IN THE SUPREME COURT OF THE STATE OF OREGON

WATERWATCH OF OREGON, INC., an Oregon nonprofit corporation,

Petitioner-Respondent on Review,

v.

WATER RESOURCES DEPARTMENT, a state agency; OREGON WATER RESOURCES COMMISSION, a state agency,

Respondents,

and

THE CITY OF COTTAGE GROVE, an Oregon municipal corporation,

Respondent-Petitioner on Review.

Supreme Court No. S062036

CA No. 147071

Water Resources Department Case No. S42117

PETITIONER-ON-REVIEW CITY OF COTTAGE GROVE'S REPLY BRIEF ON THE MERITS

On Review of the Opinion of the Court of Appeals in a Judicial Review proceeding from a Final Order of the Water Resources Department

Court of Appeals Opinion filed: December 11, 2013
Author of Opinion: Armstrong, Presiding Judge
Concurring: Duncan, Judge, and Brewer, Judge *pro tempore*

(Counsel listed on inside cover) August 2014

W. MICHAEL GILLETTE, OSB #660458
JORDAN R. SILK, OSB #105031
Schwabe, Williamson & Wyatt, P.C.
1211 SW Fifth Avenue, Suite 1900
Portland, OR 97204
Telephone: (503) 222-9981
Email: wmgillette@schwabe.com
jsilk@schwabe.com

Attorneys for Petitioner-on-Review City of Cottage Grove

ANNA M. JOYCE, OSB #013112
Solicitor General
DENISE G. FJORDBECK, OSB #822578
Senior Assistant Attorney General
Oregon Department of Justice
Appellate Division
1162 Court Street NE
Salem, OR 97301
Telephone: (503) 378-4402
Email: denise.fjordbeck@doj.state.or.us

Attorneys for Respondents Water Resources Department and Oregon Water Resources Commission

LISA A. BROWN, OSB #025240
WaterWatch of Oregon
213 SW Ash Street, Suite 208
Portland, OR 97204
Telephone: (503) 295-4039
Email: lisa@waterwatch.org

THOMAS M. CHRIST, OSB #834064
Cosgrave Vergeer Kester LLP
888 SW Fifth Avenue, Suite 500
Portland, OR 97204
Telephone: (503) 323-9000
Email: tchrist@cosgravelaw.com

Attorneys for Respondent-on-Review WaterWatch of Oregon, Inc.

RICHARD M. GLICK, OSB #792384
MICHAEL J. GELARDI, OSB #083347
Davis Wright Tremaine LLP
1300 SW Fifth Avenue, Suite 2300
Portland, OR 97201
Telephone: (503) 241-2300
Email: rickglick@dwt.com
michaelgelardi@dwt.com

Attorneys for Amici Curiae *Oregon Water Utilities Council and League of Oregon Cities*

Table of Contents

Page

TABLEOFAUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

PETITIONER-ON-REVIEWCITYOFCOTTAGEGROVE'S REPLYBRIEFONTHEMERITS

A. *ORS 537.270 renders this case moot.*

WaterWatch advances four arguments asking this Court to disregard the clear mandate in ORS 537.270 making the City's unchallenged water right certificate "conclusive evidence" in this proceeding of the extent of the City's appropriation. All fail.

First, WaterWatch claims that it is not challenging the "extent" of the City's appropriation at all. In so arguing, WaterWatch concedes that the "extent" of the City's appropriation relates directly to the amount of water that the City has the right to divert, *i.e.*, 6.2 cubic feet per second (cfs). Resp Br at 19-20. WaterWatch urges, however, that the City's right to divert 6.2 cfs of water is independent from conditions limiting that right, such as conditions expressly identified in the City's certificate.

Cottage Grove fails to perceive the distinction that WaterWatch attempts to draw. The conditions expressly identified in the City's certificate are part and parcel of "the extent" of the City's appropriation. New conditions not expressly identified in the certificate (and which OWRD expressly declined to impose) are not. In seeking to impose new, additional conditions, WaterWatch seeks to alter the extent of the City's

appropriation described in its certificate, which ORS 537.270 forbids.

Second, WaterWatch argues that, despite ORS 537.270's broad wording, ORS 537.270 binds only holders of subsequent water rights, and no one else, citing *Cleaver v. Judd*, 238 Or 266, 393 P2d 193 (1964) and *Wilber v. Wheeler*, 273 Or 855, 543 P2d 1052 (1975).

WaterWatch misreads those cases. *Cleaver* involved a dispute between plaintiffs who held prior certificated rights to appropriate water from a natural stream flowing in a draw, and defendants (an irrigation district), which held prior rights to reclaim seepage and wastewater before it flowed outside of the district's borders or into any natural stream in the draw. 238 Or at 268-71. This Court held that the plaintiffs could not invoke ORS 537.270 to establish their right to the water. *Id.* at 270-71. This Court explained that if the water was still within the district's boundaries and had not joined any natural stream subject to appropriation by plaintiffs, then defendants' rights held priority, and ORS 537.270 could not be used to divest prior water rights. *Id.* In *that* context, the court stated:

> "It is apparent that ORS 537.270, read together with [ORS] 537.260, was intended to make a water right certificate conclusive only against a person whose water right was

> 'subsequent in priority.' ORS 537.270 does not purport to foreclose the interest of an owner whose water right originated prior to that claimed by a subsequent certificate holder."

Id. at 270.

Here, WaterWatch cleaves to this Court's statement in *Cleaver* that "[i]t is apparent that ORS 537.270, read together with [ORS] 537.260, was intended to make a water right certificate conclusive only against a person whose water right was 'subsequent in priority.'" WaterWatch asserts that that statement is a holding by this Court that *no other person or entity*, including WaterWatch, is bound by ORS 537.270.

WaterWatch reads far too much into the *Cleaver* court's comment, a fact established by this Court's decision in *Wilbur*. *Wilbur* involved a water right certificate that undisputedly contained errors, which the holder had not sought to correct within three months pursuant to ORS 537.260. 273 Or at 863-65. The question before the court was whether ORS 537.270 made the certificate incapable of correction and bound the holder to its admittedly erroneous terms. *Id.*

In addressing that question, this Court noted that it previously had considered ORS 537.270 in *Cleaver*, and had concluded that "ORS 537.270 does not purport to foreclose the interest of an owner

whose water right originated prior to that claimed by a subsequent certificate holder." *Id.* at 863 (quoting *Cleaver*, 238 Or at 270). Significantly, however, the court in *Wilber* observed further that "[i]n *Cleaver we did not have occasion to consider the applicability of the statute to the certificate holder himself* and, consequently, *that question remains unresolved*." *Id.* at 863 (emphases added).

This Court's statement in *Wilbur* is directly at odds with WaterWatch's expansive interpretation of *Cleaver*: If, as WaterWatch contends, *Cleaver* holds that ORS 537.270 binds *only* holders of subsequent water rights, it would follow that, under *Cleaver*, the certificate holder was not bound by ORS 537.270. But this Court in *Wilbur* correctly recognized that the sole issue before the court in *Cleaver* was whether ORS 537.270 could be used to divest prior water rights; and that issue provided no basis for deciding any other application of ORS 537.270 including, more specifically, whether that statute binds environmental advocacy groups such as WaterWatch.[1]

[1] Ultimately, the court in *Wilbur* held that ORS 537.270 *does* bind a certificate holder, as well as holders of subsequent water rights. 273 Or at 864-65. The court emphasized that ORS 537.270 was designed "to promote the stability of water rights," and should be given effect even

The authorities cited by WaterWatch do not support its contention that ORS 537.270 does not apply. The opposite is true. The plain wording of ORS 537.270 unambiguously renders water right certificates conclusive "in *any proceeding* in *any court or tribunal of the state.*" (Emphases added.) The policy rationale underlying that broad mandate— *i.e.*, "promot[ing] the stability of water rights," *Wilber*, 273 Or at 864—precludes parties (other than holders of prior water rights) from collaterally attacking unchallenged certificates. WaterWatch is such a precluded party.

Third, WaterWatch argues that the City's construction of ORS 537.270 is inconsistent with its argument that WaterWatch should have challenged the certificate pursuant to ORS 183.484. That is, WaterWatch argues that if ORS 537.270—as it expressly states—renders unchallenged certificates conclusive in "any proceeding," then no challenge pursuant to ORS 183.484 is possible. Cottage Grove does not understand how that argument advances WaterWatch's position. Nevertheless, Cottage Grove observes that the deadline for seeking

---

when no one disputed that the certificate contained errors. *Id.*; *see also id.* at 865-66 (O'Connell, J., dissenting) (suggesting that certificate holder should be permitted to correct an "admitted mistake").

judicial review pursuant to ORS 183.484 (60 days) is subsumed by the deadline for contesting a certificate pursuant to ORS 537.260 (three months). So, while it is true that a water right certificate that has become conclusive under ORS 537.270 would not be subject to judicial review under ORS 183.484, that is so, in primary part, because after three months it is too late to file a petition for judicial review.[2]

In any event, the City's water right certificate was never challenged pursuant to either ORS 537.260 or ORS 183.484. The question here is whether ORS 537.270 makes the City's unchallenged certificate conclusive as to the extent of the City's appropriation in a judicial review proceeding brought pursuant to ORS 183.482 that challenges an OWRD extension order. The wording "any proceeding" in ORS 537.270 appears unambiguously to encompass such a proceeding. ORS 537.270 applies.

Fourth, and finally, WaterWatch argues that the 1917 Legislative Assembly that enacted ORS 537.270 could not have intended ORS 537.270 to apply to judicial review proceedings under the Oregon APA, because the APA did not exist in 1917. Cottage Grove certainly

[2] Additionally, WaterWatch's contention is akin to arguing that the ability to appeal a trial court's judgment is inconsistent with the doctrines of claim and issue preclusion.

would have a difficult task before it if, in order to show that ORS 537.270 applies to APA judicial review proceedings, Cottage Grove had to prove that the 1917 legislature specifically foresaw the APA's future enactment 30 years later. Fortunately, however, such an analysis is foreign to the law of this state.

Here, OWRD issued Cottage Grove a water right certificate pursuant to ORS 537.250, which is an order in other than a contested case.[3] The legislature has declared that unchallenged water right certificates are conclusive "in *any* proceeding." ORS 537.270 (emphasis added). The law presently appears to allow two proceedings for challenging water right certificates before they become conclusive: (1) a judicial review proceeding pursuant to ORS 183.484 filed within 60 days, or (2) an ORS 537.260 proceeding filed within three months. While the Oregon APA may have broadened the proceedings available for challenging water right certificates, nothing in ORS 537.270, the Oregon APA, or this Court's case law suggests any intent on the part of the legislature to carve out from ORS 537.270 an exception for APA judicial

[3] WaterWatch makes no specific argument before this Court that, for purposes of ORS 537.270, Cottage Grove's certificate was not one "issued in accordance with the provisions of ORS 537.250."

review proceedings.[4]

WaterWatch's argument seeks to turn the proper analysis on its head and place on Cottage Grove a burden to disprove that "any proceeding" includes proceedings created after 1917. In fact, however, it is WaterWatch who must explain why the phrase "any proceeding," means something other than "any proceeding." *See Pugsley v. Smyth*, 98 Or 448, 478, 194 P 686 (1921) ("[T]he word 'any' is an adequate term with which to express the idea of 'every'[.]"). WaterWatch offers this Court no such explanation.

B. ***This Court is not empowered to "blue pencil" the City's certificate.***

WaterWatch next argues that this Court should rewrite the City's certificate to impose the ORS 537.230(2) conditions even if this Court determines that the Court of Appeals lacked authority to vacate the certificate. WaterWatch cites OAR 690-250-0070(1) and *Tudor v. Jaca*, 178 Or 126, 164 P2d 680, *on reh'g*, 165 P2d 770 (1946), to support that

[4] WaterWatch fails to see how much it would damage its own case if its theory concerning the APA were correct. The 1917 legislature also did not have in contemplation the Oregon Court of Appeals, which came into existence in 1969. WaterWatch would truly be remediless if it were not entitled to seek judicial review in that court.

argument. Neither authority advances WaterWatch's position.

OAR 690-250-0070(1) provides,

> "Whenever the dates or times of the year within which an irrigation right may be exercised are not specified in decree, permit, certificate, order or basin program, the watermaster shall recognize the entitlement of the permits and certificates on adjudicated streams to be exercised during the same season as adjudicated rights, and permits and certificates in unadjudicated areas to be exercised between March 1 and October 31."

WaterWatch asserts that OAR 690-250-0070 allows OWRD to "enforce an irrigation season on a certificate even if no irrigation season condition is included in the certificate." Resp Br at 25-26.

The problem with WaterWatch's argument is the assumption on which it rests. Specifically, WaterWatch's argument incorrectly assumes that an irrigation right can be held not subject to limitation to an irrigation season. In fact, however, an irrigation right appears to be *by its nature* a right subject to limitation to an irrigation season. *See Smyth v. Jenkins*, 148 Or 165, 166, 33 P2d 1007 (1934) (noting that existence of an irrigation right was undisputed, but right limited to irrigation season); *see also Tudor*, 178 Or at 143 ("In general adjudications of relative rights to the use of the waters of a stream system, it is evident that the duty of water

and the duration of the irrigation season are matters which must be considered and determined, and this has been the practice in Oregon ever since the adoption of the water code of 1909." (Emphasis added)).

Thus, OAR 690-250-0070(1) allows the watermaster to identify, where the certificate does not do so, the specific time frame for the exercise of an inherently seasonal right. Because an irrigation right is by its nature limited to an irrigation season, the watermaster's designation of a specific time frame places no new, additional limitations on that right. Accordingly, OAR 690-250-0070(1) provides no authority for inserting new and additional restrictions into the City's certificate, which is not a seasonal irrigation right.[5]

WaterWatch's reliance on *Tudor* is misplaced for similar reasons. The certificate at issue in *Tudor* incorporated by reference a prior judicial decree, and the court's interpretation of the extent of the water right described in the certificate required it to resolve an ambiguity in that prior decree. 178 Or at 156-57. Under those circumstances, this Court

[5] Even assuming that OAR 690-250-0070(1) purported to allow modification of the extent of a certificate, WaterWatch fails to explain how such an agency rule could be valid in light of the legislative choice expressed in ORS 537.270.

acknowledged that "[t]here can be no doubt but that a water right certificate must be accorded the evidentiary effect which [ORS 537.270] prescribes," but, the court explained, "[i]n considering the effect of the certificate as evidence," the certificate was necessarily subject to "the conditions and limitations contained in the decree," and therefore subject to "a judicial interpretation of any ambiguity in such conditions or limitations." *Id.* That is, the limitations to which the *Tudor* certificate was subject were already contained in the certificate itself; the court merely announced them. *See id.*

Here, by contrast, OWRD expressly declined to impose the ORS 537.230(2) conditions on the City's certificate. WaterWatch fails to supply any legal basis on which this Court could rewrite the City's certificate to insert the ORS 537.270 conditions.[6]

C. ***Hamel v. Johnson does not apply.***

Next, WaterWatch reprises its reliance on *Hamel v. Johnson*, 330 Or

[6] WaterWatch also suggests that the City's water right certificate is subject to the inherent condition that the water be used for "beneficial use," which, in WaterWatch's view, excludes use of water not subject to the ORS 537.230(2) conditions that OWRD expressly declined to impose. As explained in greater detail below, WaterWatch fails to prove its peculiar definition of "beneficial use."

180, 998 P2d 661 (2000), arguing that the City's water right certificate cannot moot this challenge of the City's extension order because the extension order was a necessary predicate to the water right certificate. Even accepting WaterWatch's premise that the extension order was a necessary predicate to the certificate, WaterWatch fails to explain how *Hamel*'s principle can apply in light of ORS 537.270. In ORS 537.270, the legislature acted specifically to insulate water right certificates from collateral attack. Such an enactment necessarily assumes that the certificate could be vulnerable to such an attack, including arguments that predicate orders suffered from legal defects. Put simply, if the certificate could never be vulnerable to such an attack, it need not be protected by specific legislation. *Cf. former* ORS 109.070(1)(a) (2005), *repealed by* Or Laws 2007, ch 454, § 1 (establishing conclusive presumption of paternity under certain circumstances). ORS 537.270 precludes *Hamel*'s application to this case.

D. ***ORS 183.486 provides no basis for vacating the City's certificate.***

ORS 183.482 and ORS 183.484 set out the statutory bases for judicial review jurisdiction under the Oregon APA. ORS 183.482 creates

judicial review jurisdiction in the Court of Appeals over orders in contested cases, and ORS 183.484 creates judicial review jurisdiction in certain circuit courts over orders in other than contested cases. A third statute, ORS 183.486, *does not establish any judicial review jurisdiction*; rather, that statute sets out the scope of relief that a reviewing court may grant in a judicial review proceeding *over which it already has obtained proper judicial review jurisdiction*.

In arguing that ORS 183.486 gave the Court of Appeals authority to vacate the City's water right certificate, WaterWatch *completely ignores* the jurisdictional problems with its argument. That is, WaterWatch offers this Court no explanation how the legislature, having set out in ORS 183.482 and ORS 183.484 different jurisdictional rules for review of different types of agency orders, nonetheless did not intend reviewing courts to be bound by those jurisdictional limitations.[7] *Cf. Carnine v. Oregon State Textbook Comm'n*, 62 Or App 344, 660 P2d 201 (1983) (noting that the petitioners could not "under the guise of an attack on" one

[7] The phrase in ORS 183.486 that the reviewing court "shall provide whatever relief is appropriate irrespective of the original form of the petition" does not create judicial review jurisdiction. If it did, the specific jurisdictional rules in ORS 183.482 and ORS 183.484 would be meaningless.

agency order, "procure a *de facto* invalidation of" a different order that the petitioners had not timely challenged). WaterWatch's contention (and the Court of Appeals holding) that ORS 183.486 allows a reviewing court to exceed the Oregon APA's jurisdictional limitations is unfounded.

E. ***WaterWatch's lack of notice is immaterial.***

No law required OWRD to notify WaterWatch that it had issued a water right certificate to Cottage Grove. WaterWatch does not contest that fact; instead, WaterWatch urges this Court to announce an astonishingly expansive new rule, which would hold that,

> "if an agency does not provide notice of a subsequent order that is legally predicated on a challenged order, the agency cannot use the subsequent order (and the lack of challenge to the order) to moot the challenge to the first order * * *. *Without notice, the agency must assume the risk that its subsequent order may be set aside as part of an ORS 183.486(1) remedy*."

Resp Br at 38 (emphasis added).

In other words, WaterWatch seeks to transform the legislature's choice *not* to enact an agency notice requirement into a new jurisdictional basis for challenging *any kind of agency action whatsoever* if (again, assuming *arguendo* WaterWatch's premise) one agency action was a predicate to another. WaterWatch may not like the collective effect of

ORS 537.270, the APA's jurisdictional rules, and the legislature's decision not to enact a notice requirement. However, such complaints, being classic policy arguments unconnected to any present wording of the statutes, are properly directed to the legislature, not this Court. WaterWatch's challenge is moot.

F. ***WaterWatch's construction of ORS 537.230(2) fails.***

Turning to the merits, WaterWatch contends that the relevant point in time for determining the "maximum rate [at which water is] diverted for beneficial use before the extension," ORS 537.230(2)(b), and the "undeveloped portion of the permit," ORS 537.230(2)(c), is the last permit expiration date. In making that argument, WaterWatch does not engage in any meaningful analysis consistent with this Court's statutory interpretation methodology. Instead, WaterWatch makes an internally inconsistent and thinly supported argument that "beneficial use" of water cannot occur outside of a permit's stated development timeline, which, in WaterWatch's view, leads ineluctably to the conclusion that the prior expiration date is the relevant time period for determining whether the conditions in ORS 537.230(2) apply to an extension order.

WaterWatch's proposed construction fails for a number of reasons.

First, and most importantly, WaterWatch fails to prove the premise underlying its construction of ORS 537.230(2)(b)—*i.e.*, that diversion of water for municipal uses outside of the stated permit deadlines does not constitute "beneficial use." Unfortunately for WaterWatch, that term has never had the narrow focus that WaterWatch would give it. "Beneficial use," as a concept, refers to use of water for a legitimate purpose, and only so much as is necessary for that purpose. *See, e.g.*, *Bennett v. Salem*, 192 Or 531, 544, 235 P2d 772 (1951) (noting that putting water to "a beneficial use" means not "unreasonably wast[ing] it"); *In re Umatilla River*, 88 Or 376, 380, 168 P 922 (1918) (noting that "beneficial use," means not "wast[ing]" it, not "us[ing it] extravagantly," and not appropriating is with "[e]xcessive greed and avarice").

In fact, the legislature has "declared" specifically that using water for municipal purposes is "beneficial use." ORS 536.300(1). Thus, the phrase "diverted for beneficial use before the extension," in the context of this case, means just what it says—diverting water for municipal purposes "before the extension." Use of the phrase "beneficial use" in the statute thus fails to establish that "the extension" refers to the prior permit expiration date, rather than OWRD's action in granting an extension order.

Moreover, WaterWatch's theory of "beneficial use" is internally inconsistent and confusing. WaterWatch appears to agree that a municipality can obtain an extension of time in order to "bless" diversion occurring after a permit expiration date for purposes of a city's final proof survey. In fact, WaterWatch cites as authority OWRD's own explanation of that circumstance:

> "[A] permit holder may not include water diverted after the expiration of a development deadline in a final proof survey * * * [but] may 'apply for an extension of time and may request the construction and water development deadlines be extended such that when the permit holder does submit its final proof survey it may show that the construction and full application of water to beneficial use has occurred consistent with all of the terms of the permit—including those deadlines which have been extended. ORS 537.230(2).'"

Resp Br at 45. In other words, OWRD's action in extending a permit deadline brings permit development after a prior expiration date within compliance with the permit.

Cottage Grove agrees. And Cottage Grove submits that that understanding of the effect of OWRD extension orders is more consistent with interpreting "the extension" in ORS 537.230(2) as referring to OWRD's extension *order*, not the prior expiration *date*. Having extended the permit deadline, OWRD then looks to determine whether, at that time,

any portion of the city's permit remains undeveloped. If the city has further future permit development to undertake, OWRD imposes the ORS 537.230(2) conditions to that portion of the permit. If not, those conditions do not apply.

The opposite approach (which, confusingly, WaterWatch also appears to urge) would hold that OWRD must retroactively impose conditions on any permit development that occurs after a prior expiration date but before OWRD issues an extension order. The result is that cities either must halt all development during that time period or continue development at the risk of having that development later retroactively limited by OWRD.

As Cottage Grove has explained, no law requires OWRD to process extension requests prior to a permit expiration deadline; indeed, in this case, OWRD suspended processing extension applications for years after Cottage Grove's last expiration date. WaterWatch chides the City for not seeking an extension order earlier in time, but the rule for which WaterWatch appears to advocate would *always* require OWRD to retroactively impose conditions on permit development that occurred after a prior expiration date but before the extension order. Nothing suggests

that, in enacting the ORS 537.230(2) conditions, the legislature intended to so significantly hamper a city's ability to develop efficiently its necessary water infrastructure.

Legislation calculated to ensure that extension applications are filed and processed in advance of a permit's expiration date may be wise policy. But at present no law imposes any such requirements. On balance, the rules for which WaterWatch advocates (and the rules that the Court of Appeals adopted below) amount to making law where the legislature has declined to do so, based on the perception of some injustice. But it is not the job of this state's appellate courts to rewrite legislation or impose legislative policy where the legislature has not.

And the legislature is entitled to draw its own conclusions as to which laws are just and which are not. In this case, as it happens, the legislature's view of justice—providing stability to water right certificates, for example—happens to collide with WaterWatch's view. Nevertheless, the choice belongs to the legislature. Here, the legislature intended the ORS 537.230(2) conditions to apply if, and only if, a city would be diverting further additional amounts of water after an extension order to complete permit development. The legislature has not chosen to regulate

the timelines in which OWRD processes those extension applications. Under the law that the legislature has seen fit to enact, OWRD correctly determined that the ORS 537.230(2) conditions did not apply to the City's extension order. The Court of Appeals' contrary conclusion is erroneous.

G. ***Conclusion***

For the reasons stated in the City's brief on the merits and in this reply, this Court should reverse the Court of Appeals' decision and affirm the final order of the Water Resources Department.

DATED this 28th day of August, 2014.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: */s/ W. Michael Gillette*

W. Michael Gillette, OSB #660458
wmgillette@schwabe.com
Jordan R. Silk, OSB #105031
jsilk@schwabe.com
Pacwest Center
1211 SW 5th Ave., Suite 1900
Portland, OR 97204
Telephone: 503.222.9981

Attorneys for Petitioner-on-Review
City of Cottage Grove

CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brieflength

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 3,970 words.

Typesize

I 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 5.05(4)(f).

/s/ Jordan R. Silk
Jordan R. Silk, OSB No. 105031

CERTIFICATE OF FILING AND SERVICE

I certify that on August 28, 2014, I filed the original of this PETITIONER-ON-REVIEW CITY OF COTTAGE GROVE'S REPLY BRIEF ON THE MERITS with the State Court Administrator by the eFiling system.

I further certify that on August 28, 2014, I served a copy of the PETITIONER-ON-REVIEW CITY OF COTTAGE GROVE'S REPLY BRIEF ON THE MERITS on the following parties by electronic service via the eFiling system, if applicable, and by the United States Postal Service, first-class mail, at the following addresses:

Lisa A. Brown
WaterWatch of Oregon
213 SW Ash Street, Suite 208
Portland, OR 97204

Thomas M. Christ
Cosgrave Vergeer Kester LLP
888 SW Fifth Avenue, Suite 500
Portland, OR 97204

Attorneys for WaterWatch of Oregon, Inc.

Denise G. Fjordbeck
Anna M. Joyce
Oregon Department of Justice
Appellate Division
1162 Court Street NE
Salem, OR 97301

Attorneys for Water Resources Department and Oregon Water Resources Commission

Richard M. Glick
Michael J. Gelardi
Davis Wright Tremaine LLP
1300 SW Fifth Avenue, Suite 2400
Portland, OR 97201

Attorneys for Amici Curiae Oregon Water Utilities Council and The League of Oregon Cities

/s/ Jordan R. Silk
Jordan R. Silk, OSB No. 105031