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6 BEFORE THE PUBLIC UTILITY COMMISSION
7 OF OREGON

8 UM 1489, UM 1528, UCR 121, UCR 122, UCR 123, UCR 133, UCR 135

9 IN MATTERS OF

10 JUDY BEDSOLE AND FISHMILL LODGES
11 WATER SYSTEM,

12 Application for abandonment of
13 utility and Other above referenced Dockets
14 relating to the Operation and Maintenance of the
15 Fish Mill Lodges Water System

16 SUPPLEMENT TO PETITION FOR
17 REHEARING, RECONSIDERATION, AND
18 CLARIFICATION

19 This is intended as a Supplement to the Petition for Reconsideration, Rehearing, and
20 Clarification filed in this matter as an effort to simplify the issues and to correct typos and
21 citations.

22 In support of its petition, Petitioners state:

23 The Commission was without authority in the first instance to consider or regulate the
24 “FM/Bedsole” “water “system” for 2 simple reasons: It was not a water utility under the
25 Commissions regulatory scheme (*ORS 757.061*) and the water being delivered to specified lots
near the FM/Bedsole property could not be sold to the public either directly or indirectly.

ORS.750.300(3), or for that matter sold at all. In fact, the arrangement for the delivery of water

was based upon the requirements of Water Right Certificate 68612, (amended in 2008) duly

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1 issued by the Oregon Water Resources Department. The water certificate prohibited any use of
2 the water except as described in the permit and includes limits on the conditions by which the
3 water could be delivered to others, allowing water to be delivered only to identified lots adjacent
4 to the FM/Bedsole properties. That water permit takes precedence over any action by the
5 Commission. *ORS 536.360*. There is no delegation of authority of any sort to the Commission
6 superseding this exclusive delegation of subject matter jurisdiction.
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8
9 Thus, the Commission does not have subject matter jurisdiction and no authority to cancel,
10 create, limit, or diminish water rights or to modify real property deeded easements (or real
11 property rights generally.) This lack of subject matter jurisdiction means that all orders that
12 attempt to revise the use of the easements, the water rights, and the beneficial interest are void.

13 The Oregon State Water Resources Board is the only authorized entity to determine, modify,
14 transfer, curtail or regulate water rights. *See ORS. 540.500 et seq. OAR 690-017-0100*
15 *(Cancellation of Perfected Water Rights)*. Real property law is determined in civil court pursuant
16 to a well-developed body of law. 307.010 (1) (b.). In this case, the easements are appurtenant.
17

18 The so called “water system” is simply the result of a private arrangement by the FM/Bedsole’s
19 predecessor in interest in order to facilitate delivery of water described in the water right to
20 FM/Bedsole’s noncontiguous property from the spring that provides the water. This private
21 arrangement was wrongfully identified as a “water system” and Petitioners as a “water utility”
22 despite the lack of evidence of either. The arrangement allowed a delivery pipe belonging to
23 FM/Bedsole to be used to deliver water to specific lots (appurtenant) along its path to the
24 noncontiguous property. Duly recorded easements allowed the pipe to travel from one

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1 FM/Bedsole property across certain lots specified in the arrangement. The rights were
2 appurtenant to lots identified in the water permit, not customers or individuals.

3
4 The Commission misapplied its own rules in determining that Petitioners are or should have
5 been regulated as a “public utility.” *ORS757. 061*. Originally, total potential number of lots that
6 could be “served” was six (6) and in fact there were fewer; there was no offer or potential of
7 providing water to the public indirectly or directly; and there was no claim of being a water
8 utility. Petitioners were not an association, could not offer water service to the public directly or
9 indirectly or even expand the permit without going to the Water Resources Department. The
10 arrangement was never thought of as a utility, was never formed to be a utility, and never
11 evidenced an intent by this arrangement to be anything more than a private agreement reflecting
12 a sharing of water rights.
13

14
15 While FM/Bedsole asked for the Commission to help out sorting out rights at one point, the
16 request does not and could not confer subject matter jurisdiction and should have been rejected.
17 Any request of 20 % of the “customers” of the “utility” was without basis since Petitioners were
18 not a utility, were not an association, and did not offer water service. The rights of the
19 complainant could only have been determined by looking at the water permit. That person had
20 no more rights than granted in the permit, the extent of which is a question that should have been
21 considered before asserting authority to regulate this private arrangement. Subject matter
22 jurisdiction must be conferred by statute. That means that a misdirected request does not confer
23 subject matter jurisdiction. Parties cannot confer jurisdiction by stipulation or by concession, or
24 under duress, misunderstanding, or wrongful analysis by the Commission, its staff, lawyers or
25

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1 others. Consent decrees cannot confer jurisdiction. See, e.g. *State v K.P.*, 324 Or 1, 5, (Or
2 1996); *McEwen et ux v. McEwen et al*, 203 Or 460, 470, 280 P2d 402 (1955). See also *Twichell*
3 *v Risley*, 56 Or 226, 228, 107 P. 459 (1910) and *Skyles et al v. Kincaid et al.*, 124 Or 443, 453,
4 264 P 432 (1928.). *Fox v Lasley*, 212 Or 80,90, 318 P2d 933 (1954.) As stated by the
5 Commission in *K.S. v Qwest*, Order no 08112, page 2, “the Commission has no jurisdiction over
6 private contracts” as this water sharing arrangement clearly was.
7

8
9 The Water Certificate belonged exclusively to Petitioners, as well as the lot upon which the
10 spring exists, and did so any actions taken by staff and the Commission herein. The water
11 certificate sets out which lots could utilize the water covered by certificate. Additional rights
12 could have been requested from the Water Resources Department, which is the only agency
13 authorized to consider the allocation of water and the place from which it could be taken. Rather
14 than protecting their rights by going to the Water Resources Department staff and complainants
15 went to the Commission wrongfully claiming jurisdiction. Staff apparently did not appreciate
16 the limitations coming with the water permit, even alleging that FM/Bedsole had no right to
17 refuse “service” to others. Staff’s efforts to “protect” others who were part of the arrangement
18 may have been well intended but the first obligation was to understand the what the arrangement
19 was. Good intentions do not confer jurisdiction. The Commission has not express or implied
20 authority to create or transfer water rights in this situation. *ORS 537.120*

21 Staff’s and the Commission’s mistaken beliefs do not confer subject matter jurisdiction for the
22 decisions made herein.
23
24

1 Eventually Petitioners bowed to the actions taken by the Commission to unlawfully take the
2 infrastructure, and accepted that the Commission would not recognize the obligations presented
3 by the water certificate, and saw that the Commission was going to form “Summit” Water
4 Association. There was no grant of authority to do so. The Commission went further to attempt
5 to revoke the water certificate or transfer it to Summit and forced FM/Bedsole to enter into
6 stipulations to transfer their easements to Summit. The efforts left Petitioners with no ability to
7 serve their own properties with their own water – no easements, no right to use the infrastructure
8 -- and then to add insult to injury, forcing Petitioners to pay for their own water and for upgrades
9 to benefit others. Regulatory compulsion does not provide subject matter jurisdiction.

10
11 As part of the regulatory compulsion one or more “stipulations” were (partially) entered into
12 despite Petitioners’ unwillingness. Whether the stipulations were entered into by agreement or
13 by compulsion, neither provide the Commission with subject matter jurisdiction.

14
15 The stipulations are inconsistent with state law in several ways including the following:

- 16 a.) There is no right to take or use the water permit owned by
17 FM/Bedsole. The Commission has no eminent domain or similar right
18 to do so. The the water right is a personal property of FM/Bedsole and
19 can only be transferred by the state Water agency. *ORS.536.360*.
- 20 b.) The pipe and infrastructure is personal property used by FM/Bedsole
21 and belonged solely to them. The Commission had no authority for a
22 “taking” or to do so without due compensation;
- 23 c.) The easements used to serve the noncontiguous property run with the
24 land and are for the benefit of the property held by FM/Bedsole. But

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1 for the Commission's improper attempt to modify them or transfer
2 them, they would remain with that property when it is sold.

3 d.) The Commission cannot require FM/Bedsole to release their
4 property's rights in the easements or to transfer the use to others.
5

6 Summit Water Association has no water right of its own (as far as can be found) and cannot use
7 the water right of Petitioners¹. It cannot charge for water without a duly issued water right which
8 contains the right to be able to sell water to third parties. It cannot use the Lucas water right for
9 its water service as the Lucas water right has the same limitation as Petitioners (water not for sale
10 and not for sharing with unnamed others.) Lucas' water right is for one house, no more. Summit
11 has no right to use Petitioners' water right and recorded easements and the Commission cannot
12 by its actions provide it for it. Each person taking water from Summit must separately give
13 Summit an easement and Summit must obtain water rights of its own.
14

15
16 As previously stated, by incorporating the stipulations without review, the Commission included
17 conditions in its Order that result in leaving Petitioners unable to provide water to their own
18 properties (the "stipulation" attempts to transfer the easements and Petitioners' water right to
19 Summit), no perpetual right to continue to have services through the "Summit" water
20 association (by virtue of its paucity of members and designation that Petitioners are "water
21 users" with no right to require water service from Summit), no ability to use their own water
22 rights except by paying money to receive what is already theirs (for as long as Summit is willing
23 to continue to deliver water to them (i.e., delivering their own water pursuant to their own water
24 right) with Petitioners paying for the water that is already theirs. The "stipulations" done under
25

1 duress assigned a disproportionate share of costs going forward to Petitioners to benefit others
2 who hold no right to the water or the infrastructure. Not only is the Commission without
3 authority or subject matter jurisdiction, even under its own rules it cannot cancel a private water
4 system and replace it with a public water association without providing actual due process and
5 assuring that no one is left unable to obtain necessary water. In fact, the Commission has no
6 authority over a private water sharing arrangement and no subject matter jurisdiction to force
7 transfer, amendment, or termination of water and real property rights.
8

9
10 Relief sought:

- 11 1. Petitioners request that the following be incorporated into the Order to
12 clarify that the Order is not intended as a taking, to be punitive in nature,
13 to reduce the value of the property owned by Petitioners, or to prevent
14 Petitioners from operating their business going forward.
- 15 2. The specific areas for which clarification is sought are:
 - 16 a.) That nothing in this docket or the related dockets is intended to remove,
17 limit, modify, impair or reduce Petitioners' ability to use and maintain the
18 water right granted by the Water Resources Department with respect to
19 Petitioners own properties.
 - 20 b.) That the new "Summit Water Services" provider allow Petitioners to take
21 services from Summit including use of the delivery system and
22 infrastructure to deliver Petitioners own water to property without charge
23 except for such charges are necessary to share in the costs of maintaining
24 the system.
25

1 c.) That Summit shall obtain its own water rights to serve “customers” other
2 than Petitioners and further that customers adjacent to the current location
3 of the pipe and infrastructure used by Summit must agree to keep that
4 infrastructure in place for so long as Petitioners requires it to serve the
5 noncontiguous property.

6 d.) That Petitioners are not obligated to pay for the use of Summit services
7 any more than its equal share of the costs to maintain the system and not
8 for water. If it ceases to use Summit, it shall have no further economic
9 obligations.

10 e.) That the Commission shall retain sufficient jurisdiction over Summit
11 Water Association to assure that Petitioners can continue to use its
12 services. This is particularly important since, as stated on page 5 of 15 in
13 appendix A of the Order, there is a presumption that once the water system
14 is transferred to Summit, the Commission will no longer have jurisdiction.
15

16 As previously stated, the Commission is without authority to accept “the
17 stipulation” or to require that Petitioners agree to its terms. There have been numerous attempts
18 to claim a right to do so and argument advanced to the effect that if Petitioners did not like it,
19 they could just go to circuit court stating that Staff’s actions were consistent with the law.¹ That
20 is an incorrect statement of law since circuit court does not have jurisdiction to question or
21

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23
24 ¹Ann L. Fisher, attorney for Petitioners is prepared to file a Declaration setting
25 forth her many email discussions and an in person visit with legal representative of Staff, if the
Commission needs evidence in support of this statement.)

1 restructure a Commission order even if it is void. Without raising these issues here, Petitioners
2 have little recourse. It appears that the effort has been to strip FM/Bedsole of rights and
3 property unlawfully to benefit of others not entitled to such rights and property.
4

5 By describing what clarification is required, Petitioners hope to avoid having the Commission
6 having to reverse its Order. Petitioners want what they always wanted – to have water delivered
7 to use for its properties in the water certificate and easements. They have no interest in acting as
8 a water utility or public utility. The Commission cannot usurp the exclusive jurisdiction of the
9 state Water Agency and cannot take personal and real property rights from FM/Bedsole without
10 due process and just compensation. That has not occurred because the Commission exceeded its
11 delegated authority in fashioning its Order. The Commission is required to have an explicit
12 delegation of subject matter jurisdiction (which it does not have) to do what it has attempted
13 here. Unless the Commission adopts the clarifications and revises the Order accordingly,
14 Petitioners would be left without any ability to serve their own properties and unable to use their
15 certificated water rights. That would be irreparable injury.
16

17
18 The Summit Water Association, once it has obtained a water permit, can continue to exist,
19 subject to it not being able to charge Petitioners for water Petitioners already own or charge for
20 using a delivery system that was seized by the Commission. To effectuate the clarifications,
21 Summit would have to quit claim or otherwise transfer any exclusive interest it has or claimed in
22 the recorded easements so they might also be used by Petitioners to deliver Petitioners' water to
23 their properties. Alternatively, Summit Water Association could be required to deliver the
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25 Petitioners' water to its noncontiguous property forever at no charge except for a pro rata share

1 of the maintenance costs. If the Commission does not think it can retain jurisdiction over the
2 Summit Water Association, then the delivery infrastructure must be returned to FM/Bedsole, the
3 easements returned to their original condition, and Petitioners must be allowed to operate as they
4 are required to do under the terms of their water right.

5
6 Petitioners continue to reserve the right to brief these matters or request rehearing.

7
8 Dated this 5th day of February, 2016.

9
10 /s/ Ann Fisher

11 _____
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13 ⁱ It cannot use the water right of Petitioners without an Order by the Water
14 Resources Board making the required findings and allowing such an action. Since Petitioners do
15 not have an interest in selling or transferring its water certificate, the effectively means that
16 Summit has to petition for its own. While there is an entity called Summit with water rights, it
17 does not appear to be the same entity as the Commission has authorized and does not appear to have a
18 right to take water from the identified location of Petitioners' water right. Summit cannot unilaterally use the water
19 permit of others. That also prevents Summit from using the Lucas permit.