FILED February 3, 2016 07:23 PM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

PAUL COSGROVE, SCOTT D. BOLTON, DAVE ROBERTSON and NICHOLAS BLOSSER, Petitioners, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon, Respondent.	Case No. S063794 PETITIONER COSGROVE'S AMENDED REPLY TO RESPONDENT'S ANSWER Initiative Petition 63 (2016) Ballot Title Certified on December 21, 2015

I. Respondent Should Put "Renewable" in Quotation Marks to Alert Voters to its Special Definition.

"Section 4 of the proposed measure increases the percentage of *qualifying electricity* that the utilities described in ORS 469A.052(1) must sell to consumers." Respondent's Answer at 4 (emphasis added). In the certified ballot title's caption and result statements, Respondent refers to "qualifying electricity" as "renewable sources," which is overinclusive and misleading.

The word "renewable" has a positive connotation and commonly refers to a natural, sustainable source of energy. However, the Oregon Legislature has crafted a narrower definition of "renewable" that excludes many types of electricity produced from natural sources. To determine whether a natural source of energy fits within the Legislature's special definition of "renewable," four statutes must be applied: (1) ORS 469A.010 ("Qualifying electricity");

ORS 469A.020 ("Qualifying electricity; age of generating facility"); (3) ORS 469A.005(10) (Definition of "Renewable energy source"); and (4) ORS 469A.025 ("Renewable energy sources; rules"). To assist in understanding these statutes and determining what qualifies as "renewable," the Oregon Department of Energy has created a reference guide entitled "Oregon Renewable Portfolio Standard Eligible Resources," and a review of this guide illustrates the complexity of determining whether a natural energy source is statutorily "renewable." *See* Exhibit 1.

Respondent's Answer supports Petitioner Cosgrove's argument that the statutory definition of "renewable," as used in the caption and results statements, is complex and does not comport with the common understanding of that word. Respondent states:

> ORS 469A.005(9) defines "qualifying electricity" as "electricity described in ORS 469A.010." ORS 469A.010 describes three categories of electricity (which means, in light of ORS 469A.005(9), that each category constitutes "qualifying electricity"): (1) "electricity generated from a renewable energy source," with some qualifications (ORS 469A.010(1)); (2) "electricity from hydroelectric generators" (ORS 469A.010(3), which calls "hydroelectric energy * * * an important renewable energy source"); and (3) "electricity that the Bonneville Power Administration has designated as environmentally preferred power, or has given a similar designation for electricity generated from a renewable resource" (ORS 469A.010(2)). In short, "qualifying electricity" generally is defined as electricity from a "renewable energy source," although it appears that some electricity—electricity designated by the BPA as "environmentally preferred power"—could constitute qualifying electricity without necessarily constituting electricity from a "renewable energy source."

> In turn, ORS 469A.005(10) defines "renewable energy source" as "a source of electricity described in ORS 469A.025." ORS 469A.025 describes a number of electricity sources (thereby defining them as "renewable energy sources"): wind; solar energy; wave, tidal and ocean thermal energy; geothermal energy; some forms of biomass and biomass-byproducts; hydroelectric energy, with qualifications; combustion of municipal solid waste, with qualifications; and hydrogen gas, with qualifications. In short, ORS 469A.052 currently requires that, for 2020-2024, at least 20% of the electricity that certain utilities sell must be "qualifying electricity"—a term that, for the most part, connotes electricity from "renewable energy sources."

Respondent's Answer at 2-4. Failing to alert voters of this highly regulatory definition that exists in current law, and is adopted by the initiative, will likely cause voters to mistakenly believe *all* types of renewable energy may be used to comply with the initiative. However, due to the special definition, not all natural sources of energy are statutorily "renewable." For example, only certain types of hydropower sources qualify as "renewable" energy pursuant to current law and the initiative. *See* Exhibit 2.

To correct this deficiency, the word "renewable" should be placed in quotation marks in the caption and results statements, followed by "(defined)" to alert voters that the initiative uses the word in a specially defined manner. It is not enough to include this parenthetical in the summary only because "renewable" energy is the subject matter of the initiative and the caption must identify that subject matter in terms that

will not confuse or mislead voters. *See Greene v. Kulongoski*, 322 Or 169, 175, 903 P2d 366 (1995.)

Respondent responds by stating "the phrase 'renewable sources' is not the precise phrase referenced in the proposed measure; instead, the measure references a longer phrase—'renewable energy source.'" This concern is alleviated by placing only "renewable" in quotation marks rather than "renewable sources." Respondent also argues that voters should not be alerted to the special definition because it exists in current law, not in the initiative. In reply, Petitioner Cosgrove relies on his arguments previously presented in his Petition. *See* Petition at 8-9.

II. CONCLUSION

The Court should refer the ballot title back to Respondent with directions to correct these insufficiencies.

DATED this 3rd day of February, 2016.

Respectfully submitted,

GIBSON LAW FIRM, LLC

By /s/ Jill Gibson

Jill Gibson, OSB #973581
1500 SW Taylor St.
Portland, OR 97205
Telephone: (503) 686-0486
Fax: (866) 511-2585
Email: jill@gibsonlawfirm.org

Attorney for Petitioner Paul Cosgrove

Oregon Renewable Portfolio Standard Eligible Resources

To be eligible, all electric generation facilities must at minimum be located within the Western Electricity Coordinating Council's territory

Unless otherwise stated Renewable Energy Certificates (RECs) must have been generated after January 1, 2007 from a facility that became operational after January 1, 1995 to be eligible for the Oregon Renewable Portfolio Standard

	Eligible?	Conditions of Eligibility	Conditions of Ineligibility	Section of Oregon Revised Statutes
Wind	**Yes**			ORS 469A 025 (1)(a)
Solar photovoltaic and solar thermal	**Yes**			ORS 469A 025 (1)(b)
Wave, tidal and ocean thermal	**Yes**			ORS 469A 025 (1)(c)
Geothermal	**Yes**			ORS 469A 025 (1)(d)
Biomass	Organic human or animal waste	Facilities that became operational *before* January 1, 1995 may be used to comply with the standard if they met PURPA requirements on March 4, 2010 RECs can be banked and used for compliance beginning January 1, 2026 with generation that occurs on or after January 1, 2011	Pre-1995 facilities must have been registered in the Western Renewable Energy Generation Information System (WREGIS) before January 1, 2011 (HB 3674 Sect 5)	ORS 469A 025 (2)(a)
	Spent pulping liquor			ORS 469A 025 (2)(b)
	Forest or rangeland woody debris from harvesting or thinning conducted to improve forest or rangeland ecological health and to reduce uncharacteristic stand replacing wildfire risk			ORS 469A 025 (2)(c)
	Wood material from hardwood timber grown on land described in ORS 321 267 (3)			ORS 469A 025 (2)(d)
	Agricultural residues			ORS 469A 025 (2)(e)
	Dedicated energy crops			ORS 469A 025 (2)(f)
	Landfill gas or biogas produced from organic matter, waste water, anaerobic digesters or municipal solid waste			ORS 469A 025 (2)(g)
	*To qualify biomass cannot have been treated with chemical preservatives		Direct combustion of biomass may not be used to comply with a renewable portfolio standard if *any* of the biomass combusted to generate the electricity includes wood that has been treated with ***chemical preservatives*** such as creosote pentachlorophenol or chromated copper arsenate	ORS 469A 025 (3)
Hydroelectric	Facilities constructed after January 1, 1995 must be located outside of protected areas	The facility was built after January 1, 1995 and is located outside any protected area designated by the Pacific Northwest Electric Power and Conservation Planning Council as of July 23, 1999, or any area protected under the federal Wild and Scenic Rivers Act or the Oregon Scenic Waterways Act		ORS 469A 025 (4)(a)
	Electricity is attributable to an efficiency upgrade	The electricity is attributable to efficiency upgrades made to the facility on or after January 1, 1995	If efficiency upgrade is made to a Bonneville Power Administration facility, only that portion of the electricity generation attributable to Oregon's share of the electricity may be used	ORS 469A 025 (4)(b) ORS 469A 020 (3)
	Low Impact Hydropower Institute (LIHI) certified and utility owned	Up to 50 average megawatts of generation per year from certified low-impact hydroelectric facilities that owned by Oregon utilities	All LIHI certified hydropower facilities are eligible, regardless of when the facilities became operational	ORS 469A 025 (5)(a) ORS 469A 020 (4) (a)
	Low Impact Hydropower Institute certified, not owned by a utility, and located in Oregon	Up to 40 average megawatts of generation from certified low-impact hydroelectric facilities that are not owned by a utility and located in Oregon	Only RECs generated after January 1, 2011 are eligible for compliance (HB 3649 Sect 3) Pre-1995 facilities are eligible with no restriction on operational date	ORS 469A 025 (5)(b) ORS 469A 020 (4) (b)
	Generation attributable to a capacity upgrade is not eligible		Capacity upgrades to a hydroelectric project include any increase in generating capacity other than an increase from an efficiency upgrade	ORS 469A 020 (2) and (3); OAR 330-160-050 (3)
Municipal Solid Waste	The facility was built *before* January 1, 1995	Only up to 11 average megawatts per year only if the facility is located within Oregon These facilities may not be used for compliance until January 1, 2026	The facility must have been registered in WREGIS before January 1, 2011 to be eligible	ORS 469A 025 (6)(a) ORS 469A 020 (6) HB 3674 Sect 5
	The facility was built *after* January 1, 1995	The total amount of electricity generated in Oregon these facilities may not exceed nine average megawatts per year for the purpose of complying with a renewable portfolio standard		ORS 469A 025 (6)(b)
Hydrogen Gas	Anhydrous ammonia is used as a fuel source at the hydrogen power station		Generation from the original source of energy cannot also used for compliance The facility must have been registered in WREGIS before January 1, 2011 to be eligible	ORS 469A 025 (7); HB 3674 Sect 5
	The electricity is derived from wind, solar photovoltaic, solar thermal, wave, tidal, ocean thermal, geothermal, eligible biomass, or an eligible hydroelectric facility			
Coal	**Ineligible**		ODOE may not approve [2007 c 301 §4; 2010 c 17 §3; 2010 c 71 §2]	ORS 469A 025 (9)
Petroleum	**Ineligible**		ODOE may not approve [2007 c 301 §4; 2010 c 17 §3; 2010 c 71 §2]	ORS 469A 025 (9)
Natural Gas	**Ineligible**		ODOE may not approve [2007 c 301 §4; 2010 c 17 §3; 2010 c 71 §2]	ORS 469A 025 (9)
Nuclear Fission	**Ineligible**		ODOE may not approve [2007 c 301 §4; 2010 c 17 §3; 2010 c 71 §2]	ORS 469A 025 (9)

EXHIBIT 1

Oregon's Renewable Portfolio Standards

Hydroelectricity in the Oregon RPS

The Oregon Renewable Portfolio Standards (RPS) law states that "hydroelectric energy is an important renewable energy source" and designates three sources of hydroelectricity as eligible for the Oregon RPS (ORS 469A.010 (3)).

The RPS sets targets for acquiring new, renewable sources of energy (e.g. 25% of 2025), allowing each complying utility to determine the best mix of new renewable sources. The three types of hydroelectricity that are eligible for the Oregon RPS are[1]:

Hydroelectric Efficiency Upgrades: electricity from efficiency upgrades made to the facility after Jan. 1, 1995. Limitations are made to Bonneville Power Administration (BPA) facilities in that only the portion that is attributable to Oregon's share of the electricity generation may be used to comply.

Low-Impact Hydroelectric Projects: electricity from projects that have been certified by the Low-Impact Hydropower Institute (LIHI, www.lowimpacthydro.org). In order to be certified by LIHI a facility must meet criteria in the following areas: river flows, water quality, fish passage and protection, watershed protection, threatened and endangered species protection, cultural resource protection, recreation, and not recommended for removal. In one compliance year, a utility can use no more than 50 aMW[2] of generation from LIHI-certified facilities owned by Oregon utilities; and 40 aMW from LIHI-certified facilities not owned by a utility and located in Oregon (90 aMW or 788,400 MWh/RECs total per year[3]).

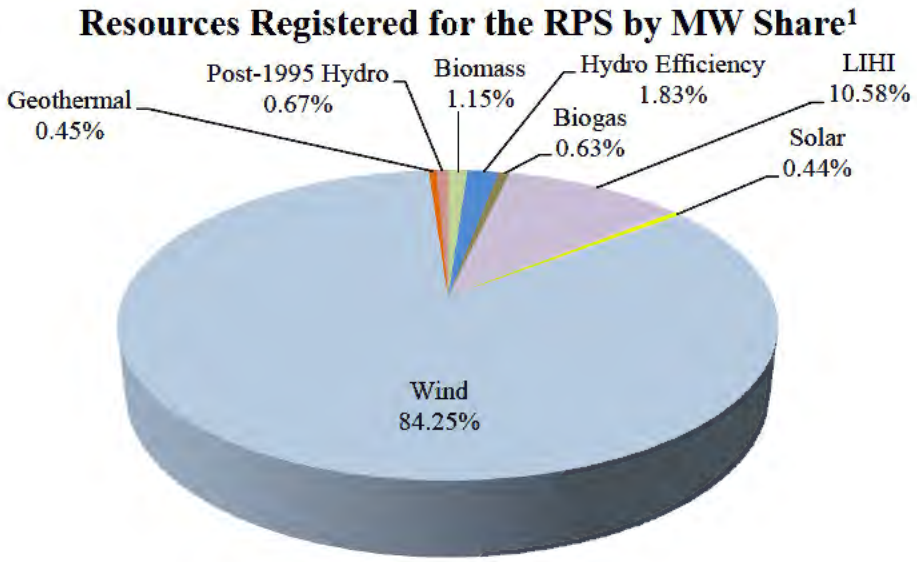
New Hydroelectric Projects: electricity from facilities that became operational after Jan. 1, 1995 and is located outside protected areas designated by Pacific Northwest Electric Power and Conservation Council[4] as of July 23, 1999 (http://www.nwcouncil.org/fw/protectedareas/home/) or any area protected under the federal Wild and Scenic Rivers Act or the Oregon Scenic Waterways Act.

Hydropower accounts for about 43% of Oregon's electricity resource mix[5]. Recognizing this, the Oregon RPS hydropower provisions create incentives for improved operations such as reducing the footprint of existing hydropower plants and increasing hydropower plant efficiency.

The law also ensures that utilities do not have to take hydropower out of their power mix in order to meet the RPS in Oregon. Utilities do not have to replace any electricity available to them under contracts from dams that are owned by Washington public utility districts and are located between the

[1] Facilities must be located within the boundaries of the Western Electricity Coordinating Council.
[2] An aMW is an average megawatt or the amount of electricity produced by the continuous production of one megawatt over the period of one year (or 8,760 megawatt hours).
[3] One Renewable Energy Certificate (REC) is equal to one MWh.
[4] Now called the Northwest Power and Conservation Council
[5] Oregon Electricity Resource Mix 2009-2011

Grand Coulee Dam and the Columbia River's junction with the Snake River.[6] Consumer owned utilities are not required to comply with the RPS to the extent that compliance would require the utility to reduce its purchases of the lowest priced electricity from BPA.[7] No utility is required to substitute qualifying electricity for electricity derived from an energy source other than coal, natural gas or petroleum.[8] As of July 2013 there are 62 Oregon RPS-certified hydroelectricity facilities which account for more than 13 percent of all registered Oregon RPS facilities by megawatt share.[9]



[6] ORS 469A.060(2)(a)
[7] ORS 469A.060(3)
[8] ORS 469A.060(b)
[9] As of June 2013, this analysis does not include the LIHI caps placed on Oregon utility-owned and non-utility owned facilities.

CERTIFICATE OF FILING AND SERVICE

I certify that on February 3, 2016, I filed the original **PETITIONER COSGROVE'S AMENDED REPLY TO RESPONDENT'S ANSWER** (Initiative Petition #2016-063) with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system and electronically served it upon Rolf Moan, attorney for Respondent; Gregory A. Chaimov, attorney for Scott D. Bolton and Dave Robertson; and Steven C. Berman, attorney for Nicholas Blosser.

I further certify that I served Margaret Ngai, Chief Petitioner, by U.S. Mail:

Margaret Ngai
5623 SE Insley St.
Portland, OR 97206

Dated: February 3, 2016

/s/Jill Gibson

1500 S.W. Taylor St
Portland, OR 97205
Telephone: 503-686-0486
Fax: 866-511-2585
Email: jill@gibsonlawfirm.org

Attorney for Petitioner