



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

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MEMORANDUM

TO: The Oregon Water Resources Commission

FROM: Thomas M. Byler, Director

SUBJECT: Agenda Item B, November 20, 2014
Water Resources Commission Meeting

Consideration of the Exceptions and Issuance of Final Order in the Matter of the Proposed Cancellation of the Water Right Certificate 3943

I. Issue Statement

The Commission is asked to consider exceptions and to issue the Final Order in the Proposed Cancellation of Water Right Certificate 3943.

II. Background

On May 13, 2013, Wolfgang Nebmaier and Vajra Ma (Proponents) each filed an Affidavit Asserting Non-Use of Certificate 3943. On August 23, 2013, the Oregon Water Resources Department (OWRD) issued a Notice of Proposed Cancellation of the Water Right evidenced by Water Right Certificate 3943. The Water Right Certificate is held by the current owners of the property to which the right is appurtenant, Andreas and Carole Blech.

The Certificate that is proposed to be canceled for non-use is for use of water from Grave Creek, a tributary of the Rogue River, for irrigation of 65 acres in the amount of .81 cfs.

On September 18, 2013 Andreas and Carole Blech filed a protest to OWRD's notice. On September 25, 2013 OWRD referred the matter to the Office of Administrative Hearings (OAH) for a contested case hearing.

A hearing was held on April 14 and 15, 2014 in Tualatin, Oregon. The issue for hearing was whether the water right evidenced by Water Right Certificate 3943 should be cancelled due to non-use. ORS 540.610; OAR 690-017-0400. OWRD and the Blechs appeared through their attorneys. Proponents Wolfgang Nebmaier and Vajra Ma, who were *pro se*, did not appear and were not present at the hearing. The record closed at the conclusion of the hearing on April 15, 2014.

Shortly thereafter, it became apparent that the first day of the proceedings was not recorded on the OAH's audio recording device. Consequently Administrative Law Judge (ALJ) Allen reconvened a hearing on May 1, 2014 to reconstruct and summarize the testimony supplied by witnesses at the hearing on April 14, 2014. At the reconvened hearing on May 1, 2014, no new testimony or evidence was admitted and no new rulings were made. The reconvened hearing served only to reconstruct material testimony that was not contained in the audio record. At the reconvened hearing the OWRD submitted a signed Stipulated Agreement reflecting the disposition of exhibits offered into the record on April 14, 2014. The ALJ agreed that the Stipulated Agreement accurately reflected the disposition of all exhibits entered into the record and signed the stipulation on May 5, 2014. The reconvened hearing was completed on May 5, 2014, and ALJ Allen took the matter under advisement.

III. Proposed Order

ALJ Allen issued a Proposed Order on June 11, 2014 (Attachment 1), concluding that no part of Certificate 3943 had been forfeited due to non-use and recommending that no portion of Certificate 3943 should be cancelled.

Proponents timely filed exceptions to the Proposed Order (Attachment 2). The Protestants filed a response to the exceptions (Attachment 3).

The exceptions to the Proposed Order concern the receipt into the record of the transcript of a deposition of a witness for the Protestants, the determination of the location of the hearing, the ruling on postponement of the hearing, communication between OWRD's attorney and Proponents, the Department's decision not to withdraw the case from the OAH, the admissibility of the evidence at hearing, the effect on Proponents of cancellation of a site visit, and the failure of the recording device at the hearing and a later status conference.

IV. Consideration of Exceptions and Issuance of a Final Order

Although the ALJ is authorized to issue the Proposed Order in a cancellation proceeding, the Commission must issue the final decision if exceptions to the Proposed Order are filed. ORS 540.641; OAR 690-017-0700. The Commission, after considering exceptions to the Proposed Order must enter an order canceling the water right, canceling in part or modifying the water right, or declaring the water right shall not be canceled or modified. ORS 540.641. The OWRD asks the Commission to consider the record, the Proposed Order, and exceptions and to issue a Final Order in Contested Case that provides a final resolution of this matter.

V. Alternatives

1. Issue a Final Order that is consistent with the Proposed Order and declares that no portion of the water right evidenced in Certificate 3943 has been forfeited due to non-use during the period in issue.
2. Issue a Final Order that cancels in whole or in part or modifies Certificate 3943.
3. Request the Administrative Law Judge to conduct further hearing as specified by the Commission.

VI. Recommendation

The Director recommends the Commission adopt Alternative 1.

Dwight French 503-986-0819
Patricia McCarty 503-986-0820
Renee Moulun (DOJ) 503-947-4520

Attachments:

1. Proposed Order
2. Exceptions to Proposed Order
3. Response to Exceptions

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

IN THE MATTER OF THE PROPOSED)	
PARTIAL CANCELLATION OF THE)	PROPOSED ORDER
WATER RIGHT EVIDENCED BY)	
CERTIFICATE 3943 FOR IRRIGATION OF)	
65 ACRES JOSEPHINE COUNTY, OREGON)	
)	
ANDREAS AND CAROLE BLECH,)	
<i>Protestants</i>)	
)	
WOLFGANG NEBMAIER AND VAJRA MA,)	OAH Ref. No: WR-13-004
<i>Proponents</i>)	OWRD Case No: PC 01-13
)	

PROCEDURAL HISTORY

On August 23, 2013, Oregon Water Resources Department (OWRD or Department) issued a Notice of Proposed Cancellation of Water Right Evidenced by Certificate Number 3943 (Notice) to Andreas and Carole Blech (Protestants). On or about September 18, 2013, Protestants, through counsel, filed a protest to Notice. On September 25, 2013, OWRD referred this matter to the Office of Administrative Hearings (OAH) for further proceedings. The OAH assigned Senior Administrative Law Judge (ALJ) Joe L. Allen to preside at hearing.

On October 24, 2013, the OAH issued a Notice of Hearing and Prehearing Conference. On November 4, 2013, a prehearing conference was held with Senior ALJ Allen presiding. The following parties appeared at the conference: Proponents Wolfgang Nebmaier and Vajra Ma appeared *pro se*, Juno Pandian, representing OWRD, and Elizabeth Howard, Attorney at Law, representing Protestants. At the prehearing conference, the ALJ established a schedule for filing prehearing motions as well as a date for a site visit prior to hearing. On or about January 15, 2014, Renee Moulun, Senior Assistant Attorney General (AAG), filed a Notice of Appearance of Counsel on behalf of OWRD.

On or about March 17, 2014, Proponent Vajra Ma filed a Motion for Postponement of Hearing. The ALJ denied that motion on or about March 26, 2014. On or about March 27, 2014, Proponent Vajra Ma filed a Petition for Reconsideration of Order Denying Postponement. The ALJ denied that petition on April 2, 2014. On or about April 1, 2014, Proponents submitted a letter indicating Proponents were “in no position to proceed.” On April 2, 2014, the ALJ requested clarification and elaboration of this statement. On April 4, 2014, Proponents filed a “Statement” indicating they were unwilling to proceed with the site visit or the evidentiary hearing as scheduled. Nonetheless, neither Proponent was willing to withdraw their affidavit of non-use.

An in-person hearing convened on April 14 through 15, 2014, in Tualatin, Oregon. Senior ALJ Allen presided over the hearing. Protestant Andreas Blech appeared with counsel Elizabeth Howard. Rene Moulon, Senior Assistant Attorney General, represented OWRD with Patricia McCarty appearing on behalf of the Department. Proponents Wolfgang Nebmaier and Vajra Ma failed to appear at the hearing. The following individuals testified at the hearing: Katherine Smith, Watermaster for District 14 testified on behalf of OWRD; Angelo Toglia, Research Engineer; Robert Robertson, Attorney at Law; Darrell Badger; Andreas Blech; and Bruce Sund, water use consultant, each testified on behalf of Protestants.¹ In addition, Protestants offered the video deposition of Jack Smith (Ex. B78), along with verbatim written transcript of that deposition (Ex. B77).² OWRD offered the affidavit of Meredith Carine, Geographic Information Systems (GIS) Analyst, in lieu of in-person testimony (Ex. A4). Proponents offered no exhibits or testimony. OWRD and Protestants offered oral closing arguments at the conclusion of the evidentiary hearing.³ The record closed at the conclusion of the hearing on April 15, 2014.⁴

ISSUE

Whether a portion of the water right evidenced by Water Right Certificated 3943 shall be cancelled due to non-use. ORS 540.610; OAR 690-017-0400.

EVIDENTIARY RULINGS

Exhibits A1 through A24, offered by OWRD, were admitted into the record without objection. Exhibits B1 through B10, B12 through 25, B27 through B30, B32 through B33, B35 through B37, B42 through B45, B61 through B78, and B80 through B86 were admitted into the record without objection. Protestants offered Exhibits B11, B26, B31, B34, B38, B39, B40, B41, B46 through B57, and B59 through B70 prior to hearing, but withdrew them at the in-person hearing. The ALJ sustained OWRD's objection to Exhibit B58 and excluded that exhibit as irrelevant. All other objections, made prior to or after the hearing, not specifically addressed in this order are hereby overruled. Due to the loss of hearing record for the April 15, 2014, proceedings, Protestants and OWRD filed a Stipulated Agreement memorializing the exhibits

¹ Protestants designated Mr. Toglia and Mr. Sund as experts in their respective fields. No party objected to this designation and the witnesses have been accepted as experts in this matter.

² On or about October 28, 2013, Protestants filed, with OWRD, an Emergency Petition for Deposition of Jack Smith based on the likelihood that Mr. Smith would be unable to testify at hearing due to advanced stage cancer. OWRD granted the petition on October 29, 2013. Mr. Smith passed away in January 2014 and Protestants offered the deposition based upon the witnesses unavailability. Proponents objected to the deposition and to its admission at hearing. Those objections are overruled in this order. Further, to the extent any objections made during the deposition are not expressly addressed in this order, such objections are hereby overruled.

³ Due to inadvertent failure of the recording software used to manage the digital hearing record, the audio recording for the second day of testimony was lost. As a result, that testimony was recreated through recollection of the ALJ, the parties, and witnesses appearing on that day. This recreation was recorded through live appearance of the witnesses on May 1, 2014. No new testimony was permitted at that time.

⁴ On May 14, 2014, Proponents filed a document entitled "Lots of Questions About What's Going on With This Case." However, the questions presented therein are more appropriately posed to operations staff rather than addressed in this order. As such, that document is not addressed beyond this footnote.

offered, admitted, withdrawn, and excluded, on May 1, 2014. The ALJ and the parties subject to appearing at the hearing signed the stipulation on that date.

STIPULATED FACT

The irrigation season relevant to the affidavits of non-use covers the period April 1, 2006 through October 31, 2010.

FINDINGS OF FACT

1. Andreas and Carole Blech are the owners of property located at Section 7, Tax Lot 1300, and Section 8, Tax Lot 400, Township 34 South, Range 5 West, Willamette Meridian (T34S R5W, W.M.) in Josephine County (subject property). As such, they are the holders of a certificated water right identified by Water Right Certificate 3943, issued by OWRD. This certificate bears a priority date of June 23, 1919. (Notice at 1; Ex. B1 at 1.)

2. Certificate 3943 permits diversion of up to 0.81 cubic feet per second (cfs) for beneficial use on 65 acres as follows: 15 acres in the Southeast quarter of Southeast quarter of Section Seven: 10 acres in the Northeast quarter of Southwest quarter; 25 acres in the Southeast quarter of Southwest quarter; 10 acres in the Southwest of Southwest quarter and 5 acres in the Northwest quarter of Southwest quarter of Section Eight, Township Thirty-four South, Range Five West of Willamette Meridian, in Josephine County, Oregon. Certificate 3943 lists the source of the water right as Grave Creek, a tributary of Rogue River. (*Id.*)

3. The place of use is identified by a hand-drawn polygon and map attached to Certificate 3943 covering approximately 65 acres (the pasture). (Ex. B1 at 2; test. of Smith and Blech.)

4. Protestants' predecessor to the subject property was Jack H. Smith. Mr. Smith purchased the property in January 2008. (Ex. B77 at 21). The subject property is zoned as woodland/resource property. Those resources include timber, subsurface minerals, and agricultural land. (*Id.* at 21 and 22.) Mr. Smith held the subject property until 2010, when he sold the property to Protestants. (Test. of Blech.)

5. During the period he owned the subject property, Mr. Smith irrigated the property using water from Grave Creek for cattle grazing purposes. (Test. of Blech and Badger; *see also*, Ex. B77.)

CONCLUSIONS OF LAW

No portion of the water right evidenced by Water Right Certificate 3943 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 Nebmaier and Ma assert Protestants have failed to make beneficial use of the water right granted under Certificate 3943 for a period exceeding five years. Consequently, Proponents assert the water right is forfeit and have sworn out affidavits seeking cancellation. As the proponents of this position, Nebmaier and Ma 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, Protestants Andreas and Carole Blech must satisfy the same evidentiary requirements as to any affirmative defenses asserted to rebut Proponents evidence.

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. Proponents' affidavits of non-use are sufficient to make a *prima facie* showing for the purposes of initiating the cancellation proceeding. Such affidavits are not, however, sufficient, in and of themselves, to establish non-use by a preponderance of the evidence. Accordingly, Proponents are responsible for meeting their burdens before Protestants 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 fact that the Proponents of the cancellation elected not to participate in the evidentiary hearing. In addition, Proponents failed to offer any exhibits to be considered at hearing.⁵ As such, the only evidence of non-use presented by Proponents is that included in the initial affidavits seeking cancellation of the water right. At the hearing, OWRD acknowledged that it had no independent evidence of water use on the subject property during the period in issue. As discussed above, to deem those affidavits sufficient to carry Proponents' burden would transform the standard of proof in this proceeding from preponderance of the evidence to a mere *prima facie* showing.

1. *Proponents failed to prove non-use for the statutory period.*

Proponents failed to demonstrate Protestants have not used the full extent of the water right from Grave Creek. Specifically, Proponents failed to participate in the hearing and

⁵ OWRD offered Proponents' affidavits of non-use to support the issuance of the Notice.

therefore did not support their allegations of non-use with admissible evidence demonstrating Protestants, or their predecessor, failed to utilize all or part of the water right for the statutory period. In support of the Notice, OWRD presented what little evidence was available to them through Proponents' affidavits. Nonetheless, such affidavits alone are insufficient to prove non-use for the statutory period.

Because 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, it is unnecessary to determine whether one or more affirmative defenses applied to Protestants' water use during the period in issue. While it is unnecessary to lay out the facts associated with Protestants' water use, a brief discussion Protestants' evidence is appropriate.⁶

2. *Protestants predecessor, Jack Smith, irrigated the subject property as permitted by the water right.*

At hearing, Protestants offered the deposition of Jack H. Smith, the prior owner of the subject property. Mr. Smith testified that he purchased the property in January 2008 and irrigated the property each year that he owned it. Mr. Smith also testified that, prior to acquiring the property, he inquired of the prior owner about water right at issue. Mr. Smith testified he was interested in the water right because he intended to use irrigate the property and wanted to make sure all water rights attached to the property were intact.⁷

Jack Smith testified he irrigated the subject property each year using various irrigation tools including over 3200 feet of irrigation piping with various sprinkler heads, a three-inch water cannon, and an unidentified quantity of lay-flat hose. Proponents demonstrated that, with the equipment identified, Mr. Smith could easily irrigate the subject property using the full extent of the water right. Mr. Smith's testimony, corroborated by that of Mr. Badger, indicates he irrigated the subject property using a rotation schedule, which ensured that he irrigated the full 65 acres over a period of three years. Further, the evidence at hearing established the purpose of the irrigation was the cultivation of grazing crops on the subject property.

Nothing in ORS 540.610 requires a water right holder use the full extent of a water right each year. Instead, the statute mandates that a water right be cancelled if the holder of the right fails to put all or a portion of the right to beneficial use for five successive years. Proponents failed to demonstrate any part of the water right at issue was not beneficially used for the statutory period. In contrast, the evidence established the owner of the subject property from 2008 until 2010 irrigated that property with water from Grave Creek for raising crops suitable for

⁶ At hearing, Protestants presented extensive evidence of irrigation practices, beneficial use of water associated with grazing crops, and the grazing of cattle during the relevant period. In addition, Protestants offered a significant amount of evidence, from expert and lay witnesses, to rebut Proponents' claims of the view afforded them from the vantage points identified. Such evidence, while not discussed in this order, is preserved in the record.

⁷ In addition to the beneficial agricultural use of water in the pasture, Mr. Smith testified he intended to conduct certain mining operations on the property as well as operate a youth camp. The evidence does not demonstrate either the mining operation or the proposed camp depended on the water right in issue. As such, neither is relevant to Mr. Smith's beneficial use of water from Grave Creek under Certificate 3493. Such uses are not addressed, in any detail, by this order.

cattle grazing. This alone is sufficient to establish the water right shall not be forfeit. Nonetheless, Protestants also presented evidence of their own irrigation practices.

3. *Protestant Andreas Blech irrigated the subject property as authorized by the water right.*

Protestant Andreas Blech testified he first visited the subject property in August 2010. The evidence demonstrates that, between August and October 2010, Protestant visited the property on three separate occasions to meet with Jack Smith and discuss specifics of the property use and irrigation practices. Protestant purchased the subject property in October 2010. Thereafter, he enlisted the assistance of Mr. Smith in irrigating the pasture and other areas of the property.

At hearing, Protestant testified that during his visits to the subject property prior to purchase he observed evidence of irrigation and cultivation of lands, which appeared to be used for grazing cattle. Protestant also testified he observed large stacks of irrigation piping on the property as well. In addition, he testified Smith showed him the points of diversion and three pumps used by Smith to irrigate the land. The evidence further demonstrates Protestants continued to cultivate crops for cattle grazing using the same seed product used by Smith in prior years.

While not relevant to the period in issue, Protestants' evidence of diversion from Grave Creek and beneficial use is important because it corroborates the testimony of Jack Smith and Darrell Badger related to beneficial use prior to Protestants' acquisition of the property. In addition, this evidence supports the claims, by Smith and Badger, that the subject property could be irrigated utilizing equipment in Smith's possession during the relevant period.

ORDER

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

1. Protestants Andreas and Carole Blech have not failed to beneficially use the water right at issue for a period of five or more years during the period in issue.
2. No portion of the water right evidenced by Certificates 3943 shall be cancelled 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:

Patricia McCarty
Oregon Water Resources Department
725 Summer Street NE 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 Director's 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 **June 11, 2014**, I mailed the foregoing **PROPOSED ORDER** in OAH Reference No. **WR-13-004**.

BY FIRST CLASS MAIL AND ELECTRONIC MAIL

Renee Moulun Sr AAG
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/s/ Rebecca Osborne
Rebecca Osborne, Administrative Specialist

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF THE PROPOSED)
PARTIAL CANCELLATION OF THE)
WATER RIGHT EVIDENCED BY)
CERTIFICATE 3943 FOR IRRIGATION OF)
65 ACRES JOSEPHINE COUNTY, OREGON)

WOLFGANG NEBMAIER AND VAJRA MA,)
Proponents)

ANDREAS AND CAROLE BLECH,)
Protestants)

**WOLFGANG NEBMAIER
AND VAJRA MA'S**

**EXCEPTIONS TO THE PROPOSED
ORDER
BY THE HONORABLE JOE ALLEN**

**IN THE CONTESTED CASE
OAH Ref. No: WR-13-004
OWRD Case No: PC 01-13**

1 Due to the "Procedural History" Proponents can only address the "Procedural
2 History" portrayed by the Administrative Law Judge, Joe Allen, which contains
3 generously applied omissions, and a few creative euphemisms. Here are the issues of
4 prejudicial double standard, and then some:

- 5 • Emergency Deposition of Jack Smith 1
- 6 • Venue of the Hearing 2
- 7 • Emergency of Another Kind, But Why? 2
- 8 • Ex-Parte Agency Intervention on Behalf of Protestants 3
- 9 • More Prejudicial Double Standard 4
- 10 • Prejudice Compounded 4
- 11 • Inadvertent Failure of the Recording Software 5
- 12 • A Party's Party Status Denied: Another Inadvertent Software Failure? 6
- 13 • Footnote Elevated 7

14 **Good Causes**

15 Several strategic omissions characterize this Proposed Order. Since this is no
16 longer about trying to get along constructively with a judge, the white elephants need no
17 longer be holy cows, if I may be permitted a mixed far eastern metaphor. What happened,
18 basically, is that the fact finder expressed his dislike for travel which, in this case, took
19 precedence over the usual policy of holding hearings at the location affected by the case.

20 This brings us to a number of crucial prejudicial "good cause" matters.

21 ***"Emergency Deposition of Jack Smith"***

22 The first was the "Emergency Deposition of Jack Smith". While the ALJ
23 properly claims that not he but the OWRD took the overnight decision to take an

1 attorney's word who was and still is no licensed medical practitioner *anywhere* to
2 constitute valid medical opinion and thus justify "good cause", he later on sanctioned the
3 decision by admitting that Emergency Deposition into the record. This makes it a matter
4 under he decided upon.

5 If the ALJ was ever witness to the full extent of the video or read the entire
6 transcript is doubtful, else he might have heard Protestants' counsel explain that it wasn't
7 really a deposition and that therefore deposition rules were not applicable. She wants it
8 her way all the way, even if it is both ways.

9 In keeping with this "Procedural History" that Emergency Deposition, along with
10 several other prejudicial issues is relegated to a footnote.

11 ***Venue of the Hearing***

12 The next "good cause" issue was the question of the venue. The fact that not only

- 13 1. the site at issue was here in Sunny Valley, but also that
 - 14 2. most of Proponents' witnesses were, as was communicated to the ALJ:
 - 15 a) elderly locals, many of whom were
 - 16 b) on fixed incomes and
 - 17 c) not really well enough to travel, and that
 - 18 3. Proponents, who themselves are on a minimal fixed income were not able to finance a
19 2-3 day "group excursion" to Salem, and that
 - 20 4. there was to be a site visit anyway (everyone was travelling to Sunny Valley anyway).
- 21 None of these facts constituted cause good enough for the fact finder to locate the hearing
22 anywhere but an 8 hour round trip from Sunny Valley.

23 ***Emergency of Another Kind, But Why?***

24 While Proponent Wolfgang Nebmaier hasn't passed away and his medical
25 situation was not certified by an attorney who was and still is no licensed medical
26 practitioner *anywhere*, he himself is.

27 By way of comparison: The emergency Deposition thing with the late Jack Henry
28 Smith was not only *not* questioned by OWRD's Brenda Bateman, there was not even a
29 chance for Proponents to raise the medical accuracy and qualification question.

30 On October 28, 2013, E.E.Howard implored the OWRD that "*Indeed, Mr. Smith*
31 *is expected to pass away within the week.*" (this would make it November 2nd) and then
32 increased her urgency by stating that "*Unfortunately, Mr. Smith is expected to pass away*

1 *in the very near term, perhaps as soon as the next day or two.*” Jack, as we know, lived
2 until mid-January and the emergency declared by the attorney who was and still is no
3 licensed medical practitioner *anywhere*, has been proven inaccurate. This was argued
4 away by her justification that her (Howard’s) own scheduling convenience was part of
5 the medical emergency. Good Cause?

6 When co-Proponent Vajra Ma files a motion for postponement of the hearing due
7 to her husband Wolfgang Nebmaier’s potentially life-threatening hypertonus and
8 hypoglycemic health crisis, there is ample time for Protestants and the previously silent
9 OWRD to clamor for certified corroboration of Wolfgang Nebmaier’s state of health. The
10 fact that he himself is a 20 year veteran licensed medical practitioner and published
11 medical author who could and did practice in other states, such as California but happens
12 not to be licensed in Oregon, is strictly rejected. No “good cause” says the judge.

13 Given no alternative but a stern denial, Proponent Vajra Ma files a statement
14 saying, among other things that she “*will not allow [her] husband to expose himself to*
15 *this degree of a health risk, until his physical and emotional/nervous state has stabilized.*
16 Not a single mention of any of this is found in the ALJ’s Procedural History. Instead, we
17 read that Proponents *were unwilling to proceed with the site visit or the evidentiary*
18 *hearing as scheduled*”, which makes us out to be quite unreasonable.
19 Obviously he interprets the adjective “procedural” as absolving him of providing
20 information about Content he has decided not to be sufficiently good cause. The reasons
21 for Proponents declining the site visit are omitted, among them, the waiver required by
22 Protestants Blech to allow Proponents to access the site. The conditions were
23 discriminatory and unreasonable. In addition, Proponents didn’t need to see what
24 irrigation hardware Protestants had laid out, partially (as per Mr. Taglia’s exhibit B20,
25 aka B82 or 12 of 21) in an area that actually was outside the irrigation area authorized by
26 the water right at issue.

27 ***Ex-Parte Agency Intervention on Behalf of Protestants***

28 In the context of Proponents’ efforts to have the hearing postponed for medical
29 reasons, the supposedly impartial OWRD counsel intervened on behalf of Protestants.
30 She made a surprise phone call to Vajra Ma offering to facilitate a settlement if
31 Proponents were willing to withdraw their Affidavits asserting non-use of the water right
32 at issue. Proponents have a record about this conversation.

33 While this highly questionable procedure may not in itself be prejudicial, it should
34 shed a light of caution on the way agency counsel eventually represents this case to the
35 Water Resources Commission. After all, she has been known to advise that “*If the*

1 *Commission chose not to defer, the Commission would need to review the record."*
2 [WRC meeting 11/21/08¹, "Graves[sic] Creek" case, agenda item O²] In other words, if
3 the WRC didn't agree to rubberstamp her case, they would need to actually do what the
4 law requires them to do: review the record.
5 *Noli turbare circulos meos.*

6 **More Prejudicial Double Standard**

7 The lack of an Oregon license is no issue when it comes to Protestants' expert
8 Angelo Toglia³. Proponents noted his lack of Oregon licensing and it didn't matter. The
9 degree of discretion an ALJ or judge has in admitting information provided by a
10 knowledgeable person or denying it is quite impressive, especially in view of the
11 unwritten and at times written rule of "*evidence [being] of such a nature that a*
12 *reasonable person would rely upon it in the prudent conduct of their business.*

13 **Prejudice Compounded**

14 These exceptions cannot cover all prejudicial exchanges and decisions in this
15 case, simply because we were not privy to them. The hearing audio, for example, was not
16 even forwarded to us until several days after the Proposed Order. This deprived us of
17 information we were entitled to as a party. In general, Proponents were not given equal
18 access to information.

19 Fully omitted from the "Procedural History" is the fact that the ALJ decided
20 somewhere to cancel the site visit. Following a strangely inverted logic, he apparently
21 decided that since Proponents were "*unwilling*" to meet their burden of proof, which was
22 and is not true, the burden of proof scale was to be even further tipped toward making
23 Protestants' description and witnesses and their "expert's" foggy, rainy day pictures as
24 being the only evidence.

25 These hearings are complex. There are proponents and protestants and there is a
26 fact finder and then there is the allegedly neutral agency. The fact finder's information is
27 to derive from general agency layout of the case circumstances, from evidence from both
28 sides and a site visit, and no one seemed to challenge that. Especially in matters involving
29 geographic circumstances, for an ALJ to see what one can see from where one claims to

¹ Minutes at http://apps.wrd.state.or.us/apps/misc/vault/vault.aspx?Type=WrdNotice¬ice_item_id=3221

² OWRD summary in "agenda item O at

http://apps.wrd.state.or.us/apps/misc/vault/vault.aspx?Type=WrdNotice¬ice_item_id=2452

http://apps.wrd.state.or.us/apps/misc/vault/vault.aspx?Type=WrdNotice¬ice_item_id=2453

http://apps.wrd.state.or.us/apps/misc/vault/vault.aspx?Type=WrdNotice¬ice_item_id=2454

http://apps.wrd.state.or.us/apps/misc/vault/vault.aspx?Type=WrdNotice¬ice_item_id=2455

³ licensed, to his credit, in the states of Alabama, Arizona, Mississippi, and Washington.

1 see something can never be replaced by images or video footage, especially those taken
2 on a rainy, foggy day. The camera is *not* the human eye. They perceive and interpret
3 stimulus quite differently, as we pointed out to the ALJ. Remember, *evidence of such a*
4 *nature that a reasonable person would rely upon it in the prudent conduct of their*
5 *business?*

6 In addition to denying Proponents' sound request for a postponement, the ALJ
7 further penalized them by additionally giving even more weight to the
8 Blech/Howard/Sund/Robertson collaboration by refusing to look at the actual site
9 circumstances. What's the good cause here? Of course, Protestants did not object to *not*
10 having the fact finder look at the on-the-ground facts.

11 ***Inadvertent Failure of the Recording Software***

12 Once an agency or a judge commits an error or any potentially questionable
13 action, the people responsible for such an action unfortunately possess the power and
14 discretion to make the error "go away". Writing up a "Procedural History" as in this case
15 is one example of how to accomplish that. Withdrawing a case from the OAH entirely as
16 in the case No. PC05-05, allegedly because Proponent⁴ Wolfgang Nebmaier (author of
17 these Exceptions) was deemed incapable of communicating in English and in need of a
18 translator, is another. It's just the nature of the blurred executive/judicial boundary
19 animal. A principle of mutual delegation and extrication from accountability. The agency
20 delegates to a fact finder, whose decision is under the jurisdiction of the agency. Does
21 this make him in reality part of the executive? His Proposed Order or Final Order is.
22 Quite unconstitutional, to be sure, but one of the components of the far eastern mixed
23 metaphor referred to above.

24 This principle controls and colors what happens when an ALJ makes a mistake.
25 Writing in the third persons and in passive voice abound. No person is ever responsible.
26 "Technical issue[s] present [themselves], software commits failures, and not only that, not
27 only has the inanimate software committed the error, it has to be assured that it – which
28 already is not an accountable entity - did not do it on purpose, hence the *inadvertent*
29 failure, as if there had ever been an intentional software error (unless you are in the
30 software testing business).. The phrase "inadvertent failure" thus betrays the
31 unwillingness of the person in charge of the "software" to admit an error. What really
32 happened was never disclosed, at least not to Proponents, at least not in time that we

⁴ then Protestant

1 could make an informed decision how to participate in the status conference which took
2 place without us due to another “technical issue [having] presented itself”.

3 ***A Party’s Party Status Denied: Another Inadvertent Software Failure?***

4 Errors happen, human and otherwise, but when they do they can be put on the
5 table and worked out. This did not happen here, which is especially true for how
6 Proponents were excluded from that status conference. The course of events entails any
7 number of emails sent out by the Office of Administrative Hearings which contained,
8 aside from a subject line, merely links to documents accessible only to subscribers of a
9 certain “cloud” or server system. This was April 16th, 2:47 pm. Proponents had and still
10 have no access to that system and inquired many times to the OAH to please provide the
11 documents in a format accessible by an average person. This string of inquiries on our
12 part continued *without response* the next day, April 17th, and through 21st and 22nd. We
13 actually made phone calls as well.

14 Not until May 1st, 2014, which turned out to be the date of the “reconvened in-
15 person hearing”, did we receive a sort-of explanation, indicating, by way of Judge Allen’s
16 quoted response, yet another inanimate entity being to blame. Maybe:

17 *“It may be that [...] the system may have sent a cancellation . . .”*

18 The net result was that we were precluded from participation in a status
19 conference to decide the consequence of the above “Inadvertent Failure of the Recording
20 Software”.

21 Below is the main body of our May 1, 2014 email to OAH:

22 For the record, below is the timeline of what happened directly before and after the
23 status conference of April 17, 2014.

24 I will forward the relevant emails to you after this email. They will not go to others on
25 this email list, but in the forwarded emails it will show that they already received them
26 at the time they were originally sent.

- 28 • April 16, 2:40 pm. Ms. Osborne sent an email stating time of the status
29 conference as 11 am.
- 30 • April 16, 2:46 pm. Ms. Osborne sent another email stating the time of the status
31 conference as 11 am. This one included call in number and code.
- 32 • April 16, 2:47 pm. Ms. Osborne sent an encrypted email with subject line;
33 "Canceled: Blech SR-13-004 Status Conference" Needless to say, this was
34 confusing.
- 35 • April 16, 5:20 pm Vajra Ma responded Ms. Osborne's "Canceled" email stating
36 that "As before, we cannot open this" and requested the pertinent info be sent by
37 regular email. [Ms. Osborne knew from a previous email sent from Vajra Ma that
38 she and Wolfgang Nebmaier cannot open the encrypted messages. In that

1 previous instance she responded to this previous email by giving us direct info,
2 outside an encrypted message.]

- 3 • April 17, 9:49 am. Vajra Ma sent an email to Ms Osborne: " We are unsure what
4 is happening. Is the status conference cancelled? We cannot open the 'secure
5 message' and yesterday requested you send it by regular email test. Please
6 confirm what is happening." There was no response.
- 7 • April 18, Vajra Ma phoned Ms. Osborne. Ms. Call took the call and said she
8 would look into it, after which we spoke again on the phone and Ms. Call
9 informed Vajra Ma that the status conference had been held on April 17.
- 10 • April 21, 11:48 am Vajra Ma emailed Ms. Osborne: "We are still waiting for a
11 clarification about the post-hearing event of last week. This is our third email
12 requesting clarification with what seemed to be a cancellation of the status
13 conference." There was no response.

14 As of today, we have not even received any record of the hearing to the extent it did
15 take place, except for the "recollection" summary. We have no timeline for closing
16 arguments. We have not had an opportunity to submit any pleading in relation to
17 whatever took place at or since the hearing.

19 Footnote Elevated

20 On page 2 of the Proposed Order, we find the following footnote:

⁴ On May 14, 2014, Proponents filed a document entitled "Lots of Questions About
What's Going on With This Case." However, the questions presented therein are more
appropriately posed to operations staff rather than addressed in this order. As such, that
document is not addressed beyond this footnote.

21 After weeks of Proponents' inquiries, emails and phone calls being ignored,
22 the letter insultingly footnoted this way raised the following questions:

- 23 • Are Proponents party to his matter?
- 24 • Are Proponents entitled to a record of the hearing? CD would suffice.
- 25 • Are Proponents entitled to a timetable/calendar for closing arguments and
26 subsequent events provided for by law?
- 27 • Will Proponents be supplied with the required data and information in a timely
28 manner to not prejudice them in protecting their interest and exercising their rights
29 as party in this case?

30 Not only does the Honorable Joe Allen try to avoid the responsibility for his operations
31 staff, he also neglects to admit that these questions essentially address his decisions. As of May
32 14, 2014, Proponents still had no idea how any of the procedural(!) decisions had come out. A
33 question like "Are Proponents party to his matter?" falls into the judge's ballpark. It addresses
34 his and not his staff's decisions to keep Proponents out of the loop. The next two questions also

1 address his, the judge’s, not his staff’s decision, to wrap up the hearing without giving
2 Proponents even as much as an insight about what had transpired at the hearing. The final
3 question is also addressing ALJ Allen, and not operations staff. .

4 The two communications that didn’t even make it into a footnote were Proponents’
5 “Request for Clarification on the April 16 and April 17 2014 POST-HEARING EVENTS”. and
6 their June 5th, motion to DISCLOSE RECORD and STATUS. Apparently, by deeming them
7 not part of the “Procedural History”, the ALJ feels justified in excluding them from his
8 Proposed Order.

9 The June 5th 2014 email and hardcopy contained the following request and motion:

After having received no responses whatsoever to our previous inquiries,
questions, and requests, Proponents Vajra Ma and Wolfgang Nebmaier hereby move for
the hearing entities, OAH, ALJ, OWRD to

DISCLOSE RECORD and STATUS

Previous Communication is attached.

Proponents are party to his matter and are entitled to equal access to filings,
dispositions, orders, and whatever other information and communication generated and
exchanged. This includes the audio of the hearings and hearing orders including the
timetable for closing arguments and other procedural matters, and further dispositions.

10
11 These omissions can not be blamed on a “technical issue [that] presented itself”
12 nor on an “inadvertent software failure” nor on anything “*the system may have sent*” or
13 done.

14 **Summary**

15 The bulk of the issues raised above in our exceptions – as they were previously in oral
16 and written communication, motions, questions, letters, and emails, concerns a
17 prejudicial double standard, prejudicial errors and failures in the responsibility of the ALJ
18 blamed on inanimate objects like software and systems and technical issues.

- 19 • The Emergency Deposition of Jack Smith was approved and admitted despite having
20 been based on incompetent and inaccurate claims by Ms. Howard and absolutely no
21 medical evidence whatsoever.

- 1 • Extensively demonstrated good cause for holding the hearing near the site location (as
2 is usual) was deemed insufficient – while not countered with much of anything of
3 good cause on the part of the ALJ. This decision prejudiced Proponents and their local
4 witnesses.
- 5 • Further demonstrated good cause for postponing the hearing due to Proponent
6 Wolfgang Nebmaier’s health situation was deemed insufficient despite his own
7 extensive medical qualifications. This represents a prejudicial and absolutely
8 unfounded double standard, especially in view of Ms. Howard’s incompetent and
9 inaccurate medical statements taken at face value and later sanctioned by the ALJ.
10 Agency counsel this time openly sided with Protestants.
- 11 • Agency counsel also intervened ex parte on behalf of Protestants by trying to leverage
12 the requested postponement due to Mr. Nebmaier’s state of health into an
13 incriminating *Settlement* with Protestants.
- 14 • More prejudicial double standard was exercised by ALJ approving yet another
15 unlicensed “expert”, Mr. Taglia. N.B., all this in contrast to Mr. Nebmaier’s senior
16 qualifications being dismissed.

17 The list of prejudicial and discriminatory (and either incompetent or negligent) actions
18 goes on and on as detailed above.

19 ***The Proposed Order should be dismissed and the case remanded.***

20 Realistically, however, Proponents are not sure if they should expect the Water
21 Resources Commission to get to read these exceptions and to partake of the actual record
22 of the case. Instead, and sadly, it is more likely that the impartial agency representatives
23 present the Commission with a staff report and a recommendation and underline that
24 recommendation with advise like "*If the Commission chose not to defer [to the staff
25 report and recommendation], the Commission would need to review the record.*"

26 Be that as it may, the record needs to show how prejudicially the case was
27 managed.

28
29 Respectfully

30
31
32 Wolfgang Nebmaier

Vajra Ma

I HEREBY CERTIFY THAT THE AFOREGOING WOLFGANG NEBMAIER AND VAJRA MA'S EXCEPTIONS TO THE PROPOSED ORDER BY ALJ J. ALLEN IN THE CONTESTED CASE OAH REF. NO: WR-13-004, DATED JULY 11, 2014

were served, by email and US Postal Service (USPS) on

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

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Oregon Water Resources Dept
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Vajra Ma

1
2

1
2
3 BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
4 STATE OF OREGON
5 FOR THE
6 OREGON WATER RESOURCES DEPARTMENT

7 IN THE MATTER OF THE PROPOSED
8 CANCELLATION OF THE WATER
9 RIGHT EVIDENCED BY CERTIFICATE
10 3943 FOR USE OF WATER FROM GRAVE
11 CREEK FOR IRRIGATION OF 65 ACRES,
12 JOSEPHINE COUNTY, OREGON

OAH Reference No. WR-13-004

OWRD Case No. PC 01-13

RESPONSE TO PROPONENTS WOLFGANG
NEBMAIER AND VAJRA MA'S
EXCEPTIONS TO PROPOSED ORDER

11 WOLFGANG NEBMAIER and VAJRA MA,

12 Proponents,

13 vs.

14 ANDREAS and CAROLE BLECH,

15 Protestants.

16 Protestants Andreas and Carole Blech ("Protestants") hereby respond to Proponent
17 Wolfgang Nebmaier and Vajra Ma's ("Proponents") Exceptions to the Proposed Order.

18 **I. Introduction.**

19 The Director of the Oregon Water Resources Department ("OWRD") should adopt the
20 Proposed Order as the Final Order in this case. Proponents filed Exceptions addressing the
21 process that led to the Proposed Order. However, Proponents did not file their Exceptions on
22 time. The Director should adopt the Proposed Order with no review of Proponents' untimely
23 Exceptions. Should the Director consider the Exceptions, he will find the record in this case
24 demonstrates that Proponents were provided a full and equal opportunity to participate in the
25 hearing and process leading thereto, but chose not to do so. Finally, the Director will find that
26 Proponents' Exceptions fail to assign error to the substantive findings of fact and conclusions of

1 law in the Proposed Order. In other words, Proponents take exception to the process, but not the
2 determination that the water right evidenced by Certificate 3943 is not forfeit. Proponents'
3 claimed procedural irregularities do not warrant a remand of a Proposed Order, the substance of
4 which the Proponents do not object. The Director should adopt the Proposed Order.

5 **II. Standard of Review.**

6 **A. Standard for Reviewing Exceptions.**

7 Adversely affected parties may file exceptions to a Proposed Order. OAR 137-003-0650;
8 OAR 690-002-0175. Exceptions are written objections to the proposed findings and
9 recommendations and should not include new or additional evidence. *Id.*; *see also* Oregon
10 Attorney General's Administrative Law Manual (January 2012) at 157. In this case, the
11 Proposed Order appeal provision provided:

12 Exceptions are legal or factual arguments illustrating legal or factual error in the
13 proposed order, as demonstrated by the record. Evidence not in the record may
14 not be offered in exceptions. Exceptions must clearly and concisely identify the
15 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.

16 Proposed Order at 7.

17 **B. Standard for Issuing Final Order.**

18 The Director issues the final order in this proceeding. OAR 690-002-0175. The
19 standards that apply to the final order are straightforward: First, the final order must correctly
20 interpret and apply the law. ORS 183.482(8); *see also Moon v. Government Standards and*
21 *Practices Comm.*, 198 Or. App. 244, 246, 246 n. 1 (2005).

22 Second, the final order must set out findings of fact that support its conclusions. ORS
23 183.650; OAR 137-003-0655(1, 2). In making a finding of fact, the Director will apply a
24 preponderance of the evidence standard. *Cook v. Michael*, 214 Or. 513, 526 (1958); Oregon
25 Attorney General's Administrative Law Manual (January 2012) at 142-43. However, the
26 Director may not modify a finding of "historical fact" by the Administrative Law Judge ("ALJ")

1 unless the Director determines that there is clear and convincing evidence in the record that the
2 finding was wrong. ORS 183.650(3); OAR 137-003-0665(4). A finding of historical fact is a
3 finding that an event did or did not occur in the past or that a circumstance or status did or did
4 not exist either before the hearing or at the time of the hearing. *Id.* The findings in the Proposed
5 Order related to irrigation with Certificate 3943 are historical facts.

6 Finally, the final order must provide a reasoned application of the law to the findings of
7 fact. *See Drew v. Psychiatric Sec. Review Bd.*, 322 Or. 491, 500 (1996) (finding that an agency
8 must “demonstrate in their opinions the reasoning that leads the agency from the facts that it has
9 found to the conclusions that it draws from those facts.”). If the Director modifies the proposed
10 order issued by the administrative law judge in any substantial manner, the Director must
11 identify the modification and explain to the parties why the modification was made. OAR 137-
12 003-0665(3). For purposes of this provision, the Director modifies a proposed order in a
13 "substantial manner" when the effect of the modification is to change the outcome or the basis
14 for the order or to change a finding of fact. *Id.*

15 In this case, the Proposed Order should be adopted as the Final Order without change.

16 **III. Because Protestants’ Exceptions Were Untimely, The Director Should Issue a**
17 **Final Order that Adopts the Proposed Order.**

18 Protestants’ Exceptions were not timely filed at OWRD or timely served on the
19 Protestants.

20 Exceptions to the Proposed Order were to be “received at the Water Resources
21 Department no later than 30 days after the date of service . . .”. Proposed Order at 7. The
22 Proposed Order does not provide for “receipt” by email. *Id.* Further, the rules governing
23 contested case proceedings provide that service must be effectuated by mail or fax, unless the
24 agency or the ALJ provides otherwise. OAR 137-003-0520(4). In this case, neither the ALJ nor
25 the OWRD has provided for email service or filing.

26 The Proposed Order was served on June 11, 2014. Proposed Order at 8. Any exceptions

1 were therefore to be received by the OWRD on or before July 11, 2014. Proponents emailed
2 their Exceptions to the OWRD on July 11, 2014,¹ certifying that they had also mailed the
3 Exceptions the same day. The Exceptions were not therefore received by OWRD via an
4 accepted method by the filing date.

5 Further, Proponents did not serve Protestants with a copy of their Exceptions by an
6 accepted method until July 12, 2014, a day after service was required. See Exhibit C to
7 Declaration of Elizabeth E. Howard (“Howard Dec.”). Service of the Exceptions had to be
8 accomplished by mail or fax. OAR 137-003-0520(4). Protestants received an email from
9 Proponents on July 11, 2014, complete with a certificate of service that represented that
10 Proponents had mailed the Exceptions on July 11, 2014. However, Proponents did not actually
11 mail the Exceptions to Protestants until July 12, 2014. Thus, Proponents’ service on Protestants
12 was also untimely.

13 Proponents’ filing and service was not effective to meet the requirements of the Proposed
14 Order or applicable regulations. The Director should decline to review Proponents’ Exceptions
15 and should issue a final order adopting the Proposed Order unchanged and without delay. See
16 Proposed Order at 7 (“If exceptions are not filed within the allowed period, the Director will
17 issue a final order.”)

18 **IV. If the Director Considers Protestants’ Objections, Protestants Have Not**
19 **Demonstrated Any Error by the ALJ.**

20 **A. Proponents’ Exceptions Address Only Perceived Procedural Issues**
21 **and Do Not Address the Substance of the ALJ’s Proposed Order.**

22 Pursuant to the applicable rules and the Proposed Order, exceptions may be submitted to
23 raise “legal or factual arguments illustrating legal or factual error in the proposed order, as

24 ¹ Protestants first received Proponents’ Exceptions via an email directed to the ALJ at 3:19 p.m.
25 on July 11, 2014. Declaration of Elizabeth E. Howard (“Howard Decl.”), Exhibit A. The other
26 recipients of this email are not visible. This email was re-sent at 6:17 p.m. on July 11, 2014 to
the ALJ, the Attorney General, Patricia McCarty at the OWRD, and Protestants’ counsel. *Id.*,
Exhibit B.

1 demonstrated by the record.” *See* Proposed Order at 7; *see also* Oregon Attorney General’s
2 Administrative Law Manual (January 2012) at 157. Proponents’ Exceptions do not assign error
3 to the findings of fact or conclusions of law in the Proposed Order. Proponents do not object to
4 the determination that they did not demonstrate forfeiture or to the determination that Certificate
5 3943 was not forfeit. *See* Proposed Order at 5-6 (making these findings). Though Proponents’
6 allege procedural errors, these claims do not justify a remand where there is no claim that the
7 Proposed Order erred in its findings and conclusion of law in the first instance. The Director
8 should adopt the Proposed Order as issued.

9 **B. The ALJ Ensured that Proponents Had a Full and Equal Opportunity**
10 **to Participate in the Hearing.**

11 Proponents had a full and fair opportunity to participate in the contested case proceeding.
12 Assuming *arguendo* that Proponents had raised a substantive exception to the Proposed Order
13 and that a procedural error occurred, Proponents’ were not prejudiced. Neither a remand nor a
14 modification of the Proposed Order is necessary.

15 **1. Testimony of Jack Smith by Deposition (“Emergency**
16 **Deposition of Jack Smith”).**

17 As the former owner of land served by Certificate 3943 during the period of alleged non-
18 use, Jack Smith was a key witness in this case. Motion to Allow Jack Smith (Deceased) to
19 Testify Via Deposition Testimony in Lieu of In-Person or Telephonic Testimony. His deposition
20 was taken October 31, 2013 due to his fight with terminal cancer and his fading physical
21 condition. *Id.*

22 Proponents argue that since Mr. Smith was not declared terminally ill by a medical doctor
23 and did not pass away as quickly as expected, that it was improper to take his deposition last fall.
24 Exceptions at 1-2. Proponents do not argue that they were prejudiced by the admission of Mr.
25 Smith’s testimony, and do not dispute that Mr. Smith was terminally ill and eventually passed
26 away in January 2014. *Id.*

1 Depositions are allowed in contested case proceedings with the leave of the agency,
2 which was obtained in this case. OAR 137-003-0572. Jack Smith was deposed by Protestants
3 and Proponents on October 31, 2013. *See* Motion to Allow Jack Smith (Deceased) to Testify Via
4 Deposition Testimony in Lieu of In-Person or Telephonic Testimony. Proponents had advanced
5 notice of and attended the deposition. *Id.* Proponents also had a full opportunity to cross-
6 examine Mr. Smith, and in addition to doing so, noted objections to Protestants' questioning and
7 to Mr. Smith's deposition testimony in the record. *Id.*

8 On April 1, 2014, in accordance with the November 7, 2013 Prehearing Order,
9 Protestants sought leave to offer Jack Smith's deposition as testimony in lieu of in-person or
10 telephonic testimony due to the fact that Mr. Smith has passed away and was a key witness for
11 the Protestants' case. *See* Nov. 7, 2013 Prehearing Order; *see also* Motion to Allow Jack Smith
12 (Deceased) to Testify Via Deposition Testimony in Lieu of In-Person or Telephonic Testimony.
13 Objections to that request were due by April 7, 2014. Nov. 7, 2013 Prehearing Order. No
14 objections were filed with the ALJ.

15 Prior to the in-person hearing, Protestants filed written responses to the objections
16 Proponents raised in Mr. Smith's deposition. Request for Ruling on Objections to Jack Smith's
17 Testimony at the Contested Case Hearing. Proponents filed no response. The objections were
18 resolved on the first day of the hearing. April 14, 2014 Hearing Record.

19 Proponents were not prejudiced by the circumstances surrounding the deposition of Jack
20 Smith, or its later admission as testimony in the proceedings. The parties were aware that the
21 purpose of the deposition was to preserve Mr. Smith's testimony for use at the contested case
22 hearing. *See* Emergency Petition for Deposition of Jack Smith. Proponents appeared, cross-
23 examined Mr. Smith, and made objections on the record. They had a full and fair opportunity to
24 participate and did participate in the creation of what later became Mr. Smith's testimony.

25 Proponents also had an opportunity to object to the admission of Mr. Smith's testimony,
26 but did not do so. Proponents then failed to provide a written filing responding to Protestants'

1 written filing on the deposition or to appear at the hearing. Proponents thus chose to forgo at
2 least three opportunities to object to the admission of Mr. Smith's testimony in this matter.
3 Proponents have waived any claims they may have had with regards to the admission of Mr.
4 Smith's testimony at the hearing.

5 Proponents separately raise concerns with the agency's decision to grant an expedited
6 deposition of Mr. Smith without a doctor's verification that he was terminally ill. Mr. Smith's
7 illness was confirmed by him at his deposition, and is evidenced by the fact that Mr. Smith
8 passed away less than three months after his deposition took place. Further, Mr. Robertson
9 testified at the hearing that while Mr. Smith remained mentally sharp during the progression of
10 his illness, his physical health declined continuously until the time he passed away. *See* Hearing
11 Record April 14, 2014. The agency properly exercised its discretion under the circumstance to
12 allow an emergency deposition that preserved Mr. Smith's testimony before he was physically
13 unable to provide it.

14 The decision to allow the deposition of and to admit the deposition testimony of Mr.
15 Smith did not prejudice Proponents, who attended and participated in the deposition then forwent
16 at least three opportunities to object to the admission of Mr. Smith's critical testimony at the
17 hearing. The testimony should remain part of the record.

18 2. Hearing Location ("Venue of the Hearing").

19 The hearing for this matter took place in Tualatin, Oregon on April 14 and 15, 2014.
20 Proponents take issue with the ALJ's decision to hold the hearing at a location that was not near
21 Sunny Valley, Oregon and the place of use for Certificate 3943. Exceptions at 2. Proponents'
22 issues with the venue were thoroughly addressed and put to rest in the underlying proceeding.
23 The ALJ is vested with discretion on the venue of the hearing and his determination to proceed
24 with the hearing Tualatin was reasonable under the circumstances in this case. The selected
25 venue was not prejudicial to Proponents.

26 The parties and ALJ Allen specifically discussed the venue for the in-person hearing

1 during the November 4, 2013 prehearing conference. Andreas and Carole Blech's Response to
2 Petition to Reconsider Venue ("Venue Response") at 2. Though they initially agreed to the
3 Tualatin venue, Proponents later raised concerns with the venue for the hearing. *See* Letter from
4 Proponents to ALJ Allen dated November 7, 2013; Proponents' Request for Disclosure and
5 Petition for Reconsideration.

6 As Protestants explained at the time, the Office of Administrative Hearings ("OAH")
7 only has two locations where the hearing can occur. Venue Response at 2. One is located in
8 Salem, the other is in Tualatin. *Id.* ALJ Allen had determined, after hearing from the parties, at
9 the November 4, 2013 prehearing conference that the Tualatin location would provide the
10 necessary space for the proceedings and was the only location that offered security. *Id.* It also
11 offered better parking for hearing participants than the Salem OAH facility. *Id.* Holding the
12 hearing at a location other than one of the OAH locations would not have been appropriate in
13 terms of creating a clean record and accommodating all the parties and their witnesses and
14 materials in the hearing room. *Id.* Given that the hearing needed to be held at an OAH facility,
15 it was reasonable for the ALJ to choose an OAH location that provided security and sufficient
16 space to accommodate the multiple participants in the case.²

17 Additionally, to the extent that the distance was a concern for any of Proponents'
18 witnesses, the Prehearing Order provided a specific route for the parties to seek to have witnesses
19 appear by telephone. *See* Prehearing Order. Proponents did not make a request to have their
20 witnesses appear by phone.

21 Proponents argue that since the parties and ALJ were willing to travel to the site for a site
22 visit, they should have been willing to travel again for the hearing. A hearing presents logistical
23 concerns that are not present at a site visit, including the need for proper technology, sufficient
24

25 ² The ALJ noted that security was a concern for these proceedings at the November 7,
26 2013 prehearing conference.

1 space for all the parties, witnesses, and materials to conduct the hearing, and sufficient security
2 to ensure the proceedings run smoothly. Comparison of the hearing to the site visit is a *non*
3 *sequitur*.

4 The ALJ reasonably found that the hearing should be held at the Tualatin OAH facility,
5 and made reasonable accommodations for witnesses who were unable to travel to the hearing in
6 person. Proponents were not prejudiced by the hearing location.

7 **3. Denial of Motion to Postpone Hearing (“Emergency of**
8 **Another Kind, But Why?”).**

9 The ALJ was reasonable in deciding not to set over the hearing absent an opinion from a
10 licensed medical doctor that Mr. Nebmaier could not participate and absent good cause for Ms.
11 Ma to attend the hearing.

12 On March 17, 2014, less than a month before the date set for hearing, Proponents moved
13 to postpone or withdraw the hearing due to Mr. Nebmaier’s *pre-existing* high blood pressure and
14 apparent hypoglycemia. Proponent Vajra Ma’s Motion for Postponement/Petition for
15 Withdrawal. Whether to grant such a motion falls squarely within the ALJ’s discretion.

16 Ms. Ma, the sole movant on the postponement motion, failed to demonstrate “good
17 cause” pursuant to OAR 137-003-0501 to postpone the hearing. Proponents did not provide a
18 medical opinion from a licensed Oregon doctor that Mr. Nebmaier was unable to attend or
19 participate in the proceedings. Further, Ms. Ma was able to proceed with the hearing as a co-
20 proponent and the parties had expended significant resources to prepare for hearing. *See*
21 Department’s Response to Proponent’s Motion to Postpone Proceedings; Protestants’ Opposition
22 to Proponent Vajra Ma’s Motion for Postponement/Petition for Withdrawal.³

23 Accordingly, on March 26, 2014, the ALJ issued an order denying Ms. Ma’s
24

25 _____
26 ³ Ms. Ma also sought a withdrawal. The OWRD, not the ALJ, determines whether or not
to withdraw a case pursuant to OAR 137-003-0515(4)(c).

1 postponement. *See* Prehearing Order (March 26, 2014). The ALJ found that Ms. Ma did not
2 offer any medical evidence in support of her claims regarding Mr. Nebmaier’s health, and failed
3 to establish that she and Mr. Nebmaier could not retain counsel to assist them. *Id.* The ALJ
4 further found that under OAR 137-003-0515(4)(c), the OWRD was the only entity with authority
5 to withdraw the case and that it had not made a determination to withdraw the case. *Id.*

6 On March 27, 2014, Ms. Ma sought reconsideration of the ALJ’s ruling. *See* Proponent
7 Vajra Ma’s Petition for Reconsideration of Order Denying Postponement. In support of her
8 motion, Ms. Ma offered a declaration in support of her husband’s medical claims and stating that
9 Proponents could not afford an attorney. *Id.* The ALJ denied the petition for reconsideration,
10 finding that there was no legal authority for reconsideration of any order other than a final order.
11 *See* Attachment 1 (attached for the Director’s convenience); *see also* April 14, 2014 Hearing
12 Record.

13 On April 3, 2014, Proponents filed a statement that they would not withdraw their
14 affidavits, but would be unable to participate in the hearing. Mr. Nebmaier alleged he was
15 unable to participate due to his health, while Ms. Ma stated that she could not proceed alone
16 because Mr. Nebmaier was the “legal engine” of the team. Proponents Vajra Ma and Wolfgang
17 Nebmaier’s Statement. Proponents’ refusal to withdraw their affidavits precluded OWRD from
18 withdrawing the case. OAR 137-003-0515(4)(c).

19 The ALJ’s treatment of Proponents’ request for postponement was proper. The ALJ
20 correctly found that Proponents had failed to demonstrate “good cause” pursuant to OAR 137-
21 003-0501 for postponement of the hearing. Proponents failed to provide a licensed doctor’s
22 professional opinion to substantiate their medical claims,⁴ and failed to provide good cause why
23 Ms. Ma could not proceed without Mr. Nebmaier. At the time the petition to postpone was filed,

24 _____
25 ⁴ Proponents also allege that it was improper for the ALJ to require medical
26 documentation to postpone the hearing when medical documentation was not required in support
of the request for Mr. Smith’s deposition. The rules provide for the taking of depositions with
agency permission. OAR 137-003-0572.

1 Protestants had invested significant resources in preparing for the hearing, and the OWRD and
2 Protestants both provided documentation that expeditious resolution of Proponents' claims was
3 necessary. Department's Response to Proponent's Motion to Postpone Proceedings; Protestants'
4 Opposition to Proponent Vajra Ma's Motion for Postponement/Petition for Withdrawal. The ALJ
5 properly exercised his discretion to deny the motion. OAR 137-003-0501.

6 Proponents chose not to attend the hearing or to present their case at hearing. That failure
7 did not constitute prejudice due to the fact that Proponents had not provided good cause for a
8 delay or postponement. Proponents also made no effort to obtain a medical opinion following
9 the ALJ's denial for lack of a licensed doctor's opinion. Proponents' choice to forgo
10 participation in the hearing or to attempt to obtain a medical opinion does not mean they were
11 harmed by the process leading to the Proposed Order. Rather, it means that Proponents chose to
12 let the hearing run its course without their participation.

13 **4. Agency Counsel Phone Call to Proponents ("Ex-Parte**
14 **Agency Intervention on Behalf of Protestants").**

15 Proponents next allege that the OWRD intervened on behalf of Protestants to facilitate
16 settlement of the contested case proceeding and that this should result in a remand. Exceptions
17 at 3.

18 First, Proponents characterize the communications between themselves and Ms. Moulun
19 as "ex parte." Since Ms. Moulun was not the ALJ and does not work for the ALJ, contact with
20 Ms. Moulun was not "ex parte." This argument does not warrant a remand.

21 Nothing was otherwise improper about Ms. Moulun's communications with Proponents.
22 Settlement discussions are routine in any case and such discussions do not in and of themselves
23 impact the outcome or ultimate disposition of the case at trial. Ms. Moulun's work to facilitate
24 settlement of the case had no bearing on the Proposed Order. It is therefore not relevant to the
25 Director's determination on the Final Order.

26

1 **5. Expert License (“More Prejudicial Double Standard”).**

2 Though they do not object to the finding that Certificate 3943 was not forfeit, Proponents
3 allege that the ALJ should have excluded Angelo Toglia’s expert opinion because of his lack of
4 an Oregon license. Exceptions at 4. In Oregon, an expert is not required to have an active
5 Oregon license to be qualified as an expert in a proceeding. Licensing goes to the weight to be
6 given to the expert’s testimony, not its admissibility. *See, e.g., State v. Rogers*, 330 Or. 282, 316
7 (2000); *State ex rel. Forman v. Clackamas County*, 181 Or. App. 172, 180 (2001). Mr. Toglia
8 was qualified to be an expert in this case and Proponents failed to object to his qualifications or
9 the admission of his testimony at the hearing. The admission of Mr. Toglia’s testimony is not a
10 basis to modify the Proposed Order.

11 In this case, Mr. Toglia had extensive qualifications to provide evidence regarding the
12 visibility of the site from Proponents’ claimed vantage points. Mr. Toglia is a registered
13 professional engineer with a company called Collision Research and Analysis. Hearing Record
14 April 14, 2014. He has been performing accident reconstruction and analysis for 20 years, and
15 has performed significant research in his field and authored several technical articles. *Id.* Mr.
16 Toglia was qualified to act as an expert in this case.

17 Further, Proponents did not offer any evidence that would serve as the basis for excluding
18 Mr. Toglia’s testimony or object to Mr. Toglia’s opinion being admitted at the proceeding. They
19 therefore have no grounds to file an exception here.

20 At any rate, the ALJ did not rely on Mr. Toglia’s opinion for any aspect of the Proposed
21 Order. Thus, any perceived issues with Mr. Toglia or his qualifications are not prejudicial to
22 Proponents or relevant to the Director’s adoption of the Proposed Order.

23 **6. Cancelled Site Visit and Access to Hearing Record**
24 **(“Prejudice Compounded”).**

25 Proponents take issue with the ALJ’s characterization of their role in the cancellation of
26 the site visit, and allege that the cancellation of the site visit was prejudicial to them. *See*

1 Exceptions at 3, 4-5.

2 Because the property at issue is privately owned by Protestants, the ALJ found that the
3 site visit could be conditioned on Proponents signing an access agreement and release of liability
4 for Protestants. Thereafter, Protestants' attorney prepared and asked Proponents to sign an
5 access agreement and release. Protestants' attorney received no response to Protestants' request
6 that Proponents sign the access agreement and release, despite repeat attempts to communicate
7 with Proponents. Protestants communicated this fact to the ALJ's office. Attachment 2.

8 When Proponents indicated that they would not be participating in the hearing, the ALJ
9 proposed cancelling the site visit, while reserving the right to reschedule it if Proponents decided
10 to participate in the hearing. Attachment 3. When neither the Proponents nor the other parties
11 objected, the ALJ cancelled the site visit.

12 Cancellation of the site visit was reasonable under these circumstances. Had Proponents
13 wished to move forward with the site visit, they could have responded to the ALJ's request for
14 objections to his proposed cancellation. Proponents were not prejudiced except by their own
15 failure to participate in the decision regarding the site visit.

16 Proponents also argue that it would have been beneficial for the ALJ to see the site in
17 person instead of relying only on photographs. Again, if Proponents thought that there was some
18 benefit to the ALJ reviewing the site conditions, Proponents should have participated in the
19 exchanges regarding the cancellation of the site visit. The ALJ was not required to have a site
20 visit, and his decision not to hold one in this case is reasonable.

21 Proponents separately claim prejudice because they were not provided with the hearing
22 audio until "several days" after the Proposed Order was issued. Exceptions at 4.⁵ As Proponents

23 ⁵ Proponents also claim that their Exceptions cannot cover all of the prejudicial
24 exchanges and decision in this case because they were not privy to them. The parties and the
25 ALJ have copied Proponents on all exchanges and decisions made in this case. Any gaps in
26 Protestants' understanding are due to Proponents' decision not to fully participate in the
contested case process. Proponents were provided every opportunity to participate and present
their case. They chose not to. Proponents cannot now assign error to their own decision not to
participate in their own case.

1 know, they were required to request the hearing audio in order to receive a copy of it. *See* Notice
2 of Contested Case Rights and Procedures (served on all parties in August 2013, at the outset of
3 the contested case proceeding).

4 Despite having notice of the procedure for requesting the hearing audio, Proponents did
5 not do so. Indeed, they appear to not have made an effort to call the OAH or OWRD to
6 determine how a copy could be obtained. Any issues caused by the Proponents' failure to
7 request a copy of the hearing audio are of Proponents' own creation.

8 Neither the cancelled site visit, to which Proponents did not object, nor the Proponents
9 failure to request a copy of the hearing audio are a basis to remand or modify the Proposed
10 Order.

11 **7. Hearing Record (“Inadvertent Failure of the Recording
12 Software”).**

13 Shortly after the hearing was completed, the ALJ discovered that most of the audio
14 record for the second day of the hearing had been lost. Proponents appear to have misunderstood
15 the time of the status conference set to discuss the issue with the parties. Exceptions at 6-7.
16 However, the ALJ later issued a notice reconvening the hearing on May 1, 2014. Notice of
17 Reconvened In-Person Hearing. In that notice, the ALJ provided:

18 No new testimony or evidence will be permitted on this date. New objections not
19 made at the hearing on April 15, 2014 will not be considered. This includes
written objections filed after the hearing.

20 Notice of Reconvened In-Person Hearing at 1. Proponents received the Notice and were
21 informed of the purpose for the status conference and the results thereof. Proponents made no
22 objection to the Notice, nor did they appear at the time set to recreate the record to lodge an
23 objection at that time.

24 Further, Proponents have failed to demonstrate how recreation of the hearing record for
25 the second day of the hearing caused them any prejudice.⁶ No new evidence was permitted or

26 ⁶ At one point, the Proponents appear to take issue with the mixed investigative and

1 received, and the parties were not allowed to enter new arguments or objections. The recreated
2 hearing was necessary and in no way prejudicial to Proponents.

3 **8. April 17, 2014 Status Conference (“A Party’s Party**
4 **Status Denied: Another Inadvertent Software**
5 **Failure?”).**

6 Proponents incorrectly argue that they were excluded from the status conference that
7 resulted in the Notice of Reconvened In-Person Hearing. Proponents allege that they received a
8 number of emails from the ALJ’s office, one of which stated that the status conference was
9 cancelled. However, Proponents neglect to mention that the ALJ’s office sent a non-encrypted,
10 plain text email at 3:40 p.m. on April 16, 2014, stating that the status conference would be held
11 at 11 a.m. on April 17, 2014. Attachment 4. This email should have controlled Proponents’
12 understanding, as it stated that the ALJ would not have time to send out an official notice and
13 provided the time and details for the status conference in the body of the email. *Id.*

14 Further, even if the emails had caused confusion for Proponents, Proponents do not
15 explain why they continued to seek clarification from the ALJ’s office, instead of simply calling
16 in at the set time for the status conference. Proponents had received a plain text email providing
17 the date and time of the status conference. Proponents chose not to call in. Instead, they appear
18 to have logged multiple calls to the ALJ’s office seeking clarification that had already been
19 provided to them in the April 16, 2014 email from the ALJ’s office.

20 At any rate, Proponents suffered no prejudice from their failure to attend the status
21 conference. The status conference was convened solely to address the recreation of the second
22 day of the hearing – a hearing in which Proponents did not to participate. Since Proponents did
23 not participate in the status conference and thus could not participate in its recreation, the April

24 _____
25 adjudicative functions of the agencies. Exceptions at 5. Oregon’s administrative scheme is
26 proper under Oregon law, and due process does not require a formal separation of investigative
and adjudicative functions. *Withrow v. Larkin*, 421 U.S. 35, 95 (1975); *Becklin v. Board of*
Examiners for Engineering, 195 Or. App. 186, 208 (2004).

1 17, 2014 status conference did not impact them. Proponents did receive notice of the actual
2 recreation conducted by the parties, but again chose not to participate. *See* Notice of
3 Reconvened In-Person Hearing.

4 The Director should adopt the Proposed Order, as there were no procedural irregularities
5 in the conduct of the April 17, 2014 status conference or the recreation of the hearing record on
6 May 1, 2014.

7 **9. Response to Proponents' Pleading Entitled "Lots of**
8 **Questions About What's Going on With This Case"**
9 **("Footnote Elevated").**

10 The ALJ was not required to respond to Proponents' numerous post-hearing requests for
11 information. After the hearing concluded, Proponents submitted a number of questions to the
12 ALJ regarding a number of administrative issues, including their status in the proceedings, and
13 whether they were entitled to certain documents and files. As the ALJ correctly noted in his
14 Proposed Order, these questions were more administrative than legal, and should have been
15 addressed through a call to the administrative assistant at the ALJ's office rather than through a
16 formal filing to the ALJ.

17 At any rate, the answers to the questions posed by Protestants did not require a response
18 by the ALJ or his staff. Proponents were clearly still parties to the action, as evidenced by their
19 presence on all official service lists. The time periods for all post-hearing events are governed by
20 the rules, and can be found through a review of the rules. Finally, as noted *supra*, all parties are
21 entitled to a copy of the hearing record. However, Proponents did not request a copy of the
22 hearing record prior to the date of their inquiry.

23 The ALJ's decision not to respond to the questions posed by Proponents did not prejudice
24 Proponents or impact their ability to review and understand the Proposed Order. The Director
25 should adopt the ALJ's findings regarding the administrative issues raised by Proponents in the
26 proceeding.

1 V. Proponents Were Not Prejudiced By The Contested Case Proceedings
2 ("Summary").

3 The Exceptions filed by Proponents do not provide any basis for amending or altering the
4 Proposed Order or remanding the case to the OAH. Proponents focus exclusively on perceived
5 procedural errors with the contested case proceeding. Proponents' procedural challenges fail:

- 6 A. The emergency deposition of Jack Smith was noticed in the manner
7 provided for under the administrative rules, and Proponents were present
8 and participated in the deposition. Proponents did not object to the
9 admission of the deposition as testimony at the time set for such objections
10 during the administrative process.
- 11 B. The ALJ properly determined that the hearing should be held at the
12 Tualatin OAH facilities. There are only two OAH facilities in the State of
13 Oregon, and only one of those had the space and security needed for these
14 proceedings. Proponents did not move the ALJ for permission to call their
15 witnesses via telephone.
- 16 C. The ALJ reasonably determined not to set over the hearing without a
17 licensed Oregon doctor's verification of Mr. Nebmaier's condition. At the
18 time Ms. Ma made the request to postpone the hearing, the parties had
19 invested extensive resources in preparing for hearing and had an interest in
20 having the hearing move forward as expeditiously as possible. Further,
21 Ms. Ma did not establish that she could not proceed without Mr. Nebmaier
22 Proponents did not establish "good cause" for the indefinite postponement
23 they sought. OAR 137-003-0501.
- 24 D. Ms. Moulun did not have improper ex parte contact with Mr. Nebmaier
25 and Ms. Ma. Ms. Moulun is not with the ALJ's office and is allowed to
26 contact the other parties individually under the applicable rules. Ms.

1 Moulun contacted Proponents to help facilitate a potential settlement of
2 the claims. Ms. Moulun's conduct was proper and played no role in the
3 Proposed Order's findings or conclusions.

4 E. Mr. Toglia was correctly admitted as an expert in this case. He is qualified
5 to testify about the matters he discussed, and was admitted by the ALJ
6 without objection. Experts in Oregon are not required to be licensed in the
7 state in order to be qualified as a testifying expert. Further, Proponents
8 raised no objections to Mr. Toglia at the hearing. At any rate, the ALJ did
9 not discuss or rely on Mr. Toglia's testimony in issuing the Proposed
10 Order.

11 **VI. The Oregon Water Resources Commission Should Issue a Final Order.**

12 The Proposed Order should be adopted as a Final Order without change by the Director.
13 Proponents' Exceptions were not timely filed. Further, if the Director determines to consider
14 Proponents' Exceptions, Proponents fail to actually allege or demonstrate any prejudice as a
15 result of their claimed errors. The record in this proceeding demonstrates that Proponents were
16 provided a full and equal opportunity to participate in the hearing, and any perceived harm by
17 Proponents is a result of Proponents' choices not to pursue their case as opposed to a procedural
18 error in the case proceedings.

19 Finally, and critically, Proponents' Exceptions do not assign error to any of the findings
20 of fact or conclusions of law in the Proposed Order. Proponents objections to the process are
21 irrelevant unless they also object to the ALJ's finding that Certificate 3943 was not forfeit, which
22 they do not. Given that Proponents have failed to raise exceptions regarding any of the factual
23 findings or conclusions reached by the ALJ, Proponents claimed procedural irregularities cannot
24 justify a remand or modification of the Proposed Order.

25 ///

26

From: ALLEN Joe L <joe.l.allen@state.or.us>
Sent: Wednesday, April 02, 2014 8:54 AM
To: joe.l.allen@state.or.us; 'vajra ma'
Cc: Howard, Elizabeth E.; rebecca.osborne@state.or.us; MOULUN Renee M
Subject: RE: Vajra Ma and Wolfgang Nebmaier Letter Inquiry re OAH Ref. No: WR-13-004, OWRD Case No: PC 01-13
Attachments: Vajra Ma Inquiry.pdf

Parties,

I recently received the attached letter from Ms. Ma and Mr. Nebmaier inquiring about Proponent Vajra Ma's Petition for Reconsideration. Pursuant to OAR 137-003-0675, reconsideration is available for final orders. The petition at issue seeks reconsideration of an interim ruling, rather than a final order. Proponent cites no legal authority for reconsideration of an interim ruling. Nonetheless, assuming Proponent's motion was properly before me, OAR 137-003-0675(6) provides that, if no action is taken on a petition for reconsideration, the petition is deemed denied by operation of law. As such, no written denial is required. To the extent that Proponent seeks a documented ruling, this communication shall serve as summary denial of the petition.

In addition, the attached communication cites to "a number of mailings and shipments in this matter." I am unaware of any such mailings or shipments. In addition, the statement is sufficiently vague as to provide no direction or guidance as to what Proponents seek. Therefore, I will take no further action on this statement.

Finally, the letter indicates Proponents "are in no position to proceed[.]" Again, I am unclear on the intent of Proponents' communication. If by this statement Proponents mean to indicate they no longer wish to proceed with this matter, the appropriate step would be a withdrawal of the affidavits of non-use in this matter. Short of such withdraw, this matter will proceed as scheduled. Our next step is the site visit scheduled for next week. For judicial economy, if Proponents intend to withdraw the affidavits at issue, prompt notification would be best.

Unless the affidavits of non-use are withdrawn, the parties will meet as scheduled in the Prehearing Order (9:00 am, Tuesday April 8) and at the location specified in OWRD's proposed itinerary.

Further communications should be directed to Rebecca Osborne with OAH. Direct contact, including email, with the judge should be avoided to minimize the potential for ex parte communication.

Thank you,

Joe L. Allen
Senior Administrative Law Judge
Office of Administrative Hearings
7995 SW Mohawk St. Entrance B
Tualatin, OR 97062
(503) 612- 4300
(503) 612- 4340

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advise the sender immediately by reply e-mail, keep the contents confidential, and immediately delete the message and any attachments from your system.*****

-----Original Message-----

From: vajra ma [<mailto:vajrama@greatgoddess.org>]

Sent: Tuesday, April 01, 2014 5:40 PM

To: joe.l.allen@state.or.us

Cc: rebecca.osborne@state.or.us; MCCARTY Patricia E; MOULUN Renee M; EHoward@SCHWABE.com

Subject: Vajra Ma and Wolfgang Nebmaier Letter Inquiry re OAH Ref. No: WR-13-004, OWRD Case No: PC 01-13

Judge Allen,

Please see attached inquiry letter re OAH Ref. No: WR-13-004, OWRD Case No: PC 01-13.

Thank you.

Respectfully,

Vajra Ma and Wolfgang Nebmaier



SCHWABE, WILLIAMSON & WYATT*
ATTORNEYS AT LAW

Pacwest Center, 1211 SW 6th Ave., Suite 1900, Portland, OR 97204 | Phone 503.222.9981 | Fax 503.798.2900 | www.schwabe.com

ELIZABETH E. HOWARD

Admitted in Oregon, Washington and North Dakota

Direct Line: 503-796-2093

E-Mail: ehoward@schwabe.com

April 2, 2014

VIA E-MAIL (REBECCA.OSBORNE@STATE.OR.US) AND FIRST CLASS MAIL

Joe L. Allen
Senior Administrative Law Judge
Office of Administrative Hearings - Oregon
PO Box 14020
Salem, OR 97309-4020

Re: In the Matter of the Proposed Cancellation of the Water Right Evidenced by
Certificate 3943 for Use of Water from Grave Creek for Irrigation of 65 Acres
Josephine County, Oregon
Wolfgang Nebmaier and Vajra Ma, Proponents
Andreas and Carole Blech, Protestants
OAH Ref. No.: WR-13-004 | OWRD Case No. PC 01-13
DOJ File No.: 690-303-GNG0014-14
Our File No.: 123805-193639

Dear Judge Allen:

I am writing to update you on the status of our efforts to obtain a site access agreement and waiver from Proponents for the April 8, 2014 Site Visit in the above named matter. I provided the attached site access agreement and waiver to Proponents on March 20, 2014, with a request to sign and return the agreement to my office by March 26, 2014. On March 26, 2014, I emailed Proponents asking whether they would be providing the signed site access agreement and waiver to my office as requested. Proponents did not respond. On March 31, 2014, I again emailed Proponents, advising them that if I did not hear from them regarding the signed access agreement, I would need to notify you and request that we proceed with the site visit without them. Then, again, on April 2, 2014, I sent by mail a letter and copy of the access agreement and waiver to Proponents. To date, Proponents have provided no response to any of my inquiries regarding the site access and waiver agreement. I have attached copies of the above-described communications for your reference.

As explained in the March 12, 2014 pre-hearing conference call, Proponents will not be allowed to access Protestants' property without first signing the access agreement and waiver. This may necessitate some changes to the site visit, including arranging a time to meet with

Portland, OR 503.222.9981 | Salem, OR 503.540.4282 | Bend, OR 541.749.4044 | Eugene, OR 541.686.3299
Seattle, WA 206.622.1711 | Vancouver, WA 360.694.7551 | Washington, DC 202.488.4302

PDX\123805\193639\MAN\13642141.1

Attachment 2
Page 1 of 2

Joe L. Allen
April 2, 2014
Page 2

Proponents to go to the sites on Shanks Creek Road after the other site visit participants go to the property and points of diversion. I will alert you if we receive a signed site access agreement before the scheduled time for the site access agreement. It may be that Proponents will provide one the morning of the Site Visit.

Thank you for your consideration of this matter.

Very truly yours,



Elizabeth E. Howard

EEH:jng

cc: Vajra Ma (via email and mail)
Wolfgang Nebmaier (via email and mail)
Renee Moulun (via email and mail)
Patricia McCarty (via email and mail)

Enclosures



From: ALLEN Joe L <joe.l.allen@state.or.us>
Sent: Friday, April 04, 2014 11:23 AM
To: Howard, Elizabeth E.; rebecca.osborne@state.or.us; MOULUN Renee M; 'vajra ma'; wn1470@bingo-ev.de; Wolfgang@Nebmaier.de
Subject: In the Matter of the Proposed Cancellation of the Water Right Evidenced by Water Right Certificate 3943 / OAH Ref. No.: WR-13-004

Parties,

On April 3, 2014, Proponents informed the OAH that neither would participate in the upcoming site visit or the hearing in this matter. As the parties know, the initial burden of proof in this matter rests with Proponents. Without their participation in the site visit or the upcoming hearing, it is unclear how Proponents intend to meet their burden. Nonetheless, I cannot compel participation in these proceedings. Accordingly, I propose cancellation of the upcoming site visit. I will, however, allow the parties to reserve the right to request a site visit to be scheduled after the hearing if Proponents change their position and participate in the hearing.

In addition, I feel inclined to point out that the statutes and rules for contested case proceedings do not give me authority to dismiss this matter despite Proponents' indications of non-participation. Without withdraw by the Department, this matter must proceed to hearing.

If any party objects to the proposed cancellation of the site visit, please respond to this email no later than close of business today.

Thanks you,

Joe L. Allen
Senior Administrative Law Judge
Office of Administrative Hearings
7995 SW Mohawk St. Entrance B
Tualatin, OR 97062
(503) 612- 4300
(503) 612- 4340



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From: ALLEN Joe L <joe.l.allen@state.or.us>
Sent: Friday, April 04, 2014 11:26 AM
To: Howard, Elizabeth E.; rebecca.osborne@state.or.us; MOULUN Renee M; 'vajra ma'; 'Wolfgang@Nebmaier.de'
Subject: RE: In the Matter of the Proposed Cancellation of the Water Right Evidenced by Water Right Certificate 3943 / OAH Ref. No.: WR-13-004

The email below is being resent due to failed read receipt for the address: wn1470@bingo-ev.de.

Please send all responses to all recipients.

Joe L. Allen
Senior Administrative Law Judge
Office of Administrative Hearings
7995 SW Mohawk St. Entrance B
Tualatin, OR 97062
(503) 612- 4300
(503) 612- 4340



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From: ALLEN Joe L
Sent: Friday, April 04, 2014 11:23 AM
To: 'vajra ma'; rebecca.osborne@state.or.us; MOULUN Renee M; EHoward@SCHWABE.com; wn1470@bingo-ev.de; Wolfgang@Nebmaier.de
Subject: In the Matter of the Proposed Cancellation of the Water Right Evidenced by Water Right Certificate 3943 / OAH Ref. No.: WR-13-004

Parties,

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If any party objects to the proposed cancellation of the site visit, please respond to this email no later than close of business today.

Thanks you,

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From: OSBORNE Rebecca <rebecca.osborne@state.or.us>

Date: April 16, 2014 at 3:40:40 PM PDT

To: "Howard, Elizabeth E. (ehoward@schwabe.com)" <ehoward@schwabe.com>, MCCARTY Patricia E <patricia.e.mccarty@state.or.us>, MOULUN Renee M <renee.m.moulun@state.or.us>, "Vajra Ma (vajrama@greatgoddess.org)" <vajrama@greatgoddess.org>, "Wolfgang@Nebmaier.de (wolfgang@nebmaier.de)" <wolfgang@nebmaier.de>

Subject: WR-13-004 Blech Status Conference

As it is too late for me to send out a Notice of Status Conference, please consider this email to be official notification of a Status Conference scheduled for April 17, 2014 at 11:00 am in this matter. Thank you all for your timely responses and help in this scheduling.

CERTIFICATE OF SERVICE BY REGULAR MAIL


I HEREBY CERTIFY that on the 21st day of July, 2014, I served the foregoing
 RESPONSE TO PROPONENTS WOLFGANG NEBMAIER AND VAJRA MA'S
 EXCEPTIONS TO PROPOSED ORDER on the following persons:

Wolfgang Nebmaier
 PO Box 317
 Wolf Creek, OR 97497
 With a courtesy copy by:
Wolfgang@nebmaier.de

Vajra Ma
 PO Box 317
 Wolf Creek, OR 97497
 With a courtesy copy by:
VajraMa@GreatGoddess.org

Renee Moulun
 Sr. AAG
 Oregon Department of Justice – Natural
 Resources Section
 1162 Court Street NE
 Salem, OR 97301-4096
 With a courtesy copy by:
Renee.m.moulun@doj.state.or.us

by mailing by first-class mail a true and correct copy thereof, certified by me as such, placed in a
 sealed envelope addressed to the respective parties at the addresses set forth above and deposited
 in the U.S. Post Office at Portland, Oregon, with postage paid.



 Elizabeth E. Howard

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CERTIFICATE OF FILING

I hereby certify that on July 21, 2014, I filed by **HAND DELIVERY** the foregoing
RESPONSE TO PROPONENTS WOLFGANG NEBMAIER AND VAJRA MA'S
EXCEPTIONS TO PROPOSED ORDER with:

Patricia McCarty
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301
With a courtesy copy by:
patricia.e.mccarty@state.or.us

SCHWABE WILLIAMSON & WYATT, P.C.

By: 
Elizabeth E. Howard, OSB #012951