IN THE COURT OF APPEALS OF THE
STATE OF OREGON

WILLAMETTE WATER CO.,
an Oregon corporation,
*Petitioner,*

*v.*

WATERWATCH OF OREGON, INC.,
an Oregon non-profit corporation;
and Oregon Water Resources Commission,
*Respondents.*

Oregon Water Resources Commission
S87330; A157428

Argued and submitted November 22, 2016.

Alan M. Sorem argued the cause for petitioner. With him on the opening brief was Saalfeld Griggs PC. With him on the reply brief were Stephanie L. Schuyler and Saalfeld Griggs PC.

Lisa A. Brown argued the cause and filed the briefs for respondent WaterWatch of Oregon, Inc.

Denise G. Fjordbeck, Assistant Attorney General, argued the cause for respondent Oregon Water Resources Commission. With her on the briefs were Ellen F. Rosenblum, Attorney General, and Paul L. Smith, Deputy Solicitor General.

Before Ortega, Presiding Judge, and Egan, Judge, and Lagesen, Judge.

LAGESEN, J.

Affirmed.

**LAGESEN, J.**

Petitioner Willamette Water Co. (company) petitions for judicial review of a final order of the Water Resources Commission (commission). In that order, the commission denied the company's application under ORS 537.130 for a permit to divert 34.0 cubic feet per second (cfs) of water from the McKenzie River for a quasi-municipal use. The commission determined that the statutory presumption that the company's proposed use was in the public interest was overcome because the proposed use did not comport with the commission's rules, and also because the company could not complete the construction of its proposed project within five years, as required by the terms of ORS 537.230(1).[1] Following a consideration of the statutory "public interest" factors listed in ORS 537.170(8), the commission further determined that it was unable to conclude that the issuance of the permit would "not impair or be detrimental to the public interest." For those reasons, the commission concluded it could not approve the company's permit request.

On review, in two assignments of error,[2] the company challenges that conclusion, contending it is based on an erroneous interpretation of one of the commission's administrative rules, an erroneous interpretation of a pertinent statutory provision, and a factual finding that is not supported by substantial evidence. The company seeks a reversal of the order or a remand to the commission with a direction to approve its application. Because we reject the company's arguments, we do neither and affirm.[3]

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[1] ORS 537.230 has been amended by Oregon Laws 2017, chapter 704, section 1. All references to ORS 537.230 use the numbering as it appeared in the 2013 version of the statute that was in effect at the time the commission issued its order.

[2] The company also asserts an undeveloped third assignment of error. The brief contains a numbered heading designated "Third Assignment of Error." However, under that heading, the company has not "identif[ied] precisely the legal, procedural, factual, or other ruling that is being challenged," as required by ORAP 5.45(3). Instead, the company generally argues that the commission improperly addressed issues beyond the scope of the protest filed by respondent. To the extent that the company's third assignment of error is properly presented for our review, we reject it without written discussion.

[3] Respondent WaterWatch of Oregon (WaterWatch), which did not petition for judicial review of the commission's order, has lodged what it calls a "cross-assignment of error." The commission contends that the "cross-assignment of

## I. BACKGROUND

### A. *Regulatory Framework*

"All water within the state from all sources of water supply belongs to the public." ORS 537.110. A person or entity seeking to appropriate public surface waters in Oregon generally must obtain a permit. ORS 537.130. To obtain a permit, the person or entity must submit an application to the Water Resources Department (the department). ORS 537.140(1)(a). If the application is "complete and not defective," and does not propose a use prohibited by ORS chapter 538, the department must conduct a preliminary review of the application, and notify the applicant of the results of that preliminary review. ORS 537.150. If the applicant does not direct the department to stop processing the application, the department must "complete application review and issue a proposed final order approving or denying the application or approving the application with modifications or conditions." ORS 537.153(1).

ORS 537.153 sets forth the framework for the department's review process. ORS 537.153(2) provides that there is a rebuttable presumption that a water use proposed in a permit application is in the public interest:

> "In reviewing the application under subsection (1) of this section, the department shall presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12), if water is available, if the proposed use will not injure other water rights and if the proposed use complies with the rules of the Water Resources Commission. This shall be a rebuttable presumption[.]"

The statute then specifies how the presumption may be rebutted, providing that the presumption

> "may be overcome by a preponderance of evidence that either:

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error" is not properly before us absent an independent petition for judicial review by WaterWatch and that it fails on the merits. Assuming WaterWatch's contentions are properly before us, we reject them without further written discussion.

> "(a) One or more of the criteria for establishing the presumption are not satisfied; or
>
> "(b) The proposed use will impair or be detrimental to the public interest as demonstrated in comments, in a protest under subsection (6) of this section or in a finding of the department that shows:
>
> "(A) The specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected; and
>
> "(B) Specifically how the identified public interest would be impaired or detrimentally affected."

ORS 537.153(2).

If the department determines that the presumption has been established, then it must include that determination in its proposed final order on the permit application. ORS 537.153(3)(g). If the presumption is rebutted, the director of the department or, when appropriate, the commission, must evaluate whether the proposed use is consistent with the public interest before issuing a final order on the application. ORS 537.170(8). That evaluation requires the director or the commission to consider a number of factors:

> "(a) Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public.
>
> "(b) The maximum economic development of the waters involved.
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> "(c) The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.
>
> "(d) The amount of waters available for appropriation for beneficial use.
>
> "(e) The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.

> "(f) All vested and inchoate rights to the waters of this state or to the use of the waters of this state, and the means necessary to protect such rights.
>
> "(g) The state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534."

ORS 537.170(8).

If a proposed use does not comply with commission rules, or "would otherwise impair or be detrimental to the public interest," then the application for a permit must be rejected unless modifications to comport with the public interest allow for approval. ORS 537.170(6).

As a matter of process, once the department issues a proposed final order regarding a permit application, certain interested parties may file protests and request a contested case hearing. ORS 537.153(5). Thereafter, the director must issue a final order regarding the application. ORS 537.170 (6) - (7). If a contested case hearing is held, any party to the contested case hearing may then file exceptions to the director's final order with the commission. ORS 537.173.

B. *Substantive and Procedural Facts*

We draw the background facts from the commission's order, as they are largely procedural and not disputed, save the one factual finding that the company specifically contests. *McDowell v. Employment Dept.*, 348 Or 605, 608, 236 P3d 722 (2010) (the agency's unchallenged factual findings are the facts for purposes of judicial review).

As noted, this matter is about the company's request for a permit to divert 34 cfs of water from the McKenzie River. The company holds an existing permit to divert 4 cfs from the McKenzie River to serve water users in the Goshen area between Eugene and Creswell. Although the company delivers around 375 gallons of water per capita per day, the company has not developed its 4 cfs permit.[4] Instead, the company purchases the water that it supplies from the Eugene Water and Electric Board (EWEB). The company

[4] To be precise, the company had not developed the 4 cfs permit as of the time of the commission's decision; the facts reflect the *status quo* at the time of the decision on review.

nevertheless seeks a second permit to divert additional water from the McKenzie River "to supply an expanded service area around Goshen and Pleasant Hill and to serve the cities of Creswell and Cottage Grove." In its permit application, the company asserted that "all of these areas will have water service deficiencies within a very few years. In addition, much of this area is currently using contaminated ground water. There is current demand for treated surface water to replace this ground water, along with future population growth demand."

As required by ORS 537.140, the company applied for a permit to the department. The department issued a proposed final order (PFO) recommending the issuance of the requested permit with certain conditions. WaterWatch filed a protest, and the department referred the matter to the Office of Administrative Hearings (OAH) for a contested case hearing.[5] Following the contested case hearing, the administrative law judge (ALJ) issued a proposed order recommending the denial of the company's application on several different grounds.[6] The company and WaterWatch both filed exceptions with the director. After considering the exceptions and the record in the case, the director of the department issued a final order recommending the denial of the application. The company and WaterWatch then filed exceptions to the director's order with the commission under ORS 537.173.

After considering those exceptions, the commission issued a final order adopting the director's order and denying the application. The commission explained that the matter raised two issues:

> "(1) Whether the public interest presumption under ORS 537.153(2) was overcome because one or more criteria for establishing the presumption were not satisfied. ORS 537.153(2)(a); OAR 690-310-0110(1).

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[5] The company also filed a protest and the department referred that protest to the OAH as well. The administrative law judge (ALJ) bifurcated the contested case to address the two protests separately. The company's protest is not at issue before us.

[6] The ALJ later amended the proposed final order; those modifications are not pertinent to the issue before us.

> "(2) Whether the proposed use will impair or be detrimental to the public interest."

As to the first issue, the commission observed both that (1) compliance with commission rules is a criterion for establishing the public interest presumption and (2) ORS 537.153(2) specifies that the presumption is overcome if a preponderance of the evidence shows that one or more of the criteria for establishing the presumption is not met. The commission then found that the proposed use did not comply with the commission's rule governing land use approvals, OAR 690-005-0035(4)(b)(A) - (C), because the company had not yet applied for the discretionary land use approvals from Lane County and Springfield that were necessary for the construction of the water diversion and delivery system proposed by the application. Based on that determination, the commission concluded that the presumption was overcome:

> "The evidence at the hearing established that the proposed use did not comply with the Commission's rules requiring the applicant to show land use compatibility. Because compliance with the Commission's rules is a criterion for establishing the public interest presumption, the public interest presumption was overcome, and the Department must deny the application unless it makes specific findings to demonstrate that considering all of the public interest factors listed in ORS 527.170(8) the issuance of a permit will not impair or be detrimental to the public interest. OAR 690-310-0120(5)."

The commission also determined that the presumption was overcome for an additional reason: The company's application did not propose a beneficial use of water. Specifically, the commission found that "[a] minimum of ten years may be needed to begin delivering 34 cfs of water to users." Based on that finding, the commission determined that the company's proposed use conflicted with ORS 537.230(1), which requires water right permit holders to complete proposed work within five years of the date the permit is approved:

> "Except for a holder of a permit for municipal use, the holder of a water right permit shall prosecute the construction of any proposed irrigation or other work with reasonable diligence and complete the construction within

> a reasonable time, as fixed in the permit by the Water Resources Department, not to exceed five years from the date of approval."

In view of that conflict with the statutory timeline for development, the commission concluded that the company's proposed use was not a beneficial one.

As to the second issue, the commission concluded that "the proposed use is found to impair or be detrimental to the public interest." In reaching that conclusion, it relied largely on its earlier determination that the proposed use required a lengthy development time, in excess of the five-year period contemplated by ORS 537.230(1).

Having made those determinations, the commission issued a final order denying the company's application. The company petitioned for judicial review.

On review, the company seeks a reversal or remand of the commission's order, making essentially three arguments: (1) the commission misconstrued OAR 690-005-0035(4) when it determined that the rule required the commission to deny the company's application because the company had not yet initiated the process to obtain the necessary discretionary land use approvals from Springfield and Lane County; (2) the commission's finding that it would take 10 years to develop the permit is not supported by substantial evidence; and (3) the commission misconstrued ORS 537.230(1) when it concluded that the statute required the company to show that it would develop the use requested under the permit within a five-year period. In response to those contentions, the commission argues that (1) its interpretation of OAR 690-005-0035(4) is plausible and entitled to deference under *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 881 P2d 119 (1994) (*Don't Waste Oregon*); (2) when the ALJ's evidentiary rulings are correctly understood, substantial evidence supports the commission's finding that it would take a minimum of 10 years to develop the water use proposed by the company's permit application; and (3) the commission's interpretation of ORS 537.230 is correct under this court's previous decision in *WaterWatch v. Water Resources Commission*, 193 Or App 87,

88 P3d 327 (2004), *vac'd on other grounds*, 339 Or 275, 119 P3d 221 (2005) (*WaterWatch*).

## II. ANALYSIS

We start with the company's contention that the commission misconstrued OAR 690-005-0035(4). We review the commission's interpretation of its own rule under ORS 183.482(8)(a) to determine whether the commission erroneously interpreted a provision of law. Our review is guided by the principles announced in *Don't Waste Oregon* for evaluating an agency's interpretation of its own administrative rule.

The commission construed OAR 690-005-0035(4) to preclude approval of a water permit application where, as here, the applicant is required to obtain discretionary land use approvals from local governments in order to implement a proposed use and the applicant has not yet applied for those approvals. The company contends that the rule, when properly construed, provides for conditional approval *before* the applicant has applied for any such required land use approvals. In other words, according to the company, the rule "allows an applicant to obtain a final approval as to its application for a water use permit prior to submitting for discretionary land use approval, so long as the water use *permit* is withheld until such land use approvals have been granted or are pending before the applicable local government." (Emphasis in the company's brief.)

OAR 690-005-0035(4) may be susceptible to the interpretation that the company places on it. But that is not the right question. To overcome the commission's interpretation of its rule, the company must demonstrate that the interpretation is not plausible, in view of the rule's text, context, or other applicable source of law. Under *Don't Waste Oregon*, if an agency's interpretation of its rule is plausible and "cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law, there is no basis on which this court can assert that the rule has been interpreted 'erroneously.'" 320 Or at 142 (quoting ORS 183.482(8)(a)).

The company has not made that necessary showing. Indeed, the commission's construction of its rule is a natural

reading of it. OAR 690-005-0035(4) provides, in relevant part:

> "In processing water use approvals in OAR 690-005-0025(1) through (6), the Department or Commission shall:
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> "(a) Require land use information be submitted with applications or requests, or as otherwise specified prior to taking action on the water use approval. The information shall be sufficient to assess compatibility as specified on forms contained in the department's Land Use Planning Procedures Guide;
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> "(b) Except as provided in subsection (4)(c) of this rule, the Department or Commission shall only approve the proposed water use if:
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> "(A) All requirements of statutes and rules governing Commission and Department actions are met;
>
> "(B) The land use served by the proposed water use is allowed outright or does not require discretionary land use approvals under the applicable comprehensive plan; or
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> "(C) The applicant has already received necessary land use approvals for the land use served by the proposed water use.
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> "(c) If local land use approvals are pending, place conditions on a permit or other approval to preclude use of water and any associated construction until the applicant obtains all required local land use approvals; or, withhold issuance of the water use permit or approval until the applicant obtains all required local land use approvals. The approval is allowed only if the use meets requirements in paragraph (4)(b)(A) of this rule. The Department may consider withholding water use approvals upon request by a local or state agency, or the applicant, or as otherwise warranted to serve the Department's needs[.]"

By its plain terms, subsection (4)(b)(C) authorizes the approval of a proposed water use *only* if the "applicant has already received necessary land use approvals for the land use served by the proposed water use" *unless* subsection (4)(c) permits a conditional approval. In turn, subsection (4)(c) states that conditional approvals are permissible "[i]f local land use approvals are *pending*." OAR 690-005-0035(4) (emphasis added). As the commission points out,

the ordinary meaning of the word "pending" contemplates a process that has started and is in progress. *See Webster's Third New Int'l Dictionary* 1669 (unabridged ed 2002) (defining "pending," relevantly, as "during," "while awaiting," "not yet decided"). Consequently, the commission's interpretation of OAR 690-005-0035(4) to preclude approval of a proposed water use unless the applicant, at a minimum, has begun the process for obtaining required discretionary land use approvals is a reasonable one. Under *Don't Waste Oregon*, we are not empowered to reject it.

We next address the company's challenge to the commission's finding that it would take a minimum of 10 years for the company to begin delivering the 34 cfs of water proposed in the permit to users. The company acknowledges that the record contains an affidavit from John Davis that would support that finding. However, the company asserts that the particular paragraphs of the affidavit containing the necessary supporting testimony were "disregarded" by the ALJ in response to relevance objections made by the department and, therefore, cannot constitute substantial evidence supporting the commission's finding. In response, the commission acknowledges that the ALJ stated that he "disregarded" the pertinent paragraphs in response to relevance objections by the department. However, the commission asserts that, when the ALJ's statement is considered in context, it is clear that the ALJ only disregarded portions of those paragraphs, and did not disregard the particular testimony that supports the disputed finding. The commission points out that no one objected to that part of Davis's affidavit and, thus, there is no reason to think that the ALJ excluded it.

We agree with the commission's understanding of the record. The company's position is reasonable, given the ALJ's statement that he was disregarding the paragraphs containing the testimony supporting the finding at issue. However, two facts persuade us that the ALJ excluded from evidence only the objected-to portions of the paragraphs. First, no one objected to the portions of those paragraphs addressing the 10-year time period. Second, the ALJ himself explicitly relied on Davis's testimony about the 10-year time period. As a result, the nonexcluded portions of Davis's

affidavit provide substantial evidence in support of the challenged finding and we reject the company's contention otherwise.

The final question is whether the commission erred when it interpreted ORS 537.230(1) to preclude the issuance of a permit to an applicant, other than a municipality, where the construction contemplated by the permit cannot be completed within a five-year period. We review under ORS 183.482(8)(a) to assess whether the commission erroneously interpreted the statute at issue. We conclude that it did not.

ORS 537.230(1) states:

> "Except for a holder of a permit for municipal use, the holder of water right permit shall prosecute the construction of any proposed irrigation or other work with reasonable diligence and *complete the construction within a reasonable time*, as fixed in the permit by the Water Resources Department, *not to exceed five years from the date of approval*."

(Emphases added.) As the emphasized text indicates, the work contemplated under a proposed permit generally must be work that can be accomplished within a five-year time period (unless the permit is for municipal use).[7] That indicates that the legislature intended that, where it is clear from the outset that the work contemplated by a permit cannot be completed within the five-year period, granting a permit would conflict with ORS 537.230(1). To conclude otherwise would effectively render the five-year time limitation meaningless.

We previously recognized as much in *WaterWatch*. There, we considered whether ORS 537.230(1) barred the grant of a permit for a municipal water use where the permittee would not even start construction before the expiration of the five-year period. 193 Or App at 99-113. We concluded that it did, holding that "the commission erred as a matter of law by granting a permit where the requirements of ORS 537.230(1) will not be satisfied." *Id.* at 113. Here, as

[7] Under ORS 537.230(3), the department may grant an extension of time to complete construction under an existing permit "for good cause shown" after considering reasons for the "delay" in construction, among other things.

the commission recognized, the fact that the company will take at least 10 years to complete the development of the permit necessarily means that the company cannot satisfy ORS 537.230(1)'s five-year deadline. Thus, under *WaterWatch*, the commission was correct to conclude that ORS 537.230(1) precluded it from issuing the requested permit.

The company attempts to distinguish *WaterWatch* on the facts. The company points out that, in that case, the work under the permit would not begin until after the expiration of the five-year period, whereas the company in the present case will start work before five years expire, even though it will not finish it. The company suggests that ORS 537.230(1) allows for the approval of a permit for work that will start, but not be completed, within the five-year period.

Under ORS 537.230(1), that factual difference does not matter. The fact that the applicant in *WaterWatch* would not begin work under the permit until after the expiration of the five-year period simply operated to establish that ORS 537.230(1)'s timeline for completion of construction could not be satisfied in that case; if the work was never started, it certainly could not be completed. Nothing in our reasoning suggests that a finding that work will not be started is the only type of finding that will demonstrate that an applicant cannot comply with the five-year statutory deadline. Under the plain terms of the statute, the question is whether the work will be completed within the five-year period, not whether it can be started before five years have elapsed. Here, the finding that the permit will take a minimum of 10 years to complete establishes that the company's proposal does not comport with the ORS 537.230(1) timeline.

We acknowledge that the Supreme Court subsequently vacated our decision in *WaterWatch*, and that it therefore does not remain binding on us. However, the court did so because the permit applicant in that case was a municipality and because, following our decision, the legislature passed House Bill (HB) 3038 (2005), codified at Oregon Laws 2005, chapter 410. That enactment amended ORS 537.230(1) to change the law with respect to municipalities, and also restricted judicial review of certain challenges regarding the construction of water projects by

municipalities. *WaterWatch v. Water Resources Commission*, 339 Or 275, 278-79, 119 P3d 221 (2005) (explaining amendments to ORS 537.230); *see generally* Or Laws 2005, ch 410. Nothing in the legislative changes to ORS 537.230(1), or the Supreme Court's decision vacating our decision, calls into question our interpretation of ORS 537.230(1), as that provision applies to water permit applicants other than municipalities. We therefore adopt and adhere to our decision in *WaterWatch*. The opinion was thoroughly reasoned, and the company's arguments have given us no reason to question our prior analysis.

In sum, under *WaterWatch*, it is error for the commission to approve a permit for a nonmunicipal water use when the facts before the commission establish that the work under the permit cannot be completed within the five-year period specified by ORS 537.230(1). *WaterWatch*, 193 Or App at 113. The commission therefore did not err when it concluded that ORS 537.230(1) precluded it from approving the company's permit application in view of the factual finding that it will take 10 years, if not longer, for the company to complete construction on the work proposed under the permit.

For all of the above reasons, the commission did not err in denying the company's permit application.

Affirmed.