only pertinent evidence suggests the losses are insignificant. During the period at issue, ODFW replaced the stop-logs to reduce leakage when necessary as a result of rot or wear. Further, there is some evidence that losses through the unlined reservoir are minimal. (Test. of Wright, Hearing Recording at 1:59:00 – 2:00:34.)

Ready, Willing and Able

The second element of the ORS 540.610(2)(j) exemption that ODFW must prove is that ODFW was "ready, willing and able" to beneficially use the full amount of Certificate 24625 if sufficient water had been available. OWRD interprets the phrase "ready, willing and able" as follows. The term "ready" refers to whether the diversion and delivery facilities are prepared for immediate functioning. ORS 540.610(3); *See for e.g. Day v. Hill*, 241 Or 507, 509 (Court found water right had been forfeited because there was no way water user could have accessed the

water though it was available, because there was no ditch to the property to be irrigated). The term “willing” refers to the water user’s demonstrated intent to use water consistently within the terms of the water right. The term “able,” which is the corollary to “ready,” refers to whether the water user has the needed resources to accomplish the objective of the water right (i.e., the application of the water to beneficial use stated in the water right), including whether the water user had water diversion and use facilities sufficient for the purposes of the water right.

ODFW has established that it was ready, willing and able to use the combined amount of its water rights throughout the period of nonuse. ODFW’s diversion works were and are capable of immediate functioning. Although the stop-logs in the bypass structure remained set at 104.21 feet elevation throughout the alleged period of nonuse, as described above this was due to the lack of water available to necessitate a higher stop-log elevation. The bypass structure was designed to allow the stop-logs to be set at an elevation of at least 105.7 feet elevation. The only step required of ODFW for its diversion system to be able to take advantage of additional water was to place an additional stop-log or stop-logs in the bypass structure to raise the elevation of the bypass structure intake to 105.7 feet elevation. The system was designed to allow ODFW to take such action in response to a large rainstorm, for example. OWRD concludes that this constitutes a diversion system prepared for immediate functioning.

ODFW has also demonstrated its intent to use water within the terms of its water right throughout the period of alleged nonuse. Mr. Banks’ testimony and the “Details of Monthly Pondered Fish Reports” establish that ODFW beneficially used all available water from Little Herman Creek during the period of alleged nonuse, and that ODFW’s intent is to use up to the combined total of its water rights for the purposes stated in its water right certificates.

Finally, ODFW possessed the needed resources, in the form of a functional diversion system and hatchery, to make beneficial use of water under its water rights throughout the period of nonuse.³ As a result, ODFW has established by a preponderance of the evidence that it was “ready, willing and able to use the water had it been available.”

For the reasons set forth above, ODFW has established that the ORS 540.610(2)(j) exemption to forfeiture was applicable throughout the alleged period of nonuse. Accordingly, no portion of Certificate 24625 may be cancelled.

Reasons for modification: Subsection 3 is modified to respond to issues addressed by the Proponents in their exceptions and to provide greater detail pertaining to the elements and application of ORS 540.610(2)(j).

³ David Wright’s testimony establishes that the hatchery facility’s hydraulic capacity actually exceeds the quantity of use allowed under the combined water rights.

DATED this 30th day of May, 2014.



Dwight French, Administrator
Water Rights Services Division
Oregon Water Resources Department

NOTICE OF RIGHT TO FILE EXCEPTIONS

As provided in ORS 537.445, OAR 137-003-0650 and OAR 690-002-0175, any party to this proceeding or the Department may file exceptions to this proposed order with the Oregon Water Resources Director. The exceptions must be in writing and received at the Water Resources Department no later than 30 days after the date of service (the date served according to the certificate of service) of this proposed order. You should also send a copy of your exceptions to any other party or parties to the contested case hearing. Send any exceptions to:

Oregon Water Resources Department
Attn: Patricia McCarty
725 Summer Street N.E., Suite A
Salem, OR 97301

Exceptions are legal or factual arguments illustrating legal or factual error in the proposed order, as demonstrated by the record. Evidence not in the record may not be offered in exceptions. Exceptions must clearly and concisely identify the portion(s) of the proposed order excepted to, and cite to appropriate portions of the record or Commission policies to which modifications are sought in the exceptions.

If exceptions are filed, any party or the Department may respond to the exceptions. The Department must receive responses no later than 10 days after the date of service of the exceptions. After reviewing the record, the exceptions and any additional argument, the Commission will issue a final order. The Commission may issue a final order that differs from the proposed order or may adopt the proposed order as the final order.

If exceptions are not filed within the allowed period, the Commission will issue a final order.

CERTIFICATE OF SERVICE/MAILING

On May 30, 2014, I mailed the foregoing Oregon Water Resources Department Amended Proposed Order in OAH Reference No. WR-12-009.

BY FIRST CLASS MAIL:

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Patricia McCarty 
Agency Representative

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JUN 26 2014

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

SALEM, OR

IN THE MATTER OF THE PROPOSED)
PARTIAL CANCELLATION OF THE)
WATER RIGHT EVIDENCED BY)
CERTIFICATE 24625 FOR USE OF WATER)
FROM LITTLE HERMAN CREEK FOR)
OPERATION OF A SALMON HATCHERY,)
HOOD RIVER, OREGON)

PROPONENTS' EXCEPTIONS
TO AMENDED PROPOSED
ORDER

OREGON STATE FISH COMMISSION/)
OREGON DEPARTMENT OF FISH AND)
WILDLIFE,)
Protestant)

OAH Ref. No: WR-12-009
OWRD Case No: PC 04-12

JULIA B. DEGRAW for FOOD & WATER)
WATCH and ALEX P. BROWN for BARK)
Proponents)

PROPONENTS' EXCEPTIONS

Pursuant to OAR 690-002-0175, Proponents Brown and DeGraw file the following exceptions to the Oregon Water Resources Department Amended Proposed Order of May 30, 2014 (hereinafter "Amended Order"). Proponents hereby incorporate by reference the prior exceptions filed with the Department on January 8, 2014.

I. Exceptions to Findings of Fact

A. Finding of Fact Number 3.

This finding of fact states that West, Middle, and East Oxbow Springs, together with rainfall, make up the totality of Little Herman Creek. Evidence was not presented to support this

finding. During the site visit several other seeps were visible, and were described as being more or less active depending on the season. Proponents request that the finding be amended to state: "Together with runoff and other groundwater sources located above the reservoir, these waters make up the totality of Little Herman Creek."

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B. Finding of Fact Number 13.

This finding of fact states that the bypass structure is designed to allow Oregon Department of Fish and Wildlife ("ODFW") staff to set the elevation of the stop-logs at 105.7 feet elevation. The evidence in the record does not support this finding. No evidence was presented as to the top elevation of the stop-logs within the bypass intake. ODFW Ex. A at 4 (cited in the Amended Order findings) identifies the maximum water surface elevation as 105.0 feet.

SALEM, OR

C. Finding of Fact Number 14.

This finding states that the diversion system was designed to allow for the addition of stop-logs to the bypass structures if additional water became available (as a result, for example, of a large rainstorm). The evidence does not support this finding. ODFW Ex. A at 4 (cited in the findings) identifies the maximum water surface elevation as 105.0 feet. No other evidence was presented regarding the maximum elevation of the stop-logs in the bypass structure.

D. Factual Findings Contained within the Opinion.

The Amended Order does not contain a specific finding of fact as to the amount of water used by ODFW during the relevant period. The Amended Order concludes that Proponents have established that ODFW did not use the full quantity of its water rights during the period of alleged nonuse, but that there is insufficient evidence to determine how much water was used. Amended Order at 5-6.

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Proponents again note that the water use reporting forms included in the record are SALEM, OR required to be submitted under ORS 537.099(1), and are governed by the Department's rules for means and methods for measuring and reporting water use. OAR Chapter 690, Division 85. As acknowledged by ODFW in its responses to discovery requests, "[t]he amount of water used from Little Herman Creek by ODFW can be found in it's [*sic*] Water Usage Input Forms that were submitted to WRD as required by ORS 527.099 and OAR 690-085-0010." Ex. R14 at 5. Thus, even ODFW acknowledges that the water use reporting forms are evidence of the amount of water used at the hatchery.

Mr. Banks did not testify that these reports were inaccurate. The years in which the reports show consistent numbers, the years in which Mr. Banks stated he did not take actual measurements of water used, are consistent with the amounts reported for the years when actual measurements were taken. Mr. Banks testified that he first began recording water use for all 12 months of the year in 2005, and first began measuring water use in 2011. The 2011 and 2012 reports do not show water use in any month greater than the 8.0 cfs reported in previous years. From these reports, the only reasonable conclusion is that the highest amount of water used at the hatchery during the relevant period was 8.0 cfs.¹

The Amended Order applies a dangerous double standard to the evidence in the record. On the one hand, the Amended Order finds that the ODFW's own water use reporting forms, submitted as required by state law, together with testimony as to the absence of any changes to the installation of the intake and bypass structures during the period of nonuse, are not sufficient evidence to show the amount of water used. On the other hand, the Amended Order finds that

¹ To be clear, Proponents assert that the water use reporting forms are clear evidence of the amount of water used, not evidence of the amount of water available to use at the hatchery. As explained in Proponents' first exceptions, ODFW has not met its burden of proving that water was not available during the period of nonuse because it has failed to provide *any* evidence of the amount of water available during the relevant period.

the stop-logs in the bypass could be installed to reach 105.7 feet, on the basis of no evidence specifically stating that to be true, and in contradiction to evidence in the record showing the maximum water surface elevation in the reservoir at 105.0 feet. ODFW Ex. A at 4.

Proponents object to the application of the clear and convincing evidence standard to the Administrative Law Judge's ("ALJ") finding that the water use reporting forms are unreliable evidence of water use. The Amended Order suggests that the Department must apply a clear and convincing evidence standard to overturn an ALJ's finding of historical fact. A finding of historical fact is one that "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); OAR 137-003-0665(4). Here, the ALJ did not make a finding as to the historical quantity of water use. To the contrary, the ALJ found that the water use reporting forms were unreliable evidence of the amount of water used, and declined to make a finding as to the historical water use at the hatchery. Proposed Order at 9, FN.10. As a result, the Proponent's challenge does not involve a finding of historical fact where the ALJ declined to make a finding of historical fact and instead rejected evidence of that issue entirely.

Even if "clear and convincing" is the correct standard, the Amended Order errs in concluding that the evidence does not meet that standard. Clear and convincing evidence means, "evidence establishing that the truth of the facts asserted is highly probable." *In re Cohen*, 316 Or 657, 659, 853 P2d 286 (1993). Here, no evidence in the record undermines the documentation that the maximum amount of water used by the hatchery during the relevant period was 8.0 cfs. As a result, the evidence in the record demonstrates that the ALJ was wrong in determining that the water use reporting forms are unreliable evidence of water use. This

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meets the both the preponderance of the evidence and the clear and convincing evidence standard of ORS 183.650(3) and OAR 137-003-0665(4).

II. Exceptions to Conclusions of Law in Subsection 3: Ready, Willing, and Able.

In order to meet its burden of proof and persuasion on its affirmative defense, ODFW must show that it was “ready, willing and able” to use the full amount of the water right during the period of non-use. In this context, “ready, willing, and able” is confined to the actual operational needs of the facility, and the capacity of the facility *as installed*. See *Crandall v. Water Resources Dep’t*, 45 Or App 791, 795 (1980), *aff’d* 290 Or 771 (1981). See also Koehl, Krista, *Partial Forfeiture of Water Rights: Oregon Compromises Traditional Principles to Achieve Flexibility*, 28 *Env’t. L.* 1137, 1150 (1998) (“Thus, the phrase ready, willing, and able is closely tied to the facility function and capability.”).

The Amended Order interprets the phrase “ready, willing and able” to essentially mean, “whether the diversion and delivery facilities are prepared for immediate functioning.” Amended Order at 7. The Order concludes that the hatchery facility is “prepared for immediate functioning” because ODFW could have altered the elevation of the stop-logs to raise the elevation of the bypass intake to 105.7 feet. *Id.*

Mr. Wright testified that if the hatchery wanted to increase the water surface elevation in the reservoir above 104.21, ODFW would need to add stop logs to the bypass. Hearing at 2:04:00. As discussed above, ODFW failed to provide any evidence as to the maximum possible elevation of the stop logs or whether the stop logs could be increased to reach the required elevation of 105.7 feet in the reservoir. To the contrary, the evidence submitted by ODFW contains site plan showing the maximum water surface elevation in the reservoir at 105.0 feet. Ex. A at 4. In sum, ODFW failed to present evidence that would satisfy its burden of proving

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that the hatchery, as installed, was capable of diverting and putting to beneficial use the full amount of the water right, had water been available.

III. Cancellation

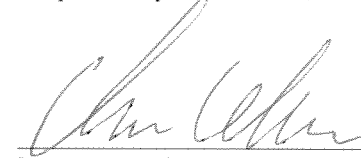
During the ten-year period of August 2000 to August 2010, ODFW failed to use more than 8.0 cfs of water from Little Herman Creek at its Oxbow Hatchery and was not otherwise ready, willing, and able to use the full amount of the water rights. Because the total of the water rights for this use is 18.82 cfs, the 8.0 cfs that was put to beneficial use during the relevant time period is attributed to the senior water right, not the subject of this cancellation proceeding, Certificate 56519. ODFW has forfeited the water right evidenced by Certificate 24625 by failing to use any of the 10.0 cfs authorized by the right.

IV. Conclusion

For the reasons stated, the Proponents oppose the Amended Proposed Order. They respectfully request that the Water Resources Commission amend the factual and legal conclusions as set forth above.

Dated this 25th day of June, 2014.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on June 25, 2014, I filed these Proponents' Exceptions by First Class U.S. Mail to the Oregon Water Resources Director at the address set forth below.

Oregon Water Resources Department
Attn: Patricia McCarty
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Salem, OR 97301

I further certify that I served a copy of the foregoing on all parties to this proceeding by E-Mail to the addresses set forth below, on June 25, 2014:

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Signed this 25th day of June, 2014,



Chris Winter

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JUN 26 2014

SALEM, OR

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BEFORE THE OREGON WATER RESOURCES COMMISSION

IN THE MATTER OF THE PROPOSED)
PARTIAL CANCELLATION OF THE WATER)
RIGHT EVIDENCED BY CERTIFICATE 24625)
FOR USE OF WATER FROM LITTLE)
HERMAN CREEK FOR OPERATION OF A)
SALMON HATCHERY, HOOD RIVER,)
OREGON)

**FINAL ORDER IN CONTESTED
CASE**

OAH Ref. No: WR-12-009
OWRD Case No: PC 04-12

OREGON STATE FISH COMMISSION/)
OREGON DEPARTMENT OF FISH AND)
WILDLIFE,)

Protestant)

JULIA B. DEGRAW AND ALEX P. BROWN,)
Proponents)

On June 18, 2012, Julia DeGraw and Alex Brown (Proponents) each filed an Affidavit Asserting Non-Use of Water Right (Affidavits of Non-Use) pertaining to Certificate 24625, which is held by the Oregon Department of Fish and Wildlife (ODFW or Protestant). The Affidavits of Non-Use allege non-use of at least a portion of Certificate 24625 from about August 2000 through August 27, 2010. On August 23, 2012 Oregon Water Resources Department (OWRD) issued a Notice of Proposed Partial Cancellation of Water Right Evidenced by Water Right Certificate 24625. The water rights are for operation of a salmon hatchery in Hood River County.

Following a hearing, The Administrative Law Judge (ALJ) issued a Proposed Order in this matter on December 10, 2013. The Proposed Order concludes that no part of the water right evidenced by Certificate 24265 has been forfeited due to non-use during the period in issue. Proponents timely filed exceptions to the Proposed Order. After consideration of the Proponents' exceptions, OWRD issued an Amended Proposed Order on May 30, 2014. Proponents timely filed exceptions to the Amended Proposed Order. The Amended Proposed Order adopts and incorporates certain parts of the Proposed Order and makes modifications to certain other parts, but does not alter the Proposed Order's conclusion that no part of Certificate 24625 has been forfeited due to non-use during the period in issue.

With one exception, described below, OWRD adopts and incorporates the entirety of the Amended Proposed Order, including the parts of the Proposed Order that are adopted and incorporated by the Amended Proposed Order. Both the Proposed Order and the Amended Proposed Order are attached.

MODIFICATIONS TO THE AMENDED PROPOSED ORDER PURSUANT TO ORS 183.650
AND OREGON ADMINISTRATIVE RULE (OAR) 137-003-0665

The second paragraph of the Amended Proposed Order's "Subsection 2" is modified as follows (deletions are shown in ~~strike~~through; additions are shown in underline):

The Proponents bear the burden of proving nonuse of some part or all of Certificate 24625 for a period of five successive years. The Proponents point to two categories of evidence. First, the Proponents argue that water user reporting records provided by ODFW establish that ODFW was using less than the combined total of its water rights throughout the period of alleged nonuse. The Proposed Order found that these records were not based on actual calculations and measurements, considered these records and concluded that they were unreliable, and do not constitute proof of the quantity of water used by a preponderance of the evidence. ORS 183.450(5) provides that no order may be issued except "as supported by, and in accordance with, reliable, probative and substantial evidence." If evidence submitted pertaining to a question of fact is not "reliable, probative and substantial," it may not serve as the basis for a finding of fact. The Proposed Order correctly determined that the records were unreliable, and may not serve as evidence in support of the amount of water used by ODFW during the period in issue.¹ ~~Reversal of this finding would require OWRD to find that the water use reporting records constitute clear and convincing evidence of the quantity of water used at the Hatchery during the periods for which the records are available. Given the testimony pertaining to the methodology of development of these records, the records do not constitute clear and convincing evidence of the amount of water used during the period at issue.~~²

² ~~Proponents are of course correct that standard of proof to establish non-use at the hearing is proof by a preponderance of the evidence. As described previously, however, that is not the standard of review of an agency's review of an ALJ's findings of historical fact. ORS 183.650(3); OAR 137-003-0665(4). A finding of the historical quantity of water use is a finding of historical fact.~~

Reasons for Modification: The Proposed Order's finding that the water use records were not based on actual calculations or measurements is a finding of historical fact, and subject to the clear and convincing standard. This finding pertains to whether an event did or did not occur in the past: calculations and measurements were not made or taken and did not serve as the basis for the numbers used in the water use records. However, the Proponents correctly point out in their exceptions that the ALJ did not make a finding as to the historical quantity of water use based on the water use records, and instead declined to do so because of the unreliability of the records. Modifying the ALJ's determination on this point would require only a reweighing of the water use records as evidence; however, there is no basis for doing so. The ALJ correctly concluded that water use records not founded in any method of measurement or calculation may

¹ PLACEHOLDER FOOTNOTE RE 2011 and 2012.

not serve as reliable or substantial evidence for the amount of water actually used during the period of the record.

ORDER²

The Oregon Water Resources Commission hereby issues the following order:

1. The Oregon Department of Fish and Wildlife has not failed to beneficially use water, under the water right at issue, at the Oxbow Hatchery for a period of five or more years during the period in issue.
2. No portion of the water right evidenced by Certificate 24625 has been forfeited due to non-use during the period in issue.

Dated this _____ day of August, 2014

John Jackson, Chair
Water Resources Commission

Appeal Rights: You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the date of service of this order. If this order was personally delivered to you, the date of service is the day you received the order. If this order was mailed to you, the date of service is the day it was mailed. Judicial review pursuant to the provisions of ORS 536.075 and ORS 183.482 is to the Oregon Court of Appeals. If you do not file a petition for judicial review within the 60 day time period, you will lose your right to appeal.

² As noted above, the Oregon Water Resources Commission adopts the ALJ's recommended order.

CERTIFICATE OF SERVICE/MAILING

On August ____, 2014, I mailed the foregoing Oregon Water Resources Commission Final Order in Contested Case in OAH Reference No. WR-12-009.

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