In the Supreme Court of the State of Oregon

In the Matter of the Proposed Cancellation of Water Right C39995 and the Proposed Partial Cancellation of Water Right C56024 Wolfgang Nebmaier and Vajra Ma Protestants / Petitioners on Review v. Michele Sessler, Robert Bruce Sessler, and Karen Gilstrap, Proponents & Respondents on Review and Oregon Water Resources Department Respondent on Review	**Water Resources Department No. PC06-06.1 (provisionally including PC 05-05)** **CA No. A140703** **SC No. 060837** **Petition for Review**

Petition for Review of the Affirmance without Opinion of June 27, 2012 and reconsideration denied of September 13, 2012 by the Court of Appeals on the Judicial Review from a Final Order of the Water Resources Commission, of November 21, 2008, denying Petitioners' exceptions to the Proposed Order and canceling all of WR C39995 (domestic) and 0.6 acres of irrigation of WR C56024.

The names, bar numbers, addresses, and telephone numbers of the parties are:

Wolfgang Nebmaier and Vajra Ma P.O.Box 317 Wolf Creek, OR 97497 Telephone: 541-951-4151 petitioners *per se*	Michele Sessler and Robert Bruce Sessler P.O.Box 234, Merlin, OR 97532, Telephone: 541-476-9699, and Karen Gilstrap 1245 Shanks Creek Road, Wolf Creek, OR 97497 respondents *per se* Ellen Rosenblum ##753239, Attorney General Inge Wells # #881137, Assistant Attorney General Department of Justice 1162 Court Street NE, Salem. OR 973014096 of attorneys for respondent Oregon Water Resources Department

Petitioners intend to file a brief on the merits if review is allowed.

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INTRODUCTION

This water rights cancellation case began based on affidavits of three persons, two of whom continually failed to accurately describe the water rights they asserted had not been exercised. Next, after numerous procedural errors, the WRD withdrew the case from the OAH claiming this author, a veteran legal translator, was unable to sufficiently understand English to communicate effectively in the proceedings, and then reassigned the case with a new number to the same ALJ. Then, petitioners' first request to replace the ALJ was wrongfully denied. Next, in its proposed order, the WRD suppressed conflicting evidence while imposing nearly half a dozen unprecedented rules and drew a conclusion which effectively severed appurtenancy from domestic water rights. And finally, following substantial exceptions by petitioners, WRD just as substantially revised the order without giving petitioners an opportunity to address the commission. The Court of Appeals affirmed without opinion.

PRAYER FOR REVIEW

Petitioners of review, Wolfgang Nebmaier and Vajra Ma respectfully seek review and reversal of the Court of Appeals's decision in *Nebmaier et al v. Sessler et al* (A140703) rec. den. 09.13.2012. Copies of the COA affirmance and the order denying reconsideration are attached to this petition.

Petitioners hereby also petition for a reversal of the underlying agency order canceling all of WR C39995 (domestic) and 0.6 acres of irrigation of WR C56024, and for award of adequate costs as set out under 3.12 on pg 50 of Petitioners' Opening Brief and Excerpt of Record in the above case, A140703.

While the specific issues of a water rights cancellation may not arise too often, it is very likely that similar matters based in the same underlying issue do

occur frequently, i.e. the boundries of discretion set by statute, rule, and policy for the day-to-day administrative work that affects most everyone who interacts with state agencies. ORAP 9.07(3)

The errors are founded in multiple and compounded distortions and misapplication of rules. The administrative agency is inconsistent and arbitrary in ruling on the issues this case presents. ORAP 9.07(1)(b)It explicitly contradicts its own rules and policies.

The Court of Appeals decision therefore is wrong, and if it stands, the last in a series of errors, it will result in the cancellation of water rights that were neither abandoned nor forfeited. It will be a serious and irreversible injustice. ORAP 9.07(14)(a)

The legal issues are well preserved and stand free and clear from the factual disputes. ORAP 9.07(7) Petitioners below have done their best to narrow the extensive case down to identify the overarching legal questions.

QUESTIONS PRESENTED

First Legal Issue: Invalid Affidavits

1. Does an affiant's failure to meet one or more of the critical conditions such as under OAR 690-017-400(2)(g) (see below[1]), sworn to in filing an affidavit asserting non-use of a water right pursuant OAR 690-017-400(2) disqualify her/his affidavit from serving as the basis for cancellation proceedings?

This matter is not comparable to the proverbial broken tail light leading to a

[1] (g) A statement that the affiant knows with certainty that no water from the allowed source has been used for the authorized use on the lands, or a portion of the lands, the portion being accurately described, under the provisions of the water right within a period of five or more successive years, and the beginning and ending years of the period of nonuse. […];

DUII leading to the discovery of a kilo of heroin in the door panel, all properly *Miranda'd*. Nor is it like an otherwise sound and well evidenced case which eventually loses its footing on a technicality. Rather, the deficiencies in the affidavits sufficiently continue throughout the proceedings to reveal the red thread of 'should never have been initiated'. ORAP 9.07(1)(b) and (1)(d), and (10)

This case mushroomed from a set of flawed affidavits asserting more than five years of non-use of two water rights. Had the agency from the start properly assessed that the majority of the affiants failed to properly identify nature and scope of the domestic water right they asserted was not exercised, none of the remaining 'saga' would have been necessary. One affiant in particular, even after multiple prompting and coaching by her own attorney during the hearing, insisted on defining the water right in question as something it is not. In other words:

2. Is the result of a contested case valid if the foundation for initiating that case is not? (ORAP 9.07(1)(d)

As Petitioners will show, this type of deficiency applies to all three affiants in various places. But minimally, the affidavits being part of the 'record as whole', the documented and at some stage hotly discussed[2] fundamental failure should be considered in 'viewing' such record as a whole.

The agency itself confirms the significance of the problem by adding to the Final Order the following text [Record Item 2, pg 1224, at about line 18], "*1. Establishing the presumption of forfeiture"*)

[2] Transcript Vol. V, M. Sessler X – pg 71, ln 21 through pg 73, ln 8: The ALJ severely chastises Proponent Michele Sessler for not knowing the water right at issue. In the process, the ALJ also establishes that it is impossible to have what she calls *direct knowledge* of someone else not exercising a domestic water right on a 15 acre parcel (while later, in her order, attributing the very same direct knowledge to Proponents' sole "relied-upon" witness Gilstrap).

The Department's decision to initiate a cancellation proceeding is based upon the appearance of facts as they are stated in affidavits of nonuse. ORS 540.631. If the Department determines from the face of the affidavits that a water use has not been used for five or more successive years […] it issues a notice of proposed cancellation. ORS 540.631.[emphases added]

However, while the author(s) *claim* to be referencing the beginning of ORS 540.631, they are not. That statute reads nothing like that but:

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 . . .

Consequential Legal Question:

3. Can either one of the phrases "*Whenever it appears*" and "*to the satisfaction of " in* ORS 540.631 absolve the WRD from intelligently, competently, and diligently assessing the content of an affidavit and from verifying that it meets the required criteria before initiating a cancellation? ORAP 9.07(1)(b)

Verification of information submitted is among the standard duties of staff throughout governmental agencies. How likely is it really that the legislative branch intended to have, on the basis of a whim, procedures initiated that can cause the affected member of the public weeks or months or even years of perhaps crippling personal and economic detriment?

Second Legal Issue: First Recusal Request

*OAR 471-060-0005(3) Every party and agency in a contested case is entitled to request a change of administrative law judge. **The first request of that party or agency shall be automatically granted.** If that party or agency makes a subsequent request, it must show good cause why the administrative law judge should not preside over the hearing. The Chief administrative law judge or designee shall decide all requests.*(emphasis added)

4. If a participant in a legal proceeding turns to a judicial officer with a request for a change of ALJ, is that participant entitled to rely upon the person presiding over that procedure to know the law and act accordingly? ORAP 9.07(4)

If this question seems baffling, it is because it is. The situation arose, at the time, from the ALJ's ongoing behavior and petitioners' growing discomfort with the idea of having her preside over the case. After some searches, Petitioners stumbled upon the recusal rule and petitioned the Chief ALJ Tom Ewing for a recusal.

The record shows (tellingly, WRD withheld that document until several years into the appeal) that the Chief ALJ decided to deny the request contrary to the legal mandate. As a consequence, Petitioners wish to ask the question:

5. If a contested case is heard and decided in a sequence of events controlled by a prejudicial error, can such an order stand, especially as the subsequent errors were closely tied to the hearing officer who should have been recused as per statute and was not? ORAP 9.07(1)(d)

Third Legal Issue: Substantial Evidence:

Under the APA, agencies may issue orders in contested cases and orders in other than contested cases. See *Oregon Env. Council v. Oregon State Bd. of Ed.*, 307 Or 30, 36-37, 761 P2d 1322 (1988). In contested cases

> *the agency must base its decision [or action] on a record of evidence that the contesting parties have an opportunity to develop, it must confine its decision to the evidence so developed, and it must explain how its decision complies with the law and is supported by the facts.* (see also Legal Question No. 7)

As cited elsewhere, ORS 183.450(5) provides that

> *No sanction shall be imposed or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party, and as supported by, and in accordance with, reliable, probative and substantial evidence.*

This statute, as complemented by ORS 183.482(8)(c)

> *The court shall set aside or remand the order [of the agency] if it finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.* (emphasis added)

would indicate that contradictory evidence, such as Proponents Sesslers' and two others' testimony (largely by Petitioners' questioning) cannot be suppressed saying "*the ALJ did not rely upon the testimony of* […] *in the findings of fact*"[3]. Thus,

6. Does the "burden of proof lies with the proponent of […] " requirement not imply that if there are three obviously joint proponents[4] of a non-use assertion at least two of whom are *required* to initiate the proceedings, that it is their joint evidence that is to be viewed to determine if they met that burden? (ORAP 9.07(1)(b)

Considering that the agency "did not rely upon" four out of Proponents' five witnesses, it is extremely unlikely that the "*record, viewed as a whole, would permit a reasonable person to make* [the] *finding.*" the agency made (ORS 183.482(8)(c)). This is even more compelling when it becomes evident that the suppressed testimony was in major parts severely undermining critical pre-requisites for a cancellation, such as the five year factor of the alleged non-use, the actual understanding of nature and scope of the water rights they asserted had not been used for five years, etc. (See also footnote on page 3.) Here, a further legal question arises:

7. Does the intent of the word "viewed" as in ORS 183.482(8)(c) require the 'viewer' to encompass, comprehend, and consider the '*record as a whole*'

[3] This phrase occurs four times in the Draft Final Order, referring to the excluded testimony, but in no way explaining or justifying why it was excluded.

[4] Also evidenced through joint representation by one counsel (briefly a team).

and to evaluate it as to its meaning and repercussions for the factual and/or legal matter before the decision making entity? ORAP 9.07(1)(b)

The question could be expanded to include the degree of inference that may be applied to 'the whole' based on a portion thereof. Indeed, at times it is plausible, logical, and credible to make inferences about a bulk of material from a representative portion of it. Pre-requisite for such an inference is the great likelihood that the sample is in fact representative.

In the present case it is generously established in the record that this is not so. And it is established that the fact finder at occasions such as [5] even actively interceded to prevent the highly critical factor of beneficial use from becoming a part of the 'record as a whole' and thereby becoming even more of an obstacle for her conclusions to stand.

In *Younger v. City of Portland*, 305_Ore__346, this Court explains:

> *These* [APA] *references to review upon the "whole" or "entire" record can be traced to the widespread perception in the 1930s and 1940s that courts had, at least with respect to review of administrative decisions,* ***wrongly*** *interpreted the longstanding "substantial evidence" rule to mean that the substantiality of evidence [***14] supporting a decision was to be evaluated by considering the supporting evidence alone.* [emphasis added]

In this case, that "not relied upon" testimony was indeed so 'non-supporting' and so damaging to their case that proponents' counsel labored at numerous occasions to disqualify or excuse them for one reason or another, be it not yet having been represented by an attorney (Michele Sessler) or suffering from memory loss due to a sledge hammer impact in the course of a brawl (Greg Smith) [6]

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[5] "*You're trying to establish that they would send them* […] *there to eat free grass. I'm not going to allow that.*" [Transcript Vol. XII, Smith D, pg 174, lines 6-22]

[6] Transcript, Vol. V, pg 84, line 5 et seq. Redirect by Ms. Howard and XIII, pg 193, lines 3 et seq.

Fourth Legal Issue: Rulemaking

This is the first of two questions about the Separation of Powers. The agencies being executive, the issue arises as to the semi-legislative powers of the executive by providing its agencies with rulemaking authority which, in reality, is not subject to checks and balances but merely to the nod of generally docile commissions.[7]

It has already been ruled (see *Megdal v. Board of Dental Examiners*, 288_Or_293 on one side and *Don't Waste Oregon Com. v. Energy Facility Siting*, 320_or_132 on the other) that an executive entity (here WRD) does not have the authority outside the APA's model rulemaking procedures [ORS 183.310 (9)] to interpret its own rules to the extent that it substantially changes their meaning.

8. Can an Order stand when it *ex post facto* modifies the instructions, explanations, and enforcement criteria used and promulgated by field personnel toward the public and affected parties and contradicts a previous determination by this Court? ORAPs 9.07(1)(d); 9.07(10); 9.07(3)

Discussion

While not identical, the issue in *Matthews v. Oregon State Board of Higher Education*, 332 Ore. 31; 22 P.3d 754; 2001, helps to illuminate the question on administrative latitude. There (as in *Rogue Flyfishers v. Water Policy Review Bd.*, 62 Or App 412) this Court, on the example of Internal Management Directives (IMDs), spells out unambiguously its understanding of the legislative intent for providing discretion to an agency:

> *Indeed, the whole point of the IMD exception is to avoid the burden of rulemaking formalities <u>when the public's interest is not at stake</u>.*

and

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[7] (In their Brief before the COA, petitioners offered a 15 year rubber stamping statistics of the Water Resources Commission.)

Formal APA rulemaking is not required […] because: (1) such a delegation amends no prior rule; and (2) the public's interest is not substantially affected.
(underlines added in both)

Both these criteria do *not* apply in this case for a number of reasons. And neither does ORS 183.335(7)(d) which would allow for

(d) Correcting grammatical mistakes in a manner that does not alter the scope, application or meaning of the rule;

Quite the contrary. As this Court found in *Marshall's Towing v. Department of State Police,* 339 Or 54, 62, 116 P3d 873 (2005)

However, the practice [. . .] if such a practice exists, never has found its way into the rules and, because it has not, failure to abide by such a practice cannot serve as a basis for suspending or revoking a letter of appointment. OSP's finding that Marshall's Towing was guilty of violating OAR 257-050-0100(2) thus cannot stand."

And in *Sun Ray Drive-In Dairy, Inc., v. Oregon Liquor Control Commission,* 16_or_app_63, this Court is even more plain spoken:

We do not require the impossible. We require that the agency formulate and publish the broad bases upon which decisions […] will be made. […] If the commission wishes to restrict the issuance of […] licenses […] it should (a) state that criterion in a published administrative regulation which has run the gauntlet of notice, hearing and publication under the Administrative Procedures Act; and (b) go on to define in a meaningful way what is meant by that term within the statutory purpose. […]

See also *Warren v. Marion County et al, 222 Ore. 307*; *353 P.2d 257*; *1960*

Some of the most egregious examples of unfounded rules in this case are:

Inside a Structure

The requirement of a diversion structure as set out in the appropriations rules and the former Assistant Regional Manager Bruce Sund's multiple colloquial reference to "in-house" use as a synonym for domestic or household *purposes*

(pursuant OAR 690.300-010(14)) are conflated into the requirement for the domestic use having to take place *inside a structure* on the land [Draft Final Order, top of pg 25, Response to Exception 7], a purported policy, totally inconsistent with department precedent and unsupported in rule or law, which only requires the use to take place on the *proper lands*. Neither before nor since has there ever been such a requirement spelled out or implied. In fact, the agency's own Bruce Sund summarized it [Transcript Vol V, pg 116, lines 8-17] as

> *"The Department's position is domestic use is domestic use".*

If the agency wished to rely upon ORS 183.355(5)[8] such a reliance is misplaced because no announcement was made. In fact, a footnote in the Proposed Order [Item 9, pg 924] documented that by suggesting

> *"At some point in the future, the Department might want to clarify the definition of domestic water use so that it is apparent what use is required inside the household versus outside."*.

Consistently

A similarly 'creative derivation' can be found where the adjective "*consistent*" from the phrase "*consistent with the laws, rules and the best interests of the people of the state*" (see beneficial use definition in OAR 690-300-0010(5)[9]) is transformed into the requirement for water being applied *consistently*, and that in diametric opposition to Bruce Sund's testimony[10] about incremental coverage of the 0.6 acre

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[8] No rule of which a certified copy is required to be filed shall be valid or effective against any person or party until a certified copy is filed in accordance with this section. However, if an agency, in disposing of a contested case, announces in its decision the adoption of a general policy applicable to such case and subsequent cases of like nature the agency may rely upon such decision in disposition of later cases.

[9] Beneficial use is defined as the reasonably efficient use of water without waste for a purpose consistent with the laws, rules and the best interests of the people of the state.

[10] Transcript Vol. V, M. Sund X/Red, pg 121 lines 17 - 23

pasture (in response to the WRD's Juno Pandian's question).

. . and verified

Fully original however is the added requirement of verification to the provisions of ORS 540.619 (3)(b). *The user is otherwise ready, willing and able to make full use of the right.* Mr. Groen, a professional plumber[11], who knew his system, had not hooked up the

> *"disconnected pipes and hoses and check to see if the water delivery system still worked."* [12]

Aside from the fact that the pipes *were* the water delivery system, which Groen used to irrigate the pasture as well as for domestic purposes around the house, failure to abide by a requirement he had no way of anticipating cannot serve as a basis for canceling his water rights.

Fifth Legal Issue: Intent

9. Can the requirements for beneficial use be expanded without proper rule-making to include not only the reasonably justified intent of a water right holder or irrigator, i.e. horses grazing, and the actual fulfillment of the intended purpose, i.e. horses grazing, but also the *intent of a third party*?
ORAPs 9.07(1)(b); 9.07(10); 9.07(3)

Petitioners respectfully maintain that there is no occurrence in statute, rule or case law to indicate that the beneficial purpose of pasturing horses has not been served, as it was intended by the landowner/irrigator whether or not the horse owner admits to having had the intent.

For comparison, as relates to squatters making valid *domestic* use of the water

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[11] Transcript Vol IV, Groen X, pg 76, ln 7

[12] Draft Final Order, pg 25, Response to Exception 9

without requiring their *intent* of doing so and *with no knowledge* of the tax lot boundaries, there is the Department's answer on page 13. While the standard for irrigation is more strict (see OAR 690.300-0010 (5) and OAR 690.300-0010 (26)), it does not require proven and contractually certified intent either, as the Department, in its Draft Final Order, Finding of Fact ## 29[13] wants to make us believe it does.

Sixth Legal Issue: Separation of Powers

In view of the improperly interpreted rules, the arbitrary imposition of contrived requirements and the up-ending of fundamental water law as developed above, the *Separation of Powers Between the Branches of Government* seems to warrant being one of the focal points of this case. From a more general perspective, we would like to raise the following question:

10. To what extent can or should an administrative law judge by virtue of her or his assignment to an agency act interchangeably with such agency?
ORAP 9.07(4)

In fact, over the course of this case, it has become increasingly difficult to distinguish the agency (Pandian, Ward, etc. and their counsel Moulon) from the ALJ Gutman. Both, the impartial fact finder as well as the impartial agency, had become extremely partial to prevailing in a case that began with an agency error.

The significance of some of the legal issues presented here therefore extends to the fundamental issue of a person's ability to rely upon statutes and rules versus the discretion of an agency to interpret them. As such, some of the questions may rise to the level of addressing ARTICLE III, SECTION 1. SEPARATION OF POWERS.

[13] (29) […] Ms. Gilstrap did not intentionally graze or pasture her horses on Tax Lot 300, and she did not have an agreement with the Groens to do so. (Test. of Gilstrap.)

Seventh Legal Issue: Appurtenancy

In regards to appurtenancy, the Department, plainly breaks with fundamental water law. The issue arises from the undisputed and generally known fact that the neighboring TL 200 main residence is, in reality, half on TL 300.

> *ORS 540.510 (1) Except as provided in subsections (2) to (8) of this section, all water used in this state for any purpose shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any water for any purpose may be made without compliance with the provisions of ORS 540.520 and ORS 540.530.*

The definitions in ORS 540.510 (above) and OAR 690.300-010(5) (14), and (24)[14], which are affirmed in numerous opinions of this Court, most notably in *Smith v WRD & Bangs* (PC 96-5; CA A95766),

> *"Where water has been used from the proper source, on the correct lands, for the authorized purpose, diversion at an unauthorized point of diversion does not constitute failure to use the waters appropriated and will not serve as the basis for a finding of forfeiture." (emphasis added*)

as well as through direct testimony by WRD personnel throughout this case such as by Department's Bruce Sund at [Transcript Vol V, pg 116, lines 8-17], that:

> *The Department's position is domestic use is domestic use. If there's somebody living out there using it, then it's still being used.*

reflect appurtenancy as one of the cornerstones of prior appropriation water law, going back to its origins. In light of this,

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

(14) "Domestic Water Use" means the use of water for human consumption, household purposes, domestic animal consumption that is ancillary to residential use of the property or related accessory uses.

(24) "Human Consumption" means the use of water for the purposes of drinking, cooking, and sanitation.

11. Can a person exercise a *domestic* water right that is *not* appurtenant to the land they are on? ORAPs 9.07(3); 9.07(4); 9.07(5); 9.07(10)

This may be an issue of first impression for the Court. It represents exactly what the Department, by way of its order, has determined: While

> *WR39995* is defined as having **Source** A, **Place** of use TL 300 and domestic use as **Purpose**, and
>
> *WR56024* as having *the same* **Source** A, **Place** of use TL 200 (adjacent to 300) and being (mostly) for the **Purpose** of domestic use,

if someone is making domestic use of water from Source A on TL 300, which water right is that person exercising?

Considering the vehemence with which the Department has protected this decision, it becomes a critical legal – and probably a far reaching political – question. Why would the WRD insist, that a person cannot be exercising the water right appurtenant to TL300 (WR39995) even if they are physically present there and make domestic use of water from Source A (proper **source**, authorized **purpose**, correct **lands**)? The department's reasoning is that such persons, even if they are on TL 300 and make domestic use of water from Source A, are really exercising WR56024, a water right which is appurtenant to a different land.

12. Can the WRD maintain a cancellation order, claiming that domestic use from the proper source on the correct lands does not constitute domestic use from the proper source on the correct lands and thus fails to satisfy the requirements for maintaining a domestic water right? ORAPs 9.07(1)(d); 9.07(3); 9.07(4); 9.07(5); 9.07(10)

Discussion

For such an order to stand would break fundamental water law. If there has

been any ambiguity about the appurtenancy of water rights, it concerned irrigation districts only. And that question has been clearly settled in *Fort Vannoy Irrigation District v. Oregon Water Resources Commission* 214 Or App 88, 162 P3d 1066 (2007), which rejects the absolute legal dominance of appurtenancy in a context where the owner of the land whereupon beneficial use takes place and the water rights holder may be different entities.

In terms of *domestic* water rights and their use on a given parcel of land, however, there is no case law undermining or overturning the fundamental domestic water rights definitions, and for good reason. No one has tried to undermine that foundation . . . until, in this case, the agency itself.

If appurtenancy, the primary of the three legs of the established definition of valid water use is weakened or eliminated, the definition of valid use is left standing on only two legs and will eventually fall. The ensuing uncertainty will draw wide ripples amid the emerging water supply concerns (ORAP 9.07(3)), an uncertainty this Court can help to prevent.

CONCLUSION

The decision of the Court of Appeals and the underlying agency order canceling all of WR C39995 (domestic) and 0.6 acres of irrigation of WR C56024, should be reviewed and reversed, and adequate costs be awarded Petitioners.

Respectfully, this 19th Day of December 2012,

Wolfgang Nebmaier Vajra Ma

CERTIFICATE of COMPLIANCE with BRIEF LENGTH and TYPE SIZE REQUIREMENTS

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief as described in ORAP 5.05(2)(a) is words. ***4540***

I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP .05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I HEREBY CERTIFY THAT THE AFOREGOING WOLFGANG NEBMAIER & VAJRA MA'S Petition for Review

originally filed November 26th, was re-filed this 19th Day of December, 2012, re-formatted and corrected as per compliance letter, with the State Court Administrator, Records Section, 1163 State Street, Salem, Oregon 97301.

and a true copy thereof served upon Michele Sessler and Robert Bruce Sessler, and upon Karen Gilstrap, *pro se* respondents and to respondent Water Resources Department, by mailing copies, with postage prepaid, in an envelope addressed to

Michele Sessler
Robert Bruce Sessler
P.O.Box 234, Merlin, OR 97532

Karen Gilstrap
1245 Shanks Creek Road
Wolf Creek, OR 97497

Inge Wells # #881137,
Assistant Attorney General
Department of Justice
1162 Court Street NE, Salem. OR 973014096
Attorney for Respondents Water Resources Department

and hand delivered it to each other: Wolfgang Nebmaier & Vajra Ma

December 19, 2012

Wolfgang Nebmaier

FILED: June 27, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

WOLFGANG NEBMAIER and VAJRA MA,
Petitioners,

v.

MICHELE SESSLER, ROBERT BRUCE SESSLER, KAREN GILSTRAP, and WATER RESOURCES DEPARTMENT,
Respondents.

~~Water Resources Department~~
PC06061

A140703

Submitted on June 01, 2012.

Before Armstrong, Presiding Judge, and Brewer, Judge, and Duncan, Judge.

Attorney for Petitioners: Wolfgang Nebmaier/Vajra Ma *pro se*.

Attorney for Respondents Robert Sessler, Michele Sessler, and Karen Gilstrap: Robert Sessler/Michele Sessler/Karen Gilstrap *pro se*.

Attorney for Respondent Water Resources Department: Inge D. Wells.

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents

[X] No costs allowed.
[ ] Costs allowed, payable by

IN THE COURT OF APPEALS OF THE STATE OF OREGON

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MICHELE SESSLER, ROBERT BRUCE SESSLER, KAREN GILSTRAP, and WATER RESOURCES DEPARTMENT,
Respondents.

Water Resources Department No. PC06061

Court of Appeals No. A140703

ORDER DENYING RECONSIDERATION

Petitioners' have filed a petition for reconsideration of the court's decision dated June 27, 2012, pursuant to ORAP 6.25. The court has considered the petition and orders that it is denied.

The petition for reconsideration is denied.

9/13/2012
1:53:34 PM
REX ARMSTRONG
PRESIDING JUDGE, COURT OF APPEALS

c: Inge D Wells
Wolfgang Nebmaier
Vajra Ma
Michele Sessler
Robert Sessler
Karen Gilstrap

Ej/82012