IN THE SUPREME COURT OF THE STATE OF OREGON

WATERWATCH OF OREGON,

Petitioner—Appellant—Petitioner on Review,

v.

WATER RESOURCES DEPARTMENT,

Respondent—Respondent—Respondent on Review,

and

WARM SPRINGS HYDRO LLC,

Intervenor—Respondent—Respondent on Review.

SC No. S067938; NA No. N009259; CA No. A165160; TC No. 16cv11938

BRIEF OF NORTHWEST HYDROELECTRIC ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS WATER RESOURCES DEPARTMENT AND WARM SPRINGS HYDRO LLC

Petition for Review of the Decision of the Court of Appeals, Petition for Review of the Decision of the Court of Appeals, on Appeal from the Judgment of the Marion County Circuit Court, by the Honorable Audrey J. Broyles, Judge

Date of Decision:	June 10, 2020
Author:	Powers, J.
Concurring:	Egan, C.J., and Ortega, P.J.

(Continued) March 2021

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OVERVIEW OF *AMICUS*

The Northwest Hydroelectric Association (NWHA) is a non-profit trade association that represents and advocates on behalf of the Northwest hydroelectric industry. NWHA has over 135 members from all segments of the industry, including electric utilities, water districts and other hydropower project owners and operators. NWHA is dedicated to the promotion of the Northwest region's waterpower as a clean, efficient energy source while protecting the fisheries and environmental quality that characterize the Pacific Northwest region. Several NWHA members are located in Oregon.

QUESTION PRESENTED

Whether the temporary in-stream use of water pursuant to a lease of a hydroelectric water right qualifies as a "use of water under a hydroelectric water right" under ORS 543A.305(3).

INTRODUCTION AND SUMMARY OF ARGUMENT

Water rights are essential to hydropower project operations, and hydropower is vital to Oregon's economy and way of life. This Court's interpretation of ORS 543A.305(3) therefore is of significant interest to

NWHA and its members and we ask the Court to uphold the decision of the Court of Appeals.

Hydropower projects are an important source of renewable electric power, accounting for more than one-third of the country's renewable energy.[1] In Oregon, hydroelectric resources make up 49% of the state's utility-scale electricity net generation.[2] Protecting and preserving the water rights associated with hydropower projects is important to ensuring their operational viability, including the ability to invest in significant maintenance activities that ensure and enhance safety and operational longevity.

The dispute raised by WaterWatch concerns two provisions of Oregon statutes on water rights. ORS 537.348 was enacted in 1987 and authorizes holders of water rights to lease such rights for in-stream use for a specified period without losing the original priority date of the water right. ORS 543A.305(3) was enacted in 1999 and provides that

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[1] U.S. Energy Information Administration, Frequently Asked Questions, Electricity Generation by Source, https://www.eia.gov/tools/faqs/faq.php?id=427&t=3 (last visited Apr. 28, 2020).

[2] U.S. Energy Information Administration, Oregon State Profile and Energy Estimates, *available at* eia.gov/state/?sid=OR (last visited Mar. 1, 2021).

water rights associated with a hydroelectric project shall be converted to a permanent in-stream water right for the public trust "[f]ive years after the use of water under a hydroelectric water right ceases." The Court of Appeals properly read these two provisions together to recognize that a hydropower facility can lease its water rights as provided in ORS 537.348 without risking the loss of those rights under ORS 543A.305. This interpretation is critical to the hydropower industry in Oregon, which may require temporary cessation of operation, in certain circumstances for more than five years, to address important maintenance and safety requirements.

ARGUMENT

I. Hydropower Generation is Important to Oregon and Reliable Water Rights Are Key to Its Preservation

Hydroelectric generation has long been a critical source of electricity in the United States, particularly in the west, where the Bureau of Reclamation began constructing dams to harness water in the early 20th century. Hydropower plays an important role in ensuring grid stability and reliability. As demonstrated by the recent blackouts in Texas, grid stability and reliability are critical to ensuring continued service to citizens, hospitals, schools and businesses. Moreover,

hydropower is a renewable energy resource, enabling states to achieve their renewable energy resource goals. The importance of hydropower is likely to increase as the United States works to address climate change, improve resiliency, and reduce dependency on fossil fuels. In addition to power generation, dams are used to supply drinking water, irrigate crops, provide flood control, store water for fire suppression, and create recreational opportunities.

Hydropower is a clean, renewable, domestic source of electricity that provides flexibility and reliability to our grid system, has the potential to substantially expand the nation's renewable energy supply, and can provide all attributes necessary for a reliable and resilient grid. It provides baseload and peaking power, operational flexibility, and a host of ancillary grid services, making it a necessary and irreplaceable component of our "all of the above" national energy strategy that is transitioning to a less carbon intensive portfolio.[3] Although capital

[3] *See, e.g.,* Nat'l. Hydropower Assoc. and Pub. Util. Dist. No. 1 of Chelan Cty., *Reinvigorating Hydropower* at 4 (Apr. 2019), *available at* https://www.hydro.org/wp-content/uploads/2019/04/Reinvigorating-Hydropower.pdf (explaining how many hydropower projects have the ability to quickly adjust generation during the day to keep loads and generating resources in balance).

intensive to develop, hydropower projects have long, useful lives stretching decades, and their fuel is renewable and free.

As our nation's single largest source of dispatchable renewable electricity, with over 100 gigawatts (GW) of capacity (including pumped storage), and Oregon's largest source of utility-scale electric generation, hydropower will play a critical role in providing grid stability and energy security as our electricity supply transitions to greater dependance on variable generation sources. Moreover, pumped storage—a type of hydroelectric energy storage that generates power as water moves between two reservoirs at different elevations—is the premier utility-scale energy storage technology in use today, providing approximately 95 percent of all energy storage in the United States.[4] As both Oregon and the country more broadly transition to renewable energy resources, the ultimate challenge is the intermittent nature of solar and wind resources. These power sources are not continuously available, but our power needs are continuously in demand. Hydroelectric facilities can address this challenge by providing energy

[4] U.S. Dep't of Energy, *A New Approach to Pumped Storage Hydropower* (June 7, 2019), *available at* energy.gov/eere/water/articles/new-approach-pumped-storage-hydropower.

storage so that renewable energy can be re-injected to the grid when needed.[5]

In Oregon, the dams and reservoirs along the Columbia River have been a significant factor contributing to economic growth, equitable access to electricity, and carbon-free electric generation.[6] Power generated by these dams, for example, began powering rural communities in the Northwest dating back to the 1930s and contributed to Oregon becoming the second-highest hydropower producing state in the nation (behind Washington). Now, approximately 28 percent of the power consumed in the Pacific Northwest is sourced by the Bonneville Power Administration (BPA), which was created in 1937 to deliver power to customers from the Bonneville Dam, and hydropower remains critical to the vitality of small and local communities across the state.[7]

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[5] For example, pumped storage facilities pump water to an upper reservoir during the day when solar resources are generating; when the sun goes down water is released back to a lower reservoir, essentially filling in the gaps during peak demand and generating the needed electricity. *See* energy.gov/eere/videos/what-pumped-storage-hydropower.

[6] Oregon.gov/energy/energy-oregon/Pages/Hydropower.aspx.

[7] *Id.*

In addition to the long history of hydropower in Oregon, there is a long history of water allocation and the management of water rights within the state. Oregon's history is tied to its waters, and its future is dependent on a stable water management regime. This is particularly true as Oregon and the rest of the country grapple with climate change and water supply management, to which hydropower resources are critical. As with any industry dependent on water, the reliability and predictability of water rights is critical to hydropower.

II. Hydropower Water Rights Must Be Interpreted in Accordance with Both ORS 537.348 and ORS 543A.305(3)

ORS 537.348 allows water users to lease their water rights for certain periods of time without losing those rights. ORS 543A.305, which was enacted after ORS 537.348, must be read in conjunction with it. Where a hydroelectric water right has been leased, it remains in use. It has not ceased and does not permanently convert to an in-stream use for the public trust. A contrary interpretation would upset the operational flexibility and long-term stability of the water rights doctrine carefully crafted by the legislature. Understanding how the hydropower industry operates within and under that doctrine helps

inform the question presented to this Court and demonstrates the validity of the lower court's analysis.

Many hydroelectric projects are large, complex facilities that are approaching or even beyond 100 years in age. It is occasionally necessary for generation at these facilities to be curtailed or cease entirely, in some cases for periods that exceed 5 years, to address emergencies or other unforeseen events, make safety repairs, replace generators or other equipment, expand a powerhouse, or make any number of other changes. While limiting generation in order to make repairs is something that hydropower operators are often able to avoid, it is critical that they retain the flexibility to do so when needed. Under WaterWatch's interpretation of ORS543A.305(3), these owners and operators would lose their ability to generate power as a result of making necessary upgrades or repairs.[8]

For example, it is possible for hydroelectric projects to be rendered inoperable for a period of years to undertake dam safety modifications.

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[8] *See also* Respondent Warm Springs Hydro LLC's Brief on Merits at 19-20 (discussing Apr. 30, 1999 testimony of PacifiCorp's Chairman Welsh, who supported the legislative provision that became ORS 543A.305(3), noting that it "contains adequate safeguards to protect the existing water use regime…").

Where a dam stability assessment determines that new foundations or other changes to the structure are needed, a project may cease operation until such repairs are undertaken. This could require geologic survey work, design and engineering work, federal and state permitting, and the construction itself.

Natural or other disasters also create a risk for long term shutdowns. For example, a fire in California has rendered a hydropower facility inoperable for a period of 8 years. Rebuilding and restoring operation is time-intensive, further complicated by the modern era of local, state and federal permitting and the environmental reviews and studies that support the permitting process. Permitting major and even minor infrastructure projects is frequently a years-long endeavor, with single study requirements that can span multiple years.

While dam operators site, plan, build and operate facilities to avoid disaster scenarios, accidents and nature happen, and developing a legal doctrine that fails to appreciate the realities of hydropower construction or reconstruction and permitting could undermine the long-term viability of the industry. For example, it is possible that a hydroelectric project located on federal land could experience a land

slide that damages the facility. In that circumstance, it could take years to make the necessary repairs and resume operations, and geology and slope survey work would be required, along with development of design/engineering plans, applying for and obtaining the necessary permits, and then constructing the project. In these scenarios, WaterWatch's interpretation of the Oregon statutes would preclude the hydropower facility from ever resuming operations.

WaterWatch's interpretation could also force dam operators into impossible management decisions that might create risk to future operations. Facilities need maintenance. That is the nature of infrastructure, particularly infrastructure built in harsh operating environments like flowing rivers. Operators plan for and manage around maintenance activities, deploying reduced flowthrough or temporary shutdown strategies to accommodate normal maintenance demands. If an operator, however, could lose its water right by performing or needing to perform a long-term shutdown that was unexpected or becomes more significant than anticipated, there is a greater risk of deferring or not fully performing critical maintenance and safety projects. This outcome was clearly not the intention of the

statutory framework the Oregon legislature envisioned. Rather, the statutes, when read together, allow for the leasing of water rights for certain periods without running the risk of losing those rights. Dam operators need the operational flexibility to address both anticipated and unexpected maintenance and construction or reconstruction activities, and a legal structure that adapts to those needs. That is the prevailing legal structure that the lower court correctly recognized and upheld.

III. A "Hydroelectric Water Right" Refers to a Right Owned by a Hydroelectric Project, Not the Actual Use

ORS 543A.305 refers to the cessation of the use of water "under a hydroelectric water right." Based on the plain language of the statute, the five-year cessation period applies to the use of the water, not to the purpose for which the water is used. The reference to "hydroelectric water right" references the source of authority for the water right, not the actual use. As noted above, this reading makes sense in light of ORS 537.348, which authorizes the leasing of a water right for a different purpose. Such a lease does not change the ownership or source of authority for the right. Rather, it allows for a temporary change in the purpose for which the water is used. Indeed, the very

purpose of ORS 537.348 is to provide water right holders a way to protect water rights that are currently not being used, while providing instream benefits.

The Court of Appeals properly relied upon the plain text of the statute, as well as its context and legislative history of ORS 543A.305(3) to conclude that a "hydroelectric water right" refers to the source of authority for the use rather than describing or limiting the use itself.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in the brief of Respondent OWRD and Respondent-Intervenor Warm

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Springs Hydro, NWHA respectfully requests that the Court affirm the decision below.

Respectfully submitted this 15th day of March, 2021.

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