

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of Water Right
Application R-87871 in the Name of

EAST VALLEY WATER
DISTRICT,

Petitioner,
Petitioner on Review,

v.

OREGON WATER RESOURCES
COMMISSION, OREGON WATER
RESOURCES DEPARTMENT, and
WATERWATCH OF OREGON,
INC.,

Respondents,
Respondents on Review,

and

JOEL RUE et al., Protestants below.

SC No. S070604

CA No. A173292

Oregon Water Resources
Commission No. R87871

**BRIEF OF *AMICUS CURIAE* OREGON ASSOCIATION OF NURSERIES
IN SUPPORT OF PETITIONER ON REVIEW EAST VALLEY WATER
DISTRICT'S BRIEF ON THE MERITS**

Petition for Review of the Decision of the Court of Appeals on Judicial Review
from a Final Order of the Oregon Water Resources Commission

Date of Opinion:	November 1, 2023
Author of Opinion:	SHORR, P.J.
Concurring Judges:	MOONEY, J., and PAGÁN, J.

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ORAP 9.17 COMPLIANCE MATTERS	2
A. Questions Presented on Review.....	2
B. Proposed Rules of Law	3
C. ORAP 9.17(2)(b)(ii).....	4
III. IDENTITY AND INTERESTS OF <i>AMICUS CURIAE</i>	7
A. The Opinion will directly impact new water right applications filed by OAN’s members.....	9
B. The Opinion poses a threat to the water right transfer system	9
C. The Opinion poses a threat to the water right regulation system	11
IV. SUMMARY OF ARGUMENT	11
V. ARGUMENT.....	14
A. The Opinion incorrectly interprets Public Interest Factor (f).....	14
B. The Court of Appeals errant statutory analysis and the resulting introduction of subjective standards regarding the use of water rights could detrimentally impact two key Oregon water right administrative processes	23
C. The Opinion fails to recognize the need to balance various Public Interest Factors as part of the Public Interest Test.....	29
VI. CONCLUSION	31

TABLE OF AUTHORITIES

Cases

Bert Brundige, LLC v. Dep't of Revenue, 368 Or 1, 485 P3d 269 (2021)16

E. Valley Water Dist. v. Oregon Water Res. Comm'n,
328 Or App. 790, 539 P3d 789 (2023)..... 1, 5, 6, 15, 17, 21,30

Fort Vannoy Irr. Dist. v. Water Res. Comm'n,
345 Or 56, 188 P3d 277 (2008) 19, 22, 26

Oliver v. Skinner, 190 Or 423, 226 P2d 507 (1951)26

PGE v. Bureau of Labor and Industries, 317 Or 606, 859 P2d 1143 (1993)16

State v. Gaines, 346 Or 160, 206 P3d 1042 (2009)6, 16

TPC, LLC v. Oregon Water Res. Dep't., 308 Or App 177, 482 P3d 121 (2020)26

Statutes

ORS 174.02016

ORS 536.30019

ORS 536.310(12) 20, 28

ORS 536.780(3)(a).....28

ORS 537.1109

ORS 537.120 6, 9, 17, 18

ORS 537.1309

ORS 537.13520

ORS 537.1531, 3, 4, 11, 12, 13, 29

ORS 537.153(2) 4, 5, 10, 30

ORS 537.153(3)(e).....	30
ORS 537.160(1)	6, 17, 18
ORS 537.170.....	3, 4, 6, 11, 12, 13, 29
ORS 537.170(6)	30
ORS 537.170(8)	29
ORS 537.170(8)(a).....	11, 31
ORS 537.170(8)(a)-(g).....	30
ORS 537.170(8)(b).....	31
ORS 537.170(8)(c).....	20, 31
ORS 537.170(8)(f)	2, 3, 5, 11, 15, 17
ORS 537.190.....	6
ORS 537.405(1)	19
ORS 537.531	19
ORS 540.510.....	24
ORS 540.520.....	23
ORS 540.610.....	18

Rules

OAR 680-380-4010.....	24
OAR 690-250-0100(1).....	27
OAR 690-250-0100(2).....	27
OAR 690-325-0030(3).....	15
OAR 690-380-0100(3).....	10, 15, 24

OAR 690-380-2000.....	24
ORAP 8.15	1
ORAP 9.17(2)(b)(ii).....	4

Other Authorities

Janet Neuman, <i>Oregon Water Law A Comprehensive Treatise on the Law of Water and Water Rights in Oregon</i> (2011).....	19
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I. INTRODUCTION

Pursuant to ORAP 8.15 and this Court’s Order Granting Motion to Appear as *Amicus Curiae* dated January 5, 2024, the Oregon Association of Nurseries (“OAN”) respectfully submits this brief (“*Amicus Brief*”) as *amicus curiae* in support of Petitioner on Review East Valley Water District’s (“East Valley”) Brief on the Merits (“*Merits Brief*”). The *Merits Brief* identifies the ways in which the opinion issued by the Oregon Court of Appeals on November 1, 2023, *E. Valley Water Dist. v. Oregon Water Res. Comm’n*, 328 Or App. 790, 539 P3d 789 (2023), (“*Opinion*”), conflicts with the common law doctrine of “prior appropriation” as it applies to vested and inchoate water rights, including instream water rights, distorts the “Public Interest Test” that is required for all new water right applications pursuant to ORS 537.153, and erodes the predictability of Oregon’s prior appropriation system for all water users across the state.

The *Opinion* introduces uncertainty and subjectivity into a system of water laws that is based on objective standards and measures. Such objectivity is critical to the fair and transparent administration of this scarce resource. The Court of Appeals’ introduction of a new, subjective public interest standard focused on “frustration of actual purpose” of a water right, alongside its

recognition of unique legal protections for a single type of water right, represents a departure from over a century of Oregon water law.

As explained in this *Amicus* Brief and in the Merits Brief, the Opinion will have significant impacts on OAN's members by undermining the predictability of Oregon's water allocation and management systems.

Therefore, OAN urges this Court to overrule the Court of Appeals' erroneous decision and issue an opinion articulating the proposed rules of law set forth below, thereby ensuring clarity and predictability for OAN's members and water users across the state.

II. ORAP 9.17 COMPLIANCE MATTERS

A. Questions Presented on Review.

OAN adopts the Questions Presented and Proposed Rules of Law Section of the Merits Brief regarding the legal questions at issue. Answering both of the questions posed by East Valley, and restated in this section, will be critical to ensure OAN's members can continue to obtain and manage water in a transparent and predictable manner.

1. Does ORS 537.170(8)(f), which identifies a public interest in "vested and inchoate rights" to state waters, as well as in "the means necessary to protect such rights," encompass qualitative, subjective, or abstract

considerations, such as a right to particular stream characteristics desirable for a senior instream water right holder?

2. Do ORS 537.153 and ORS 537.170 allow the Oregon Water Resources Commission (“Commission”) to conclude that an application for a new water right would “impair or be detrimental to the public interest,” based on its own legal interpretation of a single “Public Interest Factor,” without evaluating six other factors specified by statute and even when all subsidiary factual findings support approving the application?

B. Proposed Rules of Law.

OAN adopts the Questions Presented and Proposed Rules of Law Section of the Merits Brief and urges this Court to adopt the proposed rules of law set forth in this Section and in the Questions Presented and Proposed Rules of Law Section of the Merits Brief.

1. ORS 537.170(8)(f) does not recognize a public interest in qualitative, subjective, or abstract stream conditions desirable for any senior water right, including any “instream” water right. ORS 537.170(8)(f) merely codifies the doctrines of “prior appropriation” and the basic tenet of “injury” by recognizing that all “vested and inchoate” water rights—including instream water rights—are entitled to receive a particular rate and quantity of water at a particular stream location.

2. ORS 537.153 and 537.170 require the Commission to “consider” and balance all seven statutory Public Interest Factors as a whole to determine whether the public interest presumption at ORS 537.153(2) has been overcome. As a matter of both statutory interpretation and administrative law, the Commission does not adequately “consider” the Public Interest Factors when it concludes that a water right application would impair or be detrimental to the public interest based on a novel legal interpretation of a single Public Interest Factor, without allowing the applicant a full opportunity to respond to that new interpretation, without addressing the other Public Interest Factors, and without adopting factual findings and reasoning to support its decision.

C. ORAP 9.17(2)(b)(ii).

OAN hereby incorporates by reference East Valley’s Statement of the Case submitted pursuant to ORAP 9.17(2)(b)(ii). For purposes of the arguments presented in this *Amicus* Brief, the facts related to the decision of the Commission and the Court of Appeals regarding East Valley’s water right application (“Application”) as set forth in this Section II.C are particularly relevant.

The Commission’s final written decision on East Valley’s Application was issued on November 25, 2019 (“Final Order”). (ER-343 to 356.) The Final Order was issued following a lengthy, multi-stage review of East Valley’s

application by the Oregon Water Resources Department (“OWRD”), the Director of OWRD, and an Administrative Law Judge. Merits Brief at 7-15. At each level of review, the decision-maker made no finding that the public interest presumption at ORS 537.153(2) had been overcome. Merits Brief at 7-12. However, upon review of the OWRD Director’s order (“Director’s Order”), the Commission reversed the findings of the Director and denied East Valley’s application in the Final Order. (ER 343 to 356.)

In the Final Order, the Commission determined that the presumption that the proposed use would not impair or be detrimental to the public interest was overcome based solely on “consideration” of the public interest factor set forth at ORS 537.170(8)(f) (“Public Interest Factor (f)”). (ER-354.) When describing the scope of its review, the Commission concluded,

“[t]he elements of a water right that merit protection include not just the rate and priority date, but also the beneficial purpose to which the water will be applied. Given this, we examine whether the in-stream water right is a vested right that merits protection, and if so, whether the Director’s Order provides conditions that adequately protect the instream water right.”

E. Valley Water Dist., 328 Or App at 802. By applying this framework, the Commission found that if the proposed appropriation would impair or conflict with the “beneficial purpose” of the existing instream water right certificate on the stream from which the Application proposed to use water, the proposed

reservoir would impair or be detrimental to “the public interest” as a result.

(ER-354.)

The Court of Appeals ultimately affirmed the Final Order in the Opinion. In the Opinion, the Court of Appeals identified the need to undertake a statutory interpretation analysis as set forth in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009) in response to East Valley’s petition for judicial review of the Final Order. In its analysis, the Court of Appeals examined the two statutes identified by the Commission, ORS 537.120¹ and ORS 537.160(1)² related to “beneficial use.” *E. Valley Water Dist.*, 328 Or App at 801-02. As a result of its analysis, the Court of Appeals found that the Commission had correctly interpreted Public Interest Factor (f) because, among other things, “it [is] unlikely that the legislature intended that a junior water right would be permitted to frustrate the actual purpose and use of a senior water right.” 328 Or App at 806.

¹ ORS 537.120 provides that “[s]ubject to existing rights, and except as otherwise provided in ORS chapter 538, all waters within the state may be appropriated for beneficial use, as provided in the Water Rights Act and not otherwise; but nothing contained in the Water Rights Act shall be so construed as to take away or impair the vested right of any person to any water or to the use of any water.”

² ORS 537.160(1) provides that “[s]ubject to the provisions of subsections (2) and (3) of this section, and of ORS 537.170 and 537.190, the Water Resources Department shall approve all applications made in proper form which contemplate the application of water to a beneficial use, unless the proposed use conflicts with existing rights.”

Additionally, in a footnote, the Court of Appeals suggested that its conclusion was based, in part, on the “instream” status of the instream water right certificate on the stream from which East Valley proposed to use water, explaining that “for some types of water use, such as irrigation, it makes sense to consider the quantity of water that is available when determining whether a water right is protected. However, not all water uses are consumptive.” *Id.* at 803 n 12.

III. IDENTITY AND INTERESTS OF *AMICUS CURIAE*

OAN is an Oregon nonprofit trade association representing Oregon’s nursery and greenhouse industry, which is the state’s largest agricultural sector. OAN’s members grow ornamental nursery stock, seedlings used in reforestation and food crops, Christmas trees, and greenhouse-grown flowers. Many of OAN’s members also farm irrigated land on which they raise food crops and other agricultural products. OAN’s members depend on a clean, reliable water supply to grow their world-renowned plants and agricultural products. OAN is active in water law and policy matters and has long advocated for consistent application and enforcement of Oregon’s water laws in order to ensure predictable water allocation and water management in the state. OAN’s members rely on the clear, predictable application of state water law, including

the law's basis in the prior appropriation doctrine and its recognition of beneficial use as the basis, measure, and limit of all water rights.

OAN's members rely on various processes administered by OWRD to manage water wisely and efficiently, including: (i) the new water right application process to obtain new water rights, (ii) the transfer process to change elements of existing water rights as a means to secure new water supply and bolster operational flexibility, and (iii) the regulation process to regulate existing water rights during times of water shortage. As set forth in East Valley's Petition for Review filed on December 20, 2023 ("Petition"), one estimate by the Oregon Department of Fish and Wildlife provides that Oregon has over 1,500 instream water rights covering 11,000 river miles. Petition at 14-15. As such, it is likely that OWRD will evaluate existing instream water rights in the context of any one of these administrative processes. OAN members rely upon the certainty and predictability for all these processes, which necessitates objective, consistent, and uniform application of OWRD's statutes and rules that implement core tenets of Oregon water law. By introducing a subjective standard regarding "frustration" of "actual purpose" and suggesting that instream water rights may be entitled to a broader scope of protection than other water rights, the Opinion is at odds with these core tenets and jeopardizes each of these processes.

A. The Opinion will directly impact new water right applications filed by OAN's members.

In Oregon, all water from all sources belongs to the public and appropriation of water for beneficial use is subject to existing water rights. ORS 537.110; ORS 537.120. Except for a limited set of water uses that are exempt from a permit requirement, any prospective water user must submit an application to OWRD to obtain a new water right. ORS 537.130. OAN's members routinely apply for new water rights to secure a new water supplies for nursery and farm operations. In most stream systems, it is highly likely that a stream targeted for a new appropriation will have an established instream water right. *See* Petition at 14-15. As a result of the Court of Appeals' errant interpretation of the law, the Opinion threatens to end such new appropriations in any basin where an instream water right is present.

B. The Opinion poses a threat to the water right transfer system.

Further, in basins where water is no longer available to support new water rights, OAN's members rely upon OWRD's administrative transfer process to change attributes of existing water rights, including moving the place

of use (“POU”)³ designated on a water right certificate. The statutes that guide the transfer process require OWRD to evaluate whether the proposed change will “injure” existing rights. Injury is defined as an “existing water right not receiving previously available water to which it is legally entitled.” OAR 690-380-0100(3).⁴ This is an objective analysis based on the measure of streamflow available to the existing water right. The approach set forth in the Opinion turns its back on this objective approach, instead introducing a subjective judgment-based concept of “frustration of actual purpose.” Further, in an injury analysis in the context of a transfer application where instream water rights are present, OWRD assesses the impact to instream water rights by determining whether the flow rate designated on the instream water right will be diminished. The Opinion’s conclusion that instream water rights may be entitled to additional, subjective protections beyond their guaranteed rate is directly counter to this objective analysis. As such, the Opinion has the potential to significantly alter the only pathway OAN’s members, and all water users, have to obtain additional water supply in fully appropriated basins.

³ In Oregon, consumptive water rights have a designated POU or service area that restricts where water may be used. Non-consumptive instream water rights have a designated stream reach that dictates the upper and lower geographic limits of the instream right.

⁴ The injury analysis is also part of the Public Interest Test for new surface water right applications under ORS 537.153(2).

C. The Opinion poses a threat to the water right regulation system.

Finally, the Opinion could impact water right regulation. OWRD's watermasters use objective streamflow measurements to determine whether to regulate junior water right holders during times of water shortage. OAN's members rely on the objective application of Oregon's quantitative, flow-based water laws for the efficient and predictable regulation of junior and senior water rights. By introducing a new "frustration of actual purpose" standard in the context of protecting existing and vested water rights, and by introducing the concept that instream water rights may be distinguished from other water rights, the Opinion has the potential to undermine this long-established system of water regulation upon which OAN's members rely.

IV. SUMMARY OF ARGUMENT

The Public Interest Factors at ORS 537.170(8)(a) through (f) identify the specific public interests relevant to the Commission's Public Interest Test as codified at ORS 537.153 and 537.170. The scope of each of these factors, including ORS 537.170(8)(f), "Public Interest Factor (f)," is a matter of legislative intent.

Under Public Interest Factor (f), the Commission may consider "vested and inchoate" water rights and "the means necessary to protect such rights" as a factor in the Public Interest Test. The legislature intended Public Interest Factor

(f) to codify well-established principles under Oregon’s “prior appropriation” doctrine, including the core principle of beneficial use. The Court of Appeals reviewed statutes related to beneficial use in the context of conflict with or impairment of existing vested rights. However, the Court of Appeals did not undertake a full *Gaines* analysis to determine the legislative intent behind ORS 537.153 and 537.170. 328 Or App at 802. A complete analysis would have included a review of statutes related to Oregon’s core water law principle of beneficial use. Lacking this critical context, the Court of Appeals introduced a “frustration of actual purpose” standard that diverges from the quantifiable attributes that define beneficial use for every water right in Oregon. 328 Or App at 806. The new standard instead introduces significant subjectivity regarding the attributes of a water right permit or certificate that merit protection.

Additionally, as a result of the flawed understanding regarding the basis of Oregon water rights, the Court of Appeals articulated another standard that is similarly meritless. The Court of Appeals stated that while it is appropriate to consider quantity of available water for some types of water use, that objective metric may not be applicable to non-consumptive uses, including instream water rights. *Id.* at 803 n 12. This statement fails to recognize that all consumptive and non-consumptive water rights are grounded in the principle of beneficial use.

Beneficial use allows for measurable and objective water right administration. By turning its back on this principle, the Opinion has opened the door to introduce subjectivity and uncertainty not just in the new water right application process, but in two key administrative processes: the water right transfer process and the water right regulation process.

In the context of new water right applications, the Opinion fails to recognize the need to balance all the Public Interest Factors as part of the Public Interest Test. Once the public interest presumption has attached to a new water right application, ORS 537.153 and 537.170 require the Commission to “consider” and balance all seven statutory Public Interest Factors as a whole to evaluate whether the presumption has been overcome. As part of this evaluation, the Commission may rely on a single Public Interest Factor to find that the public interest presumption is overcome, as the Court of Appeals noted. 328 Or App at 807. However, the Commission must still perform a totality-of-the-circumstances balancing test analyzing all other Public Interest Factors as part of its evaluation.

The Court of Appeals erred by considering only a *single* Public Interest Factor in its evaluation, which led it to conclude that the public interest presumption had been overcome. 328 Or App at 807. The Court of Appeals’

approval of this approach paves the way for the Commission and OWRD to forego any sort of balancing test and instead focus on a single factor. *Id.*

V. ARGUMENT

A. The Opinion incorrectly interprets Public Interest Factor (f).

The Opinion interprets Public Interest Factor (f) in a manner that represents a sweeping change to the long-held understanding of the scope of this factor, and demonstrates a fundamental misunderstanding of Oregon’s prior appropriation system, including the tenets of injury and beneficial use. The legislature enacted Public Interest Factor (f) against the backdrop of core water law principles, including prior appropriation, beneficial use, and injury. As outlined in this section, the Court of Appeals failed to conduct a proper legislative history analysis, which accordingly resulted in the Court of Appeals’ recognition of a novel “frustration of actual purpose” standard and increased protections for non-consumptive water rights, neither of which have a basis in the principle of beneficial use. The Merits Brief has provided an analysis of the statutes that codify a key Oregon water right tenet – beneficial use – which OAN adopts in full and incorporates by reference.

Notably, in the proceedings below, OWRD, the Director of OWRD, and the Administrative Law Judge all interpreted Public Interest Factor (f) as codifying the legal concept of “injury.” Petition at 2. Injury is a core legal

concept in Oregon water law that recognizes a junior water right may not interfere with a quantity of water available to satisfy a senior right. *See e.g.* OAR 690-380-0100(3); OAR 690-325-0030(3). The new interpretation of Public Interest Factor (f) as encompassing a “frustration of actual purpose” standard stretches beyond a quantitative consideration regarding interference with available streamflow rates that is embedded in Oregon’s injury and beneficial use principles. *E. Valley Water Dist.* 328 Or App at 806. Instead, it introduces qualitative considerations regarding the assumed underlying functional purposes of an individual instream water right.

The concerning impact of the Court of Appeals’ interpretation is further compounded by Footnote 12 in the Opinion, which suggests that instream water rights may be entitled to legal protections beyond the protections enjoyed by other water rights – an assertion which ignores the key attributes that define and limit all water rights. *E. Valley Water Dist.*, 328 Or App at 803 n 12.

In reaching this result, the Court of Appeals erred by failing to conduct a sufficient statutory interpretation analysis of ORS 537.170(8)(f) under *Gaines*, despite presenting its conclusions regarding the “frustration of actual purpose” standard as the result of a *Gaines* analysis.

1. *Gaines* requires a court to analyze the context of a statute and legislative history proffered by a party to determine legislative intent.

In *Gaines*, this Court recognized that pursuing the legislative intent of a statute is the “cardinal rule” of statutory construction. 346 Or at 165; ORS 174.020. Under the *Gaines* analysis to ascertain legislative intent, the first step in a statutory construction inquiry is an examination of the text and context. *Id.* at 171. Statutory context, for the purposes of *Gaines*, can include “provisions of the same statute or other related statutes.” *Bert Brundige, LLC v. Dep’t of Revenue*, 368 Or 1, 4, 485 P3d 269, 271 (2021), citing *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). Further, under the *Gaines* framework, a court will consider legislative history that is presented by a party, though it has the discretion to determine how much weight it will give to such history. *Gaines*, 346 Or at 171.

Although the Court of Appeals acknowledged that East Valley’s challenge to the Commission’s decision presented a question of statutory interpretation of Public Interest Factor (f)⁵ and stated that it applied the *Gaines* methodology, the Opinion does not contain evidence that the first step of the

⁵ East Valley also raised a question about the statutory interpretation of the statutes governing instream water rights. While OAN does not address deficiencies of the Opinion with regard to the statutory interpretation analysis of these statutes, it incorporates East Valley’s argument and legislative history regarding the Instream Water Rights Act set forth in the Merits Brief in full.

analysis was completed. *E. Valley Water Dist.*, 328 Or App at 801. Notably, the Court’s statutory interpretation analysis of Public Interest Factor (f) failed to consider the multiple beneficial use statutes and the handful of statutes regarding “beneficial purpose” in Oregon’s water code. Further, the Court of Appeals’ statement regarding legislative intent is not supported by a legislative history analysis:

“Reading all those statutory provisions together and taking into consideration the language of the certificate itself, we think it unlikely that the legislature intended that a junior water right would be permitted to frustrate the actual purpose and use of a senior water right.”

E. Valley Water Dist., 328 Or App at 806. This significant leap to insert presumed legislative intent without the necessary analysis is a serious error on which the ultimate conclusions in the Opinion are based.

a) The Court of Appeals’ analysis of the context of ORS 537.170(8)(f) does not meet the standards of the *Gaines* analysis because it failed to consider numerous related statutes regarding beneficial use of water rights in Oregon.

The Court of Appeals neglected to complete the first step of the *Gaines* analysis, resulting in the omission of important contextual statutes related to beneficial use. The Court of Appeals, through its adoption of the Commission’s statutory interpretation summary, examined ORS 537.120 and ORS 537.160(1) as part of the *Gaines* analysis it applied to Public Interest Factor (f). *E. Valley*

Water Dist., 328 Or App at 801-02. ORS 537.120 and ORS 537.160(1) both address the impairment of vested water rights and conflicts between existing water rights as those concepts relate to beneficial use.

However, these statutes regarding beneficial use are only two of numerous statutes that discuss the core concept of beneficial use. The Court of Appeals' analysis was so deficient that it neglected to consider even the statute that defines "beneficial use." *See e.g.* ORS 540.610.

Under Oregon law, beneficial use is "the basis, the measure and the limit of all rights to the use of water in this state." ORS 540.610. The brevity of this statement belies its significance: beneficial use is a foundational concept in Oregon water law and an objective statutory measuring stick by which all water rights are approved and assessed. In addition to these statutory terms that help define limits of all water rights, beneficial use also describes types of water uses. The legislature has recognized a specific, but not exhaustive, list of beneficial uses, including "uses of water for domestic, municipal, irrigation, power development, industrial, mining, recreation, wildlife, and fish life uses

and for pollution abatement.”⁶ ORS 536.300. Note that OWRD can and does issue water rights for beneficial uses not specifically named in statute.

However, such water rights still contain limits on water use that OWRD has determined will allow for beneficial use without waste. The nature of beneficial use is explained succinctly in Oregon’s most comprehensive water law treatise, which notes, “beneficial use has two aspects—the type of use and the amount of use.” Janet Neuman, *Oregon Water Law A Comprehensive Treatise on the Law of Water and Water Rights in Oregon* Chapter 3, 80 (2011).

Water right permits and certificates capture all the elements that define “beneficial use” for a water right, including the maximum rate at which a water right holder may appropriate water, the season of use during which water may be used, the total amount of water that may be used, the type of use that is allowed, and the priority date. *Fort Vannoy Irr. Dist. v. Water Res. Comm'n*, 345 Or 56, 79, 188 P3d 277, 292 (2008). A complete evaluation of the context of Public Interest Factor (f), including as it relates to beneficial use limits

⁶ ORS Chapter 537 also contains specific examples of uses that the legislature has declared to be beneficial uses. *See, e.g.* ORS 537.405(1) (“Reservoirs in existence on or before January 1, 1995, that store less than 9.2 acre-feet of water or with a dam or impoundment structure less than 10 feet in height, are found to be a beneficial use of the water resources of this state”); ORS 537.531 (“The Legislative Assembly declares aquifer storage and recovery is a beneficial use...”).

inherent to each water right, would have given the Court of Appeals the necessary contextual grounding to understand the legislative intent behind Public Interest Factor (f).

Importantly, a complete contextual analysis as required by *Gaines* would have revealed that the term adopted by the Commission to define its scope of review, “beneficial purpose,” is a term that appears throughout Oregon water law statutes and has various existing definitions, including in a separate Public Interest Factor, ORS 537.170(8)(c). The Court of Appeals’ notable omission of any discussion regarding the existing definitions of this term in statute and its subsequent approval of the Commission’s determination that “beneficial purpose” may be considered by the Commission in evaluation of Public Interest Factor (f) shows that the *Gaines* contextual analysis was sorely lacking.

The term “beneficial purpose” that was ultimately cited by the Commission, despite its review of statutes related to “beneficial *use*,” appears at various locations in the statutes that guide water use in Oregon. *See e.g.*, ORS 537.170(8)(c) (“The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control”); ORS 537.135, (“[t]he appropriation of water for the purpose of recharging ground water basins or reservoirs is declared to be for a beneficial purpose”); ORS 536.310(12) (“when proposed uses of water are in mutually exclusive conflict or when

available supplies of water are insufficient for all who desire to use them, preference shall be given to human consumption purposes over all other uses and for livestock consumption, over any other use, and thereafter other beneficial purposes in such order as may be in the public interest consistent with the principles of chapter 707, Oregon Laws 1955”). None of these statutes were analyzed or addressed in the Opinion.

Had the *Gaines* framework been applied properly, the Court of Appeals would have identified the statutes that define beneficial use and that provide the necessary grounding to understand the legislative intent behind Public Interest Factor (f). Further, the Court of Appeals likely would have recognized the ambiguity inherent to the term “beneficial purpose” and undertaken a legislative history analysis to determine the intent of the term and its relationship to the water right attributes the legislature intended the Commission consider under Public Interest Factor (f).

b) The Court of Appeals’ assertion of the legislature’s intent regarding “frustration of actual purpose” is not supported by a *Gaines* analysis and is directly in conflict with Oregon’s core concept of beneficial use of water.

At the end of the Court of Appeals’ insufficient *Gaines* analysis, the Court offered the following unsupported conclusion: “we think it unlikely that the legislature intended that a junior water right would be permitted to frustrate the actual purpose and use of a senior water right.” *E. Valley Water Dist.* 328

Or App at 806. The Court of Appeals failed to undertake the necessary legislative history analysis to reach this conclusion.

The Opinion's unsubstantiated characterization of legislative intent as the basis for a novel interpretation of Public Interest Factor (f) is a serious error. The Opinion does not contain any analysis or evidence that the legislature intended the "frustration of actual purpose" to be a standard by which water rights, including instream water rights, are evaluated in the public interest review process.

The Court of Appeals' articulation of the "frustration of actual purpose" standard runs afoul of the beneficial use standard for all water rights in Oregon, which manifests itself in a practical sense through OWRD-issued water right certificates that contain all the terms of authorized water use, including the type of use allowed and the maximum rate that may be appropriated. *See Fort Vannoy Irr. Dist.*, 345 Or 56, 79. By grounding water rights in the principle of beneficial use, water right administration can be measurable and objective. The "frustration of actual purpose" language put forward by the Court of Appeals is neither, and it is not supported by Oregon law or by a *Gaines* analysis.

B. The Court of Appeals errant statutory analysis and the resulting introduction of subjective standards regarding the use of water rights could detrimentally impact two key Oregon water right administrative processes.

As discussed above, water right permits and certificates contain specific beneficial use parameters, including the type of use, the priority date, and the maximum rate of appropriation (consumptive rights) or the maximum instream flow rate (non-consumptive rights). OWRD relies on these defined attributes when undertaking various administrative processes, including the transfer process and the water right regulation process. By introducing subjective standards in the context of the public interest test that contradict core statutory concepts which serve as the foundation for all water rights in Oregon, the Opinion has the potential to impact both the water right transfer process and the water right regulatory processes.

1. The subjective standards introduced by the Opinion are contrary to the objective standards OWRD applies in the water right transfer process.

In Oregon, a water right holder may change an element of a water right certificate through the “transfer” process, which is authorized by ORS 540.520 *et seq.* and administered by OWRD. Through the transfer process, the holder of a water right can change the point of diversion for surface water (“POD”) or point of appropriation (“POA”) for groundwater, the POU, or the character of use (*e.g.*, from irrigation use to municipal use), provided the water comes from

the same source. ORS 540.510; OAR 690-380-2000. In large portions of the state where streams are overappropriated, transfers are the only viable option to secure reliable water to be used on additional acreage.

Upon receipt of a transfer application, OWRD will review the application to ensure the proposed transfer would not enlarge the water right or injure any other water right on the system. OAR 680-380-4010. Under OAR 690-380-0100(3), injury occurs when the proposed transfer would result in an existing water right not receiving the water that was previously available and to which it is legally entitled. This standard does not distinguish between different types of water rights, and it does not call for OWRD to evaluate whether the actual purpose of a water right would be frustrated by a proposed transfer. Rather, it provides a quantitative, objective standard to determine whether or not a transfer application will reduce the flow that is legally available to other senior and junior water rights on the system per the terms of beneficial use for those water rights, as evidenced by their respective permits or certificates.

The Court of Appeals' novel instream water right impacts analysis ignores the critical flow-based metric that OWRD applies as part of the injury analysis. The Opinion, if left in place, could lay the foundation for OWRD to introduce qualitative considerations when it conducts its injury analysis on stream systems where senior instream water rights are present. This would

create significant practical problems, where OWRD staff, lacking scientific expertise in aquatic ecosystem management, would now be required to evaluate complex biological factors to determine (1) the “actual purpose” for which an instream right was granted (if such documentation even exists), (2) whether that purpose, in the judgment of OWRD staff, would be “frustrated” by the proposed transfer, and (3) if, in the judgment of OWRD staff, the “actual purpose” of the senior water right would be “frustrated,” and (4) whether that water right would be injured by the proposed transfer as a result. Application of a “frustration of actual purpose” standard during an injury evaluation would represent a significant deviation from current practice and task OWRD staff with evaluations that are beyond the scope of the subject matter OWRD staff is trained to address.

2. The subjective standards introduced by the Opinion are contrary to the objective standards OWRD applies in the water right regulatory process.

Like the transfer process, OWRD staff who implement the water right regulation process rely on objective standards to effectively manage water in Oregon. All water use in the state is regulated pursuant to the prior appropriation system, which recognizes that water rights with more recent priority dates, called “junior” water rights, will be the first to be curtailed during times of shortage in favor of water rights with older priority dates, called

“senior” water rights. *See e.g., Fort Vannoy Irr. Dist.*, 345 Or 56, 64, 188 P3d 277 (2008)(“[T]he enactment of the Water Rights Act in 1909 (Or. Laws 1909, ch. 216) marks the ascendancy of the appropriation doctrine as the prevailing water law of Oregon.”); *TPC, LLC v. Oregon Water Res. Dep’t.*, 308 Or App 177, 185, 482 P3d 121 (2020) (discussing a “call” for water made by senior instream water right holders because “instream flows * * * were below or projected to fall below the established levels” for the instream water rights). This Court has previously held that under the prior appropriation system, a water right holder is entitled to a specific rate and volume of water at a specific stream location. *See Oliver v. Skinner*, 190 Or 423, 442, 226 P2d 507 (1951) (“A prior appropriation of a definite amount of water may be made, limited to use during a definite period of time * * * .”). In summary, OWRD applies a quantitative metric to regulate water use during times of water shortage (*i.e.* low flows) such that junior water rights are prohibited from using their authorized quantity of water in order to allow senior water rights continued access to the seniors’ authorized quantity of water.

During the summer months, flow levels typically decline in rivers and streams across the state. When that occurs, available streamflow is not adequate to provide every water user on the system with the authorized rate set forth in the water users’ certificate. At that point, OWRD’s watermaster “regulates off”

junior water users to ensure that the senior rights holders receive the full rate authorized on their water rights. This includes regulation in favor of senior instream water rights.

When a watermaster receives a senior water right call, the watermaster will investigate the complaint by reviewing “appropriate records” and conducting field inspections. OAR 690-250-0100(1). Watermasters typically keep a tabulation of all water rights on a given system, including the priority dates and authorized rates. If the watermaster determines the call is valid through a review of this information, the watermaster will then regulate off junior water right holders. OAR 690-250-0100(2).

To enforce the priority system, a watermaster relies on the information contained within the four corners of the water right certificate—specifically the priority date and the authorized rate for consumptive rights or the authorized flow for instream rights. Rate is a clear metric that allows the watermaster to enforce Oregon’s law of priority in a predictable and objective manner. Watermasters are often charged with managing water use for hundreds of water rights simultaneously. As such, it is imperative for a watermaster to have clear, objective standards to manage the relative priority dates and use of all water right holders.

Besides potentially requiring OWRD's watermasters to make decisions far outside the scope of their expertise and training, in the context of instream water rights, the Opinion threatens to allow instream water rights to take on a "super status." As discussed in the Merits Brief, instream water rights are a unique statutory creation that provide for protected instream flow rates within the established parameters of Oregon water law. If a watermaster is tasked with regulating instream rights by subjective standards, while simultaneously regulating consumptive rights under the proven statutory objective regulation practices, it will result in an unpredictable and unmanageable regulation system.

Where the legislature has intended for one type of water right to have a preference over other types, it has made that clear in statute. The Oregon legislature has specifically identified narrow situations where one type of water right is given a preference over another, including providing a preference for human and livestock use during drought. ORS 536.780(3)(a). *See also* ORS 536.310(12) ("When proposed uses of water are in mutually exclusive conflict or when available supplies of water are insufficient for all who desire to use them, preference shall be given to human consumption purposes over all other uses and for livestock consumption, over any other use, and thereafter other beneficial purposes in such order as may be in the public interest consistent with the principles of chapter 707, Oregon Laws 1955, under the existing

circumstances”). Therefore, it is clear that the legislature understands how to expressly grant special status to certain types of uses. There is, however, no provision in the Instream Water Rights Act that does so for instream water rights.

Although the Commission’s Final Order addresses a specific and unique set of circumstances, the Opinion could have ramifications far beyond the reservoir storage application at issue in this case. The Court of Appeals reached conclusions that will upend over a century of established water law in Oregon. This has the potential to ripple out beyond the present case and the public interest review process. There is a very real danger that the Opinion could impact other OWRD administrative processes, including the water right transfer and water right regulation schemes.

C. The Opinion fails to recognize the need to balance various Public Interest Factors as part of the Public Interest Test.

All new water right applications must comply with the Public Interest Test outlined in ORS 537.153 and 537.170, which is comprised of a list of factors set forth in ORS 537.170(8) (collectively, the “Public Interest Factors,” and, individually, a “Public Interest Factor”). The Court of Appeals’ approval of the Commission’s *sua sponte* legal interpretation, and focus on a single Public Interest Factor to reach its water right application decision, introduces

significant uncertainty into the public interest review standards for new water right applications.

Oregon's water right permitting statutes establish a rebuttable presumption that a new water right application is in the public interest if certain objective statutory criteria are met. ORS 537.153(2), (3)(e); ORS 537.170(6). This rebuttable presumption may be overcome through a showing that the proposed water use would impair or be detrimental to the public interest through an evaluation of the Public Interest Factors set forth at ORS 537.170(8)(a)-(g). If the Opinion is allowed to stand, OAN's members and prospective water users could be subject to a public interest review that is centered on the evaluation of a single Public Interest Factor rather than a comprehensive review of all the Public Interest Factors set forth in ORS 537.170(8)(a)-(g). The Court of Appeals held that the public interest presumption had been overcome based upon the evaluation of a single Public Interest Factor. *E. Valley Water Dist.*, 328 Or App at 807. This holding opens the door for the Commission and OWRD to forego any sort of balancing test and instead focus on a single factor. Put another way, the Court of Appeals' determination changes an analysis that balances competing Public Interest Factors into a test in which any one of the individual Public Interest Factors can result in an effective veto or denial of an application. OAN anticipates that a

shift to a single-factor evaluation could result in unbalanced evaluations for new water right applications that do not appropriately weigh all the Public Interest Factors.

The Opinion could result in a public interest evaluation in which OWRD fails to consider important statutory criteria such as “conserving the highest use of the water for all purposes” (ORS 537.170(8)(a)); “maximum economic development of the waters involved [in a water right application]” (ORS 537.170(8)(b)); and “control of the waters of the state for all beneficial purposes” (ORS 537.170(8)(c)). Words such as “control” and “conserve” are frequently used as terms of art in water law to describe the storage of water that would otherwise be lost as runoff during periods of high precipitation.

This issue is discussed in greater detail in the Merits Brief. OAN joins in that portion of the Merits Brief.

VI. CONCLUSION

Predictable water allocation and management is critical for efficient, sustainable water use. The Opinion leaves in its wake a murky standard for future water right applicants to navigate and it creates a significant measure of unpredictability for the public interest review and the overall water right application process. It also effectively converts the water right application process into a policymaking exercise, where OWRD will now insert its own

subjective judgment about the “character” and “actual purpose” of an instream right into an analysis previously based on objective Public Interest Factors. The Opinion undermines the quantitative, predictable standards that have been at the core of the public interest test for new water rights, and OAN’s members and other prospective water right applicants will suffer the consequences.

The Opinion has the potential to impact not only the water right application process, but to spill over into other OWRD administrative processes that frequently implicate instream water rights. Both the water right transfer process and the water right regulation process could be significantly impacted if the Opinion is allowed to stand.

For these reasons, as well as those set forth in the Merits Brief, OAN respectfully requests that this Court overrule the Court of Appeals’ erroneous

decision and issue an opinion articulating the proposed rules of law set forth above.

DATED: July 11, 2024

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH
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I certify that this brief complies with the word count limitation in ORAP 5.05, and the word count of this brief is 7,437 words.

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DATED: July 11, 2024

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CERTIFICATE OF FILING AND SERVICE

I certify that on July 11, 2024 I filed the foregoing **BRIEF OF *AMICUS CURIAE* OREGON ASSOCIATION OF NURSERIES IN SUPPORT OF PETITIONER ON REVIEW EAST VALLEY WATER DISTRICT'S BRIEF ON THE MERITS** with the State Appellate Court Administrator by using the appellate courts' electronic filing system. I served the same on the following participants in this case via the court's electronic filing system and via email.

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