



MEMORANDUM

TO: Water Resources Commission

FROM: Thomas M. Byler, Director

SUBJECT: Agenda Item D, June 24, 2020
Water Resources Commission Meeting

Consideration of the Exceptions and Issuance of Final Order in the Matter of the Proposed Cancellation of Water Right Certificates 2366 and 22086

I. Issue Statement

The Commission is asked to consider exceptions and to issue the Final Order in the proposed partial cancellation of water right certificates 2366 and 22086.

II. Background

On November 1, 2017, Peggy M. Freitas, Evern Sturdevant, Carol Schneider and Linda Ganim (Proponents) each filed an Affidavit Asserting Non-Use of certificates 2366 and 22086 in Jackson County. The affidavits assert non-use on a portion of the place of use under both certificates corresponding to two tax lots, #300 and #302. The portion of the certificate 2366 proposed to be cancelled for non-use was for irrigation from the Westerly Branch of Carter Creek, a tributary of Emigrant Creek. The portion of the certificate 22086 proposed to be cancelled for non-use was from Dollarhide Spring for irrigation and supplemental irrigation of approximately 5.7 acres and stock watering.

On November 20, 2017, the Oregon Water Resources Department (OWRD) issued a Notice of Proposed Partial Cancellation to the current owners of the property.

The owner of tax lot #302 is Lutchter Land LLC. Lutchter Land LLC did not file a protest.

The owner of tax lot #300 is Magdalena Winter. On December 18, 2017, Magdalena Winter filed a protest to the Notice of Proposed Partial Cancellation. On January 10, 2018, OWRD referred the matter to the Office of Administrative Hearings (OAH) for a contested case hearing.

A hearing was held on April 25 and 26, 2019 in Eugene, Oregon. The issue for hearing was whether a portion of certificates 2366 and 22086 should be cancelled due to non-use (ORS 540.610; OAR 690-017-0400). The proponents and protestant, Magdalena Winter, appeared through their attorneys. The record closed after submission of written closing arguments on June 3, 2019.

III. Proposed Order

Administrative Law Judge (ALJ) Vaughn issued a Proposed Order on August 9, 2019 (Attachment 1), concluding that:

1. The water right evidenced by Water Right Certificate 2366 is subject to partial cancellation due to non-use as follows:
 - Pursuant to ORS 540.641(1), the Water Resources Commission may enter an order cancelling the portion of Water Right Certificate 2366 applicable to irrigation with a place of use on tax lot #302 (*Lutcher Property*); and
 - The portion of Water Right Certificate 2366 applicable to irrigation with a place of use on tax lot #300 (*Winter Property*) shall be cancelled.
2. No portion of the water right evidenced by Water Right Certificate 22086 is subject to cancellation with respect to the portion of the place of use that lies within tax lot #300 (*Winter Property*) and/or tax lot #302 (*Lutcher Property*) based on non-use of the water during the period of April 1997 through May 2016.

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

IV. Amended Proposed Order

OWRD issued an Amended Proposed Order (APO) on November 1, 2019 (Attachment 4), adopting the ALJ's Proposed Order in large part. The APO clarified one finding of fact, added one conclusion of law and modified the *Conclusion* portion of the Opinion section.

In summary, the APO proposed to order the following:

1. The water right evidenced by Water Right Certificate 2366 is subject to partial cancellation as follows:
 - Pursuant to ORS 540.641(1) and OAR 690-017-0500, the Water Resources Commission shall enter an order cancelling the portion of Water Right Certificate 2366 applicable to irrigation and stock with a place of use on tax lot #302 (*Lutcher Property*) because the owner failed to protest.
 - The portion of Water Right Certificate 2366 applicable to irrigation with a place of use on tax lot #300 (*Winter Property*) shall be cancelled because the owner conceded non-use during the period asserted.
2. No portion of the water right evidenced by Water Right Certificate 22086 is subject to cancellation with respect to the portion of the place of use that lies within tax lot #300 (*Winter Property*) and/or tax lot #302 (*Lutcher Property*) based on non-use of the water during the period of April 1997 through May 2016.

3. No portion of the water right evidenced by Water Right Certificate 22086 is subject to cancellation with respect to the portion of the place of use that lies within tax lot #302 (*Lutcher Property*) based on non-use of the water during the period of April 1997 through May 2016. However, pursuant to ORS 540.641(1) and OAR 690-017-0500, the Water Resources Commission shall enter an order cancelling the portion of Water Right Certificate 22086 applicable to irrigation, supplemental irrigation and stock use on those acres located within tax lot #302 (*Lutcher Property*), as the owner did not file a protest on the proposed cancellation.

A key difference is that where the proposed order found that the proponents did not prove non-use for Certificate 22086 and that no portion of the right should be cancelled due to non-use, the Department's amended proposed order determined that the failure of the owner (*Lutcher Land*) to protest required cancelling the portion of the right on that owner's land pursuant to OAR 690-017-0500 (which states that if the record owner or occupant receiving the notice does not protest the proposed cancellation, the Water Resources Department shall enter an order cancelling the water right).

Proponents timely filed exceptions to the Amended Proposed Order (Attachment 5). Protestant Winters filed a response to the exceptions (Attachment 6).

V. Consideration of Exceptions and Issuance of a Final Order

The Commission must issue the final decision if exceptions to the Amended Proposed Order are filed (see ORS 540.641; OAR 690-017-0700). A draft Final Order is included in Attachment 7, including a consideration of the exceptions.

In regards the exceptions, the Department's Amended Proposed Order incorporated the ALJ's conclusion that the Proponents failed to show by a preponderance of the evidence that there has been a period of five or more years of non-use of Certificate 22086 for irrigation on Tax Lots 300 or 302 during the period of April 1997 through May 2016. The Proponents objected to the incorporation. The Proponents assert that they did show by a preponderance of evidence that there was no use of water under Certificate 22086 during the period from April 1997 through April 2002.

After reviewing the exceptions, staff do not recommend changes to the Amended Proposed Order and disagrees with the Proponents exception. Staff note that even if the Commission were to agree that Proponents met their burden to show non-use during that period, it would not be sufficient to find that Certificate 22086 was forfeited and subject to cancellation. The end of the alleged non-use is April 2002, which is at least six months beyond the 15-year period (November 2002) that is grounds for rebuttal of the presumption of forfeiture under ORS 540.610(2)(f).

VI. Conclusion

The Commission, after considering exceptions to the Amended Proposed Order must enter an order cancelling the water right, cancelling in part or modifying the water right, or declaring the water right shall not be cancelled or modified (ORS 540.641). If the Final Order partially cancels a water right, a new water right certificate for the remaining portion of the right must be issued (ORS 540.650).

The Department asks the Commission to consider the Proposed Orders and exceptions, and to issue a Final Order in Contested Case that provides a final resolution of this matter. A draft Final Order, incorporating by reference the Amended Proposed Order, is included for consideration by the Commission.

VII. Alternatives

1. Issue the Final Order included as Attachment 7, cancelling the portion of Water Right Certificate 2366 located within Tax Lots 300 and 302 and cancelling the portion of Water Right Certificate 22086 located within Tax Lot 302, and direct the Department to issue certificates confirming the portions of Certificate 2366 and 22086 not cancelled.
2. Request the Administrative Law Judge to conduct further hearings as specified by the Commission.

VIII. Recommendation

The Director recommends the Commission adopt Alternative 1.

Attachments:

1. ALJ Vaughn's Proposed Order
2. Proponents' Exceptions to the ALJ's Proposed Order
3. Protestant's Response to Exceptions to the ALJ's Proposed Order
4. OWRD's Amended Proposed Order
5. Proponents' Exceptions to OWRD's Amended Proposed Order
6. Protestant's Response to Exceptions to OWRD's Amended Proposed Order
7. Final Order in Contested Case

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

<p>IN THE MATTER OF THE PROPOSED PARTIAL CANCELLATION OF THE WATER RIGHTS EVIDENCED BY CERTIFICATE 2366 FOR USE OF WATER FROM WESTERLY BRANCH OF CARTER CREEK FOR IRRIGATION, <i>and</i></p> <p>CERTIFICATE 22086 FOR USE OF WATER FROM DOLLARHIDE SPRING FOR IRRIGATION, SUPPLEMENTAL IRRIGATION AND STOCK, JACKSON COUNTY, OREGON</p>	<p>) PROPOSED ORDER</p> <p>)</p> <p>)</p> <p>) OAH Reference No. 2018-OWRD-00017</p> <p>) Agency Case No. PC 17-03</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>
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PROCEDURAL HISTORY

On November 20, 2017, the Oregon Water Resources Department (OWRD or Department) issued a Notice of Proposed Partial Cancellation of Water Rights (Notice) based on affidavits filed with the Department by Peggy M. Freitas, Evren Sturdevant, Carol Schneider and Linda Ganim (collectively, the Proponents). On December 18, 2017, Magdalena Winter (Protestant/Ms. Winter) filed a protest to the Notice. On January 10, 2018, OWRD referred this matter to the Office of Administrative Hearings (OAH) for further proceedings. The OAH assigned Administrative Law Judge (ALJ) James Dreyer to preside over the case. The OAH subsequently reassigned the matter to ALJ Ehren Vaughn to preside at hearing.

On March 2, 2018, the OAH issued a Notice of Prehearing Conference. On March 22, 2018, ALJ Vaughn convened a prehearing conference by telephone. Patricia McCarty, representing OWRD, appeared and participated in the conference. Magdalena Winter appeared with counsel, Eugene Anderson. Proponents' attorney, Peter Mohr, also participated in the conference. The parties agreed to the issues for hearing, deadlines for discovery, and a hearing date. On March 23, 2018, ALJ Vaughn issued a Scheduling Order.

On March 28, 2018, the OAH issued a Notice of In-Person Hearing, scheduling a hearing for October 9 through 11, 2018.

On July 16, 2018, Proponents filed a Motion for Partial Summary Determination (Motion). On August 8, 2018, Protestant filed a Response to the Motion for Partial Summary Determination (Response). On August 20, 2018, Proponents filed a Reply in Support of Proponents' Motion for Partial Summary Determination (Reply). ALJ Vaughn denied the

Proponents' request for oral argument on the Motion.

On September 7, 2018, ALJ Vaughn issued a Ruling denying Proponents' Motion for Partial Summary Determination.

On September 11, 2018, Proponents filed a request for continuance of the hearing based on witness unavailability.

On September 19, 2018, ALJ Vaughn conducted a site visit during which the ALJ, as well as all attendees, observed the relevant locations and structures on Tax Lots 300, 302, 303, and 304. Ms. McCarty participated in the site visit on behalf of OWRD along with Shavon Haynes, District 13 Watermaster. Mr. Mohr participated on behalf of Proponents. Mr. Anderson participated along with Ms. Winter and her partner, Leo Anifowose.

ALJ Vaughn convened a telephone status conference on September 26, 2018, in which Ms. McCarty, Mr. Anderson, and Mr. Mohr participated. ALJ Vaughn granted the September 11, 2018 request for continuance, and rescheduled the hearing for December 13 and 14, 2018.

On November 5, 2018, the parties submitted signed Stipulations Regarding Non-Use of Portions of Water Right Certificate 2366. OWRD did not object to the stipulations.

On November 27, 2018, ALJ Vaughn convened a telephone status conference. Ms. McCarty and Mr. Anderson participated. ALJ Vaughn rescheduled the hearing on his own motion for March 28 and 29, 2019. At Mr. Mohr's subsequent request, the hearing was rescheduled for April 25 and 26, 2019.

ALJ Vaughn convened a hearing at the OAH in Eugene, Oregon on April 25 and 26, 2019. Ms. McCarty represented OWRD, Mr. Mohr represented Proponents, and Mr. Anderson represented Protestant at the hearing. Mr. Haynes testified on behalf of OWRD. Ms. Schneider, Ms. Freitas, Ms. Sturdevant, Bob Long, and William Fleeger testified on behalf of Proponents. Susan Krant, Ms. Winter, Mr. Anifowose, and James Gail testified on behalf of Protestant. The record remained open until May 17, 2019 to receive written closing arguments from the parties. On May 17, 2019, Mr. Mohr requested an extension to the deadline for submitting closing arguments to allow for transcription of the testimony. ALJ Vaughn granted the extension. The record closed on June 3, 2019, after the OAH received written closing arguments from both Protestant and Proponents.

ISSUES

1. Whether the water right evidenced by Certificate 2366 has been partially forfeited by a failure to make beneficial use of the water for irrigation on the portion of the place of use that lies within Tax Lots 300 and 302 for a period of five or more consecutive years during the period of April 1997 through May 2016. ORS 540.610; OAR 690-017-0400.

2. Whether the water right evidenced by Certificate 22086 has been partially forfeited by a failure to make beneficial use of the water for irrigation, supplemental irrigation, and stock

use on the portion of the place of use that lies within Tax Lots 300 and 302 for a period of five or more consecutive years during the period of April 1997 through May 2016. ORS 540.610; OAR 690-017-0400.

EVIDENTIARY RULINGS

Exhibit A1, offered by OWRD, was admitted into the record without objection. Proponents offered Exhibits B1 through B15 and B17 through B28, which were admitted into evidence without objection.¹ Protestants offered Exhibits C1 through C3, which were admitted into evidence without objection.

Protestant offered Exhibit C4 during the hearing for impeachment purposes regarding Ms. Schneider's testimony. Exhibit C4 consists of photographs purporting to show Tax Lot 300 and the surrounding area. Proponents objected to the admission of Exhibit C4. Proponents' objection is overruled. Exhibit C4 is admitted into evidence for the limited purpose of impeachment.

FINDINGS OF FACT

1. Water Right Certificate 2366 (the Carter Creek Water Right) was issued in the name of L.D. Dollarhide and has a priority date of October 26, 1915. It authorizes use of 0.44 cubic feet per second (cfs) from Westerly Branch of Carter Creek, a tributary of Emigrant Creek, for irrigation of 25 acres in the SE ¼ SW ¼ of Section 16 and 10 acres in the NE ¼ NW ¼ of Section 21, Township 40 South, Range 2 East, W.M., being a total of 35 acres. (Ex. A1 at 5-6.)

2. Water Right Certificate 22086 (the Dollarhide Spring Water Right) was issued in the name of Dorothy D. Presley and has a priority date of May 15, 1953. It authorizes use of 0.022 cfs from Dollarhide Spring, a tributary of Emigrant Creek Watershed, for irrigation, supplemental irrigation and stock as follows: 4.5 acres supplemental in the SE ¼ SW ¼ of Section 16, 1.1 acres supplemental in the NE ¼ NW ¼ of Section 21, stock in the NE ¼ NW ¼ of Section 21, and 0.1 acre primary in the SW ¼ SW ¼ of Section 16, Township 40 South, Range 2 East, W.M., being a total of 5.7 acres. (Ex. A1 at 7-8.)

3. Protestant is the record owner of Tax Lot 300, 12.5 acres within Sections 16 and 21, Township 40 South, Range 2 East, W.M., in Jackson County, Oregon (the Winter property). Protestant has owned the property since 2015. (Exs. A1 at 1, C3 at 1; Test. of Winter.)

4. Lutcher Land LLC is the record owner of Tax Lot 302 within Section 21, Township 40 South, Range 2 East, W.M., in Jackson County, Oregon (the Lutcher property). (Ex. A1 at 1.)

5. On November 1, 2017, Proponents filed affidavits with OWRD asserting the water rights evidenced by Water Right Certificates 2366 and 22086 had been forfeited due to failure to make beneficial use of the water on Tax Lots 300 and 302 for five or more consecutive years during the period from April 1997 through May 2016. (Ex. A1 at 19, 26, 31, and 51.)

¹ Proponents did not offer Exhibit B16 into evidence.

6. On November 20, 2017, OWRD issued the Notice to Protestant and to Lutchter Land LLC. OWRD proposed cancelling for non-use the portions of the Carter Creek and Dollarhide Spring water rights that lie within Tax Lots 300 and 302. (Ex. A1 at 1-3.)

7. On December 18, 2017, Protestant filed a Protest with OWRD and requested a contested case hearing regarding the November 20, 2017 Notice issued by OWRD. Lutchter Land LLC did not file a protest. (Ex. A1 at 57-58; Record.)

Carter Creek Water Right

8. There is no evidence indicating that water from Carter Creek has been applied to beneficial use for irrigation purposes, pursuant to the terms and conditions of Water Right Certificate No. 2366, at any time since 1997 on those lands located in the NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 21, and the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 16, in Township 40 South, Range 2 East, W.M., in Jackson County, Oregon, and which lands are identified in the Jackson County Assessor records as Tax Lots 300 and 302. (*Stipulations Regarding Non-Use of Portions of Water Right Certificate No. 2366.*)

Relevant Tax Lots – 300, 302, 303, and 304

9. Tax Lot 300, the Winter Property, is located on the west side of Old Highway 99 (the highway) in Ashland, Oregon. The property is partially wooded. A residence is located on the property. The residence is at the top of a driveway that leads to the west up a rising slope from the highway. The residence receives water from a tank located in a separate well house on the property. The well house connects to a well located on the property. The tank also connects to a feed line that draws water from Dollarhide Spring located to the south, on Tax Lot 304. A valve system on the tank allows the user to switch between using water from the well and water from the spring. (Test. of Winter, Anifowose, and Gail; Ex. A1 at 9 and 45.)

10. Tax Lot 302, the Lutchter Property, is south of and adjacent to Tax Lot 300. The western portion of Tax Lot 302 is largely wooded. The portion of Tax Lot 302 closest to the highway contains a fenced area of the property currently used for agriculture. (Test. of Winter and Anifowose; Exs. A1 at 9, B17.)

11. Tax Lot 303, the Schneider Property, is south of and adjacent to Tax Lot 302. Tax Lot 303 contains a residence at the top of a driveway extending to the west from Old Highway 99. Portions of Tax Lots 300 and 302 are visible from the driveway and residence on the Schneider Property. (Test. of Schneider; Ex. A1 at 9.)

12. Tax Lot 304 is currently owned by Ms. Schneider and is located south of and adjacent to the Schneider Property. Dollarhide Spring is located in a wooded portion of Tax Lot 304 to the south and west of the residence on the Schneider Property. A spring box located on Tax Lot 304 covers and encloses Dollarhide Spring. The spring box is accessible from the Winter and Schneider Properties via a small walking trail through the woods. (Test. of Schneider, Winter, and Haynes; Ex. A1 at 9.)

Dollarhide Spring, Spring Box, and Connecting Pipe System

13. The spring box located on Tax Lot 304 is connected to the well house on the Winter Property by an underground pipe. The pipe runs from the spring box on Tax Lot 304 through the Schneider and Lucher Properties to the Winter Property, where it feeds into the storage tank in the well house. The pipe connecting the spring box to the Winter property is underground for the entirety of the distance from Tax Lot 304 to the Winter property, with the exception of a valve which is accessible from above ground part way along the pipe. (Test. of Winter, Gail, and Haynes.)

14. Water travels from the spring box through the underground pipe toward the Winter Property solely by force of gravity. The pipe from the spring box slopes generally downward in elevation towards the Winter Property, allowing gravity to maintain the flow of water from the spring through the pipe. There is a slight upward angle in one portion of the pipe. When air enters into the pipe, it can on occasion cause an air bubble to form at the high point in the pipe, slowing or preventing water flow. By releasing the air bubble using the above-ground valve, the water flow can be restarted. (Test. of Anifowose, Winter, Krant, and Gail.)

Proponent and Prior Owners of Tax Lot 300

Susan Krant

15. Susan Krant and her husband purchased the Winter Property in 1998 from Ms. Wilson, the previous owner. Ms. Krant resided on the property from 1998 until 2004, when she sold the property to James and Sandra Gail. (Test. of Krant; Ex. C3 at 3.)

16. At the time Ms. Krant purchased the Winter Property, the well was already installed on the property, and the pipe connecting Dollarhide Spring to the well house on the Winter Property was already in place. Ms. Krant built a larger well house on the property and installed a water-holding tank. Ms. Krant installed a retaining wall on the property in order to make a large, flat lawn to the east of the residence. The lawn was approximately one-half the size of a football field. The lawn was irrigated solely with water from Dollarhide Spring using underground pipes and an automated pop-up sprinkler system. The control system for the automated sprinklers was located in the well house. Ms. Krant also used water from Dollarhide Spring to hand-water a garden located to the west of the residence and several fruit trees on the property. She used water from Dollarhide Spring every day for some combination of watering the lawn, watering the garden, watering the fruit trees, or filling the pond. (Test. of Krant; Ex. C3 at 3-6.)

17. Ms. Krant maintained a pond on the eastern portion of Tax Lot 300. The pond typically filled partly from rainwater and snow, and it slowly emptied as water seeped out of the pond and into the surrounding ground. Ms. Krant would use a hose from the well house to fill the remainder of the pond from time to time. The amount of water used for the pond depended on the season, the weather, and the amount of water that seeped into the surrounding ground. (Test. of Krant.)

18. When Ms. Krant purchased the Winter Property, the Fleegers owned Tax Lot 304. Mr. Fleeger gave Ms. Krant permission to walk to the spring box across Tax Lots 303 and 304, and he acknowledged Ms. Krant's right to use water from Dollarhide Spring. The Fleegers did not interfere with Ms. Krant's use and maintenance of the spring, the spring box, or the release valve. (Test. of Krant; Ex. C3 at 5.)

19. From January through July 2001, the Krants repaired a septic field located on the Winter Property to the east of the residence. The process involved digging out and repairing the underground septic system, then reseeding the grass overtop of the septic field. (Test. of Krant.)

James Gail

20. James and Sandra Gail purchased the Winter Property from the Krants in April 2004. At the time of purchase, the Krants explained the spring and pipe system to Mr. Gail. Mr. Gail understood that the flow of water from Dollarhide Spring was sometimes intermittent and that the water in the pipe required occasional "restarting." Mr. Gail resided on the property until he sold it to Ms. Winter in 2015. (Test. of Gail; Ex. C3 at 7.)

21. Mr. Gail used water from Dollarhide Spring to irrigate the lawn, to water the garden, to water a rock wall with flowers planted on top of it, and to water several fruit trees all located on the Winter Property. The Gails also used water from Dollarhide Spring for drinking and domestic use in the residence. The Gails used only water from Dollarhide Spring for all of their needs for the first five or six years they resided on the property. (Test. of Gail; Ex. C3 at 8.)

22. Mr. Gail checked on the spring box, maintained the pipe and/or the box, and cleared debris approximately two or three times per year while he resided on the property. (Test. of Gail.)

23. During three or four of the years the Gails resided on the Winter Property, Dollarhide Spring failed to produce sufficient water for the property's needs. This typically occurred in September or October during particularly dry years. During those years, the Gails used water from the well to supplement the spring water. Beginning in 2008 or 2009, the Gails had difficulty with the well and began using spring water for home and domestic use in addition to irrigation and garden use. (Test. of Gail.)

Magdalena Winter and Leo Anifowose

24. Ms. Winter purchased the Winter Property from the Gails in June 2015. She has resided on the property with her partner, Mr. Anifowose, since that time. When Ms. Winter purchased the property, Mr. Gail explained the irrigation system from Dollarhide Spring. (Test. of Winter and Anifowose; Ex. C3 at 1.)

25. When Ms. Winter purchased the property, there was already an extensive irrigation system including pop-up sprinklers for the lawn area as well as hose irrigation for the lavender plants on the property and the garden located behind the residence. The lawn was green at the time of purchase in 2015. (Test. of Anifowose.)

26. Water from Dollarhide Spring stopped flowing to the Winter Property in August 2015 because of an air bubble in the pipe. Mr. Anifowose and Mr. Gail used the valve to restart the flow of water. (Test. of Anifowose.) In spring 2016, Ms. Winter installed a PVC pipe underground on the property. The pipe ran from the existing pipe towards the east along the driveway on the property. The new pipe was intended to allow gravity-fed irrigation to portions of the east side of the property. Ms. Winter subsequently installed drip irrigation for crops on the Winter Property as well as a fenced crop on Tax Lot 302. (Test. of Winter; Ex. C2 at 3-6.)

27. Ms. Winter and Mr. Anifowose currently grow fruit, vegetables, herbs, cannabis, mushrooms, and lavender on the Winter Property. They use approximately three to four acres of the property for agriculture. (Test. of Winter and Anifowose.) They use the terraced area to the north and east of the residence to grow herbs and other plants. They grow legal cannabis for medicinal use via a drip irrigation system which waters 12 plants, each plant being 10-12 feet high and housed in a custom eight-foot square box, located to the east of the residence on the Winter Property. (Test. of Anifowose.)

28. Ms. Winter has used water from Dollarhide Spring each season since 2015 for irrigation whenever water is available. When spring water is not available, she has used well water and had water delivered by truck to supplement the spring water. (Test. of Winter.)

Protestants and Protestants' Witnesses

William Fleeger

29. William Fleeger has degrees in watershed management and community wildfire protection. He earned a Ph.D. in natural resources and environmental studies in 2007. He worked for the forest service for eight years. He now teaches environmental studies and environmental policy. He is familiar with forest management, trail maintenance, firefighting, and watershed management. (Test. of Fleeger.)

30. William and Mary Fleeger purchased the Schneider Property in October 1992 and purchased Tax Lot 304 in June 1993. Mr. Fleeger resided on the Schneider Property until 2003. He rented out the property from 2003 until 2009, and he would visit the property annually during that time. Mr. Fleeger did not interact with the neighbors during his visits, and he did not go onto the Winter Property or Tax Lot 302 at any time between 2003 and 2009. (Test. of Fleeger.)

31. Mr. Fleeger was unaware of Dollarhide Spring at the time he purchased the Schneider Property and Tax Lot 304. After the purchase, Helen Wilson, who owned and resided on the Winter Property at that time, informed Mr. Fleeger of the spring and of the water right allowing her to use water from the spring. Mr. Fleeger understood there to be irrigation and stock watering rights. (Test. of Fleeger.)

32. While Mr. Fleeger owned Tax Lots 303 and 304, the residence on the Winter Property was not visible from the residence on the Schneider Property. The residence on the Winter Property was “pretty well screened” by trees and foliage. The Winter Property was more

readily visible from the highway. Mr. Fleeger drove along the highway past the Winter Property daily during the period he resided on the Schneider Property. (Test. of Fleeger.)

33. Mr. Fleeger went onto the Winter Property “a couple of times” while Ms. Wilson was in residence and once while Ms. Krant was in residence. He did not observe stock watering on the Winter Property or on Tax Lot 302 at any time during the period when he owned the Schneider Property. He did not observe Ms. Wilson irrigating her property during her period of ownership. Mr. Fleeger did not observe irrigation by Ms. Krant to the south of the residence on the Winter Property. Mr. Fleeger did not observe the Krants installing the lawn on the east side of the residence on the Winter Property. (Test. of Fleeger.)

Linda Ganim

34. Linda Ganim and her husband owned the Schneider Property from September 2009 until they sold the property to Carol Schneider in May 2013. On November 1, 2017, Ms. Ganim filed an affidavit with OWRD asserting that she had “seen no evidence that water has been applied for irrigation use or for the watering of livestock on the Winter Property or on Tax Lot 302 during the period of years September, 2009 through May, 2013[.]” (Ex. B6.)

Carol Schneider

35. Carol Schneider purchased the Schneider Property in May 2013, and purchased Tax Lot 304 in June 2013. Ms. Schneider has resided on the property continuously since 2013. (Test. of Schneider.)

36. Portions of the Winter Property are visible from Ms. Schneider’s residence. The residence on the Winter Property is not typically visible from the residence on the Schneider property due to trees and vegetation. Depending on the season, the view of the Winter Property from the road is sometimes obscured by trees. Ms. Schneider went onto the Winter Property once in 2015 or 2016 during the spring. She has not otherwise been onto the Winter Property. (Test. of Schneider.)

37. On November 1, 2017, Ms. Schneider filed an affidavit with OWRD asserting that she had “seen no evidence that water has been applied for irrigation use on the Winter Property or on Tax Lot 302 during the period from May, 2013 up until late Spring 2016.” (Ex. B3.)

Peggy Freitas

38. Ms. Freitas lived in the area near the Winter Property from 1950 to 1967. She later returned to the area in 1997 and has resided since that time on Tax Lot 708, which is located approximately one mile north and northeast of the Winter Property. Ms. Freitas has never been on the Schneider Property or on Tax Lot 304. Ms. Freitas has never gone onto the Winter Property aside from one or more occasions in her youth. The Winter Property is not visible from Tax Lot 708. Ms. Freitas sometimes visits an acquaintance who resides on Tax Lot 900, from which portions of the Winter Property are visible. Visibility onto the Winter Property was

reduced between 1997 and 2010 as the trees on the property have grown. Ms. Freitas has not observed irrigation on the Winter Property at any time since 1997. (Test. of Freitas.)

Evern Sturdevant

39. Evern Sturdevant and her husband purchased Tax Lot 100 in 1989 and built a residence on the property in 1992. Tax Lot 100 is located to the east of Tax Lot 302 and the Schneider Property across Old Highway 99. Ms. Sturdevant resided on the property until 2014. (Test. of Sturdevant; Exs. B5 and B28.)

40. Ms. Sturdevant visited the Winter Property approximately once per month while Ms. Wilson resided there. She visited the Krants following their purchase of the property. She visited the Gails after they purchased the property, but less frequently than she visited the Krants. Ms. Sturdevant did not discuss the property's water supply or water use with any of the owners. (Test. of Sturdevant.)

41. Ms. Sturdevant observed potted plants and flowers on the Winter Property watered with sprinklers during the period Ms. Wilson resided there. While Ms. Krant resided on the property, Ms. Sturdevant was aware of the improvements to the lawn area and observed that the lawn was typically greener than the surrounding areas, even during the summer time. Ms. Sturdevant observed that the pond on the property would sometimes be filled. (Test. of Sturdevant.)

42. On November 1, 2017, Ms. Sturdevant filed an affidavit with OWRD asserting that she had "seen no evidence that water has been applied for irrigation use or for the watering of livestock on the Winter Property or on Tax Lot 302 during the period of years December, 1989 through the fall of 2014." (Ex. B3.)

Bob Long

43. Mr. Long is a hydrogeologist, registered geologist, and certified water rights examiner in the state of Oregon. He has 20 years of experience working in the field of water rights, with 15 years as a certified water rights examiner. He has lived in the Pacific Northwest for 25 years. As part of his work, Mr. Long evaluates compliance with permit conditions and interprets aerial photography. (Test. of Long.)

44. Mr. Long reviewed aerial photographs of the region that includes the Winter Property and Tax Lots 302, 303, and 304 taken on the following dates: June 1993, August 1998, August 2001, August 2005, July 2010, August 2011, and July 2014. (Exs. B9 – B15.) Mr. Long observed a darkened area on the photograph from August 2001 that could indicate an irrigated lawn or a soil disturbance on the Winter Property. (Test. of Long; Ex. B11.) Mr. Long did not observe soil disturbance in any of the other aerial photographs that would indicate installation or improvement of underground irrigation systems. In the 2014 photograph, Mr. Long did not observe any equipment such as above-ground sprinkler systems, pumps, or water lines that would indicate there was irrigation on the Winter Property. From viewing the aerial photographs, Mr. Long would not have been able to see existing underground pipes,

underground irrigation systems, or pop-up sprinkler systems not in use. Mr. Long would not have been able to see soil disturbances from maintenance or installation of underground equipment from reviewing a photograph if the installation had occurred two years or more before the photograph was taken. (Test. of Long.)

45. Mr. Long visited the area including the Winter Property and Tax Lot 302 in person in June 2016 or 2017 and again in September 2018. In the earlier visit, he observed the properties from a position standing on Old Highway 99 looking to the west, and from the Schneider property looking north. On the second visit, he went onto the Winter Property via the driveway, walked into the tree line to the west of the residence, and went approximately 400 feet along the northern boundary of the property. During the 2018 visit, Mr. Long observed a drip irrigation system on the Winter Property, and observed that the well on the Winter Property appeared to be connected to the irrigation system. Mr. Long observed no visible irrigation equipment aside from the drip irrigation. (Test. of Long.)

CONCLUSIONS OF LAW

1. The water right evidenced by Water Right Certificate 2366 is subject to partial cancellation due to non-use as follows:

- Pursuant to ORS 540.641(1), the Water Resources Commission may enter an order cancelling the portion of Water Right Certificate 2366 applicable to irrigation with a place of use on Tax Lot 302; and
- OWRD shall cancel the portion of Water Right Certificate 2366 applicable to irrigation with a place of use on Tax Lot 300.

2. Proponents failed to meet their burden to shown a period of five or more consecutive years of non-use of any portion of the water right evidenced by Water Right Certificate 22086 with respect to the place of use on Tax Lot 300 or Tax Lot 302 during the period of April 1997 through May 2016.

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); *Dixon v. Board of Nursing*, 291 Or App 207, 213 (2018) (in administrative actions, the burden of proof is by a preponderance of the evidence). Proof by a preponderance of the 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 assert that Protestant has failed to make beneficial use of the water rights granted under Certificates 2366 and 22086 for a period exceeding five years with respect to the place of use on Tax Lots 300 and 302. Consequently, Proponents assert the water rights are forfeit and have submitted sworn affidavits seeking cancellation of the relevant portions of those

rights. As the proponents of this position, they bear the burden to prove by a preponderance of the evidence the facts necessary to demonstrate forfeiture. In the event Proponents are able to carry their burden and prove non-use for the statutory period, Protestant 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.² Accordingly, Proponents are responsible for meeting their burdens before Protestant 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.*

In addition to defining use as the measure of a water right and identifying the bases for forfeiture due to non-use of the right, ORS 540.610 provides, in relevant part:

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

* * * * *

(f) The end of the alleged period of nonuse occurred more than 15 years before the date upon which evidence of nonuse was submitted to the commission or the

² ORS 540.631 provides authority for the Water Resources Commission to begin cancellation proceedings of a forfeited water right and provides, in part:

Whenever it appears to the satisfaction of the Water Resources Commission upon the commission's own determination or upon evidence submitted to the commission by any person that a perfected and developed water right has been forfeited as provided in ORS 540.610(1), and would not be rebutted under ORS 540.610 (2), the commission shall initiate proceedings for the cancellation of such water right by causing written notice of such initiation of proceedings to be given by registered or certified mail, return receipt requested, to the legal owner of the lands to which the water right is appurtenant and to the occupant of such lands. * * * The notice shall state that the legal owner or the occupant has a period of 60 days from the date of the mailing of the notice within which to protest the proposed cancellation of the water right.

commission initiated cancellation proceedings under ORS 540.631, whichever occurs first.

* * * * *

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

* * * * *

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

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

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

OAR 690-017-0400(1) identifies the process for cancellation of a water right initiated by Department:

The Department shall initiate proceedings to cancel a perfected water right, as provided in ORS 540.631 and these rules, whenever it appears that a right has been forfeited as provided in 540.610. The decision to initiate cancellation proceedings shall be based on evidence submitted to the Department, by any person, that alleges five or more years of nonuse so as to create a presumption of forfeiture, and from which evidence it further appears the presumption of forfeiture would not likely be rebutted under OAR 690-017-0800(2)(a), (d) or (e).³

³ OAR 690-017-0800(2) provides grounds for rebutting the presumption of forfeiture consistent with ORS 540.610(2) and provides, in part:

A presumption of forfeiture may be rebutted by showing one or more of the following:

(a) The water right is for reasonable and usual municipal use of water;

* * * * *

(d) The period of nonuse occurred during a period of time within which land was withdrawn from use under the Federal Soil Bank Program or the Federal Conservation Reserve Program;

Period in Issue

The Notice proposes partial cancellation of the water rights at issue based on five or more consecutive years of non-use during the period of April 1997 through May 2016. Proponents assert that evidence of non-use should be considered for the period of April 1997 through May 2019. (*Proponents' Closing Argument* at 1.) That proposed period includes three years outside the scope of the Notice. For that reason, any period after May 2016 is not considered. Protestant asserts that no evidence of non-use should be considered prior to November 1, 2002, pursuant to ORS 540.610(2)(f) and OAR 690-017-0800(2)(e) (a presumption of forfeiture may be rebutted by a showing that the period of non-use ended more than 15 years prior to the date evidence of non-use was submitted). (*Protestant's Closing Argument* at 1.) The cited provisions, however, apply only when attempting to rebut an established presumption of forfeiture after a showing of lack of beneficial use for five successive years. For the reasons discussed below, it is unnecessary to address whether this or any other rebuttal is applicable. Accordingly, the relevant period is April 1997 through May 2016.

Expert Testimony

Mr. Long is an expert in hydrogeology. He is a certified water rights examiner and has significant experience in the Pacific Northwest. He testified credibly and his testimony is given great weight.

Mr. Long reviewed aerial photographs and twice viewed or visited the Winter Property in person. Mr. Long made the following assertions regarding the Winter Property and Tax Lot 302, which are not disputed by any evidence in the record: none of the aerial photographs, aside from the one taken in 2011, showed soil disturbance that would indicate installation or improvement of an underground irrigation system; there were no visible above-ground water lines, sprinklers, pipes, or other equipment that would indicate ongoing irrigation in any of the aerial photographs; during his observation of the Winter Property from the Schneider Property in 2016 or 2017, he was unable to observe the drip irrigation system; and during his sole visit onto the Winter Property in 2018, he observed a drip irrigation system being used to irrigate crops on the property.

Water Right Certificate No. 2366 and Stipulations

Water Right Certificate No. 2366 (the Carter Creek water right) authorizes use of water from the Westerly Branch of Carter Creek, a tributary of Emigrant Creek, for irrigation of a total of 35 acres with a place of use including land on the Winter Property and Tax Lot 302.

Lutcher Land LLC is the owner of record of Tax Lot 302. OWRD served Lutcher Land LLC with the Notice. Lutcher Land LLC did not file a protest and did not appear for or participate in the hearing in this matter in any capacity.

(e) The end of the alleged period of nonuse occurred more than 15 years before the date upon which evidence of nonuse was submitted or cancellation proceedings were initiated under ORS 540.631, whichever occurs first[.]

ORS 540.641 identifies the requirements and procedure for filing protests of cancellation proceedings generally. With respect to owners or occupants who fail to file a protest in response to a notice proposing cancellation, it provides, in relevant part:

(1) If the legal owner or the occupant receiving notice as provided in ORS 540.631 fails to protest the proposed cancellation of the water right within the 60-day period prescribed in the notice, the Water Resources Commission may enter an order canceling the water right.

ORS 540.641(1) permits the Water Resources Commission, rather than OWRD, to enter an order cancelling the water right in the event the legal owner or occupant receiving notice fails to protest the proposed cancellation of the water right within the period prescribed in the Notice.

Accordingly, because Lucher Land LLC failed to protest the proposed partial cancellation within the applicable period, the Water Resources Commission may enter an order cancelling the portion of Water Right Certificate No. 2366 applicable to irrigation with a place of use on Tax Lot 302.

Protestant acknowledges that Carter Creek no longer flows onto or over either the Winter Property or Tax Lot 302. Protestant stipulated that there has been no water applied to beneficial use for irrigation purposes on the Winter Property from Carter Creek pursuant to Water Right Certificate No. 2366 at any time since 1997.

Because Protestant acknowledges that there has been no water applied to beneficial use for irrigation purposes on the Winter Property from Carter Creek pursuant to Water Right Certificate No. 2366 at any time since 1997, Proponents have met their burden to show a period of five or more consecutive years of non-use. As such, they have established a presumption of forfeiture with respect to Certificate No. 2366 on the Winter Property. Protestant does not assert that any rebuttals under ORS 540.610(2) apply to the presumption of forfeiture as to Certificate No. 2366. The portion of Certificate No. 2366 applicable to irrigation on the Winter Property should therefore be cancelled for non-use.

Water Right Certificate No. 22086

Both Protestant and Proponents provided testimony from witnesses regarding beneficial use under Certificate No. 22086 during the period in issue. Because ownership of the relevant tax lots changed multiple times during the relevant period, beneficial use on the Winter Property is addressed by period of ownership in chronological order.

April 1997 – Dec. 1998 (Wilson)

Ms. Wilson owned the Winter Property during the period from April 1997 until December 1998. Neither Mr. Fleeger nor Ms. Sturdevant observed irrigation on the Winter Property or Tax Lot 302 during this period. The only evidence of water use during this time is Ms. Sturdevant's observation that Ms. Wilson watered potted plants and flowers with a sprinkler.

There is no evidence showing that Ms. Wilson used water from Dollarhide Spring, as opposed to the well, for watering, and there is no evidence of the volume or frequency of the watering. The preponderance of the evidence shows that during this period of approximately 21 months, there was no beneficial use of the water from Dollarhide Spring for irrigation on the Winter Property or Tax Lot 302.

December 1998 – April 2004 (Krant)

Ms. Krant purchased the Winter Property in December 1998. Proponents assert that there was no water used for irrigation on the property between December 1998 and April 2004. Mr. Fleeger did not observe irrigation on the Winter Property to the south of the residence during that period. However, Mr. Fleeger acknowledged that the property was “pretty well screened” by trees and foliage at that time. Furthermore, he did not go onto the Winter Property or Tax Lot 302 except for a single occasion during Ms. Krant’s period of ownership, and he visited his own property only on an annual basis beginning in 2003. Mr. Long reviewed aerial photographs from August 1998 and August 2001. Mr. Long observed a darkened area in the photograph from August 2001 that could indicate an irrigated lawn or soil disturbance on the Winter Property. Considering the date of the photograph, it is reasonable to infer that the area in question was a soil disturbance resulting from Ms. Krant’s repair and reseeded of the septic field. Mr. Long saw no other indication of irrigation. No other evidence suggests non-use during this period.

In contrast, Ms. Krant’s specific, detailed testimony constitutes persuasive evidence of ongoing water use from Dollarhide Spring for landscaping, gardening, and agriculture during this period. Ms. Krant installed a retaining wall and large lawn to the east of the residence, which she regularly irrigated with water from Dollarhide Spring using automated sprinklers. Additionally, she filled and maintained a pond on the property and watered fruit trees at various locations on the property.

Ms. Krant’s testimony is more persuasive than Mr. Fleeger’s and Mr. Long’s regarding water use during the period from 1998 through 2004. Ms. Krant had direct knowledge of the multiple, specific uses of water from Dollarhide Spring during that time. Although Mr. Fleeger testified credibly, his view of the Winter Property and Tax Lot 302 was largely obscured from his residence, he went onto one of those lots only once after Ms. Krant began residing there, and he did not reside on the Schneider Property for a portion of the time he owned it. Accordingly, his ability to observe the Winter Property was severely limited both by obstructions to the view and by his lack of proximity to the property. Mr. Long based his assertions on a review of two aerial photographs relevant to this period. Considering Ms. Krant’s consistent irrigation on the property, it is more likely than not that the methods of irrigation (e.g. pop-up sprinklers and hoses) were not discernable from the aerial photographs. The fact that neither Mr. Fleeger nor Mr. Long observed irrigation does not demonstrate by a preponderance of the evidence that no irrigation occurred on either the Winter Property or Tax Lot 302. On the contrary, the overwhelming balance of the evidence shows that Ms. Krant engaged in consistent, substantial irrigation on her property.

Proponents have not met their burden to show by a preponderance of the evidence that the water right holder failed to make beneficial use of the water for irrigation and supplemental

irrigation on the Winter Property or Tax Lot 302 pursuant to Certificate 22086 during this period.

April 2004 – 2015 (Gail)

Mr. Gail purchased the Winter Property in April 2004. Mr. Gail resided on the property from 2004 until 2015, and he regularly used Dollarhide Spring water to irrigate the lawn, garden, rock wall vegetation, and several fruit trees on the property. Once he began experiencing problems with the well in approximately 2008, he also used spring water for domestic use. In years when the spring water was insufficient to meet all of his needs, he used the spring water until it was depleted.

Mr. Fleeger owned Tax Lots 303 and 304 until 2009. However, he did not reside on the property at any time after 2003, and he visited the property only on an annual basis between 2003 and 2009. Although he did not observe irrigation on the Winter Property or Tax Lot 302 during this time, his failure to observe irrigation is not sufficient to support a conclusion that no irrigation occurred because of his frequent absence from the region and because of the obstruction from foliage described above.

Ms. Ganim owned the Schneider Property from September 2009 until May 2013. Although Ms. Ganim filed an affidavit with OWRD asserting that she had “seen no evidence” of irrigation or stock watering on the Winter Property or Tax Lot 302 during that time, she did not testify at hearing and was not subject to cross-examination. Her assertion via affidavit does not constitute persuasive evidence of non-use.

Ms. Schneider owned the Schneider Property and Tax Lot 304 beginning in 2013. She did not observe irrigation on the Winter Property or Tax Lot 302. She acknowledged that the residence on the Winter Property, as well as portions of the property itself, are obscured by trees, both from her residence and from the road, to varying degrees depending on the season. Ms. Schneider went onto Tax Lot 302 only once in 2015 or 2016.

Mr. Long reviewed aerial photographs from August 2005, July 2010, August 2011, and July 2014 and did not observe any equipment such as sprinkler systems, pumps, or above-ground water lines that would indicate there was irrigation on the Winter Property during that period. However, he acknowledged that the photographs would not allow him to observe pop-up sprinklers or other irrigation equipment already installed underground.

The evidence shows that, during that period, Mr. Gail regularly used Dollarhide Spring water for irrigation and, in later years, for domestic use, until the supply of water from the spring was depleted. Proponents have not met their burden to show by a preponderance of the evidence that the water right holder failed to make beneficial use of the water for irrigation and supplemental irrigation on the Winter Property and/or Tax Lot 302 pursuant to Certificate 22086 during this period.

June 2015 – May 2016 (Winter)

Ms. Winter purchased the Winter Property in June 2015. Since that date, she has grown

and irrigated fruit, vegetables, herbs, cannabis, mushrooms, and lavender on the property as well as a portion of Tax Lot 302. Ms. Winter uses approximately three to four acres of her property for agriculture plus an additional fenced area on Tax Lot 302. Ms. Winter has used water from Dollarhide Spring for irrigation each season whenever spring water is available.

Proponents assert that there was no water used for irrigation on the Winter Property between June 2015 and May 2016. Ms. Schneider, who resided on the Schneider Property during this period, did not observe irrigation on the Winter Property or on Tax Lot 302.⁴ However, the fact that Ms. Schneider did not observe irrigation on either lot is attributable to the obstructions in the view of the properties and to the types of irrigation methods, which were largely underground and not visible from the Schneider Property. Ms. Schneider's testimony does not outweigh the significant evidence of ongoing irrigation on both lots during this period.

Proponents have not met their burden to show by a preponderance of the evidence that the water right holder failed to make beneficial use of water for irrigation and supplemental irrigation on the Winter Property and/or Tax Lot 302 pursuant to Certificate 22086 during that period.

Conclusion:

Lutcher Land LLC did not file a protest with OWRD in response to the Notice. Pursuant to ORS 540.641(1), the Water Resources Commission may enter an order cancelling the portion of the Carter Creek water right (Water Right Certificate No. 2366) applicable to irrigation with a place of use on Tax Lot 302.

Protestant stipulated to non-use of the Carter Creek water right on Tax Lot 300 for a period of five or more consecutive years from April 1997 to May 2016. Accordingly, OWRD may enter an order cancelling the portion of the Carter Creek water right (Water Right Certificate No. 2366) applicable to irrigation with a place of use on Tax Lot 300.

Proponents have shown, and Protestant does not dispute, that there has been no stock watering pursuant to the Dollarhide Spring water right (Water Right Certificate No. 22086) at any time between 1997 and 2016 on Tax Lots 300 or 302. However, the Notice proposed partial cancellation based solely on *place* of use. The Notice did not propose partial cancellation based on failure to engage in a particular type of beneficial use. No portion of the water right shall be cancelled based on a failure to make beneficial use of the water for stock use.

Proponents have shown by a preponderance of the evidence that, during the approximately 21-month period from April 1997 until December 1998, there was no beneficial use of the water from Dollarhide Spring for irrigation or supplemental irrigation on Tax Lots 300 or 302. This period is less than five consecutive years. Accordingly, it is insufficient to establish a presumption of forfeiture of the water right for non-use.

⁴ Mr. Long did not view aerial photographs taken during this period, and he did not visit the location until after May 2016.

Proponents have failed to meet their burden to show by a preponderance of the evidence that there has been a period of five or more consecutive years of non-use of the portion of Dollarhide Spring water right applicable to irrigation or supplemental irrigation on Tax Lots 300 or 302 during the period of April 1997 through May 2016. Accordingly, Proponents have not established a presumption of forfeiture as to any portion of that water right, and no portion of that water right is subject to cancellation.

ORDER

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

1. The water right evidenced by Water Right Certificate 2366 is subject to partial cancellation due to non-use as follows:

- Pursuant to ORS 540.641(1), the Water Resources Commission may enter an order cancelling the portion of Water Right Certificate 2366 applicable to irrigation with a place of use on Tax Lot 302; and
- The portion of Water Right Certificate 2366 applicable to irrigation with a place of use on Tax Lot 300 shall be cancelled.

2. No portion of the water right evidenced by Water Right Certificate 22086 is subject to cancellation with respect to the portion of the place of use that lies within Tax Lot 300 and/or Tax Lot 302 based on non-use of the water during the period of April 1997 through May 2016.

/s/Ehren Vaughn

Administrative Law Judge
Office of Administrative Hearings

APPEAL PROCEDURE

NOTICE

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

Oregon Water Resources Department
725 Summer Street 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 Directors determination and discretion. After reviewing the record, the exceptions and any additional argument, the Director will issue a final order. The Director may issue a final order that differs from the proposed order or may adopt the proposed order as the final order.

CERTIFICATE OF MAILING

On August 9, 2019 I mailed the foregoing PROPOSED ORDER in OAH Case No. 2018-OWRD-00017.

BY FIRST CLASS AND, WHERE AVAILABLE, BY ELECTRONIC MAIL:

Name	Address	Contact
Magdalena Winter	5580 Old Hwy 99 S Ashland OR 97520	
Carol Schneider	5590 Old Highway 99 S Ashland OR 97520	
Peggy Freitas	4765 Old Highway 99 S Ashland OR 97520	
Linda Ganim	PO Box 583 Ashland OR 97520	
Evern Sturdevant	2443 Bridgewater Way Medford OR 97501	
Patricia McCarty	725 Summer St NE, Ste A Salem OR 97301	Patricia.E.McCarty@oregon.gov
Eugene V Anderson	515 E Main St Ashland OR 97520	eanderson@davishearn.com
Peter Mohr	2 Centerpointe Dr. 6th Flr Lake Oswego OR 97035	peter.mohr@jordanramis.com

/s/Alexandria N Whitley
Hearing Coordinator

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF OREGON

FOR THE

OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF THE PROPOSED	)	PROPONENTS' EXCEPTIONS TO
PARTIAL CANCELLATION OF	)	PROPOSED ORDER
CERTIFICATES 2366 AND 22086)	
	)	OAH Case No. 2018-OWRD-00017
	)	Agency Case No. PC 17-03
)	

I. INTRODUCTION

Pursuant to ORS 537.445, OAR 137-003-0650 and OAR 690-002-0175, Proponents Carol Schneider, Linda Ganim, Peggy Freitas, and Evern Sturdevant ("Proponents") hereby timely submit these exceptions to the Proposed Order issued in this matter and dated August 9, 2019 (the "Proposed Order"). These exceptions are timely filed within the time period specified in OAR 690-002-0175 and the appeal procedures set forth in the Proposed Order.

II. Procedural Summary and Scope of Exceptions

On November 20, 2017, the Oregon Water Resources Department (the "Department") issued a *Notice of Proposed Partial Cancellation of Water Rights* ("Notice") based on affidavits filed by Proponents. The *Notice* stated Proponents' affidavits asserted that those portions of Water Right Certificate No. 2366, which originally authorized primary irrigation (the "Carter Creek Water Right"), and Water Right Certificate No. 22086, which originally authorized primary irrigation, supplemental irrigation, and stock watering (the "Dollarhide Spring Water Right") on portions of Tax Lot 300 and/or Tax Lot 302, have been forfeited due to non-use for a

1 period of five successive during the approximately 19-year period from April, 1997 through
2 May, 2016. *Notice*, pp 1 – 2. The Notice further provided that Proponents’ affidavits, “if not
3 countered by other evidence, establishes at least five years of non-use of” the Water Rights and
4 that, absent the submittal of countering evidence, the affidavits created a presumption of the
5 forfeiture of the Water Rights. *Id.* at pp 2-3.

6 In response to the *Notice*, Protestant, as the owner of record of Tax Lot 300, filed with the
7 Department a letter protest to the alleged forfeiture of those portions of the Water Rights
8 originally authorized to be placed to beneficial use on Tax Lot 300 on or about December 18,
9 2017. Notably, Lutcher Land, LLC, as the owner of record of Tax Lot 302, never filed a protest
10 to the *Notice* and the accompanying alleged forfeiture of those portions of the Water Rights
11 originally authorized to be placed to beneficial use on Tax Lot 302. Lutcher Land, LCC never
12 later sought to intervene in the proceedings.

13 On November 8, 2018, the parties entered into a stipulation confirming the non-use of
14 water for irrigation purposes under Water Right Certificate 2366 on the affected portions of Tax
15 Lot 300 and Tax Lot 302.

16 A hearing was held in this matter on April 25 and 26. The ALJ entered a Proposed Order
17 which was served on the parties on August 9, 2019. In the Proposed Order, the ALJ concluded
18 as a matter of fact and law as follows:

- 19 1. Lutcher Land LLC did not file a protest with OWRD in response to the Notice.
20 Pursuant to ORS 540.641(1), the Water Resources Commission may enter an
21 order cancelling the portion of the Carter Creek water right (Water Right
Certificate No. 2366) applicable to irrigation with a place of use on Tax Lot 302.
- 22 2. Protestant stipulated to non-use of the Carter Creek water right on Tax Lot 300 for
23 a period of five or more consecutive years from April 1997 to May 2016.
24 Accordingly, OWRD may enter an order cancelling the portion of the Carter
25 Creek water right (Water Right Certificate No. 2366) applicable to irrigation with
a place of use on Tax Lot 300.

- 1 3. Proponents have shown, and Protestant does not dispute, that there has been no
2 stock watering pursuant to the Dollarhide Spring water right (Water Right
3 Certificate No. 22086) at any time between 1997 and 2016 on Tax Lots 300 or
4 302. However, the Notice proposed partial cancellation based solely on *place* of
5 use. The Notice did not propose partial cancellation based on failure to engage in
6 a particular type of beneficial use. No portion of the water right shall be cancelled
7 based on a failure to make beneficial use of the water for stock use.
8
9 4. Proponents have shown by a preponderance of the evidence that, during the
10 approximately 21-month period from April 1997 until December 1998, there was
11 no beneficial use of the water from Dollarhide Spring for irrigation or
12 supplemental irrigation on Tax Lots 300 or 302. This period is less than five
13 consecutive years. Accordingly, it is insufficient to establish a presumption of
14 forfeiture of the water right for non-use.
- 15 5. Proponents have failed to meet their burden to show by a preponderance of the
16 evidence that there has been a period of five or more consecutive years of non-use
17 of the portion of Dollarhide Spring water right applicable to irrigation or
18 supplemental irrigation on Tax Lots 300 or 302 during the period of April 1997
19 through May 2016. Accordingly, Proponents have not established a presumption
20 of forfeiture as to any portion of that water right, and no portion of that water
21 right is subject to cancellation.

22 (Proposed Order, p. 17-18)

23 In reliance on these conclusions of fact and law, the ALJ entered an Order (the “Order”) holding
24 as follows:

25 “1. The water right evidenced by Water Right Certificate 2366 is subject to partial
 cancellation due to non-use as follows:

- Pursuant to ORS 540.641(1), the Water Resources Commission may enter an order cancelling the portion of Water Right Certificate 2366 applicable to irrigation with a place of use on Tax Lot 302; and
- The portion of Water Right Certificate 2366 applicable to irrigation with a place of use on Tax Lot 300 shall be cancelled.

 2. No portion of the water right evidenced by Water Right Certificate 22086 is subject to cancellation with respect to the portion of the place of use that lies within Tax Lot 300 and/or Tax Lot 302 based on non-use of the water during the period of April 1997 through May 2016.”

1 The Proponents submit exceptions to preceding Paragraph 2 of the ALJ's Order for
2 reasons that the ALJ's underlying conclusions of fact and law are erroneous on a variety
3 of fronts.

4 **EXCEPTIONS TO THE PROPOSED ODER**

5 1. The ALJ's underlying conclusions alleging that that the portion of the Dollarhide
6 Spring Right originally authorized for use on Tax Lot 302 is not subject to
7 forfeiture is erroneous as (a) the land owner of record Tax Lot 302 never filed a
8 protest to the Cancellation Notice and (b), in the alterative, there is no evidence in
the record that any water from the Dollarhide was ever applied to beneficial use
on Tax Lot 302.

9 It is undisputed in this case that the land owner of record of Tax Lot 302, Lutch
10 Land, LLC, was served with the Cancellation Notice as a matter of law, but never filed a
11 protest to the Cancellation Notice. (Proposed Order, p. 13-14). It is also undisputed in
12 this case that where, as here, Lutch Land, LLC, as the legal owner of that portion of the
13 Dollarhide Spring Right that originally authorized the beneficial use of water on the Tax
14 Lot 302, has received notice as provided in ORS 540.631, and failed to protest the
15 proposed cancellation of the water right within the 60-day period prescribed in the notice,
16 the Department *shall* enter an order cancelling the water right as provided in ORS
17 540.641. OAR 690-017-0500.

18 Moreover, in the alternative, at no time has any information been provided
19 confirming the owner of Tax Lot 300 or any other party of record as possessing a
20 sufficient interest to allege lack of forfeiture on behalf of Lutch Land, LLC. To the
21 contrary, when responding to *Proponents' Request for Admissions* regarding Protestant's
22 use of water from the Dollarhide Spring Water Right on Tax Lot 302, the Protestant
23 admitted such a request was "*Not Applicable.*" Such a response is considered non-
24 responsive and, as a result, an admission as a matter of law. ORCP 45. The ALJ's rulings
25 regarding the lack of forfeiture of all or any portion of the Dollarhide Spring Right as

1 initially authorized for use on Tax Lot 302 are erroneous and the Proposed Order should
2 be corrected to show that all such water rights interests are subject to cancellation.

- 3
4 2. The ALJ's underlying conclusions alleging that the content of the Cancellation
5 Notice prevents the ALJ's consideration of forfeiture regarding historic use for
6 stock watering (or any other initially authorized use of water) from the Dollarhide
Spring misconstrues the content of the Cancellation Notice and must be stricken
as erroneous.

7 Proponents' incorporate their preceding argument herein regarding the extent to which
8 any and all portions of the Dollarhide Spring Right initially authorized for application to
9 beneficial use on Tax Lot 302 are necessarily subject to cancellation as a matter of fact and law.
10 In addition, the claim in the Proposed Order that the Cancellation Notice only sought to cancel
11 the authorized place of use of the affected portion of the Dollarhide Spring Right is frankly hard
12 to understand at all. The very purpose of a Cancellation Notice – expressly stated or otherwise –
13 is to provide to record notice to affected parties that (a) evidence has been submitted creating a
14 record presumption of forfeiture regarding specified water right interests and (b) that such
15 presumption can be rebutted by the filing of a sufficient protest and additional evidence as may
16 be presented in a contested case hearing. *Cancellation Notice*, p. 2. Nowhere in the Cancellation
17 Notice has the Department stated or implied that such notice does not reach to considerations of
18 the historic use of the water rights interests at issue – including those initially authorized under
19 the Dollarhide Spring Right or the older Carter Creek Water Right. Further, nor does the
20 Proposed Order specifically identify such shortcomings or provide any legal authority for such a
21 position. The Proposed conclusions within the Proposed Order alleging that the Cancellation
22 Notice did not provide grounds to allege forfeiture for lack of application of portions of the
23 Dollarhide Spring Right initially authorized for beneficial use on Tax Lot 302 must be stricken
24 as erroneous.
25

1 3. Contrary to the Proposed Order, the evidence in the record *does* confirm that the affected
2 portions of Water Right Certificate No. 22086 authorized for beneficial use on Tax Lot
3 300 and 302 have been forfeited due to non-use for a period of five or more years during
4 the Period from April 1997-April 2002.

5 Although the Proposed Order correctly finds there was no evidence of use of the
6 Dollarhide Spring Right on Tax Lot 300 or Tax Lot 302 from April 1997 until December 1998,
7 the order makes erroneous findings for the following period, at a minimum, up through the end
8 of 2002. In considering the following period through the 2002 irrigation season, Proponents
9 presented the testimony of Bill Fleeger, who owned the neighboring Tax Lot 303 upon which the
10 Dollarhide Spring is located and upon which he resided after 2002, and that of Bob Long, who
11 was admitted as a water expert. While the testimony of both of these witnesses was summarized
12 in Proponents' written closing, a copy of Proponents' Written Closing Argument is attached as
13 Exhibit A. In considering these same period of years, the Protestant presented the testimony of
14 Susan Krant, the then owner of the Tax Lot 300. Proponents reference to the lack of credibility
15 presented by Ms. Krant's testimony in consideration of Mr. Fleeger's and Mr. Long's is also
16 included in Proponents' Written Closing.

17 In considering the weight of the testimony to be attributed to Proponents' witnesses
18 compared to that of Ms. Krant, the ALJ made very summary disposition of the significance of
19 Bill Fleeger's and Bob Long's testimony when it came to the period when Ms. Krant assumed
20 ownership in late December, 1998. In particular, the ALJ found that Mr. Fleeger could not see
21 Tax Lot 300 and yet he testified he could see it every day he came by Tax Lot 300 on his way to
22 his way to and from work. Furthermore, the expert Bob Long testified that there was no
23 evidence of irrigation on Tax Lot 300 during this five-year period based on aerials of record. As
24 a matter of fact, the only period during which there was evidence of any accumulation of water
25 on the property irrigation was when a septic field failed on Tax Lot 300 in 2001, an event, while
recognized in the Proposed Order, doesn't amount to irrigation.

1 In consideration of the forgoing, and in consideration of the evidence of record referred
2 to in Protestants attached closing as presented by Mr. Fleeger, Mr. Long and Ms. Krant,
3 Proponents request that the Proposed Order be revised to that the Dollarhide Spring Right must
4 be considered subject to forfeiture and cancelled as a matter of fact and law due to no less than
5 five years of continuous non-use form April 1997 through April 2002.

6 Dated this 9th day of September, 2019.

7
8 JORDAN RAMIS PC
9 Attorneys for Proponents Carol Schneider,
10 Evorn Sturdevant, Peggy Freitas, and Linda
11 Ganim

12 By: 
13 Peter D. Mohr, OSB # 013556
14 Peter.Mohr@jordanramis.com
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3
4 **BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS**

5 **STATE OF OREGON**

6 **FOR THE**

7 **OREGON WATER RESOURCES DEPARTMENT**

8 IN THE MATTER OF THE PROPOSED) **PROPONENTS' CLOSING**
9 PARTIAL CANCELLATION OF) **ARGUMENT**
10 CERTIFICATES 2366 AND 22086)
11) OAH Case No. 2018-OWRD-00017
12) Agency Case No. PC 17-03
13)

14 **I. INTRODUCTION**

15 Proponents Carol Schneider, Linda Ganim, Peggy Freitas, and Evern Sturdevant
16 (“Proponents”) hereby submit this closing brief in support of their claims that those portions of
17 Water Right Certificate No. 2366 and Water Right Certificate No. 22086 authorized for
18 beneficial use on Tax Lots 300 and 302 (collectively, the “Water Rights”) have been forfeited
19 due to non-use (pursuant the terms and conditions of each certificate) for a period of five or more
20 successive years during the 19-year period from April, 1997 through May, 2019.

21 Proponents timely submit this Written Closing in consideration of the consecutive two-
22 day evidentiary hearing held before Administrative Law Judge Ehren Vaughn (“ALJ”) at the
23 Office of Administrative Hearings in Eugene, Oregon, beginning on the morning of April 25,
24 2019.

25 **II. PROCEDURAL SUMMARY**

On November 20, 2017, the Oregon Water Resources Department (the “Department”) issued a *Notice of Proposed Partial Cancellation of Water Rights* (“Notice”) based on affidavits

1 filed by Proponents. The *Notice* stated Proponents’ affidavits asserted that those portions of
2 Water Right Certificate No. 2366, which originally authorized primary irrigation (the “Carter
3 Creek Water Right”), and Water Right Certificate No. 22086, which originally authorized
4 primary irrigation, supplemental irrigation, and stock watering (the “Dollarhide Spring Water
5 Right”) on portions of Tax Lot 300 and/or Tax Lot 302, have been forfeited due to non-use for a
6 period of five successive during the approximately 19-year period from April, 1997 through
7 May, 2016. *Notice*, pp 1 – 2. The Notice further provided that Proponents’ affidavits, “if not
8 countered by other evidence, establishes at least five years of non-use of” the Water Rights and
9 that, absent the submittal of countering evidence, the affidavits created a presumption of the
10 forfeiture of the Water Rights. *Id.* at pp 2-3.

11 In response to the *Notice*, Protestant, as the owner of record of Tax Lot 300, filed with the
12 Department a letter protest to the alleged forfeiture of those portions of the Water Rights
13 originally authorized to be placed to beneficial use on Tax Lot 300 on or about December 18,
14 2017. Lutch Land, LLC, as the owner of record of Tax Lot 302, never filed a protest to the
15 *Notice* and the accompanying alleged forfeiture of those portions of the Water Rights originally
16 authorized to be placed to beneficial use on Tax Lot 302.

17 As confirmed by the ALJ’s letter of September 26, 2018, on September 11, 2018, the
18 ALJ held a pre-hearing conference during which the Proponents and the Protestant agreed to file
19 a joint stipulation confirming that there is no evidence that since 1997 water has been applied to
20 beneficial use for irrigation purposes on Tax Lot 300 or Tax Lot 302 pursuant to the terms and
21 conditions of the Carter Creek Water Right. Proponents and the Protestant filed the referenced
22 joint stipulation on November 8, 2018. As a result, and as further confirmed by the ALJ during
23 the hearing in this matter, no additional evidence regarding the lack of historic use of the Carter
24 Creek Water Right on Tax Lot 300 or Tax Lot 302 since 1997 would be required for introduction
25

1 into the record to confirm forfeiture of such interests as a matter of fact and law.¹

2 **II. ISSUES BEFORE THE ADMINISTRATIVE LAW JUDGE**

3 The remaining issues before the ALJ consists of the following:

4 1. Whether any portion of the water right authorized under the Dollarhide Spring
5 Water Right for application to beneficial use on Tax Lot 300 is subject to statutory forfeiture
6 under ORS 540.610; and

7 2. Whether any portion of the water right authorized under the Dollarhide Spring
8 Water Right for application to beneficial use on Tax Lot 302 is subject to statutory forfeiture
9 under ORS 540.610.

10
11 **V. STATEMENT OF FACTS**

12 It is undisputed that the Dollarhide Spring is located on Tax Lot 304. Tax Lot 304 is
13 currently owned by Protestant Carol Schneider who purchased the Tax Lot 304 and the
14 adjacent Tax Lot 303 in May, 2013. Exhibit B-1; Exhibit B-2. The Dollarhide Spring Water
15 Right possesses a priority date of May 15, 1953 and authorizes the use of 0.022 cfs from the
16 Dollarhide Spring for irrigation, supplemental irrigation and stock as follows: 4.5 acres
17 supplemental in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 16, 1.1 acres supplemental in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of
18 Section 21, stock in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 21, and 0.1 acre primary in the SW $\frac{1}{4}$ SW $\frac{1}{4}$
19 of Section 16, Township 40 South, Range 2 East, W.M., being a total of 5.7 acres. *Notice* at 2.

20 *////*

21
22
23 ¹ In addition, because Lucher Land, LLC failed to ever file a protest to the alleged cancellation
24 of that portion of the Carter Creek Water Right originally authorized for use on Tax Lot 302, the
25 ALJ determined in its ruling served upon the parties on September 7, 2018 that any further
administration of any cancellation of that portion of the Carter Creek Water Right fell within the
exclusive authority of the Department. ORS 540.641(1); OAR 690-017-0500.

1 Ownership of record of Tax Lot 303 during the period from June 1993 to May 2016 is
2 as follows:

3 June 25, 1993 - September 2, 2009: William Fleeger and Mary Ellen Fleeger;

4 September 2, 2009 - May 10, 2013: Michael P. Ganim, and Linda A. Ganim;

5 May 10, 2013 – Current: Carol Schneider.

6 Exhibit B-1.

7 Ownership of record of Tax Lot 304 during the period from June 1993 to May 2016 is
8 as follows:

9 June 18, 1993 - September 2, 2009: William Fleeger and Mary Ellen Fleeger;

10 September 2, 2009 – June 18, 2013: Michael P. Ganim, and Linda A. Ganim;

11 June 18, 2013 – Current: Carol Schneider.

12 Exhibit B-2.

13 Regarding the ownership history of Tax Lot 300 and Tax Lot 302, no deeds were
14 introduced into the record confirming the title history of these properties during the period at
15 issue from April of 1997 through May of 2016. However, based on her affidavit of record and
16 her testimony, Susan Krant and her husband purchased Tax Lot 300 from Helen Wilson on
17 December 1, 1998. Based on his affidavit of record and his testimony, Jim Gail and his wife
18 purchased the Tax Lot 300 from the Krants on April 24, 2004.

19 *1. Proponents Supporting Testimony*

20 a. William Fleeger

21 William Fleeger testified that at the time that he and his wife purchased Tax Lot 303 in
22 1998, a Helen Wilson owned and lived on Tax Lot 300. Tr. p. 168, LL 11-19. Mr. Fleeger
23 further testified that Helen Wilson claimed she possessed a water right on the Dollarhide
24 Spring. Tr. p. 168, LL 11-19. Although Mr. Fleeger did not initially take much interest in the
25 alleged water right to the Dollarhide Spring, Helen Wilson did indicate to him that “she used it

1 for her household use so it was very important to her, and that's what she said where she got
2 her drinking water." Tr. p. 173, LL 4-11. Mr. Fleeger drew the conclusion that Helen Wilson
3 had plumbed the spring and spring box directly to her house. *Id.* Mr. Fleeger also stated that
4 he never saw any irrigation take place on Tax Lot 300 during the entire period of time that
5 Helen Wilson lived on Tax Lot 300 nor did he ever see any type of sprinkler or other irrigation
6 system. Tr. p. 173, LL 18-21. Mr. Fleeger testified that he believes Helen Wilson lived on
7 Tax Lot 300 as late as 1997. Tr. p. 172, LL 17-22.

8 It would not be until following Helen Wilson's sale of Tax 300 did Mr. Fleeger begin
9 to take greater interest in the Dollarhide Spring Water Right, and ultimately began to
10 understand what it actually originally authorized with regard to the use of the spring water. Tr.
11 p. 169, LL 6-7, LL 10-23; Tr. p. 170, LL 1-7. With an already extensive background in natural
12 resources management at that time, Mr. Fleeger became more familiar with the principles of
13 western water law including, but not limited to, the principles governing the forfeiture of a
14 water right. Tr. p. 164, LL 1 through Tr. p. 166, LL 3.

15 Mr. Fleeger testified to how the Dollarhide Spring Water Right authorized the use of
16 the spring water for irrigating the meadows on Tax Lot 300 and stock watering on Tax Lot
17 302. Tr. p. 170, LL 1-7. Mr. Fleeger also additionally testified that it was his understanding
18 that the southern boundary of Tax Lot 300 was just south of the driveway that ran up Tax Lot
19 300. Tr. p. 180, LL 16-21. His testimony regarding the place of the common boundary
20 between Tax Lot 300 and Tax Lot 302 was also consistent with his testimony regarding the
21 lack of any evidence of irrigation on Tax Lot 302 in that the Dollarhide Spring only authorized
22 stock watering on Tax Lot 302. Mr. Fleeger indicated he had never seen any stock watering
23 on Tax Lot 300 or 302 nor had ever seen any stock watering facilities on either property. Tr.
24 p. 170, LL 13-21. And again, consistent with his understanding of the location of the common
25

1 boundary between Tax Lot 300 and Tax Lot 302, Mr. Fleeger testified he never saw any
2 irrigation on Tax Lot 302 the entire time he lived on Tax Lot 303. Tr. p. 181, LL 3-6.

3 As stated above, Mr. Fleeger took more interest in what was originally authorized
4 under the Dollarhide Spring Water Right after Susan Krant and her husband acquired Tax Lot
5 300, by his recollection, in approximately 1988. Upon encountering them on his property one
6 day, he and the Krants discussed the spring box and the Krants' intention to make
7 improvements to the box. Tr. p. 174, LL 1 through Tr. p. 175, LL 16. It was this initial
8 interaction with the Krants that encouraged Mr. Fleeger to learn more about the Dollarhide
9 Spring Water Right. *Id.* After confirming what the Dollarhide Spring Water Right did
10 originally allow, Mr. Fleeger arranged for another meeting with the Krants to discuss the
11 spring box and more importantly the state of the Dollarhide Spring Water Right. *Id.* During
12 that subsequent conversation, Mr. Fleeger informed the Krants that the water right only
13 allowed use for irrigation and stock watering and since he had lived on Tax Lot 303 beginning
14 in 1993, and that he had no evidence of the spring water ever being used respectively on Tax
15 Lot 300 or Tax Lot 302 for such purposes, they would not have the legal basis to make
16 improvements to the box or use the water for the specified purposes. *Id.* Mr. Fleeger did offer
17 to allow them to "continue to use the spring as Helen had done" for solely household use, but
18 during that same conversation also let them know that if they intended to improve the spring
19 box and bring equipment onto his property, he would take action to seek to confirm the
20 Dollarhide Water Right as subject to forfeiture on grounds that spring water had not been
21 appropriated and applied to irrigation and stock watering use for a period of at least five years.
22 *Id.* Later during his testimony on cross, Mr. Fleeger reaffirmed his willingness to only let the
23 Krants use the spring water as their predecessor Helen Wilson had, for household use only.
24 Tr. p. 178, LL 13 - Tr. p. 179, LL 4.

25

1 During the period from 1993 up until he and his wife moved to New Hampshire in
2 2003 for Mr. Fleegeer to pursue graduate studies, Mr. Fleegeer assumed employment in southern
3 Oregon in a variety of natural resource management related positions. Tr. p. 164, LL 1-23
4 through p. 165, LL 1-5. During these ten years, his morning commute regularly consisted of
5 him going further up the hill to take the freeway to work and then taking Old Highway 99 back
6 home. Tr. p. 179, LL 9-23. As a result, Mr. Fleegeer enjoyed a variety of vantage points from
7 which he could see Tax Lot 300 during that time. *Id.* Mr. Fleegeer also expressly
8 acknowledged that while he could see the entirety of Tax Lot 300 during his work commute
9 during the ten year period from 1993 to 2003 that he and his wife lived on Tax Lot 303, it may
10 be more difficult to see all such areas now given the additional growth of vegetation. Tr. p.
11 179, LL 18-21. Finally, during this period, Mr. Fleegeer stated he never recalled seeing a lawn
12 installed in front of (the east side) of the residence on Tax Lot 300. TR. p. 181, LL 11-13.

13 ***b. Peggy Freitas***

14 Peggy Freitas testified that she had lived in the area from 1950 to 1967 on a ranch
15 owned by her father and which consisted of some 3,000 acres and that she regularly rode all
16 over such lands, including the tax lots of interest in this case during that time. Tr. p. 44, LL 10-
17 18; Tr. p. 45, LL 22 – Tr. p. 46, LL 2. In 1973, she moved to California, ultimately moving
18 back to the area in April of 1997. Tr. p. 46, LL 5 – 7. However, she never lost contact with
19 the area as she frequently visited her parents during that time. *Id.* When she returned in April
20 of 1997, she moved back into the original ranch house she grew up in which is approximately
21 a mile north of Tax Lot 303 off Old Highway 99. Tr. p. 47, LL 4-5. Since her return to the
22 area in April of 1997, Ms. Freitas never witnessed any irrigation or the watering of livestock
23 on Tax Lot 300 or 302 with the exception of the cultivation of cannabis approximately three
24 years ago on Tax Lot 302. Tr. p. 49 LL 15-22; Tr. p. 50, LL 21-23; Tr. p. 51, LL 19 – Tr. p.
25 52, LL 2. Ms. Freitas testified that she came up Old Highway 99 frequently to visit the owners

1 of Tax Lot 900 which is the parcel adjacent to the norther boundary of Tax Lot 300 and from
2 which she could see Tax Lot 300 quite clearly. Tr. p. 51, LL 1-3; Tr. p. 53, LL 3; Exhibit B-
3 17. From Tax Lot 900 and from Old Highway 99 in 1997 and for at least thirteen years
4 thereafter, it was quite easy to see the entirety of Tax Lot 300 as the shrubs, trees and high
5 grass on Tax Lot 300 then were not nearly as significant as they are today. Tr. p. 53, LL 10-17,
6 LL 21-22. From even just the driveway of Tax Lot 900 alone, one could have been able to see
7 a garden or some amount of irrigation on Tax Lot 300. Tr. p. 54, LL 3-10. At that time, no
8 irrigation systems of any kind were seen on Tax Lot 300 including those which may be of a
9 nature used around the house for lawn or garden. Tr. p. 54, LL 11-14; Tr. p. 61, LL 11-14; Tr.
10 p. 63, LL 13-16.

11 c. *Evern Sturdevant*

12 In 1989, Evern Sturdevant and her husband purchased Tax Lot 100 which is a parcel
13 located on the east side Old Highway 99 opposite from and just south of Tax Lots 300 and
14 302. Tr. p. 69, LL 20-23; Exhibit B-17. They built a house on Tax Lot 100 in 1992, lived
15 there year round, and she sold the property in June of 2014. Tr. p. 70, LL 1-6. Ms. Sturdevant
16 testified that she knew Helen Wilson and that she would frequently visit her at least once every
17 couple of weeks to a month during the years that Ms. Wilson owned Tax Lot 300. Tr. p. 70,
18 LL 22 - Tr. p. 71, LL 5. At that time, Ms. Wilson possessed very limited mobility to the point
19 where she has difficulty taking care of her body, personal hygiene. Tr. p. 71, LL 6-9. Also
20 during that time, while Ms. Sturdevant didn't know from where Ms. Wilson sourced her water
21 supply, Ms. Wilson did not engage in any irrigation of lawn or garden, but she did water two
22 potted plants on her steps. Tr. p. 71, LL 20-23.

23 In addition, during the years that Ms. Sturdevant visited Ms. Wilson, in addition to her
24 seeing no irrigation of a lawn or garden (or any other form of irrigation) on Tax Lot 300, nor
25

1 did she ever witness any irrigation on Tax Lot 302 or watering of livestock on either Tax Lot
2 302 or Tax Lot 300. Tr. p. 70, LL 5-20.

3 After Helen Wilson sold Tax Lot 300 to Susan Krant and her husband, Ms. Sturdevant
4 indicated that she never saw any irrigation on Tax Lot 300 or Tax Lot 302, but she did once
5 see a sprinkler to water some small area in front of their house. Tr. p. 74, LL 12-21. No actual
6 size of the area referred to was provided. *Id.* When asked form where Susan Krant sourced
7 her water supply, Ms. Sturdevant indicated that the Krants were entirely reliant on the
8 Dollarhide Spring to source all of their water. Tr. p. 74, LL 22 – Tr. p. 75, LL 8; Tr. p. 75, LL
9 17-19; Tr. p. 75, LL 22 – Tr. p. 76, LL 1.

10 On cross examination, Ms. Sturdevant spoke more to the extent to which any irrigation
11 took place on Tax Lot 300 during both the Krants' ownership of such parcel and that of their
12 successors in interest, Jim Gail and his wife.² In response to cross examination, Ms.
13 Sturdevant stated that regarding Tax Lot 300, "you could tell people just didn't irrigate
14 [inaudible] the property, if they did any irrigation, it wasn't very much . . . they just watered
15 around the houses a little bit [inaudible] very dry." Tr. p. 80, LL 8-12.

16 *d. Bob Long (Proponents Expert Witness)*

17 Mr. Long is a hydrogeologist specializing in water resources and water rights in the
18 State of Oregon, a registered geologist in the State of Oregon, and a registered water rights
19 examiner in the State of Oregon. Tr. p. 82, LL 16-17. In part, Mr. Long possesses expertise in
20 (a) advising and providing documentation to confirm that a water permit once secured can be
21 properly proven up with evidence of use established by aerial photography, system capacity
22 and other credible information to secure the full amount of water conditionally authorized in
23

24 ² Regarding the extent to which the Gails may have irrigated Tax Lot 300 during the period they
25 owned Tax Lot 300, the record of Ms. Sturdevant's direct testimony, while difficult to discern
throughout, regarding the period Gails owned the property, it was largely inaudible for purposes
of making reference.

1 order to receive the maximum amount of water under a water right certificate, *and conversely*,
2 (b) analyzing *via* aerial photography and site visits to confirm the existence of equipment
3 (commercial or residential scale) – to determine if the capacity even existed on the ground to
4 apply the water to the previously authorized use per the water right certificate to confirm,
5 whether the water right – and particularly, an irrigation water right – has been applied to the
6 such use pursuant to the terms and conditions of the certificate to avoid being subject to
7 forfeiture. Tr. p. 82, LL 14 - Tr. p. 89, LL 16. Mr. Long was accepted by the ALJ as an
8 expert in the subject matter addressed in his testimony. Tr. p. 90, LL 2-8.

9 Mr. Long testified extensively regarding his approach to identify the lands to which the
10 Dollarhide Springs Water Right originally authorized the application of spring water for
11 irrigation purposes and the lands authorized for the location of stock watering. Tr. p. 89, LL
12 17 – Tr. p. 122, LL 12. The conclusions drawn in his analysis that there was no evidence of
13 irrigation under the Carter Creek Water Right or the Dollarhide Spring Water Right on Tax
14 Lots 300 or 302 to avoid periods of non-use for five or more successive years was based on (a)
15 his GIS mapping of the place of use as identified in the proof maps provided for the water
16 rights, (b) his mapping of the same as underlain by aerial photos beginning as early as 1993
17 through 2017, (c) his two site visits, and (d) his review of the aerial photos together with a
18 topographic map including Tax Lots 300 and 302. *Id.*; Exhibit B-28.

19 Mr. Long's testimony included a comprehensive analysis of the aerial photos and the
20 reasons why such aeriels support the conclusion that no irrigation occurred on Tax Lot 300
21 during the period of 1993 through July 2014. Tr. p. 91, LL 20 – Tr. p. 101, LL 2. While the
22 aerial reviewed during this period revealed no irrigation or otherwise water of any portion of
23 Tax Lot 300, some form of irrigation whether by drainage or otherwise did appear to occur to
24 the area immediately east of the house in 2001. Exhibit B-11. However, since the review of an
25 aerial alone could not determine what the cause may be, Mr. Long offered that it could

1 represent inflows to that area from a failed septic system given the nature and location of the
2 image especially when there has been no evidence of irrigation prior or in subsequent aerials.
3 Tr. p. 96, LL 8- Tr. p. 97, LL 8. Susan Krant later confirmed a septic failure did occur and the
4 repair of the system was not completed until July of that year (2001). Tr. p. 134, LL 18 – Tr.
5 p. 135, LL 11.

6 Regarding the place of use of the irrigation right originally authorized under the
7 Dollarhide Spring Water Right, Mr. Long stated why any irrigation authorized under the
8 Dollarhide Spring Water Right was limited to Tax Lot 300 and that the stock watering right
9 was limited to Tax Lot 302. Tr. p. 94, LL 3 – Tr. p. 96, LL4.

10 In discussing the aerials, Mr. Long also testified that if any level of irrigation did occur,
11 it would have been caught on the aerials even if the area in question was relatively small. Tr. p.
12 97, LL 10 – Tr. p. 98, LL 14. However, Susan Krant testified at length to the existence of a
13 the “biggest lawn [she had ever] seen for a non-park[,]” immediately east of the house stating
14 that it was about a third to half the size of a football field. Tr. p. 130, LL 6-13. Further, she
15 testified to their maintenance of a “huge pond” which was allegedly located east of the alleged
16 lawn. Tr. p. 131, LL 15 – 23. Again, none of these major irrigated or water sourced features
17 showed up on the aerials even though evidence of the cultivation of something so small as
18 cannabis plants are readily visible on Proponents blown up aerial Exhibit B-17 presented
19 during the hearing.

20 2. *Historic reliance on the Dollarhide Spring as a Source of Household Use*

21 As stated above by William Fleeger, Helen Wilson relied on the Dollarhide Spring as
22 her sole source of water and such practice was continued by Susan Krant and her husband. As
23 also stated above, Evren Sturdevant also had communications with Susan Krant that the spring
24 was their only source of water. Tr. p. 75, LL 1-5; Tr. p. 75, LL 22 – Tr. p. 76, LL1. As the
25 subsequent owners of Tax Lot 300 after the Krants, Jim Gail and his wife continued their

1 dependence on the Dollarhide Spring for household use. Affidavit of James R. Gail, ¶5-6.
2 (filed in support of Protestant’s Response to Proponents Motion for Partial Summary
3 Determination).

4 **IV. BURDEN OF PROOF**

5 Proponents have the burden to prove that Protestant or her predecessors failed to apply
6 the water authorized for the application to beneficial use under the Dollarhide Spring Water
7 Right on Tax Lot 300 for a period of five successive years as a matter of fact and law. ORS
8 540.610(1). Once the Proponents have met their burden of proof, the evidentiary burden then
9 shifts to Protestant to prove that either that the application of water to beneficial use has occurred
10 during any five year period of none use shown by the Proponents or that such non-use is excused
11 during the five year period(s) in question under one more of the affirmative defenses enumerated
12 under ORS 540.610(2); *see also, Notice, p. 2.*

13 The burden of presenting evidence to support a fact of position in a contested case rests
14 on the proponent of the fact or position. *See* OAR 340-011-0545. Proof must be by a
15 preponderance of the evidence. *See* ORS 183.450(2); *see also Sobel v. Board of Pharmacy*, 130
16 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995)(standard of proof under the Administrative
17 Procedures Act is preponderance of evidence absent legislation adopting a different standard).
18 Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts
19 asserted are more likely true than not. *See Riley Hill General Contractor v. Tandy Corp.*, 303 Or
20 390 (1989). A proposition is, therefore, established by a preponderance of the evidence if, in
21 light of the evidence presented, the proposition is more probably true than false. *See Cook v.*
22 *Michael*, 214 Or 513, 330 P2d 1026 (1958). As a result, ORS 183.450(5) provides that in a
23 contested case, no “*order be issued except upon consideration of the whole record or such*
24 *portions thereof as may be cited by any party, and as supported by, and in accordance with,*
25 *reliable, probative and substantial evidence.*”

1 On this basis, while the initial presumption of forfeiture existed with the Proponents
2 submittal of their affidavits alleging non-use, to the extent Proponents introduce additional
3 probative and reliable evidence in the record during the hearing, the Protestant's burden is no
4 longer limited to introducing evidence to counter the rebuttable presumption of forfeiture
5 established by Proponents' affidavits. Rather, the Protestant's burden further increases to
6 counter all of the additional reliable, probative and substantial evidence Proponents introduced
7 into the record as whole during the hearing. As argued further below, Protestant has failed to
8 meet such a burden nor has Protestant, in the alternative, provided any evidence in the record that
9 either Protestant or her predecessors can be excused from not applying water to beneficial use for
10 five or more successive years under any of the affirmative defenses enumerated under
11 540.610(2).

12 **VI. ARGUMENT**

13 Proponents do not contest that the lands originally authorized to be irrigated under the
14 Dollarhide Spring Water Right are located on Tax Lot 300. As initially set forth in their
15 respective affidavits - and as furthered in their testimony, Proponents submit that all portions of
16 the Dollarhide Spring Water Right that were originally authorized for primary and supplemental
17 irrigation on Tax Lot 300 have been lost to forfeiture for lack of use for a period of five or more
18 successive years during the period from April 1997 through July 2014.

19

20 **A. Proponents have met their evidentiary burden of proof that the portion of**
21 **the Dollarhide Spring Water Right that authorizes the application of water**
22 **from the spring to Tax Lot 300 for irrigation purposes must be cancelled for**
23 **lack of such use for a period of five or more successive years during the**
24 **period between April 1997 and July of 214.**

25 1. Proponents' witnesses are reliable.

 All of Proponents' testimony regarding the period during which they allege the
Dollarhide Spring Water Right was not used for purposes of irrigation on Tax Lot 300 and for

1 Stock Watering on Tax Lot 302 is reliable. None of the witnesses who testified to the lack of the
2 referenced application of the water right during that time possessed an interest of a nature that
3 would compel them, or at a minimum, have them feel any personal obligation or preference to
4 favor the issuance of a finding of forfeiture. Moreover, among those whose testimony upon
5 which this closing argument relies, it was only William Fleegeer that at one point owned a title
6 interest in Tax Lot 300. As he discussed in his testimony, he only objected to the use of the
7 water from the spring on lawful grounds to the extent the others would still seek to use the
8 Dollarhide Spring Water Right for those express purposes as originally authorized under the
9 water right. In the case of Evern Sturdevant, she even maintained friendships with Helen Wilson
10 and Susan Krant.

11 2. The evidence introduced by the Proponents' is probative.

12 The evidence introduced by the Proponents is formed from the personal knowledge of
13 disinterested parties who are very familiar with the use of water on the properties at issue for
14 extended periods of time that bridge the different ownerships of Tax Lot 300 and Tax Lot 302.
15 As a disinterested party, William Fleegeer possesses a natural resources management background
16 and readily confirmed the nature of the Dollarhide Spring Water Right as well as the extent to
17 which it was susceptible to forfeiture.

18 Evern Sturdevant and Peggy Freitas, both again disinterested parties, had lived in the area
19 for decades and knew it very well.

20 Proponents' expert Bob Long possesses specialized knowledge in the area of water
21 resources and water rights. The scope of his testimony and accompanying exhibits is probative
22 as it represents the only demonstrative evidence presented in this case regarding the historic use
23 of the Dollarhide Spring Water on Tax Lot 300 and 302 during the relevant period from April
24 1997 to July 2014 and which confirms that during such time there has been no history of
25 irrigation use on Tax Lot 300 and no history of livestock watering on Tax Lot 302.

1 3. The evidence introduced by the Proponents' is substantial.

2 The evidence introduced by the Proponents is substantial. By example only, the
3 testimony of witnesses William Fleeger, Peggy Freitas, Evern Sturdevant all overlap in terms of
4 periods of years considered relative to water use. The fact that there testimony is relatively
5 consistent among them also further confirms that such testimony is also all the more reliable.

6 In addition, the testimony and accompanying technical analysis and supporting aerial
7 exhibits presented by Bob Long is very substantial as it provides a complete and credible
8 assessment of the historic use of the Dollarhide Spring Water Right.

9
10 **B. With the introduction of their evidence in this matter, Proponents have met
11 their burden of proof and created a rebuttable presumption that the
12 Dollarhide Spring Water has not been used for five or more successive years
13 and therefore must be subject to forfeiture and cancelled as a matter of law.**

14 Protestant has not introduced sufficient evidence to overcome the presumption of
15 forfeiture created by the Proponents introduction of evidence in this case. At no time throughout
16 the course of these proceedings has Protestant introduced any evidence to so much as show by
17 photos, or other records or documents confirming that during the period in question, irrigation
18 did occur on Tax Lot 300 during the period between April of 1997 and July 2014. By example
19 only, Protestant did not introduce one photo confirming the irrigation of Tax Lot 300 nor
20 introduce one exhibit confirming the installation of lawn or field irrigation systems at any time
21 during the period in question.

22 Furthermore, the record in these proceedings confirms that no by later than 1993 the
23 Dollarhide Spring was directly plumbed to the house located on Tax Lot 300. Moreover, Susan
24 Krant acknowledged that the spring water was capable of being pumped directly to the house on
25 Tax 300 and James Gail stated that he necessarily used water from the Dollarhide Spring for
household use. With the evidence of record showing that the Dollarhide Spring has been
plumbed directly to the house on Tax Lot 300 since before 1997, Protestant also failed to

1 produce any evidence of whether there are flow meters or other devices to confirm how much
2 water was used from the spring and for what purpose.

3 In consideration of the forgoing and, more specifically, Protestants' failure to rebut the
4 presumption of forfeiture created by Proponents evidence introduced into the record, the
5 Dollarhide Spring must be considered subject to forfeiture and cancelled as a matter of fact and
6 law.

7 Dated this 31st day of May, 2019.

8
9 JORDAN RAMIS PC
10 Attorneys for Proponents Carol Schneider,
11 Evern Sturdevant, Peggy Freitas, and Linda
12 Ganim

13 By: s/ Peter D. Mohr
14 Peter D. Mohr, OSB # 013556
15 Peter.Mohr@jordanramis.com
16
17
18
19
20
21
22
23
24
25

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the date shown below, I served a true and correct copy of the
3 foregoing PROPONENTS' CLOSING ARGUMENT on:

4 Eugene V. Anderson
5 Davis Hearn Anderson & Turner PC
6 515 E Main St
7 Ashland OR 97520
8 E-mail: eanderson@davishearn.com
9 Attorney for Protestant Magdalena Winter

10 Patricia McCarty
11 Oregon Water Resources Department
12 725 Summer St NE Ste A
13 Salem OR 97301
14 E-mail: Patricia.E.McCarty@oregon.gov

- 15 by first class mail, postage prepaid.
16 by hand delivery.
17 by facsimile transmission.
18 by facsimile transmission and first class mail, postage prepaid.
19 by electronic transmission.
20 by electronic transmission and first class mail, postage prepaid.

21 DATED: May 31, 2019.

22 *s/ Peter D. Mohr*
23 _____
24 Peter D. Mohr, OSB # 013556
25 Attorney for Proponents

CERTIFICATE OF SERVICE

JORDAN RAMIS PC **Exhibit A**
Attorneys at Law
PO Box 230669 **Page 17 of 17**
Portland OR 97281
Telephone: 503.598.7070 Fax: 503.598.7373

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the date shown below, I served a true and correct copy of the
3 foregoing PROPONENTS' EXCEPTIONS TO PROPOSED ORDER on:

4 Eugene V. Anderson
5 Davis Hearn Anderson & Turner PC
6 515 E Main St
7 Ashland OR 97520
8 E-mail: eanderson@davishearn.com
9 Attorney for Protestant Magdalena Winter

10 Patricia McCarty
11 Oregon Water Resources Department
12 725 Summer St NE Ste A
13 Salem OR 97301
14 E-mail: Patricia.E.McCarty@oregon.gov

- 15 by first class mail, postage prepaid.
- 16 by hand delivery.
- 17 by facsimile transmission.
- 18 by facsimile transmission and first class mail, postage prepaid.
- 19 by electronic transmission.
- 20 by electronic transmission and first class mail, postage prepaid.

21 DATED: September 9, 2019.

22 *s/ Peter D. Mohr*
23 _____
24 Peter D. Mohr, OSB # 013556
25 Attorney for Proponents

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

In The Matter Of The Proposed Partial)	
Cancellation Of The Water Rights Evidenced	)	Protestant’s Response to
By Certificate 2366 For Use Of Water From	)	Proponents’ Exceptions to
Westerly Branch Of Carter Creek For Irrigation,	)	Proposed Order
and Certificate 22086 For Use Of Water From)	
Dollarhide Spring For Irrigation, Supplemental)	
Irrigation And Stock, Jackson County, Oregon	)	OAH Reference No. 2018-OWRD-00017
	)	Agency Case No. C-2366 and C-22086
)	

Protestant, Magdalena Winter, offers the following Response to Proponents’ Exceptions to Proposed Order:

Response to Proponents’ Exceptions #3

Simply stated Proponents want the Department to overrule ALJ Vaughn’s findings that Protestant’s witnesses were more credible than Proponents’. Yet Proponents cite no valid reasons why the Department should do so. Essentially Proponents urge the Department to disregard ALJ Vaughn’s evaluation of the credibility of the witnesses identified by Proponents (Fleeger, Long, and Krant) and ask the Department to accept the testimony of Proponents’ own witnesses (Fleeger and Long) over that of Ms. Krant. Proponents cite no specific instances where ALJ Vaughn made findings of fact that were wrong, mistaken, or were not supported by some admissible evidence. Proponents simply state that, in Proponents’ opinion, the testimony of Fleeger and Long was more credible than Ms. Krant’s and hence the Department should overrule ALJ Vaughn’s express and implied determinations on the credibility of these witnesses and to make Proponents’ requested change to the Proposed Order.

In any review process the body reviewing a lower tribunal’s rulings normally gives great deference to the finder of fact who heard and saw the testimony in question. The rationale for this deference is not difficult to grasp. The finder of fact at the lower level has the benefit of all the information and elements of communication we all employ, consciously and unconsciously, to evaluate someone’s credibility. Not least of those critical elements are the non-verbal elements of

communication that are simply not available to the reviewing tribunal reading a transcript of the lower proceeding.

Even on *de novo* review, the Court of Appeals gives great deference to the lower court's evaluation of credibility, for this reason. In *Ryf v. Hoffman Construction Co.*, 254 Or 624, 631, 459 P 2d 991 (1969), the Supreme court - on *de novo* review of a workers' compensation award - stated:

"[W]e * * * have to give some weight to the fact that the Hearing Officer, and he alone, has the opportunity to observe the claimant and other witnesses, a factor which we have regarded as highly significant in reviewing other cases on appeal."

See also *Haines Com'l Equip. Co. v. Butler*, 268 Or 660, 664, 522 P 2d 472 (1974):

"... we accord great weight to [a trial court's findings of fact] when, as in this case, the testimony was conflicting")

Bragger v. Oregon Trail Savings, 275 Or 219, 221, 550 P 2d 421 (1976):

("[t]he trial judge is in a much better position to assess the credibility of the witnesses than is this court and his conclusion * * * is entitled to considerable weight")

O'Donnell-Lamont and Lamont, 337 Or 86, 89, 91 P 3d 721 (2004), *cert. den.*, 543 U.S. 1050, 125 S.Ct. 867, 160 L.Ed.2d 770 (2005):

"In our *de novo* review of the record, we give considerable weight to the findings of the trial judge who had the opportunity to observe the witnesses and their demeanor in evaluating the credibility of their testimony."

Focusing on the time period being questioned by Proponents, (April 1997 - April 2002), ALJ Vaughn refers to the testimony of Susan Krant on P. 5-6, and on P. 15-16, of the Proposed Order. Specifically ALJ Vaughn expressly found the testimony of Susan Krant to be more persuasive than that of Proponents' witnesses Fleeger and Long:

"Ms. Krant's testimony is more persuasive [than] Mr. Fleeger's and Mr. Long's regarding water use during the period from 1998 through 2004. Ms. Krant had direct knowledge of the multiple, specific uses of water from Dollarhide Spring during that time. Although Mr. Fleeger testified credibly, his view of the Winter Property and Tax Lot 302 was largely obscured from his residence, he went onto one of those lots only once after Ms. Krant began residing there, and he did not reside on the Schneider Property for a portion of the time he owned it. Accordingly, his ability to observe the Winter Property was severely limited both by obstructions to the view

and by his lack of proximity to the property. Mr. Long based his assertions on a review of two aerial photographs relevant to this period. Considering Ms. Krant's consistent irrigation on the property, it is more likely than not that the methods of irrigation (e.g. pop-up sprinklers and hoses) were not discernable from the aerial photographs. The fact that neither Mr. Fleeger nor Mr. Long observed irrigation does not demonstrate by a preponderance of the evidence that no irrigation occurred on either the Winter Property or Tax Lot 302. On the contrary, the overwhelming balance of the evidence shows that Ms. Krant engaged in consistent, substantial irrigation on her property.

Proponents have not met their burden to show by a preponderance of the evidence that the water right holder failed to make beneficial use of the water for irrigation and supplemental irrigation on the Winter Property or Tax Lot 302 pursuant to Certificate 22086 during this period.”

Ms Krant owned and lived on the Winter property from 1998 - 2004. Ms. Krant is a practicing Oregon attorney, based in Ashland. Ms. Krant’s testimony was specific and detailed. Moreover Ms. Krant’s testimony was consistent with that of her predecessor in interest, Mr. Gail, and with the testimony of the other witnesses who had actually owned and lived on the Winter property and used the Dollarhide Spring water. Ms. Krant has no dog in this fight, and she is truly an impartial witness. There is no reason why ALJ Vaughn’s finding that Ms. Krant’s testimony was credible and persuasive should be overruled.

Response to Proponents’ Exceptions #1 and #2

In the Proposed Order ALJ Vaughn correctly states that the burden of persuasion is on Proponents to prove non-use of the water. Proposed Order P. 10-11. In the Conclusions of Law section of the Proposed Order ALJ Vaughn concludes that:

“Proponents failed to meet their burden to show[n] a period of five or more consecutive years of non-use of any portion of the water right evidenced by Water Right Certificate 22086 with respect to the place of use on Tax Lot 300 or Tax Lot 302 during the period April 1997 through May 2016”.

This finding is supported by the evidence, and this finding negates any need to review the evidence presented by the Protestant, Ms. Winter, because the burden of showing affirmative use of the water never shifted to Ms. Winter.

//

//

Conclusion

ALJ Vaughn ruled that “Proponents have not met their burden to show by a preponderance of the evidence that the water right holder failed to make beneficial use of the water for irrigation and supplemental irrigation on the Winter Property or Tax Lot 302 pursuant to Certificate 22036 during this time period.” ALJ Vaughn’s rulings and Proposed Order should be confirmed as Proposed.

Dated this 19th day of September, 2019.

DAVIS, HEARN, ANDERSON & TURNER
A Professional Corporation



Eugene V. Anderson, OSB #971988
Attorney for Protestant Magdalena Winter
eanderson@davishearn.com

CERTIFICATE OF FILING/SERVICE

I hereby certify that on September 19, 2019, I served a true copy of the PROTESTANTS' RESPONSE TO PROPONENTS' EXCEPTIONS TO PROPOSED ORDER on:

Patricia McCarty
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725 Summer St. NE Ste A
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Agency Representative, Oregon Water Resources Department

Via Mail and Email

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Attorney for Proponents

Via Email

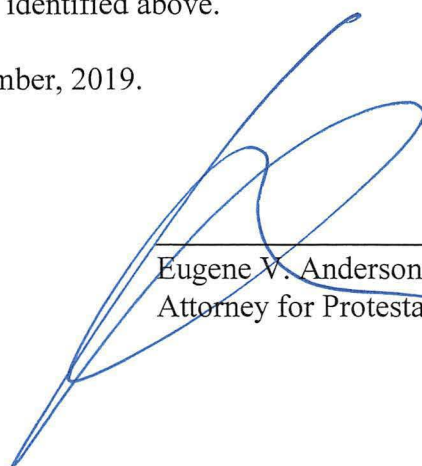
- by **MAILING** a full, true and correct copy on September 19, 2019 to said person or persons in a sealed envelope, with postage paid addressed to said person or persons as set forth above, and deposited in the post office at Ashland, Oregon, on said day. Between the said post office and the address to which said copy was mailed, there is regular communication by U.S. Mail.
- by causing a full, true, and correct copy thereof to be **HAND-DELIVERED** to the attorney at the attorney's last-known office address listed above on the date set forth below.
- by sending a full, true, and correct copy thereof via **OVERNIGHT COURIER** in a sealed, prepaid envelope, addressed to the attorney as shown above, the last known office address of the attorney, on the date set forth below.
- by **FAXING** a full, true, and correct copy thereof to the attorney at the fax number shown above, which is the last known fax number for the attorney's office, on the date set forth below. The receiving fax machine was operating at the time of service and the transmission was properly completed, according to the confirmation report.



by **E-MAILING** a full, true, and correct copy thereof to the attorney at the attorney's last-known e-mail address listed above on the date set forth below.

- by **ESERVICE**, a full, true, and correct copy of the foregoing document on September 19, 2019, was transmitted via electronic mail/eservice through the Oregon Judicial Department e-filing system, to the person(s) identified above.

Dated this 19 day of September, 2019.



Eugene V. Anderson, OSB #971988
Attorney for Protestant Magdalena Winter

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

IN THE MATTER OF THE PROPOSED PARTIAL CANCELLATION OF THE WATER RIGHTS EVIDENCED BY CERTIFICATE 2366 FOR USE OF WATER FROM WESTERLY BRANCH OF CARTER CREEK FOR IRRIGATION, <i>and</i> CERTIFICATE 22086 FOR USE OF WATER FROM DOLLARHIDE SPRING FOR IRRIGATION, SUPPLEMENTAL IRRIGATION AND STOCK, JACKSON COUNTY, OREGON) <u>AMENDED PROPOSED ORDER</u>))) OAH Reference No. 2018-OWRD-00017) Agency Case No. PC 17-03)))))))))
---	--

The Administrative Law Judge's ("ALJ") Proposed Order in this proceeding was issued on August 9, 2019. On September 9, 2019, the proponent filed timely exceptions to the Proposed Order. On September 19, 2019, the protestant filed a response to the exceptions. OWRD has considered the exceptions and response and issues this Amended Proposed Order pursuant to OAR 137-003-0655.

Amended proposed orders issued pursuant to OAR 137-003-0655 must comply with OAR 137-003-0665(3), by identifying and explaining any substantial changes to the ALJ's proposed order. This Amended Proposed Order describes, by section, each of the changes made to the Proposed Order.

The "Procedural History" section, the "Issues" section, and the "Evidentiary Rulings" section of the Proposed Order are adopted by OWRD and incorporated into this Amended Proposed Order without modification and are set out below.

PROCEDURAL HISTORY

On November 20, 2017, the Oregon Water Resources Department (OWRD or Department) issued a Notice of Proposed Partial Cancellation of Water Rights (Notice) based on affidavits filed with the Department by Peggy M. Freitas, Evern Sturdevant, Carol Schneider and Linda Ganim (collectively, the Proponents). On December 18, 2017, Magdalena Winter (Protestant/Ms. Winter) filed a protest to the Notice. On January 10, 2018, OWRD referred this matter to the Office of Administrative Hearings (OAH) for further proceedings. The OAH

assigned Administrative Law Judge (ALJ) James Dreyer to preside over the case. The OAH subsequently reassigned the matter to ALJ Ehren Vaughn to preside at hearing.

On March 2, 2018, the OAH issued a Notice of Prehearing Conference. On March 22, 2018, ALJ Vaughn convened a prehearing conference by telephone. Patricia McCarty, representing OWRD, appeared and participated in the conference. Magdalena Winter appeared with counsel, Eugene Anderson. Proponents' attorney, Peter Mohr, also participated in the conference. The parties agreed to the issues for hearing, deadlines for discovery, and a hearing date. On March 23, 2018, ALJ Vaughn issued a Scheduling Order.

On March 28, 2018, the OAH issued a Notice of In-Person Hearing, scheduling a hearing for October 9 through 11, 2018.

On July 16, 2018, Proponents filed a Motion for Partial Summary Determination (Motion). On August 8, 2018, Protestant filed a Response to the Motion for Partial Summary Determination (Response). On August 20, 2018, Proponents filed a Reply in Support of Proponents' Motion for Partial Summary Determination (Reply). ALJ Vaughn denied the Proponents' request for oral argument on the Motion.

On September 7, 2018, ALJ Vaughn issued a Ruling denying Proponents' Motion for Partial Summary Determination.

On September 11, 2018, Proponents filed a request for continuance of the hearing based on witness unavailability.

On September 19, 2018, ALJ Vaughn conducted a site visit during which the ALJ, as well as all attendees, observed the relevant locations and structures on Tax Lots 300, 302, 303, and 304. Ms. McCarty participated in the site visit on behalf of OWRD along with Shavon Haynes, District 13 Watermaster. Mr. Mohr participated on behalf of Proponents. Mr. Anderson participated along with Ms. Winter and her partner, Leo Anifowose.

ALJ Vaughn convened a telephone status conference on September 26, 2018, in which Ms. McCarty, Mr. Anderson, and Mr. Mohr participated. ALJ Vaughn granted the September 11, 2018 request for continuance, and rescheduled the hearing for December 13 and 14, 2018.

On November 5, 2018, the parties submitted signed Stipulations Regarding Non-Use of Portions of Water Right Certificate 2366. OWRD did not object to the stipulations.

On November 27, 2018, ALJ Vaughn convened a telephone status conference. Ms. McCarty and Mr. Anderson participated. ALJ Vaughn rescheduled the hearing on his own motion for March 28 and 29, 2019. At Mr. Mohr's subsequent request, the hearing was rescheduled for April 25 and 26, 2019.

ALJ Vaughn convened a hearing at the OAH in Eugene, Oregon on April 25 and 26, 2019. Ms. McCarty represented OWRD, Mr. Mohr represented Proponents, and Mr. Anderson represented Protestant at the hearing. Mr. Haynes testified on behalf of OWRD. Ms. Schneider,

Ms. Freitas, Ms. Sturdevant, Bob Long, and William Fleegeer testified on behalf of Proponents. Susan Krant, Ms. Winter, Mr. Anifowose, and James Gail testified on behalf of Protestant. The record remained open until May 17, 2019 to receive written closing arguments from the parties. On May 17, 2019, Mr. Mohr requested an extension to the deadline for submitting closing arguments to allow for transcription of the testimony. ALJ Vaughn granted the extension. The record closed on June 3, 2019, after the OAH received written closing arguments from both Protestant and Proponents.

ISSUES

1. Whether the water right evidenced by Certificate 2366 has been partially forfeited by a failure to make beneficial use of the water for irrigation on the portion of the place of use that lies within Tax Lots 300 and 302 for a period of five or more consecutive years during the period of April 1997 through May 2016. ORS 540.610; OAR 690-017-0400.

2. Whether the water right evidenced by Certificate 22086 has been partially forfeited by a failure to make beneficial use of the water for irrigation, supplemental irrigation, and stock use on the portion of the place of use that lies within Tax Lots 300 and 302 for a period of five or more consecutive years during the period of April 1997 through May 2016. ORS 540.610; OAR 690-017-0400.

EVIDENTIARY RULINGS

Exhibit A1, offered by OWRD, was admitted into the record without objection. Proponents offered Exhibits B1 through B15 and B17 through B28, which were admitted into evidence without objection.¹ Protestants offered Exhibits C1 through C3, which were admitted into evidence without objection.

Protestant offered Exhibit C4 during the hearing for impeachment purposes regarding Ms. Schneider's testimony. Exhibit C4 consists of photographs purporting to show Tax Lot 300 and the surrounding area. Proponents objected to the admission of Exhibit C4. Proponents' objection is overruled. Exhibit C4 is admitted into evidence for the limited purpose of impeachment.

FINDINGS OF FACT

Modifications to the Proposed Order's Findings of Fact

All Findings of Fact, with the exception of #8, are adopted by OWRD and incorporated into this Amended Proposed Order without modification. Finding of Fact 8 has been modified as shown below (additions in underline; deletions in ~~striketrough~~):

1. Water Right Certificate 2366 (the Carter Creek Water Right) was issued in the name of L.D. Dollarhide and has a priority date of October 26, 1915. It authorizes use of 0.44 cubic feet per second (cfs) from Westerly Branch of Carter Creek, a tributary of Emigrant Creek, for

¹ Proponents did not offer Exhibit B16 into evidence.

irrigation of 25 acres in the SE ¼ SW ¼ of Section 16 and 10 acres in the NE ¼ NW ¼ of Section 21, Township 40 South, Range 2 East, W.M., being a total of 35 acres. (Ex. A1 at 5-6.)

2. Water Right Certificate 22086 (the Dollarhide Spring Water Right) was issued in the name of Dorothy D. Presley and has a priority date of May 15, 1953. It authorizes use of 0.022 cfs from Dollarhide Spring, a tributary of Emigrant Creek Watershed, for irrigation, supplemental irrigation and stock as follows: 4.5 acres supplemental in the SE ¼ SW ¼ of Section 16, 1.1 acres supplemental in the NE ¼ NW ¼ of Section 21, stock in the NE ¼ NW ¼ of Section 21, and 0.1 acre primary in the SW ¼ SW ¼ of Section 16, Township 40 South, Range 2 East, W.M., being a total of 5.7 acres. (Ex. A1 at 7-8.)

3. Protestant is the record owner of Tax Lot 300, 12.5 acres within Sections 16 and 21, Township 40 South, Range 2 East, W.M., in Jackson County, Oregon (the Winter property). Protestant has owned the property since 2015. (Exs. A1 at 1, C3 at 1; Test. of Winter.)

4. Lutchter Land LLC is the record owner of Tax Lot 302 within Section 21, Township 40 South, Range 2 East, W.M., in Jackson County, Oregon (the Lutchter property). (Ex. A1 at 1.)

5. On November 1, 2017, Proponents filed affidavits with OWRD asserting the water rights evidenced by Water Right Certificates 2366 and 22086 had been forfeited due to failure to make beneficial use of the water on Tax Lots 300 and 302 for five or more consecutive years during the period from April 1997 through May 2016. (Ex. A1 at 19, 26, 31, and 51.)

6. On November 20, 2017, OWRD issued the Notice to Protestant and to Lutchter Land LLC. OWRD proposed cancelling for non-use the portions of the Carter Creek and Dollarhide Spring water rights that lie within Tax Lots 300 and 302. (Ex. A1 at 1-3.)

7. On December 18, 2017, Protestant filed a Protest with OWRD and requested a contested case hearing regarding the November 20, 2017 Notice issued by OWRD. Lutchter Land LLC did not file a protest. (Ex. A1 at 57-58; Record.)

Carter Creek Water Right

8. There is no evidence indicating that water from Carter Creek has been applied to beneficial use for irrigation purposes, pursuant to the terms and conditions of Water Right Certificate No. 2366, at any time since 1997 on those lands located in the ~~NW¼~~ NE¼ of NW¼ of Section 21, and the SE¼ of the SW¼ of Section 16, in Township 40 South, Range 2 East, W.M., in Jackson County, Oregon, and which lands are identified in the Jackson County Assessor records as Tax Lots 300 and 302. (*Stipulations Regarding Non-Use of Portions of Water Right Certificate No. 2366.*)

Reason for modification: The description of lands to which the water right under Certificate 2366 is appurtenant as the NW¼ NW¼ of Section 21, rather than the NE¼ NW¼ of Section 21, appears to have been taken from the "*Stipulations Regarding Non-Use of Portions of Water Right Certificate No. 2366*", which is in error. The correct location of Tax Lots 300 and 302 is

the NE¼ NW¼ of Section 21, Township 40 South, Range 2 East, W.M., in Jackson County, Oregon. See Certificate 2366.

Relevant Tax Lots – 300, 302, 303, and 304

9. Tax Lot 300, the Winter Property, is located on the west side of Old Highway 99 (the highway) in Ashland, Oregon. The property is partially wooded. A residence is located on the property. The residence is at the top of a driveway that leads to the west up a rising slope from the highway. The residence receives water from a tank located in a separate well house on the property. The well house connects to a well located on the property. The tank also connects to a feed line that draws water from Dollarhide Spring located to the south, on Tax Lot 304. A valve system on the tank allows the user to switch between using water from the well and water from the spring. (Test. of Winter, Anifowose, and Gail; Ex. A1 at 9 and 45.)

10. Tax Lot 302, the Lutcher Property, is south of and adjacent to Tax Lot 300. The western portion of Tax Lot 302 is largely wooded. The portion of Tax Lot 302 closest to the highway contains a fenced area of the property currently used for agriculture. (Test. of Winter and Anifowose; Exs. A1 at 9, B17.)

11. Tax Lot 303, the Schneider Property, is south of and adjacent to Tax Lot 302. Tax Lot 303 contains a residence at the top of a driveway extending to the west from Old Highway 99. Portions of Tax Lots 300 and 302 are visible from the driveway and residence on the Schneider Property. (Test. of Schneider; Ex. A1 at 9.)

12. Tax Lot 304 is currently owned by Ms. Schneider and is located south of and adjacent to the Schneider Property. Dollarhide Spring is located in a wooded portion of Tax Lot 304 to the south and west of the residence on the Schneider Property. A spring box located on Tax Lot 304 covers and encloses Dollarhide Spring. The spring box is accessible from the Winter and Schneider Properties via a small walking trail through the woods. (Test. of Schneider, Winter, and Haynes; Ex. A1 at 9.)

Dollarhide Spring, Spring Box, and Connecting Pipe System

13. The spring box located on Tax Lot 304 is connected to the well house on the Winter Property by an underground pipe. The pipe runs from the spring box on Tax Lot 304 through the Schneider and Lutcher Properties to the Winter Property, where it feeds into the storage tank in the well house. The pipe connecting the spring box to the Winter property is underground for the entirety of the distance from Tax Lot 304 to the Winter property, with the exception of a valve which is accessible from above ground part way along the pipe. (Test. of Winter, Gail, and Haynes.)

14. Water travels from the spring box through the underground pipe toward the Winter Property solely by force of gravity. The pipe from the spring box slopes generally downward in elevation towards the Winter Property, allowing gravity to maintain the flow of water from the spring through the pipe. There is a slight upward angle in one portion of the pipe. When air enters into the pipe, it can on occasion cause an air bubble to form at the high point in the pipe,

slowing or preventing water flow. By releasing the air bubble using the above-ground valve, the water flow can be restarted. (Test. of Anifowose, Winter, Krant, and Gail.)

Proponent and Prior Owners of Tax Lot 300

Susan Krant

15. Susan Krant and her husband purchased the Winter Property in 1998 from Ms. Wilson, the previous owner. Ms. Krant resided on the property from 1998 until 2004, when she sold the property to James and Sandra Gail. (Test. of Krant; Ex. C3 at 3.)

16. At the time Ms. Krant purchased the Winter Property, the well was already installed on the property, and the pipe connecting Dollarhide Spring to the well house on the Winter Property was already in place. Ms. Krant built a larger well house on the property and installed a water-holding tank. Ms. Krant installed a retaining wall on the property in order to make a large, flat lawn to the east of the residence. The lawn was approximately one-half the size of a football field. The lawn was irrigated solely with water from Dollarhide Spring using underground pipes and an automated pop-up sprinkler system. The control system for the automated sprinklers was located in the well house. Ms. Krant also used water from Dollarhide Spring to hand-water a garden located to the west of the residence and several fruit trees on the property. She used water from Dollarhide Spring every day for some combination of watering the lawn, watering the garden, watering the fruit trees, or filling the pond. (Test. of Krant; Ex. C3 at 3-6.)

17. Ms. Krant maintained a pond on the eastern portion of Tax Lot 300. The pond typically filled partly from rainwater and snow, and it slowly emptied as water seeped out of the pond and into the surrounding ground. Ms. Krant would use a hose from the well house to fill the remainder of the pond from time to time. The amount of water used for the pond depended on the season, the weather, and the amount of water that seeped into the surrounding ground. (Test. of Krant.)

18. When Ms. Krant purchased the Winter Property, the Fleeegers owned Tax Lot 304. Mr. Fleeeger gave Ms. Krant permission to walk to the spring box across Tax Lots 303 and 304, and he acknowledged Ms. Krant's right to use water from Dollarhide Spring. The Fleeegers did not interfere with Ms. Krant's use and maintenance of the spring, the spring box, or the release valve. (Test. of Krant; Ex. C3 at 5.)

19. From January through July 2001, the Krants repaired a septic field located on the Winter Property to the east of the residence. The process involved digging out and repairing the underground septic system, then reseeding the grass overtop of the septic field. (Test. of Krant.)

James Gail

20. James and Sandra Gail purchased the Winter Property from the Krants in April 2004. At the time of purchase, the Krants explained the spring and pipe system to Mr. Gail. Mr. Gail understood that the flow of water from Dollarhide Spring was sometimes intermittent and that

the water in the pipe required occasional “restarting.” Mr. Gail resided on the property until he sold it to Ms. Winter in 2015. (Test. of Gail; Ex. C3 at 7.)

21. Mr. Gail used water from Dollarhide Spring to irrigate the lawn, to water the garden, to water a rock wall with flowers planted on top of it, and to water several fruit trees all located on the Winter Property. The Gails also used water from Dollarhide Spring for drinking and domestic use in the residence. The Gails used only water from Dollarhide Spring for all of their needs for the first five or six years they resided on the property. (Test. of Gail; Ex. C3 at 8.)

22. Mr. Gail checked on the spring box, maintained the pipe and/or the box, and cleared debris approximately two or three times per year while he resided on the property. (Test. of Gail.)

23. During three or four of the years the Gails resided on the Winter Property, Dollarhide Spring failed to produce sufficient water for the property’s needs. This typically occurred in September or October during particularly dry years. During those years, the Gails used water from the well to supplement the spring water. Beginning in 2008 or 2009, the Gails had difficulty with the well and began using spring water for home and domestic use in addition to irrigation and garden use. (Test. of Gail.)

Magdalena Winter and Leo Anifowose

24. Ms. Winter purchased the Winter Property from the Gails in June 2015. She has resided on the property with her partner, Mr. Anifowose, since that time. When Ms. Winter purchased the property, Mr. Gail explained the irrigation system from Dollarhide Spring. (Test. of Winter and Anifowose; Ex. C3 at 1.)

25. When Ms. Winter purchased the property, there was already an extensive irrigation system including pop-up sprinklers for the lawn area as well as hose irrigation for the lavender plants on the property and the garden located behind the residence. The lawn was green at the time of purchase in 2015. (Test. of Anifowose.)

26. Water from Dollarhide Spring stopped flowing to the Winter Property in August 2015 because of an air bubble in the pipe. Mr. Anifowose and Mr. Gail used the valve to restart the flow of water. (Test. of Anifowose.) In spring 2016, Ms. Winter installed a PVC pipe underground on the property. The pipe ran from the existing pipe towards the east along the driveway on the property. The new pipe was intended to allow gravity-fed irrigation to portions of the east side of the property. Ms. Winter subsequently installed drip irrigation for crops on the Winter Property as well as a fenced crop on Tax Lot 302. (Test. of Winter; Ex. C2 at 3-6.)

27. Ms. Winter and Mr. Anifowose currently grow fruit, vegetables, herbs, cannabis, mushrooms, and lavender on the Winter Property. They use approximately three to four acres of the property for agriculture. (Test. of Winter and Anifowose.) They use the terraced area to the north and east of the residence to grow herbs and other plants. They grow legal cannabis for medicinal use via a drip irrigation system which waters 12 plants, each plant being 10-12 feet

high and housed in a custom eight-foot square box, located to the east of the residence on the Winter Property. (Test. of Anifowose.)

28. Ms. Winter has used water from Dollarhide Spring each season since 2015 for irrigation whenever water is available. When spring water is not available, she has used well water and had water delivered by truck to supplement the spring water. (Test. of Winter.)

Protestants and Protestants' Witnesses

William Fleeger

29. William Fleeger has degrees in watershed management and community wildfire protection. He earned a Ph.D. in natural resources and environmental studies in 2007. He worked for the forest service for eight years. He now teaches environmental studies and environmental policy. He is familiar with forest management, trail maintenance, firefighting, and watershed management. (Test. of Fleeger.)

30. William and Mary Fleeger purchased the Schneider Property in October 1992 and purchased Tax Lot 304 in June 1993. Mr. Fleeger resided on the Schneider Property until 2003. He rented out the property from 2003 until 2009, and he would visit the property annually during that time. Mr. Fleeger did not interact with the neighbors during his visits, and he did not go onto the Winter Property or Tax Lot 302 at any time between 2003 and 2009. (Test. of Fleeger.)

31. Mr. Fleeger was unaware of Dollarhide Spring at the time he purchased the Schneider Property and Tax Lot 304. After the purchase, Helen Wilson, who owned and resided on the Winter Property at that time, informed Mr. Fleeger of the spring and of the water right allowing her to use water from the spring. Mr. Fleeger understood there to be irrigation and stock watering rights. (Test. of Fleeger.)

32. While Mr. Fleeger owned Tax Lots 303 and 304, the residence on the Winter Property was not visible from the residence on the Schneider Property. The residence on the Winter Property was “pretty well screened” by trees and foliage. The Winter Property was more readily visible from the highway. Mr. Fleeger drove along the highway past the Winter Property daily during the period he resided on the Schneider Property. (Test. of Fleeger.)

33. Mr. Fleeger went onto the Winter Property “a couple of times” while Ms. Wilson was in residence and once while Ms. Krant was in residence. He did not observe stock watering on the Winter Property or on Tax Lot 302 at any time during the period when he owned the Schneider Property. He did not observe Ms. Wilson irrigating her property during her period of ownership. Mr. Fleeger did not observe irrigation by Ms. Krant to the south of the residence on the Winter Property. Mr. Fleeger did not observe the Krants installing the lawn on the east side of the residence on the Winter Property. (Test. of Fleeger.)

Linda Ganim

34. Linda Ganim and her husband owned the Schneider Property from September 2009 until they sold the property to Carol Schneider in May 2013. On November 1, 2017, Ms. Ganim filed an affidavit with OWRD asserting that she had “seen no evidence that water has been applied for irrigation use or for the watering of livestock on the Winter Property or on Tax Lot 302 during the period of years September, 2009 through May, 2013[.]” (Ex. B6.)

Carol Schneider

35. Carol Schneider purchased the Schneider Property in May 2013, and purchased Tax Lot 304 in June 2013. Ms. Schneider has resided on the property continuously since 2013. (Test. of Schneider.)

36. Portions of the Winter Property are visible from Ms. Schneider’s residence. The residence on the Winter Property is not typically visible from the residence on the Schneider property due to trees and vegetation. Depending on the season, the view of the Winter Property from the road is sometimes obscured by trees. Ms. Schneider went onto the Winter Property once in 2015 or 2016 during the spring. She has not otherwise been onto the Winter Property. (Test. of Schneider.)

37. On November 1, 2017, Ms. Schneider filed an affidavit with OWRD asserting that she had “seen no evidence that water has been applied for irrigation use on the Winter Property or on Tax Lot 302 during the period from May, 2013 up until late Spring 2016.” (Ex. B3.)

Peggy Freitas

38. Ms. Freitas lived in the area near the Winter Property from 1950 to 1967. She later returned to the area in 1997 and has resided since that time on Tax Lot 708, which is located approximately one mile north and northeast of the Winter Property. Ms. Freitas has never been on the Schneider Property or on Tax Lot 304. Ms. Freitas has never gone onto the Winter Property aside from one or more occasions in her youth. The Winter Property is not visible from Tax Lot 708. Ms. Freitas sometimes visits an acquaintance who resides on Tax Lot 900, from which portions of the Winter Property are visible. Visibility onto the Winter Property was reduced between 1997 and 2010 as the trees on the property have grown. Ms. Freitas has not observed irrigation on the Winter Property at any time since 1997. (Test. of Freitas.)

Evern Sturdevant

39. Evern Sturdevant and her husband purchased Tax Lot 100 in 1989 and built a residence on the property in 1992. Tax Lot 100 is located to the east of Tax Lot 302 and the Schneider Property across Old Highway 99. Ms. Sturdevant resided on the property until 2014. (Test. of Sturdevant; Exs. B5 and B28.)

40. Ms. Sturdevant visited the Winter Property approximately once per month while Ms. Wilson resided there. She visited the Krants following their purchase of the property. She visited the Gails after they purchased the property, but less frequently than she visited the Krants.

Ms. Sturdevant did not discuss the property's water supply or water use with any of the owners. (Test. of Sturdevant.)

41. Ms. Sturdevant observed potted plants and flowers on the Winter Property watered with sprinklers during the period Ms. Wilson resided there. While Ms. Krant resided on the property, Ms. Sturdevant was aware of the improvements to the lawn area and observed that the lawn was typically greener than the surrounding areas, even during the summer time. Ms. Sturdevant observed that the pond on the property would sometimes be filled. (Test. of Sturdevant.)

42. On November 1, 2017, Ms. Sturdevant filed an affidavit with OWRD asserting that she had "seen no evidence that water has been applied for irrigation use or for the watering of livestock on the Winter Property or on Tax Lot 302 during the period of years December, 1989 through the fall of 2014." (Ex. B3.)

Bob Long

43. Mr. Long is a hydrogeologist, registered geologist, and certified water rights examiner in the state of Oregon. He has 20 years of experience working in the field of water rights, with 15 years as a certified water rights examiner. He has lived in the Pacific Northwest for 25 years. As part of his work, Mr. Long evaluates compliance with permit conditions and interprets aerial photography. (Test. of Long.)

44. Mr. Long reviewed aerial photographs of the region that includes the Winter Property and Tax Lots 302, 303, and 304 taken on the following dates: June 1993, August 1998, August 2001, August 2005, July 2010, August 2011, and July 2014. (Exs. B9 – B15.) Mr. Long observed a darkened area on the photograph from August 2001 that could indicate an irrigated lawn or a soil disturbance on the Winter Property. (Test. of Long; Ex. B11.) Mr. Long did not observe soil disturbance in any of the other aerial photographs that would indicate installation or improvement of underground irrigation systems. In the 2014 photograph, Mr. Long did not observe any equipment such as above-ground sprinkler systems, pumps, or water lines that would indicate there was irrigation on the Winter Property. From viewing the aerial photographs, Mr. Long would not have been able to see existing underground pipes, underground irrigation systems, or pop-up sprinkler systems not in use. Mr. Long would not have been able to see soil disturbances from maintenance or installation of underground equipment from reviewing a photograph if the installation had occurred two years or more before the photograph was taken. (Test. of Long.)

45. Mr. Long visited the area including the Winter Property and Tax Lot 302 in person in June 2016 or 2017 and again in September 2018. In the earlier visit, he observed the properties from a position standing on Old Highway 99 looking to the west, and from the Schneider property looking north. On the second visit, he went onto the Winter Property via the driveway, walked into the tree line to the west of the residence, and went approximately 400 feet along the northern boundary of the property. During the 2018 visit, Mr. Long observed a drip irrigation system on the Winter Property, and observed that the well on the Winter Property appeared to be

connected to the irrigation system. Mr. Long observed no visible irrigation equipment aside from the drip irrigation. (Test. of Long.)

CONCLUSIONS OF LAW

Modifications to the Proposed Order's Conclusions of Law

The conclusions of law are adopted by OWRD and incorporated into this Amended Proposed Order with the modifications. A third conclusion of law has been added (additions in underline; deletions in ~~striketrough~~):

1. The water right evidenced by Water Right Certificate 2366 is subject to partial cancellation due to non-use as follows:

- Pursuant to ORS 540.641(1), the Water Resources Commission may enter an order cancelling the portion of Water Right Certificate 2366 applicable to irrigation with a place of use on Tax Lot 302; and
- OWRD shall cancel the portion of Water Right Certificate 2366 applicable to irrigation with a place of use on Tax Lot 300.

2. Proponents failed to meet their burden to shown a period of five or more consecutive years of non-use of any portion of the water right evidenced by Water Right Certificate 22086 with respect to the place of use on Tax Lot 300 or Tax Lot 302 during the period of April 1997 through May 2016.

3. Pursuant to ORS 540.641(1) and OAR 690-017-0500, the Water Resources Commission shall enter an order cancelling the portion of Water Right Certificate 22086 applicable to irrigation, supplemental irrigation and stock watering with a place of use on Tax Lot 302.

Reason for modification: The proposed order found that Lutchter Land LLC, owner of tax lot 302, did not file a protest. OAR 690-017-0500 states: "If the record owner or occupant receiving notice as provided in ORS 540.631 fails to protest the proposed cancellation of the water within the 60-day period prescribed in the notice, the Water Resources Department shall enter an order cancelling the water right as provided in ORS 540.641."

OPINION

The first portion of the Opinion is adopted without modification.

The third paragraph of the *Conclusion* portion of the Opinion is modified below (additions in underline; deletions in ~~striketrough~~).

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); *Dixon v. Board of Nursing*, 291 Or App 207, 213 (2018) (in administrative actions, the burden of proof is by a preponderance of the evidence). Proof by a preponderance of the 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 assert that Protestant has failed to make beneficial use of the water rights granted under Certificates 2366 and 22086 for a period exceeding five years with respect to the place of use on Tax Lots 300 and 302. Consequently, Proponents assert the water rights are forfeit and have submitted sworn affidavits seeking cancellation of the relevant portions of those rights. As the proponents of this position, they bear the burden to prove by a preponderance of the evidence the facts necessary to demonstrate forfeiture. In the event Proponents are able to carry their burden and prove non-use for the statutory period, Protestant 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.² Accordingly, Proponents are responsible for meeting their burdens before Protestant 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.*

² ORS 540.631 provides authority for the Water Resources Commission to begin cancellation proceedings of a forfeited water right and provides, in part:

Whenever it appears to the satisfaction of the Water Resources Commission upon the commission's own determination or upon evidence submitted to the commission by any person that a perfected and developed water right has been forfeited as provided in ORS 540.610(1), and would not be rebutted under ORS 540.610 (2), the commission shall initiate proceedings for the cancellation of such water right by causing written notice of such initiation of proceedings to be given by registered or certified mail, return receipt requested, to the legal owner of the lands to which the water right is appurtenant and to the occupant of such lands. * * * The notice shall state that the legal owner or the occupant has a period of 60 days from the date of the mailing of the notice within which to protest the proposed cancellation of the water right.

In addition to defining use as the measure of a water right and identifying the bases for forfeiture due to non-use of the right, ORS 540.610 provides, in relevant part:

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

* * * * *

(f) The end of the alleged period of nonuse occurred more than 15 years before the date upon which evidence of nonuse was submitted to the commission or the commission initiated cancellation proceedings under ORS 540.631, whichever occurs first.

* * * * *

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

* * * * *

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

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

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

OAR 690-017-0400(1) identifies the process for cancellation of a water right initiated by Department:

The Department shall initiate proceedings to cancel a perfected water right, as provided in ORS 540.631 and these rules, whenever it appears that a right has been forfeited as provided in 540.610. The decision to initiate cancellation proceedings shall be based on evidence submitted to the Department, by any person, that alleges five or more years of nonuse so as to create a presumption of forfeiture, and from which evidence it further appears the presumption of forfeiture would not likely be rebutted under OAR 690-017-0800(2)(a), (d) or (e).³

³ OAR 690-017-0800(2) provides grounds for rebutting the presumption of forfeiture consistent with ORS 540.610(2) and provides, in part:

Period in Issue

The Notice proposes partial cancellation of the water rights at issue based on five or more consecutive years of non-use during the period of April 1997 through May 2016. Proponents assert that evidence of non-use should be considered for the period of April 1997 through May 2019. (*Proponents' Closing Argument* at 1.) That proposed period includes three years outside the scope of the Notice. For that reason, any period after May 2016 is not considered. Protestant asserts that no evidence of non-use should be considered prior to November 1, 2002, pursuant to ORS 540.610(2)(f) and OAR 690-017-0800(2)(e) (a presumption of forfeiture may be rebutted by a showing that the period of non-use ended more than 15 years prior to the date evidence of non-use was submitted). (*Protestant's Closing Argument* at 1.) The cited provisions, however, apply only when attempting to rebut an established presumption of forfeiture after a showing of lack of beneficial use for five successive years. For the reasons discussed below, it is unnecessary to address whether this or any other rebuttal is applicable. Accordingly, the relevant period is April 1997 through May 2016.

Expert Testimony

Mr. Long is an expert in hydrogeology. He is a certified water rights examiner and has significant experience in the Pacific Northwest. He testified credibly and his testimony is given great weight.

Mr. Long reviewed aerial photographs and twice viewed or visited the Winter Property in person. Mr. Long made the following assertions regarding the Winter Property and Tax Lot 302, which are not disputed by any evidence in the record: none of the aerial photographs, aside from the one taken in 2011, showed soil disturbance that would indicate installation or improvement of an underground irrigation system; there were no visible above-ground water lines, sprinklers, pipes, or other equipment that would indicate ongoing irrigation in any of the aerial photographs; during his observation of the Winter Property from the Schneider Property in 2016 or 2017, he was unable to observe the drip irrigation system; and during his sole visit onto the Winter Property in 2018, he observed a drip irrigation system being used to irrigate crops on the property.

A presumption of forfeiture may be rebutted by showing one or more of the following:

(a) The water right is for reasonable and usual municipal use of water;

* * * * *

(d) The period of nonuse occurred during a period of time within which land was withdrawn from use under the Federal Soil Bank Program or the Federal Conservation Reserve Program;

(e) The end of the alleged period of nonuse occurred more than 15 years before the date upon which evidence of nonuse was submitted or cancellation proceedings were initiated under ORS 540.631, whichever occurs first[.]

Water Right Certificate No. 2366 and Stipulations

Water Right Certificate No. 2366 (the Carter Creek water right) authorizes use of water from the Westerly Branch of Carter Creek, a tributary of Emigrant Creek, for irrigation of a total of 35 acres with a place of use including land on the Winter Property and Tax Lot 302.

Lutcher Land LLC is the owner of record of Tax Lot 302. OWRD served Lutcher Land LLC with the Notice. Lutcher Land LLC did not file a protest and did not appear for or participate in the hearing in this matter in any capacity.

ORS 540.641 identifies the requirements and procedure for filing protests of cancellation proceedings generally. With respect to owners or occupants who fail to file a protest in response to a notice proposing cancellation, it provides, in relevant part:

(1) If the legal owner or the occupant receiving notice as provided in ORS 540.631 fails to protest the proposed cancellation of the water right within the 60-day period prescribed in the notice, the Water Resources Commission may enter an order canceling the water right.

ORS 540.641(1) permits the Water Resources Commission, rather than OWRD, to enter an order cancelling the water right in the event the legal owner or occupant receiving notice fails to protest the proposed cancellation of the water right within the period prescribed in the Notice.

Accordingly, because Lutcher Land LLC failed to protest the proposed partial cancellation within the applicable period, the Water Resources Commission may enter an order cancelling the portion of Water Right Certificate No. 2366 applicable to irrigation with a place of use on Tax Lot 302.

Protestant acknowledges that Carter Creek no longer flows onto or over either the Winter Property or Tax Lot 302. Protestant stipulated that there has been no water applied to beneficial use for irrigation purposes on the Winter Property from Carter Creek pursuant to Water Right Certificate No. 2366 at any time since 1997.

Because Protestant acknowledges that there has been no water applied to beneficial use for irrigation purposes on the Winter Property from Carter Creek pursuant to Water Right Certificate No. 2366 at any time since 1997, Proponents have met their burden to show a period of five or more consecutive years of non-use. As such, they have established a presumption of forfeiture with respect to Certificate No. 2366 on the Winter Property. Protestant does not assert that any rebuttals under ORS 540.610(2) apply to the presumption of forfeiture as to Certificate No. 2366. The portion of Certificate No. 2366 applicable to irrigation on the Winter Property should therefore be cancelled for non-use.

Water Right Certificate No. 22086

Both Protestant and Proponents provided testimony from witnesses regarding beneficial

use under Certificate No. 22086 during the period in issue. Because ownership of the relevant tax lots changed multiple times during the relevant period, beneficial use on the Winter Property is addressed by period of ownership in chronological order.

April 1997 – Dec. 1998 (Wilson)

Ms. Wilson owned the Winter Property during the period from April 1997 until December 1998. Neither Mr. Fleeger nor Ms. Sturdevant observed irrigation on the Winter Property or Tax Lot 302 during this period. The only evidence of water use during this time is Ms. Sturdevant's observation that Ms. Wilson watered potted plants and flowers with a sprinkler. There is no evidence showing that Ms. Wilson used water from Dollarhide Spring, as opposed to the well, for watering, and there is no evidence of the volume or frequency of the watering. The preponderance of the evidence shows that during this period of approximately 21 months, there was no beneficial use of the water from Dollarhide Spring for irrigation on the Winter Property or Tax Lot 302.

December 1998 – April 2004 (Krant)

Ms. Krant purchased the Winter Property in December 1998. Proponents assert that there was no water used for irrigation on the property between December 1998 and April 2004. Mr. Fleeger did not observe irrigation on the Winter Property to the south of the residence during that period. However, Mr. Fleeger acknowledged that the property was "pretty well screened" by trees and foliage at that time. Furthermore, he did not go onto the Winter Property or Tax Lot 302 except for a single occasion during Ms. Krant's period of ownership, and he visited his own property only on an annual basis beginning in 2003. Mr. Long reviewed aerial photographs from August 1998 and August 2001. Mr. Long observed a darkened area in the photograph from August 2001 that could indicate an irrigated lawn or soil disturbance on the Winter Property. Considering the date of the photograph, it is reasonable to infer that the area in question was a soil disturbance resulting from Ms. Krant's repair and reseeded of the septic field. Mr. Long saw no other indication of irrigation. No other evidence suggests non-use during this period.

In contrast, Ms. Krant's specific, detailed testimony constitutes persuasive evidence of ongoing water use from Dollarhide Spring for landscaping, gardening, and agriculture during this period. Ms. Krant installed a retaining wall and large lawn to the east of the residence, which she regularly irrigated with water from Dollarhide Spring using automated sprinklers. Additionally, she filled and maintained a pond on the property and watered fruit trees at various locations on the property.

Ms. Krant's testimony is more persuasive than Mr. Fleeger's and Mr. Long's regarding water use during the period from 1998 through 2004. Ms. Krant had direct knowledge of the multiple, specific uses of water from Dollarhide Spring during that time. Although Mr. Fleeger testified credibly, his view of the Winter Property and Tax Lot 302 was largely obscured from his residence, he went onto one of those lots only once after Ms. Krant began residing there, and he did not reside on the Schneider Property for a portion of the time he owned it. Accordingly, his ability to observe the Winter Property was severely limited both by obstructions to the view and by his lack of proximity to the property. Mr. Long based his assertions on a review of two

aerial photographs relevant to this period. Considering Ms. Krant's consistent irrigation on the property, it is more likely than not that the methods of irrigation (e.g. pop-up sprinklers and hoses) were not discernable from the aerial photographs. The fact that neither Mr. Fleeger nor Mr. Long observed irrigation does not demonstrate by a preponderance of the evidence that no irrigation occurred on either the Winter Property or Tax Lot 302. On the contrary, the overwhelming balance of the evidence shows that Ms. Krant engaged in consistent, substantial irrigation on her property.

Proponents have not met their burden to show by a preponderance of the evidence that the water right holder failed to make beneficial use of the water for irrigation and supplemental irrigation on the Winter Property or Tax Lot 302 pursuant to Certificate 22086 during this period.

April 2004 – 2015 (Gail)

Mr. Gail purchased the Winter Property in April 2004. Mr. Gail resided on the property from 2004 until 2015, and he regularly used Dollarhide Spring water to irrigate the lawn, garden, rock wall vegetation, and several fruit trees on the property. Once he began experiencing problems with the well in approximately 2008, he also used spring water for domestic use. In years when the spring water was insufficient to meet all of his needs, he used the spring water until it was depleted.

Mr. Fleeger owned Tax Lots 303 and 304 until 2009. However, he did not reside on the property at any time after 2003, and he visited the property only on an annual basis between 2003 and 2009. Although he did not observe irrigation on the Winter Property or Tax Lot 302 during this time, his failure to observe irrigation is not sufficient to support a conclusion that no irrigation occurred because of his frequent absence from the region and because of the obstruction from foliage described above.

Ms. Ganim owned the Schneider Property from September 2009 until May 2013. Although Ms. Ganim filed an affidavit with OWRD asserting that she had "seen no evidence" of irrigation or stock watering on the Winter Property or Tax Lot 302 during that time, she did not testify at hearing and was not subject to cross-examination. Her assertion via affidavit does not constitute persuasive evidence of non-use.

Ms. Schneider owned the Schneider Property and Tax Lot 304 beginning in 2013. She did not observe irrigation on the Winter Property or Tax Lot 302. She acknowledged that the residence on the Winter Property, as well as portions of the property itself, are obscured by trees, both from her residence and from the road, to varying degrees depending on the season. Ms. Schneider went onto Tax Lot 302 only once in 2015 or 2016.

Mr. Long reviewed aerial photographs from August 2005, July 2010, August 2011, and July 2014 and did not observe any equipment such as sprinkler systems, pumps, or above-ground water lines that would indicate there was irrigation on the Winter Property during that period. However, he acknowledged that the photographs would not allow him to observe pop-up sprinklers or other irrigation equipment already installed underground.

The evidence shows that, during that period, Mr. Gail regularly used Dollarhide Spring water for irrigation and, in later years, for domestic use, until the supply of water from the spring was depleted. Proponents have not met their burden to show by a preponderance of the evidence that the water right holder failed to make beneficial use of the water for irrigation and supplemental irrigation on the Winter Property and/or Tax Lot 302 pursuant to Certificate 22086 during this period.

June 2015 – May 2016 (Winter)

Ms. Winter purchased the Winter Property in June 2015. Since that date, she has grown and irrigated fruit, vegetables, herbs, cannabis, mushrooms, and lavender on the property as well as a portion of Tax Lot 302. Ms. Winter uses approximately three to four acres of her property for agriculture plus an additional fenced area on Tax Lot 302. Ms. Winter has used water from Dollarhide Spring for irrigation each season whenever spring water is available.

Proponents assert that there was no water used for irrigation on the Winter Property between June 2015 and May 2016. Ms. Schneider, who resided on the Schneider Property during this period, did not observe irrigation on the Winter Property or on Tax Lot 302.⁴ However, the fact that Ms. Schneider did not observe irrigation on either lot is attributable to the obstructions in the view of the properties and to the types of irrigation methods, which were largely underground and not visible from the Schneider Property. Ms. Schneider's testimony does not outweigh the significant evidence of ongoing irrigation on both lots during this period.

Proponents have not met their burden to show by a preponderance of the evidence that the water right holder failed to make beneficial use of water for irrigation and supplemental irrigation on the Winter Property and/or Tax Lot 302 pursuant to Certificate 22086 during that period.

Conclusion:

Lutcher Land LLC did not file a protest with OWRD in response to the Notice. Pursuant to ORS 540.641(1), the Water Resources Commission may enter an order cancelling the portion of the Carter Creek water right (Water Right Certificate No. 2366) applicable to irrigation with a place of use on Tax Lot 302.

Protestant stipulated to non-use of the Carter Creek water right on Tax Lot 300 for a period of five or more consecutive years from April 1997 to May 2016. Accordingly, OWRD may enter an order cancelling the portion of the Carter Creek water right (Water Right Certificate No. 2366) applicable to irrigation with a place of use on Tax Lot 300.

Proponents have shown, and Protestant does not dispute, that there has been no stock watering pursuant to the Dollarhide Spring water right (Water Right Certificate No. 22086) at any time between 1997 and 2016 on Tax Lots 300 or 302. ~~However, the Notice proposed partial cancellation based solely on place of use. The Notice did not propose partial cancellation based~~

⁴ Mr. Long did not view aerial photographs taken during this period, and he did not visit the location until after May 2016.

~~on failure to engage in a particular type of beneficial use. No portion of the water right shall be cancelled based on a failure to make beneficial use of the water for stock use.~~

Reason for modification: The Notice states on page 1: “**Basis for Initiation Of Proposed Cancellation Action:** It is asserted in affidavits filed with the Water Resources Department . . . that the portion of the place of use under Certificate 2366 and under Certificate 22086 that lies within tax lots 300 and 302 has been forfeited due to non-use for irrigation, supplemental irrigation and stock use for approximately 19 years (April 1997 through May 2016).” In addition, it states on page 2: “The portion of Certificate 22086 proposed to be canceled for non-use of water from Dollarhide Spring is that portion of the place of use that lies within tax lots 300 and 302.” Each type of water use was alleged to have been forfeited by non-use of water for that use on the portion of the place of use lying within what is now tax lots 300 and 302.

Proponents have shown by a preponderance of the evidence that, during the approximately 21-month period from April 1997 until December 1998, there was no beneficial use of the water from Dollarhide Spring for irrigation or supplemental irrigation on Tax Lots 300 or 302. This period is less than five consecutive years. Accordingly, it is insufficient to establish a presumption of forfeiture of the water right for non-use.

Proponents have failed to meet their burden to show by a preponderance of the evidence that there has been a period of five or more consecutive years of non-use of the portion of Dollarhide Spring water right applicable to irrigation or supplemental irrigation on Tax Lots 300 or 302 during the period of April 1997 through May 2016. Accordingly, Proponents have not established a presumption of forfeiture as to any portion of that water right, and no portion of that water right is subject to cancellation.

ORDER

Modifications to the Proposed Order’s Order section

The Order section is adopted by OWRD and incorporated into this Amended Proposed Order with the modifications below (additions in underline; deletions in ~~striketrough~~):

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

1. The water right evidenced by Water Right Certificate 2366 is subject to partial cancellation due to non-use as follows:

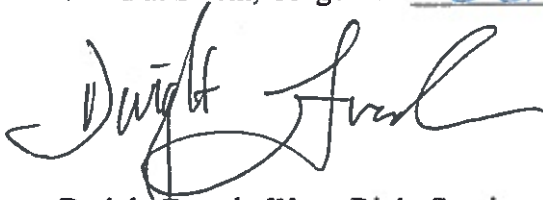
- Pursuant to ORS 540.641(1) and OAR 690-017-0500, the Water Resources Commission shall ~~may~~ enter an order cancelling the portion of Water Right Certificate 2366 applicable to irrigation with a place of use on Tax Lot 302; and
- The portion of Water Right Certificate 2366 applicable to irrigation with a place of use on Tax Lot 300 shall be cancelled.

2. No portion of the water right evidenced by Water Right Certificate 22086 is subject to cancellation with respect to the portion of the place of use that lies within Tax Lot 300 and/or Tax Lot 302 based on non-use of the water during the period of April 1997 through May 2016.

3. Pursuant to ORS 540.641(1) and OAR 690-017-0500, the Water Resources Commission shall enter an order cancelling the portion of Water Right Certificate 22086 applicable to irrigation, supplemental irrigation and stock use on those acres located within Tax Lot 302.

Reason for modification: The proposed order found that Lutch Land LLC, owner of tax lot 302, did not file a protest. OAR 690-017-0500 states: "If the record owner or occupant receiving notice as provided in ORS 540.631 fails to protest the proposed cancellation of the water within the 60-day period prescribed in the notice, the Water Resources Department shall enter an order cancelling the water right as provided in ORS 540.641."

Dated at Salem, Oregon on October 31, 2019



Dwight French, Water Right Services Administrator
for Tom Byler, Director

APPEAL PROCEDURE

NOTICE

This Amended Proposed Order is issued by OWRD pursuant to OAR 137-003-0655. 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 amended 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 amended proposed order. You should also send a copy of your exceptions to any other party or parties to the contested case hearing. Send any exceptions to:

Oregon Water Resources Department
c/o Patricia McCarty
725 Summer Street NE, Suite A
Salem, OR 97301

Exceptions are legal or factual arguments illustrating legal or factual error in the amended 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 amended 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 Commission will issue a final order. The Commission may issue a final order that differs from the proposed order or may adopt the proposed order as the final order.

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

CERTIFICATE OF MAILING

On November 1, 2019 I mailed the foregoing AMENDED PROPOSED ORDER in OAH Case No. 2018-OWRD-00017.

BY FIRST CLASS AND, WHERE AVAILABLE, BY ELECTRONIC MAIL:

Name	Address	Contact
Magdalena Winter	5580 Old Hwy 99 S Ashland OR 97520	
Carol Schneider	5590 Old Highway 99 S Ashland OR 97520	
Peggy Freitas	4765 Old Highway 99 S Ashland OR 97520	
Linda Ganim	PO Box 583 Ashland OR 97520	
Evern Sturdevant	2443 Bridgewater Way Medford OR 97501	
Patricia McCarty	725 Summer St NE, Ste A Salem OR 97301	Patricia.E.McCarty@oregon.gov
Eugene V Anderson	515 E Main St Ashland OR 97520	eanderson@davishearn.com
Peter Mohr	2 Centerpointe Dr. 6th Flr Lake Oswego OR 97035	peter.mohr@jordanramis.com

/s/Patricia McCarty
Oregon Water Resources Department

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BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF OREGON

FOR THE

OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF THE PROPOSED) **PROPOSANTS' EXCEPTIONS TO**
PARTIAL CANCELLATION OF) **AMENDED PROPOSED ORDER**
CERTIFICATES 2366 AND 22086)
) OAH Case No. 2018-OWRD-00017
) Agency Case No. PC 17-03
)

I. INTRODUCTION

Pursuant to ORS 537.445, OAR 137-003-0650 and OAR 690-002-0175, Proponents Carol Schneider, Linda Ganim, Peggy Freitas, and Evern Sturdevant (“Proponents”) hereby timely submit these exceptions to the Amended Proposed Order issued in this matter and dated October 31, 2019 (the “Amended Proposed Order”). These exceptions are timely filed within the time period specified in OAR 690-002-0175 and the appeal procedures set forth in the Amended Proposed Order.

II. PROCEDURAL SUMMARY AND SCOPE OF EXCEPTIONS

The ALJ issued his Proposed Order in this proceeding which was served upon the parties on August 9, 2019 (“Proposed Order”). On September 9, 2019, Proponents filed *Proponents’ Exceptions to Proposed Order* (“Initial Exceptions”) with the Oregon Water Resources Department (the “Department”). Proponents incorporate the procedural history in these proceedings set forth in Proponents’ Initial Exceptions.

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1 **A. ALJ's Proposed Order as Amended by the Department.**

2 In the Proposed Order, the ALJ entered an Opinion based on the ALJ's Findings of Fact
3 (Proposed Order, pp. 3-11) and Conclusions of Law (Proposed Order, p. 11). Proponents do not
4 object to Department's following corrections to the ALJ's Opinion:

- 5 1. “Lutcher Land LLC did not file a protest with OWRD in response to the Notice.
6 Pursuant to ORS 540.641(1), the Water Resources Commission may enter an
7 order cancelling the portion of the Carter Creek water right (Water Right
8 Certificate No. 2366) applicable to irrigation with a place of use on Tax Lot 302.”
- 9 2. “Protestant stipulated to non-use of the Carter Creek water right on Tax Lot 300
10 for a period of five or more consecutive years from April 1997 to May 2016.”
11 “Accordingly, OWRD may enter an order cancelling the portion of the Carter
12 Creek water right (Water Right Certificate No. 2366) applicable to irrigation with
13 a place of use on Tax Lot 300.”
- 14 3. “Proponents have shown, and Protestant does not dispute, that there has been no
15 stock watering pursuant to the Dollarhide Spring water right (Water Right
16 Certificate No. 22086) at any time between 1997 and 2016 on Tax Lots 300 or
17 302. ~~However, the Notice proposed partial cancellation based solely on place of
18 use. The Notice did not propose partial cancellation based on failure to engage in
19 a particular type of beneficial use. No portion of the water right shall be cancelled
20 based on a failure to make beneficial use of the water for stock use.~~”
- 21 4. “Proponents have shown by a preponderance of the evidence that, during the
22 approximately 21-month period from April 1997 until December 1998, there was
23 no beneficial use of the water from Dollarhide Spring for irrigation or
24 supplemental irrigation on Tax Lots 300 or 302. This period is less than five
25 consecutive years. Accordingly, it is insufficient to establish a presumption of
 forfeiture of the water right for non-use.”
5. “Proponents have failed to meet their burden to show by a preponderance of the
 evidence that there has been a period of five or more consecutive years of non-use
 of the portion of Dollarhide Spring water right applicable to irrigation or
 supplemental irrigation on Tax Lots 300 or 302 during the period of April 1997
 through May 2016. Accordingly, Proponents have not established a presumption
 of forfeiture as to any portion of that water right, and no portion of that water
 right is subject to cancellation.”

(Proposed Order, pp. 17-18; Amended Proposed Order, pp. 18-19)

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1 Based on the ALJ's Opinion and accompanying conclusions therein, the ALJ entered the
2 following Order. Proponents do not object to Department's following corrections to the ALJ's
3 Order:

4 "1. The water right evidenced by Water Right Certificate 2366 is subject to partial
5 cancellation due to non-use as follows:

- 6 • Pursuant to ORS 540.641(1) and OAR 690-017-0500, the Water
7 Resources Commission ~~shall~~ may enter an order cancelling the portion of
8 Water Right Certificate 2366 applicable to irrigation with a place of use on
9 Tax Lot 302; and
- The portion of Water Right Certificate 2366 applicable to irrigation with a
place of use on Tax Lot 300 shall be cancelled.

10 2. No portion of the water right evidenced by Water Right Certificate 22086 is subject to
11 cancellation with respect to the portion of the place of use that lies within Tax Lot 300
12 and/or Tax Lot 302 based on non-use of the water during the period of April 1997
13 through May 2016.

14 3. Pursuant to ORS 540.641(1) and OAR 690-017-0500, the Water Resources
15 Commission shall enter an order cancelling the portion of Water Right Certificate 22086
16 applicable to irrigation, supplemental irrigation and stock use on those acres located
17 within Tax Lot 302."

18 (Proposed Order, pp.18; Amended Proposed Order, pp. 19-20)

19 With the Department's issuance of the Amended Proposed Order, Proponents maintain
20 the following exceptions previously submitted against the Proposed Order: (1) the ALJ's
21 underlying Findings of Facts incorporated in the Amended Proposed Order were and remain
22 incomplete as they fail to reflect adequate consideration of relevant testimony of Proponents'
23 witnesses William Fleeger and expert Bob Long including Mr. Longs' interpretation of aerials of
24 the lands in question, all regarding the lack of irrigation of Tax Lot 300 and 302 during the five
25 year period from April 1997 through April 2002; (2) the ALJ's Findings of Fact incorporated in
the Amended Proposed Order suffer for making erroneous assumptions regarding, and giving too
much weight to, Protestants' witness Susan Krant's alleged historic use of water from the
Dollarhide Spring on Tax Lot 300 for irrigation purposes in the face of more credible,

1 countervailing evidence presented by Proponents; and (3) at no time during the course of such
2 proceedings did Protestants introduce *any* demonstrative evidence that would corroborate Ms.
3 Krant’s testimony regarding any irrigation having taken place during the irrigation seasons of
4 1999 through the end of April of the 2002 irrigation season.

5 **B. Proponents’ Initial Exceptions to the Proposed Order.**

6 Proponents submitted the following three exceptions in response to the ALJ’s Proposed
7 Order:

8 Initial Exception No. 1. The ALJ’s underlying conclusions alleging that that the
9 portion of the Dollarhide Spring Right originally authorized for use on Tax Lot 302
10 is not subject to forfeiture is erroneous as (a) the land owner of record Tax Lot 302
11 never filed a protest to the Cancellation Notice and (b), in the alterative, there is no
12 evidence in the record that any water from the Dollarhide was ever applied to
13 beneficial use on Tax Lot 302.

14 (Initial Exceptions, pp. 4-5)

15 Initial Exception No. 2. The ALJ’s underlying conclusions alleging that the content
16 of the Cancellation Notice prevents the ALJ’s consideration of forfeiture regarding
17 historic use for stock watering (or any other initially authorized use of water) from
18 the Dollarhide Spring misconstrues the content of the Cancellation Notice and must
19 be stricken as erroneous.

20 (Initial Exceptions, p. 5)

21 Initial Exception No. 3. Contrary to the Proposed Order, the evidence in the record
22 *does* confirm that the affected portions of Water Right Certificate No. 22086
23 authorized for beneficial use on Tax Lot 300 and 302 have been forfeited due to non-
24 use for a period of five or more years during the Period from April 1997-April 2002.

25 (Initial Exceptions, p. 6)

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1 In consideration of the Department’s corrections to ALJ’s Proposed Order as set forth in
2 the Amended Proposed Order, Proponents maintain only their Exception No. 3 against the
3 Amended Proposed Order.¹

4 **III. THE AMENDED PROPOSED ORDER IS INCORRECT TO THE EXTENT IT**
5 **INCORPORATES ALL ELEMENTS OF THE ALJ’S PROPOSED ORDER**
6 **DETERMINING AFFECTED PORTIONS OF THE DOLLARHIDE SPRING**
7 **WATER RIGHT (WATER RIGHT CERTIFICATE NO. 22086) AUTHORIZED**
8 **FOR BENEFICIAL USE ON TAX LOT 300 AND 302 HAVE *NOT* BEEN**
9 **FORFEITED DUE TO NON-USE DURING THE FIVE-YEAR PERIOD FROM**
10 **APRIL 1997 THROUGH APRIL 2002.**

11 Proponents take exception to the Amended Proposed Order to the extent it incorporates
12 the ALJ’s findings of fact, and following conclusions within the ALJ’s Opinion which have led
13 to the issuance of a Proposed Order not supported by the record and which, as a result, cannot be
14 determined correct as a matter of law:

15 “Proponents have shown by a preponderance of the evidence that, during the
16 approximately 21-month period from April 1997 until December 1998, there was no
17 beneficial use of the water from Dollarhide Spring for irrigation or supplemental
18 irrigation on Tax Lots 300 or 302. This period is less than five consecutive years.
19 Accordingly, it is insufficient to establish a presumption of forfeiture of the water right
20 for non-use.”

21 “Proponents have failed to meet their burden to show by a preponderance of the evidence
22 that there has been a period of five or more consecutive years of non-use of the portion of
23 Dollarhide Spring water right applicable to irrigation or supplemental irrigation on Tax
24 Lots 300 or 302 during the period of April 1997 through May 2016. Accordingly,
25 Proponents have not established a presumption of forfeiture as to any portion of that
water right, and no portion of that water right is subject to cancellation.”

(Amended Proposed Order, p. 19)

¹ Proponents’ Exception No. 1 did additionally claim in the alternative that there is no evidence in the record that any water from the Dollarhide Spring was ever applied to beneficial use on Tax Lot 302, however, given that the Amended Proposed Order correctly reflects that cancelation of all affected portions of both water rights is required as matter of law, such argument no longer need be made regarding Tax Lot 302. However, contrary to the ALJ’s Proposed Order, Proponents’ witness William Fleegeer expressly testified that have never saw any irrigation on Tax Lot 302, which the record shows is adjacent to his driveway and highly visible from the residence on Tax Lot 303 where he lived. Proponents’ Closing Argument, pp. 5-6 (citing Tr. P. 170, LL 13-21 and Tr. P. 181, LL3-6).

1 Protestants object to the Department’s incorporation of the ALJ’s above-referenced
2 conclusions listed above as contrary to the record in these proceedings. The record indicates that
3 the Proponents have shown by a preponderance of the evidence that there has been a period of
4 five or more consecutive years of non-use of the portion of Dollarhide Spring water right (Water
5 Right Certificate No. 22086) authorized for irrigation or supplemental irrigation on Tax Lots 300
6 or 302 during the period from April 1997 through April of 2002.

7 The Proposed Order correctly finds there was no evidence of use of the Dollarhide Spring
8 Right on Tax Lot 300 or Tax Lot 302 from April 1997 until December 1998. However, the
9 Proposed Order, and by incorporation, the Amended Proposed Order, makes summary
10 disposition – and, ultimately erroneous findings of fact – for the following period from
11 December 1999 up through the end of April 2002 (the “Disputed Period”). Proposed Order, pp.
12 15-17; Amended Proposed Order, pp. 16-17, 19). In considering the Disputed Period, and as set
13 forth in Proponents’ Closing Argument and Proponents’ Exceptions to the Proposed Order, the
14 Proposed Order confirms that the Proponents in part presented the testimony of Bill Fleeger, who
15 owned the neighboring Tax Lot 303 upon which the Dollarhide Spring is located and upon which
16 he resided until 2003, Evern Sturdevant, who lived on Tax Lot 100 which is located east and
17 south of Tax Lot 300 and directly of Tax Lot 300 and frequently visited the Tax Lot 300 during
18 this owner of and that of Bob Long, who was accepted by the ALJ as a water resources expert.
19 The testimony of these witnesses was summarized in Proponents’ written closing. For the
20 Disputed Period, the Protestant presented the testimony of Susan Krant, the then owner of the
21 Tax Lot 300. When evaluating the testimony of Mr. Fleeger, Ms. Sturdevant and Mr. Long as
22 compared to that of Ms. Krantz, the ALJ’s Findings of Fact are erroneous to the extent that the
23 Proposed Order and, ultimately, the Amended Proposed, held that Protestants satisfied their
24 burden of production and burden of persuasion in attempting to rebut the testimony of

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1 Mr. Fleeger, Ms. Sturdevant, and Mr. Long. Further, the testimony of Proponents' three
2 witnesses call into significant question the credibility of Ms. Krant's testimony.

3 **A. The Amended Proposed Order is Erroneous for Finding that Susan Krant's**
4 **Testimony was More Persuasive than that of Mr. Fleeger Concerning the Use**
5 **of the Dollarhide Spring water right on Tax Lot 300 during the Disputed**
6 **Period.**

7 The ALJ acknowledged Mr. Fleeger as a very credible witness. However, the ALJ's
8 findings of fact regarding Mr. Fleeger's testimony are incomplete and fail to confirm the extent
9 to which they conflict with, and credibly counter, the ALJ's findings that Proponents' Witness
10 Susan Krant's statements should be deemed more persuasive, much less persuasive at all
11 regarding the use of water from the Dollarhide Spring water right for irrigation purposes on Tax
12 Lot 300. In consideration of the record before the Department, the Amended Proposed Order
13 should be further revised to reflect that Mr. Fleeger's testimony, in combination with the
14 testimony of Proponents' expert, Mr. Long, and lay person Ms. Sturdevant, and in consideration
15 of Ms. Krant's testimony, establishes by a preponderance of the evidence that Proponents have
16 met their burden of production and persuasion that it is more likely true than not that Ms. Krant
17 did not use water from the Dollarhide Spring on Tax Lot 300 during the Disputed Period.

18 When considering whether there was sufficient evidence to show that water from the
19 Dollarhide Spring had been applied to irrigation use on Tax Lot 300 during the period of
20 December 1998 through 2004, the ALJ entered extremely summary findings of fact that are so
21 incomplete as to be erroneous. By example only, in the ALJ's Findings of Fact in the Proposed
22 Order, the ALJ stated that, while Mr. Fleeger could not see the residence on Tax Lot 300 (which
23 at that time belonged to Susan Krant and her husband) from his residence located of the western
24 portion of Tax Lot 303 (the Schneider Property), the residence was more visible from the
25 highway as he drove by Tax Lot 300 (the Winter Property). Proposed Order pp. 8-9, Paragraph
32. While such a statement is true, it incomplete nor does it represent the other areas on Tax Lot

1 303 and from which Mr. Fleeger could clearly see the residence located on Tax Lot 300 and the
2 surrounding area. In this regard, and contrary to the ALJ's findings, Mr. Fleeger testified that he
3 could readily see Tax Lot 300 including the areas where the residence is located as he would
4 regularly walk down and back up his driveway to retrieve his mail. Tr. P179, LL 15-21.

5 As discussed in Proponents Exceptions to the Proposed Order, in his testimony Mr.
6 Fleeger told Ms. Krantz and her husband they could only use the Dollarhide Spring but only on
7 the express provision they only continued to use it for the purpose of securing water solely for
8 in-house uses just as their predecessor to Tax Lot 300, Helen Wilson, had done. Mr. Fleeger
9 made it abundantly clear that should Ms. Krant begin using the spring water for irrigation
10 purposes on Tax Lot 300, he would then initiate forfeiture proceedings on the Dollarhide Spring
11 water right on grounds that no water had been used from the spring for irrigation purposes on
12 Tax Lot 300 at any time for the more than five years had owned Tax Lot 303. Krantz, on the
13 other had testified that Fleeger never interrupted their use of the spring after their initial meeting,
14 presumably to imply that Fleeger did not care how they used the water. Nothing could have been
15 further from the truth. Mr. Fleeger's failure to initiate forfeiture was and remains as credible
16 evidence that Ms. Krant and her husband never irrigated the Tax Lot 300 with water from the
17 Dollarhide Spring at least up to 2003, the year in which Mr. Fleeger and his wife moved to New
18 Hampshire (which moved was noted by the ALJ in his findings). And yet, in consideration of
19 this additional evidence combined with the ALJ's express finding that Mr. Fleeger was a very
20 credible witness, neither the ALJ Findings nor the Amended Proposed Order make any mention
21 of this significant exchange. Such an exchange also withdraws any significance from the ALJ's
22 prior finding that Mr. Fleeger didn't actually go onto Tax Lot 300 more than once or twice until
23 he moved to New Hampshire in 2003.

24 Given the credibility that the ALJ attributed to Mr. Fleeger's testimony, it is safe to
25 conclude that he would have sought forfeiture if he saw irrigation ever take place, and he

1 certainly would have noticed any such activities should they begin to occur.

2 **B. The Amended Proposed Order is Erroneous for Finding that Protestant's**
3 **witness Susan Krant's Testimony was More Persuasive than that of Mr.**
4 **Long's Concerning the Use of the Dollarhide Spring water right on Tax Lot**
5 **300 during the Disputed Period.**

6 As with Mr. Fleeger, and as argued in Proponents' Exceptions to the Proposed Order, the
7 ALJ entered very summary finding regarding the testimony of Proponents' water resources
8 expert Bob Long regarding the lack of any evidence of irrigation on Tax Lot 300 during the
9 Disputed Period.

10 By example only, the ALJ, and ultimately the Department, disregarded Mr. Long's
11 testimony regarding the three aerials taken of Tax Lot 300 prior to, during, and after the Disputed
12 Period which he provided clear evidence that at no time during the Disputed Period had water
13 been applied to irrigation. These aerials, identified as Proponents Exhibits B-10, B-11 and B-12
14 confirm an historic lack of irrigation of these lands. The ALJ however, incorrectly dismissed
15 such findings as inadequate to necessarily show lack of use for reason that was not an aerial
16 introduced for the entire five years of the Disputed Period. The ALJ even went so far in his
17 Findings of Fact to assume that the area shown as green in the August 2001 aerial as evidence of
18 irrigation even when Ms. Krant testified that such was the same year that the septic field located
19 in the same area failed.

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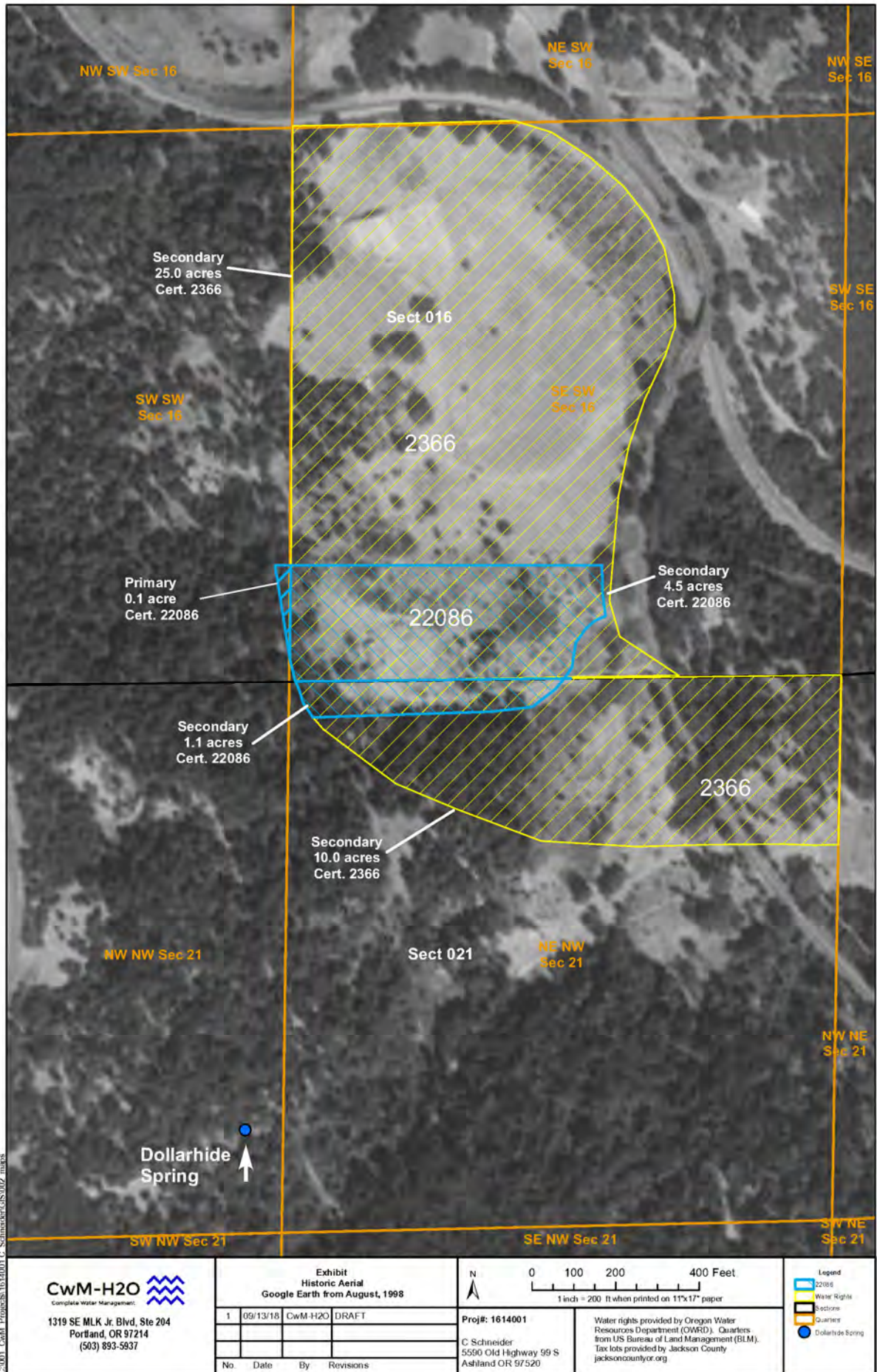
CONCLUSUION

In consideration of the ALJ’s failure to properly consider the Proponents’ Exceptions to the Proposed Order, which Proponents incorporate herein in their entirety, and in consideration of the evidence of record referred to above as presented by Mr. Fleeger, Mr. Long and Ms. Krant, Proponents request that the Proposed Order be revised to confirm that the Dollarhide Spring Right must be considered subject to forfeiture and cancelled as a matter of fact and law due to no less than five years of continuous non-use December 1998 through April 2002.

Dated this 2nd day of December, 2019.

JORDAN RAMIS PC
Attorneys for Proponents Carol Schneider,
Evern Sturdevant, Peggy Freitas, and Linda
Ganim

By: s/ Peter D. Mohr
Peter D. Mohr, OSB # 013556
Peter.Mohr@jordanramis.com



CS001_CwM_Proj#1614001_C_Schneider/GIS/002.mxd

CwM-H2O
 Complete Water Management
 1319 SE MLK Jr. Blvd, Ste 204
 Portland, OR 97214
 (503) 893-5937

Exhibit Historic Aerial Google Earth from August, 1998			
No.	Date	By	Revisions
1	09/13/18	CwM-H2O	DRAFT

Proj#: 1614001
 C Schneider
 5590 Old Highway 99 S
 Ashland OR 97520

Water rights provided by Oregon Water Resources Department (OWRD). Quarries from US Bureau of Land Management (BLM). Tax lots provided by Jackson County jacksoncounty.or.gov

Legend

- 22086
- Water Rights
- Sections
- Quarter
- Dollarhide Spring



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CwM-H2O
 Complete Water Management
 1319 SE MLK Jr. Blvd, Ste 204
 Portland, OR 97214
 (503) 893-5937

Exhibit
 Historic Aerial
 Google Earth from August, 2001

No.	Date	By	Revisions
1	09/13/18	CwM-H2O	DRAFT

N
 0 100 200 400 Feet
 1 inch = 200 ft when printed on 11x17" paper

Proj#: 1614001
 C Schneider
 5590 Old Highway 99 S
 Ashland OR 97520

Water rights provided by Oregon Water Resources Department (OWRD). Quarries from US Bureau of Land Management (BLM). Tax lots provided by Jackson County jacksoncounty.or.gov

Legend

- 22086
- Water Rights
- Sections
- Quarter
- Dollarhide Spring



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CwM-H2O
 Complete Water Management
 1319 SE MLK Jr. Blvd, Ste 204
 Portland, OR 97214
 (503) 893-5937

**Exhibit
 Historic Aerial
 Google Earth from August, 2005**

No.	Date	By	Revisions
1	09/13/18	CwM-H2O	DRAFT

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 0 100 200 400 Feet
 1 inch = 200 ft when printed on 11x17" paper

Proj#: 1614001

C Schneider
 5590 Old Highway 99 S
 Ashland OR 97520

Water rights provided by Oregon Water Resources Department (OWRD). Quarters from US Bureau of Land Management (BLM). Tax lots provided by Jackson County jacksoncounty.or.gov

Legend

- 22086
- Water Rights
- Sections
- Quarters
- Dollarhide Spring

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the date shown below, I served a true and correct copy of the
3 foregoing PROPONENTS' EXCEPTIONS TO AMENDED PROPOSED ORDER on:

4 Eugene V. Anderson
5 Davis Hearn Anderson & Turner PC
6 515 E Main St
7 Ashland OR 97520
8 E-mail: eanderson@davishearn.com
9 Attorney for Protestant Magdalena Winter

10 Patricia McCarty
11 Oregon Water Resources Department
12 725 Summer St NE Ste A
13 Salem OR 97301
14 E-mail: Patricia.E.McCarty@oregon.gov

- 15 by first class mail, postage prepaid.
- 16 by hand delivery.
- 17 by facsimile transmission.
- 18 by facsimile transmission and first class mail, postage prepaid.
- 19 by electronic transmission.
- 20 by electronic transmission and first class mail, postage prepaid.

21 DATED: December 2, 2019.

22 *s/ Peter D. Mohr*
23 _____
24 Peter D. Mohr, OSB # 013556
25 Attorney for Proponents

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

In The Matter Of The Proposed Partial)	
Cancellation Of The Water Rights Evidenced	)	Protestant's Response to
By Certificate 2366 For Use Of Water From	)	Proponents' Exceptions to
Westerly Branch Of Carter Creek For Irrigation,	)	Amended Proposed Order
and Certificate 22086 For Use Of Water From)	
Dollarhide Spring For Irrigation, Supplemental)	
Irrigation And Stock, Jackson County, Oregon	)	OAH Reference No. 2018-OWRD-00017
	)	Agency Case No. C-2366 and C-22086
)	

Protestant, Magdalena Winter, offers the following Response to Proponents' Exceptions to Amended Proposed Order:

RESPONSE

Yet again, Proponent Schneider wants the Department to overrule ALJ Vaughn's explicit findings that Protestant's witnesses were more credible than Proponent's. Yet again Proponent cites no valid reasons why the Department should do so other than the facile observation that Proponent had three witnesses (Fleeger, Long, and Sturdevant), to Protestant's single witness (Krant). Essentially Proponent urges the Department to disregard ALJ Vaughn's evaluation of the credibility of the witnesses and ask the Department to accept the testimony of Proponent's own witnesses over that of Ms. Krant. Once again Proponent simply states that, in Proponent's opinion, the testimony of her own witnesses was more credible than Ms. Krant's testimony and hence the Department should overrule ALJ Vaughn's express and implied determinations on the credibility of these witnesses and to make Proponent's requested change to the Amended Proposed Order. The changes Proponent requests amount to a complete reversal of ALJ Vaughn's ultimate ruling that the Water Right Certificate No. 22086 was NOT forfeited.

Proponent's latest Exceptions are more accurately described as a Motion for Reconsideration, or an Appeal of ALJ Vaughn's Findings and Conclusions of Law. Neither of which are procedurally appropriate, and neither of which should gain any traction with the OWRD.

CONCLUSION

ALJ's Vaughn's Findings and Conclusions of Law are supported by the evidence, and ALJ Vaughn's ultimate ruling should NOT be overruled that:

“Proponents have failed to meet their burden to show by a preponderance of the evidence that there has been a period of five or more consecutive years of non-use of the portion of Dollarhide Spring water right applicable to irrigation or supplemental irrigation on Tax Lots 300 ... during the period of April 1997 through May 2016. Accordingly, Proponents have not established a presumption of forfeiture as to any portion of that water right, and no portion of that water right is subject to cancellation.”

The Amended Proposed Order should be confirmed.

Dated this 3rd day of December, 2019.

DAVIS, HEARN, ANDERSON & TURNER
A Professional Corporation

Eugene V. Anderson, OSB #971988
Attorney for Protestant Magdalena Winter
eanderson@davishearn.com

CERTIFICATE OF FILING/SERVICE

I hereby certify that on December 3, 2019, I served a true copy of the PROTESTANTS' RESPONSE TO PROPONENTS' EXCEPTIONS TO AMENDED PROPOSED ORDER on:

Patricia McCarty
Oregon Water Resources Department
725 Summer St. NE Ste A
Salem OR 97301
patricia.e.mccarty@oregon.gov
Agency Representative, Oregon Water Resources Department

Via Mail and Email

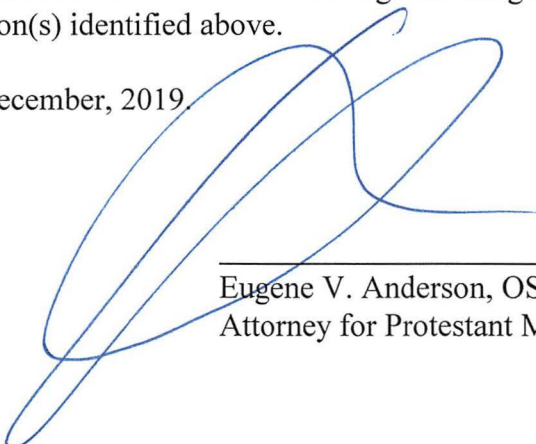
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Attorney for Proponents

Via Email

- by **MAILING** a full, true and correct copy on December 3, 2019 to said person or persons in a sealed envelope, with postage paid addressed to said person or persons as set forth above, and deposited in the post office at Ashland, Oregon, on said day. Between the said post office and the address to which said copy was mailed, there is regular communication by U.S. Mail.
- by causing a full, true, and correct copy thereof to be **HAND-DELIVERED** to the attorney at the attorney's last-known office address listed above on the date set forth below.
- by sending a full, true, and correct copy thereof via **OVERNIGHT COURIER** in a sealed, prepaid envelope, addressed to the attorney as shown above, the last known office address of the attorney, on the date set forth below.
- by **FAXING** a full, true, and correct copy thereof to the attorney at the fax number shown above, which is the last known fax number for the attorney's office, on the date set forth below. The receiving fax machine was operating at the time of service and the transmission was properly completed, according to the confirmation report.

- by **E-MAILING** a full, true, and correct copy thereof to the attorney at the attorney's last-known e-mail address listed above on the date set forth below.
- by **ESERVICE**, a full, true, and correct copy of the foregoing document on December 3, 2019, was transmitted via electronic mail/eservice through the Oregon Judicial Department e-filing system, to the person(s) identified above.

Dated this 3rd day of December, 2019.



Eugene V. Anderson, OSB #971988
Attorney for Protestant Magdalena Winter

BEFORE THE OREGON WATER RESOURCES COMMISSION

In The Matter of the Proposed	)	FINAL ORDER IN CONTESTED CASE
Partial Cancellation of the Water Right)	
Evidenced by Certificate 2366 for use of)	
water from Westerly Branch of Carter	)	OAH Case No. 2018-OWRD-00017
Creek for Irrigation,	)	Agency Case No. PC 17-03
<i>and</i>)	
)	
Certificate 22086 for use of water from)	
Dollarhide Spring for Irrigation,)	
Supplemental Irrigation and Stock,)	
Jackson County, Oregon)	

I. PROCESS SINCE PROPOSED ORDER WAS ISSUED

As the Proposed Order issued by Administrative Law Judge Vaughn notes, an in-person contested case hearing was convened in this matter on April 25 and 26, 2019, in Eugene, Oregon for the purpose of hearing the protest submitted against the Oregon Water Resources Department's Notice of Proposed Partial Cancellation Evidenced by Certificates 2366 and 22086. The record closed on June 3, 2019, after the OAH received written closing arguments from both Protestant and Proponents.

On August 9, 2019, ALJ Vaughn issued a Proposed Order recommending partial cancellation of Certificate 2366 and that Certificate 22086 have no portion cancelled. On September 9, 2019, the proponents filed timely exceptions to the Proposed Order. On September 19, 2019, the protestant filed a response to the exceptions.

OWRD issued an Amended Proposed Order on November 1, 2019, pursuant to OAR 137-003-0655. The Department's amended proposed order determined that a portion of Certificate 2366 must be cancelled because the owner of that portion of the certificate failed to protest the notice of proposed cancellation. Where the proposed order found that non-use was not proved for Certificate 22086 and therefore no portion of the right should be cancelled, the Department's amended proposed order determined that the same failure of the owner to protest required canceling the portion of the right on that owner's land.

On December 2, 2019, the proponents filed timely exceptions to the Amended Proposed Order. On December 3, 2019, the protestant filed a response to the exceptions. The Oregon Water Resources Commission herein considers the exceptions and response to exceptions and issues its final order in this contested case denying the exceptions and ordering partial cancellation of Certificate 2366 and Certificate 22086. The Commission also adopts and incorporates by reference the Amended Proposed Order dated November 1, 2019.

II. CONSIDERATION OF EXCEPTIONS

A. Commission Authority for Considering Exceptions and Issuing Final Order

If the legal owner of a water right for which a notice of proposed cancellation has been issued files a protest against the proposed cancellation of the water right, a time and place for a hearing on the protest must be fixed. ORS 540.641. A contested case hearing must be conducted pursuant to ORS Chapter 183 before the Office of Administrative Hearings. ORS 540.641; ORS 183.635. The ALJ assigned to the matter shall issue a proposed order including recommended findings of fact and conclusions of law based on the record made in the contested case hearing. ORS 183.464; ORS 183.450. Exceptions to the Proposed Order may be filed and are considered by the Commission which is vested with the authority to enter an order canceling in part or modifying the water right, or declaring that the water right shall not be canceled or modified. ORS 540.641.1

B. Consideration of Exceptions

The Amended Proposed Order incorporated the ALJ's conclusion that the Proponents failed to show by a preponderance of the evidence that there has been a period of five or more years of non-use of Certificate 22086 for irrigation on Tax Lots 300 or 302 during the period of April 1997 through May 2016. The Proponents object to the incorporation. The Proponents assert that they did show by a preponderance of evidence that there was no use of water under Certificate 22086 during the period from April 1997 through April 2002.

Analysis: Even if the Commission were to agree that Proponents met their burden to show non-use during that period, it would not be sufficient to find that Certificate 22086 was forfeited and subject to cancellation. If the end of the alleged period of nonuse occurred more than 15 years before the date upon which evidence of nonuse was submitted to the commission, or the commission initiated cancellation proceedings under ORS 540.631, whichever occurs first, it is grounds for rebuttal of the presumption of forfeiture. ORS 540.610(2)(f). In this case, the first evidence of nonuse (Proponents' affidavits) were filed with OWRD on November 1, 2017. Fifteen years prior to November 1, 2017 is November 1, 2002. The end of the alleged non-use the Proponents argue was established is April 2002, which is at least six months beyond the 15-year period.

¹ ORS 540.641 states:

(1) If the legal owner or the occupant receiving notice as provided in ORS 540.631 fails to protest the proposed cancellation of the water right within the 60-day period prescribed in the notice, the Water Resources Commission may enter an order canceling the water right.

(2) If the legal owner or the occupant receiving notice as provided in ORS 540.631 files a protest against the proposed cancellation of the water right with the commission within the 60-day period prescribed in the notice, the commission shall fix a time and place for a hearing on the protest. The commission shall cause written notice of the hearing to be given at least 10 days prior to the hearing to the person protesting the cancellation of the water right and to any other person who in the opinion of the commission is an interested party to the proceeding. The hearing shall be held by the commission and shall be conducted under the provisions of ORS chapter 183 pertaining to contested cases. After the hearing the commission shall enter an order canceling the water right, canceling in part or modifying the water right, or declaring that the water right shall not be canceled or modified.

Conclusion: The Proponents' exceptions are denied.

ORDER

The portion of Water Right Certificate 2366 located within Tax Lots 300 and 302 is cancelled.

The portion of Water Right Certificate 22086 located within Tax Lot 302 is cancelled.

Dated this _____ day of _____, 2020.

Meg Reeves, Chair
Oregon Water Resources Commission

NOTICE OF RIGHT TO APPEAL. You are entitled to seek judicial review of this order. Judicial review may be obtained by filing a petition for review with the Oregon Court of Appeals within sixty (60) days from the service of the Final Order. Judicial review is pursuant to the provisions of ORS 183.482.

CERTIFICATE OF MAILING

On June ____, 2020, I mailed the foregoing Final Order in Contested Case.

BY FIRST CLASS AND, WHERE AVAILABLE, BY ELECTRONIC MAIL:

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/s/
Oregon Water Resources Department